BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SCHREINER'S GARDENS and DAVID SCHREINER, Petitioners, vs. DEPARTMENT OF ENVIRONMENTAL QUALITY, STATE OF OREGON, Respondent, and TRANS ENERGY - OREGON, INC., Participant/ Respondent.	LUBA No. 84-003 84-004 84-005 FINAL OPINION AND ORDER

On Remand from the Court of Appeals.

Ronald Saxton and Catherine Riffe, Portland, filed the Petition for Review and Catherine Riffe argued the cause on behalf of Petitioners. With them on the brief were Lindsay, Hart, Neil & Weigler.

Michael B. Huston, Salem, filed the response brief and argued the cause on behalf of Respondent DEQ.

Wallace W. Lien, Salem, filed the response brief and argued the cause on behalf of Participant Trans-Energy of Oregon. With him on the brief were Rhoten, Rhoten & Speerstra.

BAGG, Chief Referee; DuBAY, Referee; KRESSEL, Referee; participated in this decision.

AFFIRMED 09/12/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bagg.

NATURE OF THE DECISION[1]

Petitioners challenge three permits issued by the Department of Environmental Quality (DEQ). The permits are an air contaminant discharge permit, a waste discharge permit (for liquid wastes) and a solid waste disposal permit. The permits are necessary for the operation of a waste burning facility in Marion County.

FACTS

The facility is to be placed east of Highway Interstate 5 south of Brooklake Road and west of the Southern Pacific Railroad right-of-way. The site is zoned for Exclusive Farm Use (EFU) by Marion County. Marion County approved siting the facility at this location. Its decision was the subject of an appeal to this Board. However, we did not issue a ruling on the merits of that decision. We dismissed the appeal because petitioners failed to file a petition for review within the time allowed, and the Court of Appeals affirmed. Schreiners Gardens v. Marion County, ___ Or LUBA ___, (LUBA No. 83-065, 1983), aff'd without opinion, 66 Or App 194 (1983).

The waste burning facility, as proposed by the applicant, Trans-Energy of Oregon, was also the subject of an earlier appeal to this Board. Families for Responsible Government v. Marion County, 6 Or LUBA 254 (1983). In that case, siting of this facility at a location commonly known as the "Chemawa site" was approved by Marion County. The approval was appealed

to this Board, and we affirmed the county's decision. Our decision was then appealed to the Court of Appeals which remanded the case. Families for Responsible Government v. Marion County, 65 Or App 8, 670 P2d 615 (1983). After the remand, the parties agreed to a remand of the decision to Marion County. Families for Responsible Government v. Marion County, ___ Or LUBA ___ (LUBA No. 82-054, Slip Op 3/19/84). We do not know what, if any, action Marion County has taken pursuant to the voluntary remand.

FIRST ASSIGNMENT OF ERROR

> "The respondent erred in failing to make a finding of consistency with the Statewide Planning Goals, acknowledged Marion County Comprehensive Plan, and applicable Marion County zoning ordinance that would satisfy ORS 197.180(1)." Petition for Review at 7.

In this assignment of error, petitioners allege ORS 197.180(1) imposes a duty on state agencies to make land use decisions consistent with the statewide planning goals and the Marion County Comprehensive Plan.[2]

Petitioners allege DEQ must make findings, supported by substantial evidence in the record, which show its decision complies with the goals and other applicable criteria. Petitioners state DEQ may not simply rely on a land use compatibility statement or "consistency" statement by Marion County. Because no such findings exist in this case, petitioners contend DEQ violated ORS 197.180(1).

