

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

Oct 8 4 29 PM '82

3	BEAR CREEK VALLEY)	
	SANITARY AUTHORITY,)	
4)	
	Petitioner,)	LUBA No. 80-090
5)	
	vs.)	FINAL OPINION
6)	(ORDER ON REMAND)
	JACKSON COUNTY,)	
7)	
	Respondent.)	

On Remand from Court of Appeals

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REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in the decision.

AFFIRMED 10/08/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 This appeal is before the Board on remand from the Court of
3 Appeals. See: Jackson County v Bear Creek Valley Sanitary
4 Authority, 53 Or App 1823, 632 P2d 1349 (1981), affirmed, ___
5 Or ___ (CS 28143, 1982). The Board's original opinion is
6 reported at 2 Or LUBA 75 (1980). The Board was directed by the
7 Court of Appeals to address issues raised by petitioner which
8 the Board did not reach in its opinion. The parties have
9 agreed that the Board's review on remand should be limited to
10 the following assignments of error:

- 11 (1) Assignment of Error No. 2: The county made a
12 decision that was not supported by substantial
evidence in the whole record;
- 13 (2) Assignment of Error No. 3: The county failed to
14 follow statutory procedure applicable to the
15 plans and programs of special districts to the
prejudice of the substantial rights of the
petitioner;
- 16 (3) Assignment of Error No. 4: The county violated
17 LCDC Goal 2 by failing to coordinate the
18 development of the Jackson County Comprehensive
19 Plan (1980) with the plans and programs of the
20 BCVSA by the breach by the county of the
cooperative agreement between the county and
21 BCVSA dated June 7, 1978, (App. 1), and the 208
Plan Implementation Agreement of the Greater Bear
Creek Basin Waste Treatment Master Plan (App.
4)."¹

22 OPINION ON REMAND

23 Petitioner's second assignment of error is not well taken.
24 The county's ordinance is clearly legislative as it establishes
25 "general polic[y] without regard to a specific piece of
26 property." Fasano v. Washington Co. Comm., 264 Or 574, 580,

1 507 P2d 23 (1973); Neuberger v. City of Portland, 288 Or 155,
2 603 P2d 771 (1979), rev den 288 Or 585, 607 P2d 722 (1980). It
3 is not error for findings in support of a legislative decision
4 such as this to not be supported by substantial evidence, at
5 least absent citation to some legal requirement that there be
6 substantial evidence. Lima v Jackson County, 56 Or App
7 619, ___ P2d ___ (1982). Petitioner has not identified any
8 such requirement that might be applicable in this case.²

9 Petitioner's third assignment of error was disposed of by
10 the Court of Appeals in review of our opinion. This board
11 construed petitioner's first and third assignments as together
12 raising the issue of the county's authority to establish sewer
13 policy of the type involved in this ordinance. The Court of
14 Appeals ruled the county did not exceed its authority in
15 adopting the ordinance in question. That ruling is dispositive
16 of petitioner's third assignment of error.

17 Petitioner's fourth assignment of error is that the county
18 violated Goal 2 by failing to comply with the cooperative
19 agreement dated June 7, 1978, and the 208 Plan Implementation
20 Agreement of the Greater Bear Creek Basin Waste Master Plan.
21 Petitioner's fourth assignment of error is not well taken. In
22 BCVSA v Jackson County, 2 LCDC 126 (LCDC No. 78-020, 1978),
23 LCDC held invalid an ordinance adopted by Jackson County which
24 conflicted with the same cooperative agreement now at issue.
25 The ordinance was adopted as an interim measure by the county
26 to restrict the extension of sewer services until

1 acknowledgment of the county's plan. The portion of the
2 cooperative agreement which the interim ordinance violated was
3 the following:

4 "4. Until the BCVSA 'Comprehensive Sewer Plan' is
5 incorporated in the revised county comprehensive plan
6 as a portion of the public facilities element of the
7 county plan, and until acknowledgment of compliance by
8 LCDC of the revised county comprehensive plan with
9 state goals, the BCVSA may use their 'Comprehensive
10 Sewer Plan' to guide their activities and will
11 continue to submit proposed projects to the Jackson
12 County Department of Planning and Development for
13 review and comment."

14 The cooperative agreement said, prior to acknowledgment of
15 the county's plan, the BCVSA plan would be used to decide sewer
16 extension issues. The ordinance adopted by the county set
17 forth a different standard for deciding sewer extension
18 issues. LCDC held the county violated Goal 2 because the
19 county failed to explain why it had deviated from the
20 cooperative agreement.

21 In the present case, we are not concerned with the same
22 part of the cooperative agreement involved in the previous
23 BCVSA case reviewed by LCDC. The ordinance provision involved
24 here is not an interim provision, but the county's final plan
25 element relating to sewers. The issue with the cooperative
26 agreement is whether the county violated that part of the
27 agreement quoted above which provides for incorporation of the
28 BCVSA sewer plan "into the revised county comprehensive plan as
29 a portion of the public facilities element of the county
30 plan." In other words, the issue is whether the cooperative

1 agreement required the county to incorporate into its
2 comprehensive plan the BCVSA sewer plan, and, if so, whether
3 the county's failure to do so was in violation of Goal 2.
4 BCVSA's objection is that the county prepared its own plan
5 rather than incorporating BCVSA's sewer plan into the
6 comprehensive plan.

