

BEFORE THE LAND USE BOARD OF APPEALS

SEP 30 11 02 AM '83

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the)
assumed name of Oregon Land)
Use Project, Inc., an Oregon)
nonprofit corporation, KELLY)
McGREER, ROSEMARY McGREER,)
JAMES G. PERKINS, SHIRLEE)
PERKINS, DAVID DICKSON and)
MELINDA DICKSON,)

Petitioners,)

LUBA No. 81-132

vs.)

WASCO COUNTY COURT,)

Respondent.)

FINAL OPINION
AND ORDER

and)

DAVID KNAPP, RICHARD DENNIS)
SMITH, KEITH BULLOCK,)
SAMADHI MATTHEWS and)
CHIDVALIS RAJNEESH MEDITATION)
CENTER,)

Respondents-)
Participants.)

Remanded from the Court of Appeals.

Mark J. Greenfield
400 Dekum Building
519 S.W. 3rd Avenue
Portland, OR 97204
Attorney for
Petitioners

Edward J. Sullivan
O'Donnell, Sullivan & Ramis
1727 N.W. Hoyt Street
Portland, OR 97209
Attorney for
Respondents-Participants

Wilford K. Carey
Annala, Carey, Hull
& VanKoten
305 Cascade
Hood River, OR 97031
Attorney for
Respondent County

Allen L. Johnson
915 Oak Street
Suite 200
Eugene, OR 97401
Attorney for
Resondents-Participants

BAGG, Board Member

Remanded

09/30/83

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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), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioners appeal an order of the Wasco County Court
4 entitled "In The Matter Of A Petition for the Incorporation of
5 the City of Rajneeshpuram." The order approves the petition
6 and authorizes a special election for incorporation.¹

7 STANDING

8 1000 Friends of Oregon claims it has "representational
9 standing" to represent four of its members in this proceeding.
10 The four members, Kelly McGreer, Rosemary McGreer, James
11 Perkins and Shirlee Perkins are alleged to be members of 1000
12 Friends, and there is an affidavit attached to the Petition for
13 Review claiming that these individuals were members of the
14 organization at the time of the county's hearing to consider
15 the petition for incorporation held November 4, 1981.²

16 Kelly McGreer and Rosemary McGreer allege they are entitled
17 to standing because they own and operate a farm adjoining the
18 northeast quarter of the Big Muddy Ranch (operated by
19 petitioners for incorporation) and they rent additional acreage
20 in the area. They claim the decision adversely affects and
21 aggrieves them because

22 "(1) the City of Rajneeshpuram threatens their water
23 supply and thereby threatens their welfare and
their economic livelihood;

24 "(2) a city at the proposed location will increase
25 traffic on roads they use, and increase the
26 incidence of trespass (which has been a problem
for them in the past), vandalism, and livestock
loss due to dogs;

1 "(3) urban development in this rural area will
2 increase the value of land and thereby increase
3 their costs of renting land and their property
 taxes and;

4 "(4) urban development of Rajneeshpuram would
5 drastically change the character and scale of
 development in their community."

6 These allegations are supported by an affidavit.

7 James Perkins and Shirlee Perkins state they own over 8,000
8 acres of land in Wasco and Wheeler Counties, and a portion of
9 their holdings "lies downhill from the proposed city and shares
10 a common fence line." Petition for Review at 2, Item 17, p
11 59. They state an additional parcel of property "always
12 occupied by animals, lies astride Cold Camp Road, the county
13 road that approaches the entrance to Rajneeshpuram." James and
14 Shirlee Perkins claim to be adversely affected and aggrieved by
15 the county court's decision because

16 "(1) traffic has increased tremendously on the road
 past their property due to Rajneeshpuram;

17 "(2) this increased traffic threatens the Perkins'
18 stock, which uses this road;

19 "(3) a municipality in the area will increase land
20 values and taxes and make it more difficult for
 them to acquire new property if it becomes
 economically necessary;

21 "(4) an influx of large numbers of people will
22 increase the problems of trespass, open gates and
23 barn doors, broken fences, vandalism, theft, and
 fire dangers which the Perkins' have suffered in
 the past;

24 "(5) the city will threaten their water supply and
25 with it the value of their land;

1 "(6) the city will increase the spread of tansy
2 ragwort and may increase the local coyote
3 population, thereby threatening their stock and;

4 "(7) the city will make the Perkins' ranch undesirable
5 to leaseholders from an economic standpoint and
6 as a place to raise their children."

7 These allegations are supported by an affidavit.

8 David and Melinda Dickson claim to reside on and manage
9 3,500 acres approximately 15 miles from the Big Muddy Ranch.
10 They allege the road to the ranch passes their property, and
11 they allege they are adversely affected and aggrieved by this
12 decision because

13 "(1) there has already been a very significant
14 increase in traffic past their property due to
15 Rajneeshpuram;

16 "(2) if Rajneeshpuram grows in population from 200 to
17 2000, it will create a tremendous amount of
18 additional traffic past their property;

19 "(3) additional traffic due to Rajneeshpuram, often
20 driving at excessive speeds, endangers their
21 children and livestock which use the road;

22 "(4) the city will require rebuilding of the road,
23 which will increase their taxes as beneficiaries
24 of the improvement;

25 "(5) the city will destroy their rural lifestyle;

26 "(6) the city will increase noise and dust along their
27 property; and

28 "(7) the city will increase the likelihood of trespass
29 and vandalism on their ranch."