We note OAR 660-31-035, allows state agencies to rely on local government determinations of consistency with statewide

planning goals and local land use plans and regulations.[3] However, petitioners claim ORS 197.180(1) does not permit a rule which would allow DEQ to simply defer to Marion County's determination of compliance. They say an administrative agency such as the Land Conservation and Development Commission may not, by administrative rule, alter the requirements of a statute. Petitioners concede DEQ can utilize Marion County's record, but they insist DEQ is not relieved of the obligation to review the record and make findings of fact as to whether or not a particular permit is in compliance with the goals and all other land use criteria.[4]

While ORS 197.180(1) requires that state agencies make land use decisions consistent with the goals and acknowledged local plans and ordinances, we do not believe this statute precludes an administrative rule allowing state agencies to rely on statements of land use consistency adopted by other jurisdictions. The rule in question does not authorize non-compliance with land use regulations.[5] It simply allows another manner of showing compliance.[6] See Footnote 9, infra.

In this case, DEQ did what we believe was permitted under the statute and the rule. It made a choice to adopt Marion County's statement of consistency with the goals and other criteria.[7] On the face of the air contaminate discharge permit and the solid waste disposal permit, dated December 19, 1983, the following statement appears:

"Issued in accordance with the provisions of ORS

468.310 and subject to the land use compatibility statement referenced below."

Below a double line and appearing in captial letters is the following:

"LAND USE COMPATIBILITY STATEMENT;
From: Marion County
Dated: August 29, 1983"

We believe these statements are sufficient to constitute a determination that DEQ intends to rely on the land use compatibility statement by Marion County.

The challenged waste discharge permit presents a different question. This permit does not provide it is issued in accordance with any land use compatibility statement. The only reference in the permit to any findings is the following:

"The determination to issue this permit is based on findings and technical information included in the permit record." See Item 10, p. 46 in LUBA record to Court of Appeals, CA A31914.

Respondent DEQ claims this statement is adequate to incorporate Marion County's findings of goal, plan and ordinance compliance. If the permit at issue stood alone (i.e., without the other two) we could not agree.

Generally, we believe if a state agency wishes to avail itself of a rule permitting it to rely on determinations of land use consistency by local government, it must do so unambiguously. As noted, the air contaminate discharge permit and the solid waste disposal permit both clearly state reliance on Marion County's statement of compatibility. The waste discharge permit, however, does not.

The circumstances in this unusual case suggest we accept the agency's position despite ambiguity in one of the permits. It is noteworthy that all of the permits challenged here were issued on the same day, by the same agency, and are based on the same record. They concern the same facility. We believe it appropriate under these circumstances to assume DEQ intended each permit to incorporate Marion County's compatibility statement. We view the omission on the waste discharge permit to be at most a clerical oversight. A contrary conclusion (necessitating the permit be remanded) would be wasteful and unjust, even if technically defensible. We wish to emphasize, however, that our disposition of this issue is influenced heavily by the context in which the question arises.[8]

The First Assignment of Error is denied.

SECOND ASSIGNMENT OF ERROR

> "Respondent erred in issuing permits for a use of land that is inconsistent with Marion County's Comprehensive Plan and applicable zoning ordinances, thereby violating ORS 197.180(1)(b)(A)." Petition for Review at 9.

In the second assignment of error, petitioners attack Marion County's conclusions that the project meets applicable criteria. If the Marion County decision is flawed, DEQ's reliance on it means the permits must fall, according to petitioners.[9]

Petitioners first claim Marion County violated provisions of its zoning ordinance requiring that land suitable for farm use should not be put to the proposed conditional use unless

there is no other feasible non-farm land location for siting the facility. Marion County Zoning Ordinance (MCZO) 136.040(c) and (e). They state their claim of error as follows:

> "Before a solid waste disposal facility can be sited on EFU land, MCZO 136.040(c) and (e) requires a determination that there is 'no other feasible location.' The record before DEQ demonstrates that: (1) there are alternative sites and one of the alternative sites is better suited to the project. DEQ Record Vol. I pp. 82 and 94. This case must either be remanded to DEQ for consideration of the alternative site issue, or reversed because DEQ's decision is so clearly unsupported by the record." Petition for Review at 10.