7 The cooperative agreement does not, in our view, expressly
8 state BCVSA has the authority to adopt a sewer plan which is
9 binding on the county. We agree the cooperative agreement is
10 susceptible to this interpretation. Indeed, this
11 interpretation is consistent with the view of the division of
12 planning responsibilities between BCVSA and the county
13 expressed in our first opinion. However, the appellate courts
14 have now said that the county has ultimate planning authority
15 and may adopt its own sewer plan. It would seem, therefore,
16 somewhat incongruous for us to construe the cooperative
17 agreement as requiring the county to give BCVSA the authority
18 to adopt a sewer plan binding on the county when this is not
19 the scheme of things as expressed by the appellate courts.

20 Even if, however, the cooperative agreement were construed
21 as requiring the county to incorporate BCVSA's plan into the
22 county's plan, we believe the county's failure to abide by the
23 agreement if construed in this fashion is not a violation of
24 Goal 2. Deviation from the terms of a cooperative agreement is
25 not, per se, a Goal 2 violation, as explained by LCDC:

26

1 "The cooperative agreement is a coordination device
2 established by law. Where such an agreement exists,
3 it should be honored in the absence of a valid, on the
4 record excuse. The County, therefore, must bear the
burden of explaining to the District why it is
adopting substantive policy which appears to conflict
with the terms of the cooperative agreement.

5 "The explanation may well have to do with goal
6 requirements which the county finds to be in conflict
7 with the terms of the agreement. It may also have to
8 do with the county's interpretation of the agreement.
9 Whatever it is, however, it must acknowledge the
apparent conflict and take account of the special
needs of the District." BCVSA v. Jackson County,
supra, 2 LCDC at 135.

10 The county early on explained to BCVSA that it believed it
11 could not incorporate BCVSA's plan into the county's plan and
12 be consistent with the goals. The county and BCVSA tried to
13 but simply could not adopt a compromise which satisfied BCVSA's
14 concerns. In doing so, BCVSA fully understood why the county
15 acted as it did. No violation of Goal 2, therefore, resulted
16 just because the county did not incorporate BCVSA's plan into
17 its own plan.

18 There is a final reason why we cannot conclude that the
19 county's ordinance violates Goal 2. In the acknowledgment
20 proceeding before LCDC, BCVSA raised the exact issue which it
21 is asserting in this appeal. LCDC found no Goal 2 violation:

22 "The BCVSA objection cannot be sustained. Because the
23 objection does not explain the sections of the
24 cooperative agreement with Jackson County, which BCVSA
25 believes were violated by the county and does not cite
the specific reasons which BCVSA does not agree with
the public facility and services policy, it is not
possible to find a violation of Goal 2."

1 See LCDC Continuance Order "In the Matter of Jackson County's
2 Comprehensive Plan and Implementing Measures," dated May 14,
3 1982 at page 7. As stated in Footnote 2, supra, a decision by
4 LCDC on a goal issue in the context of an acknowledgment
5 proceeding is binding on this Board. LCDC determined that the
6 county's plan complied with Goal 2. Petitioner in the
7 acknowledgment proceeding had the opportunity to and did in
8 fact raise, the issue of whether the county deviated from the
9 cooperative agreement, and, if so, whether this deviation
10 constituted a violation of Goal 2. We have no authority to
11 recommend to LCDC that it, in effect, reconsider whether the
12 county's plan complies with Goal 2. Fujimoto v MSD, supra.³

13 CONCLUSION

14 For the foregoing reasons, BCVSA's second, third and fourth
15 assignments of error are denied. Jackson County's Ordinance
16 No. 80-13 adopting the public facilities and services element
17 of the Jackson County Comprehensive Plan is, accordingly,
18 affirmed.

FOOTNOTES

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This agreement was reached during a conference call with the parties. The results of the conference call were confirmed in a letter from the Board to the parties dated August 4, 1982.

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Goal 2 arguably imposes something close to a substantial evidence requirement. Part I of the goal states as the goal's purpose:

8 "To establish a land use planning process and policy
9 framework as a basis for all decisions and actions
10 related to use of land and to assure an adequate
factual base for such decisions and actions."

11 Part I of Goal 2 further provides:

12 "All land use plans shall include identification of
13 issues and problems, inventories and other factual
14 information for each applicable statewide planning
15 goal, evaluation of alternative courses of action and
16 ultimate policy choices, taking into consideration
social, economic, energy and environmental needs. The
required information shall be contained in the plan
document or in supporting documents. * * *"

17
18 Petitioner has not cited Goal 2 in this assignment of error
19 as a basis for contending substantial evidence is required. We
20 do not, therefore, decide whether Goal 2 imposes a substantial
21 evidence requirement. In any event, since our first opinion,
22 LCDC has issued a continuance order concerning Jackson County's
23 comprehensive plan and found that there was an adequate factual
24 base to support the county's public facilities and services
25 element. LCDC continuance order "In the Matter of Jackson
26 County's Comprehensive Plan and Implementing Measures" dated
May 14, 1982. LCDC's determination in its continuance order as
it relates to a goal issue is binding on this Board. Cf
Fujimoto v MSD, 52 Or App 875, 630 P2d 364 (1981).

25 3

Petitioner's argument concerning violation of the 208 Waste Treatment Master Plan is not sufficiently developed for us to pass upon it intelligently. We decline, therefore, to consider

1 this argument, except to note we are aware of no authority that
2 would hold violation of this type of intergovernmental
3 agreement is a Goal 2 violation.

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STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 8/27/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: BCVSA v. JACKSON COUNTY
LUBA NO. 80-090

Enclosed for your review is the Board's proposed opinion and order in the above captioned appeal.

The appeal is before the Board on remand from the Court of Appeals. The commission need only address the Board's discussion of the fourth assignment of error, pages 2 through 6 of the opinion. The Board's recommendation is that the county did not violate Goal 2 in adopting its own sewer plan element rather than incorporating BCVSA's sewer plan into the county's plan.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.