30 These allegations also are supported by an affidavit.

31 Respondents Knapp, et al, challenge petitioners' standing
32 on the ground that the facts alleged, even if taken as true, do
33 not establish that petitioners have standing. Respondents

1 challenge the standing of 1000 Friends of Oregon on the ground
2 there is no allegation that the other petitioners herein were
3 members of 1000 Friends of Oregon at the time of the hearing or
4 decision at issue. The Board notes, however, there is an
5 affidavit attached to the original Petition for Review stating
6 that at the time of the hearing (presumably of November 4,
7 1981) "both McGreers' and the Perkins' were members of 1000
8 Friends of Oregon." Petition for Review, Item 17, p. 109.³

9 Respondents also argue 1000 Friends has no standing because
10 there is no provision for representational standing before the
11 Board. Respondents state that 1979 Or Laws, ch 772, §4, as
12 amended by 1981 Or Laws, ch 748, requires that a petitioner
13 must show his interests are adversely affected or aggrieved,
14 and there is no grant of standing to a person who tries to
15 represent another who might meet those standing requirements.
16 Further, there is no allegation that 1000 Friends was itself
17 adversely affected or aggrieved, and 1000 Friends does not
18 allege that its participation in this proceeding is needed for
19 any reason. Respondents cite Benton County v. Friends of
20 Benton County, 294 Or 79, 653 P2d 1249 (1982) as support for
21 their argument.

22 The Board finds that 1000 Friends of Oregon has standing in
23 this proceeding. The Board relies on 1000 Friends of Oregon v.
24 Multnomah County, et al, 39 Or App 917, 593 P2d 1171 (1979).
25 In that case, the Court of Appeals based its approval of

26 //

1 standing for 1000 Friends on Hunt v. Washington Apple
2 Advertising Comm'n, 432 US 333, 97 S Ct 2434, 53 L ed 2d 383
3 (1977), in which the United States Supreme Court stated:

4 "* * * Thus we have recognized that an association has
5 standing to bring suit on behalf of its members when:
6 (a) its members would otherwise have standing to sue
7 in their own right; (b) the interests it seeks to
8 protect are germane to the organization's purpose; and
9 (c) neither the claim asserted, nor the relief
10 requested, requires the participation of individual
11 members in the lawsuit." Hunt v. Washington Apple
12 Advertising Comm'n, 432 US 333, 343, 97 S Ct 2434, 53
13 L Ed 2d 383, 394 (1977).

14 In light of 1000 Friends' stated purpose "to secure
15 reasonable implementation of laws relating to land use in the
16 State of Oregon," the Court of Appeals concluded that "1000
17 Friends was an appropriate association to assert
18 representational standing in a case in which its members would
19 have standing." 1000 Friends of Oregon, 39 Or App at 924. The
20 Board finds the facts in this case support 1000 Friends' claim
21 for representational standing under the analysis in 1000
22 Friends of Oregon v. Multnomah County, et al, supra.

23 The Board recognizes the matter of representational
24 standing was questioned by the Supreme Court in 1000 Friends v.
25 Benton County, supra, however the matter of representational
26 standing before this Board has received limited attention in
the briefs. There has been no analysis of the federal cases in
which this doctrine of standing is announced, and the questions
about representational standing posed by the Supreme Court in
1000 Friends v. Benton County, supra, have not been fully

1 addressed. The Board declines to depart from its previous
2 practice of granting representational standing based on the
3 Court of Appeals' decision in 1000 Friends v. Multnomah County,
4 supra, on the strength of very limited arguments by the parties.

5 The Board finds Kelly McGreer and Rosemary McGreer have
6 standing to bring this appeal. They have alleged the city
7 threatens their water supply and, consequently, their welfare
8 and economic livelihood. In support of this claim, the
9 McGreers submitted an affidavit in which they claim the area in
10 which they live has a limited water supply. They allege a
11 demand for groundwater by "thousands of people in
12 Rajneeshpuram" could cause their wells to run dry. As a
13 result, they would lose water for drinking and their stock.
14 The Board believes these facts and this claim of injury is
15 sufficient to show adverse effect and aggrievement. It must be
16 remembered that respondents do not challenge the facts as
17 alleged; respondents only argue that these facts do not add up
18 to standing.⁴

19 The Board finds James Perkins and Shirlee Perkins have
20 standing to bring this appeal. The Perkins have alleged
21 traffic increases as a result of the activities at
22 Rajneeshpuram, and the increased traffic threatens their stock
23 which use the roadway. The Board understands the Perkins to
24 claim that their stock are "driven on these roads and will be
25 endangered" by the traffic. Affidavit of James G. Perkins and
26 Shirlee D. Perkins attached to Petition for Review, Item

1 17, Page 102. The Board believes the claim of threat to
2 livestock as a result of increased population at Rajneeshpuram
3 and resultant increased traffic satisfies the requirements for
4 standing in 1979 Or Laws, ch 772, §4(3)(b), as amended by 1981
5 Or Laws, ch 748.⁵

6 Petitioners David and Melinda Dickson have standing to
7 bring this appeal. They allege their ranch is 15 miles from
8 the Big Muddy Ranch, but the road to the ranch passes their
9 property. Petitioners Dicksons' claim increased traffic
10 occasioned by growth from the city will cause additional
11 traffic on the road endangering their children and livestock.
12 The Board believes this claim is sufficient for standing under
13 1979 Or Laws, ch 772, §4(3)(b)(5).⁶

14 FACTS

15 The petition for incorporation was filed on October 15,
16 1981. The area proposed to be incorporated is about 20 miles
17 east of Antelope, Oregon, on approximately 2135 acres. This
18 property lies within land known as the Big Muddy Ranch. The
19 area to be incorporated consists of about 61 percent Class VII
20 and VIII soil, 35 percent Class VI soil and 4 percent Class
21 II-IV soil. Agricultural activity occurred on this land in the
22 past, but the property had been over grazed. Record 10, 17,
23 20-22, 38-41, 43.

24 The Wasco County Court heard the petition for incorporation
25 on November 4, 1981. There was testimony both for and against
26 the incorporation. At the close of the hearing, the county

1 court adopted findings of fact and conclusions of law approving
2 the petition. Record 1-45, 103.

3 Petitioners appealed the county court's order to the Land
4 Use Board of Appeals on December 1, 1981. The Board issued its
5 final opinion and order holding the matter to be outside the
6 Board's power of review on March 12, 1983, Item 41, Page 493 et
7 seq. The matter was reversed and remanded to the Board in 1000
8 Friends v. Wasco County Court, 62 Or App 75, 659 P2d 1001, rev
9 den (1983).

10 ASSIGNMENTS OF ERROR ABOUT INCORPORATION OF NEW CITIES

11 FIRST ASSIGNMENT OF ERROR

12 "The County Court Erred by Approving the Incorporation
13 Petition Absent a Demonstration of Need for Urban
14 Uses."

14 In this assignment of error, petitioners allege that
15 statewide planning goals apply to incorporation of new cities.
16 Petitioners also allege the county violated Goal 14 by failing
17 to show a "need" for urban uses in this area.

18 SECOND ASSIGNMENT OF ERROR

19 "The County Court's Order Violates the Locational
20 Factors in Goal 14."

21 Under this assignment of error, petitioners allege
22 violation of portions of Goal 14 that control the conversion of
23 rural land to urbanizable land. See Footnote 10, supra. Local
24 governments must consider these factors in determining site
25 specific locations for urban growth boundaries, according to
26 petitioners. Petitioners' complain the location of urban uses

1 in the city of Rajneeshpuram, away from existing urban areas,
2 violates Goal 14 and particularly factor 4 of Goal 14 calling
3 for "maximum efficiency of land use within and on the fringe of
4 existing urban area."

5 FOURTH ASSIGNMENT OF ERROR

6 "The County Court Improperly Concluded that Goal 3 is
7 Inapplicable in this Proceeding."

8 Under this assignment of error, petitioners say the county
9 court failed to consider whether the soils on the 64,000 acre
10 Big Muddy Ranch were SCS Class I-VI. Petitioners say the
11 county court only considered soils on 2,135 acres prior to
12 making its conclusion that Goal 3 did not apply because the
13 predominate soil type within the 2,135 acres was not within SCS
14 Class I-VI.⁷ Petitioners further complain the county's
15 finding that the property is not suitable for farm use is not
16 supported by substantial evidence. Petitioners assert the
17 record shows the land would support grazing if reclaimed for
18 that purpose. Petition for Review 19-20, Item 17, Page 76-77.

19 LCDC RULE ABOUT INCORPORATION OF NEW CITIES--
20 OAR 660-015-000, et seq.

21 Since petitioners made these allegations of violation of
22 statewide planning goals, the Land Conservation and Development
23 Commission adopted a temporary rule controlling incorporation
24 of territory into a city. The stated purpose of the rule

25 "is to clarify the requirements of Goal 14 and to
26 provide guidance to cities, counties and local
government boundary commissions regarding

1 incorporation of new cities under the goals. This
2 rule specifies the satisfactory method of applying
3 statewide planning goals 2, 3, 4 and 14 to the
4 incorporation of new cities." OAR 660-14-000.

5 When authorizing an incorporation election for an area
6 outside an acknowledged urban growth boundary, OAR
7 660-14-010(1) requires a county to take an exception to Goal 14
8 "to allow urban uses to be established on rural lands."⁸ The
9 rule goes on to say that

10 "[i]f the land proposed for incorporation is also
11 agricultural land or forest land, the county's
12 exception to goal 14 will also be considered an
13 exception to Goals 3 and 4."

14 Where a new city is to be incorporated within an acknowledged
15 urban growth boundary, no exception is required. OAR
16 660-14-010(1).

17 The rule states the decision to hold an incorporation
18 election "may also require a plan amendment." OAR
19 660-14-010(3). The Board is not certain what this provision
20 means because an exception pursuant to Goal 2 requires a plan
21 amendment, at least to the extent that "the compelling reasons
22 and facts [for the exception] shall be completely set forth in
23 the plan * * * *" Statewide Planning Goal 2. The rule also
24 includes provision for incorporation of new cities on rural
25 lands irrevocably committed to urban levels of development. By
26 its terms, the rule is applicable to incorporation of new
27 cities after August 21, 1981. OAR 660-14-050.

28 Petitioners urge the rule must be applied by this Board.

1 Application of the rule, according to petitioners, requires the
2 decision of Wasco County be reversed. Petitioners announce a
3 remand would "not be appropriate to this proceeding."

4 Petitioners' Supplemental Brief at 23.

5 Respondents argue the new rule should not be applied in
6 this review proceeding. Respondents say the rule is an
7 impermissible amendment to the statewide planning goals and was
8 not adopted with all of the formalities required for goal
9 enactment and amendment. See ORS 197.015(8) and ORS 197.225 to
10 197.245. Respondents cite LCDC's notice rule, OAR 660-01-000,
11 which requires certain notices to be made, none of which were
12 made according to respondents. Respondents say there is no
13 exception in the notice rule for emergency or temporary
14 rules. Respondents complain the rule purports to have
15 retroactive effect in violation of respondents' constitutional
16 rights. Respondents characterize the action as "retroactive
17 law making and goal post changing." Brief of Respondents on
18 Remand, page 18.

19 The Board does not believe it need address the issue of
20 whether the enactment of the temporary rule is void or
21 voidable. The Board has a singular relationship with the Land
22 Conservation and Development Commission. LUBA reviews those
23 petitions which include allegations of violation of statewide
24 planning goals and makes a recommendation to the commission on
25 the statewide goal issues. 1979 Or Laws, ch 772, §6, as
26 amended by 1981 Or Laws, ch 748. It is the commission that has

1 absolute authority to decide what statewide goals mean, and,
2 necessarily, how they are to be applied. Any error in the
3 commission's enactment or application of a statewide planning
4 goal is specifically outside LUBA's jurisdiction.⁹ The Board
5 believes it has no power to question the rule's validity.

6 The Board is mindful that petitioners did not claim failure
7 to take an exception to Goal 14 as error in this case.

8 Petitioners alleged a violation of Goal 14 on several grounds
9 including a claim no "need" was shown for urban and urbanizable
10 land. However, petitioners did not say the county was required
11 to take an exception to Goal 14 in order to create a new city.

12 Nonetheless, the Board believes it is obliged to consider the
13 new rule as controlling its review. That is, the Board must
14 apply the commission's statement of how the goals apply to a
15 particular fact circumstance notwithstanding petitioners'

16 failure to argue the goals apply in precisely the manner stated
17 in the rule. While the parties may argue as to whether the new
18 LCDC rule is one of interpretation, goal amendment or something
19 else, the Board must regard the rule as the commission's
20 directive on how the goals are to be applied to this

21 situation. The Board also is mindful that petitioners' first
22 assignment of error plainly alleges that incorporation of a
23 city on rural lands violates Goal 14. Petitioners are correct
24 in this allegation, and petitioners' first assignment of error
25 is sustained. The Commission has long held that Goal 14
26 prohibits urban uses on rural lands. Sandy v. Clackamas

1 County, 3 LCDC 139 (1979). See also Conarow v. Coos County, 2
2 Or LUBA 194 (1981); Ashland v. Jackson County, 2 Or LUBA 378
3 (1981); Wright v. Marion County, 1 Or LUBA 164 (1980); and
4 discussion at footnote 11. Incorporation permits the
5 establishment of urban and urbanizable land and urban land
6 uses. Upon incorporation, "land that could not before have
7 been used for urban use would be available for future urban
8 use." 1000 Friends of Oregon v. Wasco County Court, 62 Or App
9 75, 81-82, 659 P2d 1001, rev. den. 295 Or 259 (1983). In
10 addition, petitioners are correct in asserting, in their Fourth
11 Assignment of Error, that under Goal 3 a county may not look
12 only to the area proposed for incorporation in determining
13 whether the land is agricultural, where that area is part of a
14 larger agricultural operation. Because the effect of
15 incorporation ultimately is to allow rural land to be converted
16 to uses otherwise prohibited in exclusive farm use zones, a
17 county must look to the farm or ranch as a whole to determine
18 whether the land to be incorporated is agricultural land.
19 Lemmon v. Clemons, 57 Or App 583, 646 P2d 633 (1982); Meyer v.
20 Lord, 37 Or App 59, 586 P2d 367 (1978). Petitioners have
21 alleged that the findings fail to consider the ranch as a whole
22 in concluding that Goal 3 does not apply. Petitioners are
23 correct in this assertion. Petitioners' Fourth Assignment of
24 Error is sustained."* See page 26 at **.

25 APPLICATION OF OAR 660-014-000 ET SEQ.

26 The record does not reveal an exception to Goal 14 was

1 taken, as required under the new rule. The Board notes Wasco
2 County made extensive findings on the matter of compliance with
3 statewide planning goals when it approved the petition for
4 incorporation. The findings include discussion of Goal 14;
5 however, no exception was taken to Goal 14. Exceptions
6 criteria, while similar in some respects to criteria in Goal 14
7 for the conversion of rural to urbanizable land, are not
8 identical. Goal 2 exceptions criteria include a more basic
9 inquiry into why a use (in this case a city) should be allowed
10 and what alternative locations within the area might be used
11 for the use. A Goal 14 inquiry is more limited to the
12 specifics of population, housing, public facilities and
13 services and other related matters that are pertinent to
14 establishment of urban growth boundaries around existing
15 cities.¹⁰

16 In order to provide the parties with some guidance, the
17 Board will offer its view as to how the rule is to be applied.
18 Taking an exception to goal 14 will necessarily involve a
19 rather jumbled process. The desire to incorporate rural land
20 into a city will have to include an analysis of how large the
21 city should be in order to accommodate at least the immediate
22 population, public facilities, services and planned uses (or
23 those already in existence). Along with this initial
24 consideration of what is already on the ground or should be
25 placed on the ground, an analysis must be made as to

26 "why these other uses [this city] should be provided

1 for; [and] what alternative locations within the area
2 could be used for the proposed uses [city]." LCDC
Goal 2.

3 The analysis of these two issues must reveal, with
4 "compelling reasons and facts," why the city should be created
5 at all and why the land chosen is suitable to be incorporated
6 (as opposed to other lands). Necessarily, the governing body
7 must be convinced the reason to incorporate justifies a new
8 city and not simply enlargement of an existing city or rural
9 center.

10 Inquiry into the third of the four exceptions criteria in
11 Goal 2 is really an inquiry into whether there will be any
12 adverse "long term environmental, economic, social and energy
13 consequences to the locality, the region or the state" by the
14 creation of the city. Findings on this matter necessarily lead
15 the inquiry into the last of the four criteria, that is,
16 whether the city will be compatible with adjacent uses.

17 Some of the questions asked during the course of the
18 exceptions procedure will mirror questions asked while drawing
19 the boundaries of the city and deciding, pursuant to the seven
20 conversion factors in Goal 14, what urban growth boundaries
21 should be established for the city. The Board believes it is
22 important to note, however, that an urban growth boundary need
23 not be established for a proposed city before the petition for
24 incorporation is approved. The Board understands the rule
25 simply to require an exception to be taken to Goal 14 in order
26 to create the legal entity, a city, without which the Goal 14

1 [is useless] factors for the establishment of an urban growth
2 boundary can not be applied.^{11*} Certainly, drawing initial
3 city boundaries and answering, particularly, the first two of
4 the exceptions criteria will involve consideration of some of
5 the same issues listed in factors 1 through 7 in Goal 14. For
6 example, land needed for housing, employment, public facilities
7 and services and other urban uses will have to be determined
8 and converted into lines which will represent the proposed city
9 boundaries. The Board does not believe, however, that in
10 taking this action there must be an analysis of a scale
11 comparable to that required when drawing an urban growth
12 boundary. A showing by compelling reasons and facts that a
13 city should be allowed, that it should be in the area proposed,
14 that it will not damage the environment, the economic, social
15 and energy qualities of the area, the region or the state and
16 that the city will be compatible with adjacent uses is
17 sufficient for compliance with the rule and approval of an
18 incorporation petition.¹²

19 After incorporation, the process of drawing urban growth
20 boundaries and making a comprehensive plan of sufficient
21 quality to pass an acknowledgment review must be undertaken.
22 There is no way of knowing at the pre-incorporation stage what
23 the urban growth boundaries will be. There may be
24 circumstances in which incorporation of a city will precede by
25 some considerable time any inhabitants or even any construction
26 activities. The Board does not believe it is appropriate or

1 even possible to anticipate all the kinds of situations that
2 may satisfy a Goal 2 exception to Goal 14 for incorporation of
3 a city. Therefore, the formal application of the Goal 14
4 factors for the establishment of an urban growth boundary is a
5 separate and distinct activity from the act of incorporation.

6 The Board notes the new incorporation rule provides that if
7 an exception is taken to Goal 14, the exception will also be
8 considered an exception to Goals 3 and 4. OAR 660-14-010(1).
9 Therefore, the Board does not believe a separate exception is
10 required to Goals 3 and 4. However, the Board believes inquiry
11 must be made as to the effect of the incorporation on
12 agricultural land in order to meet the requirements of
13 paragraphs (c) and (d) of the exceptions process in Goal 2.
14 The agricultural and forest land to be considered includes
15 whatever agricultural land and forest may exist within the
16 boundaries of the proposed city. Further, the impact of the
17 incorporation on adjacent agricultural land must be considered
18 at least to the extent it is known at the time the exception is
19 taken.

20 The Board concludes the county must apply OAR 660-014-000
21 et seq. [13]*

22 OTHER ASSIGNMENTS OF ERROR

23 THIRD ASSIGNMENT OF ERROR

24 "The County's Findings are not Supported by
25 Substantial Evidence in the Whole Record." Item 17,
p. 74.

26 Petitioners allege there is no substantial evidence in the

1 record to support the county's reliance on population
2 projections for the proposed city. The projections showed a
3 population of 1500-2000 people by 1995. Record 31. The
4 unsupported population projections are not substantial evidence
5 for a determination of need to incorporate 2,135 acres,
6 according to petitioners.

7 The Board believes this assignment of error is moot.
8 Because this case must be remanded, and because both parties
9 argue that changes have occurred since the time of the original
10 petition for incorporation, the Board's determination as to
11 whether or not local population projections were then accurate
12 would be pointless.

13 FIFTH ASSIGNMENT OF ERROR

14 "The order violates Wasco County's Comprehensive Plan
15 and Goal 2." Item 17, p. 78.

16 Petitioners allege the decision to approve the petition for
17 incorporation is not consistent with the Wasco County plan.
18 This inconsistency results in a violation of both the
19 comprehensive plan and Goal 2.

20 As with the third assignment of error, the Board believes
21 this issue is moot. Since the date of the decision on appeal,
22 the county has revised its comprehensive plan. The City of
23 Rajneespuram has also written a comprehensive plan which has
24 been incorporated into the Wasco County plan. Therefore, the
25 existing Wasco County plan consists not only of portions of the
26 original plan, but also amended portions and the plan of the

1 City of Rajneeshpuram. When the case is back before the Wasco
2 County Court, the court will be obliged to apply its
3 comprehensive plan as it exists now (or as it may exist at that
4 time).¹³

5 SIXTH ASSIGNMENT OF ERROR

6 "The County Court's Order is Invalid Because
7 Petitioners Were Denied an Impartial Tribunal. Judge
8 Cantrell's Failure to Disclose Ex Parte Contacts and
9 Conflicts of Interest, and His Failure to Withdraw
from this Proceeding, Violated Fasano Safeguards and
14th Amendment Due Process Requirements." Item 17, p.
80.

10 Both petitioners and respondents agree this assignment of
11 error would be rendered moot if the Board were to remand or
12 reverse the decision of the Wasco County Court. County Judge
13 Cantrell is no longer a member of the county court. Therefore,
14 the Board does not reach this assignment^o of error.

15 This matter is remanded to Wasco County to apply OAR
16 660-014-000 et seq.

FOOTNOTES

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3 1

This case is before the Board on remand from the Court of Appeals in 1000 Friends of Oregon v Wasco County Court, 62 Or App 75, 659 P2d 1001, rev den, 295 Or 259 (1983). The Court reversed and remanded LUBA's decision in 1000 Friends of Oregon, et al v Wasco County Court, et al, 5 Or LUBA 133 (1982).

7 2

All the allegations of adverse effect and aggrievement presume the decision to approve a petition for incorporation can have an effect in land use. It must be remembered, however, that approval of the petition for incorporation is not the final step in the process leading to incorporation. There must be an election. ORS 221.050. The proceeding to consider the petition, however, is the only time where the statewide planning goals may be applied. See 1000 Friends v. Wasco County Court, 6 Or LUBA 225 (1982), aff'd, 64 Or App 3, ___ P2d ___ (1983).

13 3

The "Item" and "Page" citation is from the Record in 1000 Friends of Oregon v. Wasco County, 62 Or App 75, supra.

16 4

Other grounds alleged by the McGreers are not sufficient. Their claim of increased traffic does not explain how increased traffic will injure them. Their claim of increased incidence of trespass, vandalism, and livestock loss due to dogs is not supported by any facts which link these unpleasant events to the presence of a city. Further, their claim urban development will increase the value of their land, the costs of renting land and their property taxes is not supported by any claim that petitioners are seeking to rent additional property. See Goracke v. Benton County, 6 Or LUBA 93 (1982). Also, petitioners do not explain how a nearby city will increase the value of their land and taxes when the nearby city is a considerable distance away and petitioners have available to them a property tax deferral because of their agricultural activities. Further, petitioners do not explain how a change in the character and scale of development in their community adversely affects them.

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Petitioners Perkins' other claims are not sufficient. Petitioners make the same claim about land values and taxes as the McGreers, and the Board's response is the same as that given in the last footnote. The Perkins' claim of an influx of people increasing the problems of trespass and other problems is speculative at best. Petitioners do not explain how close they are to the city. Is the Board to assume that individuals who would cause damage to Petitioners Perkins' property would go out of their way or stop their vehicles to engage in vandalism? The Perkins do not explain how a city will cause a spread of tansy ragwort. The claim of injury to their water supply is pure speculation because it is based on their view that because municipalities have powers of condemnation, the city could damage their water supply. Whether the city would choose to exercise its power of eminent domain is highly speculative. The perceived threat of eminent domain is too remote to constitute a "likelihood of injury." See Warren v. Lane County, 6 Or LUBA 47 (1982), aff'd 62 Or App 682, ___ P2d ___ (1983).

6

The remaining claims for standing are not sufficient. Whether the city will cause the roadway to be widened is highly speculative. Further, the method of financing such a project is quite unknowable at this time. Also, it is unclear how such a project, if undertaken, would impact petitioners any differently than others in the county. Even if the Board assumes loss of rural lifestyles, noise, dust, trespass and vandalism are injuries, there is no explanation or allegation of fact to explain how the city, over 15 miles away, will be responsible for these injuries.

7

"AGRICULTURAL LAND - In western Oregon is land of predominately Class I, II, III and IV soils and in eastern Oregon is land of predominately Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event.

1 "More detailed soil data to define agricultural land
2 may be utilized by local governments if such data
3 permits achievement of this goal."

4 8

5 The rule specifically includes the decision "by a county
6 court to authorize an incorporation election pursuant to ORS
7 221.040." OAR 660-14-010(2)(a). The rule does not mention
8 county boards of commissioners. Many counties in Oregon have
9 county boards of commissioners, and this Board understands the
10 commission's intent is to include county boards of
11 commissioners under this rule. See ORS 203.230.

12 9

13 LUBA is denied the power to review a land use decision of
14 the Land Conservation and Development Commission. See 1979 Or
15 Laws, ch 772, §2(a), as amended by 1981 Or Laws, ch 748 and ORS
16 197.015(10)(b).

17 10

18 Goal 2, Part II Exceptions state:

19 "When, during the application of the statewide goals
20 to plans, it appears that it is not possible to apply
21 the appropriate goal to specific properties or
22 situations, then each proposed exception to a goal
23 shall be set forth during the plan preparation phases
24 and also specifically noted in the notices of public
25 hearing. The notices of hearing shall summarize the
26 issues in an understandable and meaningful manner.

"If the exception to the goal is adopted, then the
compelling reasons and facts for that conclusion shall
be completely set forth in the plan and shall include:

"(a) Why these other uses should be provided for;

"(b) What alternative locations within the area could
be used for the proposed uses;

"(c) What are the long term environmental, economic,
social and energy consequences to the locality,
the region or the state from not applying the
goal or permitting the alternative use;

"(d) A finding that the proposed uses will be
compatible with other adjacent uses."

1 Goal 14, in pertinent part, states:

2 "GOAL: To provide for an orderly and efficient
3 transition from rural to urban land use.

4 "Urban growth boundaries shall be established to
5 identify and separate urbanizable land from rural land.

6 "Establishment and change of the boundaries shall be
based upon consideration of the following factors:

7 "(1) Demonstrated need to accommodate long-range urban
8 population growth requirements consistent with
LCDC goals;

9 "(2) Need for housing, employment opportunities, and
livability;

10 "(3) Orderly and economic provision for public
facilities and services;

11 "(4) Maximum efficiency of land uses within and on the
fringe of the existing urban area;

12 "(5) Environmental, energy, economic and social
consequences;

13 "(6) Retention of agricultural land as defined, with
Class I being the highest priority for retention
and Class VI the lowest priority; and,

14 "(7) Compatibility of the proposed urban uses with
15 nearby agricultural activities."

16

11

17 Goal 14, by its terms, [does not control urbanization
18 without reference to an existing city] only allows urbanization
19 where there is an existing city. The goal contemplates the
20 establishment of urban growth boundaries as the means "to
21 provide an orderly and efficient transition from rural to urban
land use." Urban growth boundaries are to be drawn around
22 cities and may be coterminous with the city limits or not,
depending upon the need for urbanizable land. The goal fails
23 to establish any other means for converting rural to urban land
use. Where no city exists, therefore, the Goal 14 factors for
24 the establishment of an urban growth boundary cannot be
applied, and a Goal 2 exception is necessary. The one limited
exception is where there is an existing community or
"quasi-urban" area. See City of Medford v. Jackson County, 2
Or LUBA 387 (1981); remanded in part in 59 Or App 155, 643 P2d
1353 (1982).*

25

12

26 The third of the four exceptions criteria does not call for

1 proof of environmental, economic, social and energy benefit.
2 The criterion calls for an analysis. The Board believes the
3 analysis is sufficient if it shows by "compelling reasons and
4 facts," no harm to these qualities. If harm is shown,
5 presumably this conclusion would affect the finding of need for
6 the use and whether the use belongs on the property selected.
7 The Board wishes to add that "social" consequences means land
8 use patterns, community land use characteristics and similar
9 determinable facts. "Social" consequences does not require an
10 inquiry into whether the exception is politically sound or is
11 sociologically progressive or regressive. This criterion calls
12 for an analysis of how land is used, not who uses it.

13

14 The issues raised by petitioners in assignments of error 1
15 through 3 are resolved by OAR 660-014-000 et seq. and will not
16 be discussed further.]

17

18 Petitioners argue the county court amended its
19 comprehensive plan to incorporate the Rajneeshpuram plan only
20 because of its "coordination" responsibility under Goal 2. In
21 support of this claim, the petitioners submit affidavit from
22 the county judge. See "Petitioners' Answer to Motion to Defer"
23 of September 16, 1983. The affidavit is incompetent and not
24 relevant to explain or interpret the county plan (which, the
25 Board notes, includes no such explanation).

26 An expression of the intent of the legislature after the
making of a legislative act, or indeed after the making of a
quasi-judicial act, does not control how the act is to be
interpreted. It is the written ordinance that is subject to
review, not the pronouncements of a participant made after the
fact. Citadel Corporation v Tillamook, Or LUBA (Slip Op
September 13, 1983; ex parte Goodrich; 160 Cal 410, 117 P 451
(1911); Bagg v. Wickizen, 9 Cal App 2d 753, 50 Pd 1047 (1935);
State v. Wholesale Grocers v. Great Atlantic and Pacific Tea
Co., 154 F Supp 471 (N.D. Ill. 1957).

Further, whether the incorporation of the city is
invalidated has no effect on Wasco County's Plan. Unless
amended, the Wasco County Plan will still include these
documents which make up the city's plan and which were made
part of the Wasco County Plan.

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2 All the material underlined is new material supplied by
3 LCDC, the material bracketed is material deleted at the
4 direction of LCDC.

4
**

5 As part of its determination, attached, LCDC required LUBA
6 to reexamine the record to determine "if the land to be
7 incorporated is agricultural land as defined by Goal 3."
8 (Emphasis added) This direction is at variance with the
9 discussion on page 14, lines 9 through 24, supplied by the
10 commission, which addresses the issue of whether the whole of
11 the ranch ownership is agricultural land. That is, the text of
12 the added material states that if a review of the whole
13 ownership shows a predominance of agricultural lands, then the
14 land to be incorporated is to be considered agricultural land,
15 while the direction to the Board is only to review the land to
16 be incorporated to see if that land is agricultural land. The
17 Board listened to the discussion before the commission at its
18 meeting of September 29, and while not conclusive, the Board
19 understands the commission to believe the whole ranch is to be
20 considered when determining whether the land subject to
21 incorporation is agricultural land. The Board concludes the
22 direction is simply misstated, and the Board will review the
23 record to determine if the whole ranch is composed of
24 agricultural land.

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The Board examined the findings made by Wasco County in
this proceeding. The findings do not address the matter of
whether the soils on the entirety of the Big Muddy Ranch fall
within the definition of "agricultural land" in Goal 3. In
compliance with the direction of the commission, therefore, the
Board incorporates the language appearing at page 14, lines 9
through 24 sustaining the petitioners' fourth assignment of
error.

SEP 29 2 20 PM '83

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the,)
assumed name of Oregon Land)
Use Project, Inc., an Oregon)
nonprofit corporation, KELLY)
McGREER, ROSEMARY McGREER,)
JAMES G. PERKINS, SHIRLEE)
PERKINS, DAVID DICKSON and)
MELINDA DICKSON,)

Petitioner(s),)

v.)

WASCO COUNTY COURT,)

Respondent.)

DAVID KNAPP, RICHARD DENNIS)
SMITH, KEITH BULLOCK,)
SMADHI MATTHEWS and)
CHIDVALIS RAJNEESH MEDITATION)
CENTER,)

Respondents-)
Participants.)

LUBA No. 81-132
LCDC DETERMINATION

The Land Conservation and Development Commission approves the
recommendation of the Land Use Board of Appeals in LUBA No. 81-132 with
the following modifications:

(1) On page 15, amend lines 17 to 23 as follows:

"The Board understands the rule simply to require an
exception to be taken to Goal 14 in order to create the legal
entity, a city, without which the Goal 14 [is useless]
factors for the establishment of an urban growth boundary can
not be applied".

(2) On page 23, amend Footnote 11 as follows:

"Goal 14, by its terms, [does not control urbanization without reference to an existing city] only allows urbanization where there is an existing city. The goal contemplates the establishment of urban growth boundaries as the means "to provide an orderly and efficient transition from rural to urban land use." Urban growth boundaries are to be drawn around cities and may be coterminous with the city limits or not, depending upon the need for urbanizable land. The goal fails to establish any other means for converting rural to urban land use. Where no city exists, therefore, the Goal 14 factors for the establishment of an urban growth boundary cannot be applied, and a Goal 2 exception is necessary. The one limited exception is where there is an existing community or "quasi-urban" area. See City of Medford v. Jackson County, 2 Or LUBA 387 (1981); remanded in part in 59 Or App 155, 643 P2d 1353 (1982)."

(3) On page 16, amend lines 23 to 24 as follows:

"Therefore, the formal application of the Goal 14 factors for the establishment of an urban growth boundary is a separate and distinct activity from the act of incorporation."

(4) On page 13, line 20, add:

"The Board also is mindful that petitioners' first assignment of error plainly alleges that incorporation of a city on rural lands violates Goal 14. Petitioners are correct in this allegation, and petitioners' first assignment of error is sustained. The Commission has long held that Goal 14 prohibits urban uses on rural lands. Sandy v. Clackamas County, 3 LCDC 139 (1979). See also Conarow v. Coos County, 2 Or LUBA 194 (1981); Ashland v. Jackson County, 2 Or LUBA 378 (1981); Wright v. Marion County, 1 Or LUBA 164 (1980); and discussion at footnote 11. Incorporation permits the establishment of urban and urbanizable land and urban land uses. Upon incorporation, "land that could not before have been used for urban use would be available for future urban use." 1000 Friends of Oregon v. Wasco County Court, 62 Or App 75, 81-82, 659 P2d 1001, rev. den. 295 Or 259 (1983)."

- (5) On page 13, following the proposed addition recommended in
(4) above, add:

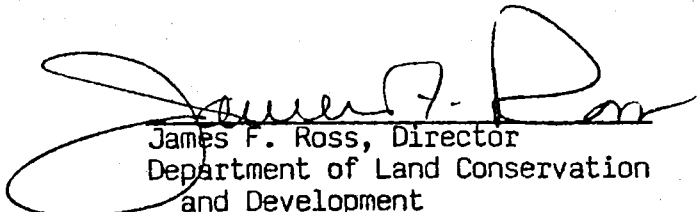
"In addition, petitioners are correct in asserting, in their Fourth Assignment of Error, that under Goal 3 a county may not look only to the area proposed for incorporation in determining whether the land is agricultural, where that area is part of a larger agricultural operation. Because the effect of incorporation ultimately is to allow rural land to be converted to uses otherwise prohibited in exclusive farm use zones, a county must look to the farm or ranch as a whole to determine whether the land to be incorporated is agricultural land. Lemmon v. Clemons, 57 Or App 583, 646 P2d 633 (1982); Meyer v. Lord, 37 Or App 59, 586 P2d 367 (1978). Petitioners have alleged that the findings fail to consider the ranch as a whole in concluding that Goal 3 does not apply. Petitioners are correct in this assertion. Petitioners' Fourth Assignment of Error is sustained."

The Commission further directs LUBA to reexamine the record with respect to this issue and determine if the land to be incorporated is agricultural land as defined by Goal 3. If LUBA finds that the land is agricultural, the order should be amended, as directed above and sustain Petitioner's fourth assignment of error on this issue.

- (6) Amend Footnote 13 (p. 24) and any other parts of the Proposed Opinion and Order consistent with the Commission's determination in this case.

DATED THIS 29 DAY OF September, 1983.

FOR THE COMMISSION:


James F. Ross, Director
Department of Land Conservation
and Development