Pursuant to MCZO 136.040(c) and (e), the county reviewed a number of alternative sites and made the following findings:[10]

> "Both the approved I-5 landfill site and the Chemawa waste-to-energy site have been appealed to the Oregon Court of Appeals and are currently pending before that court. The subject site is an alternative should the Chemawa site not be available when construction must begin to meet the landfill closure deadline. The public need to provide for a sanitary means of refuse disposal to avoid a widespread health hazard far outweighs the loss from the conversion of a small tract of farmland to non-farm use."
>
> * * *
>
> "However, the need to have a solid waste disposal facility in operation and the possibility that the Chemawa site might not be available before the Brown's Island landfill is closed require consideration of a contingency site. The County finds that locating the facility on the subject EFU zoned land is justified if the Chemawa site is not available when construction must commence. This intent will be a consideration at the time a franchise application is considered." Record, pp. 93-94.

The county findings show review of other sites against a 16 point set of criteria. Record, pp. 82-83. The findings specifically consider whether the "better" site, the Chemawa

site is a feasible location within the meaning of the ordinance. A negative conclusion is recited on grounds the Chemawa site might not be available when the existing landfill must be closed. The uncertainity arises because of the pendency of litigation over the prior decision to use the Chemawa site.

Petitioners do not argue that the county's interpretation of its ordinance is in error. Instead, petitioners ask us to remand the matter to DEQ for "consideration" of the alternative site issue, a task which, as we read the record, has already been performed by Marion County. In the absence of greater specificity as to the claim of error, we have no basis on which to proceed further on this point.

In a second portion of the second assignment of error, petitioners argue the county has not complied with MCZO 136.040(d)(2), requiring that a project not "interfere seriously with farming or forest practices on adjacent lands." Petitioners' complaint is that there will be a depletion of groundwater resource, thus interfering with farm uses.

Respondent Trans-Energy correctly points out that the county made a number of findings on groundwater. The findings say there will be sufficient groundwater for not only the plant but also surrounding water users. Record, pp. 88, 91, 92. Petitioners do not challenge the evidence supporting these findings. As Marion County has stated there will not be depletion of groundwater and as DEQ has adopted this finding,

we find no error as alleged by petitioners.

The Second Assignment of Error is denied.

The challenged permits are affirmed.

FOOTNOTES

1

This case is before us on remand from the Court of Appeals. We held petitioners lacked standing to bring this appeal. During the pendency of the appeal of our dismissal, the Supreme Court decided Jefferson Landfill Committee v. Marion County, 297 Or 280, ___ P2d ___ (1984) and Warren v. Lane County, 297 Or 290, ___ P2d ___ (1984). The parties agreed, based on those two decisions, that petitioners have standing to bring the appeal and the case should be remanded to us for a decision on the merits.

2

"Except as provided in ORS 527.722, state agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use:" ORS 197.180(1).

3

At the time the permits were issued, OAR 660-31-035, a Land Conservation and Development Commission rule, provided in part, that

> "[a]gencies shall rely upon the affected local governments consistency determination in the following cases:
>
> "(1) Where the agency finds the affected local government has determined that the proposed activity and use are consistent or inconsistent with its Acknowledged Comprehensive Plan and implementing ordinances.
>
> "(2) Where the affected local government does not have an acknowledged plan or the state agency makes a finding in accordance with 660-31-025(1) or (2) and, the state agency finds that:
>
> > "(a) The local review included consideration of the appropriate Statewide Planning Goals; and
> >
> > "(b) The local review provided notice and the opportunity for public and agency review and comment. If notice and the opportunity for public and agency review are not provided, the

agency shall only rely on the local determination if no objections are raised during the agency's review. Where objections are raised, the agency shall make its own determination...." OAR 660-31-035.

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[4] ORS 197.180(7) requires the Land Conservation and Development Commission to adopt rules prescribing circumstances in which state agencies may rely on local determinations of statewide planning goal and comprehensive plan and land use regulation compatibility. This statute was passed before DEQ issued the permits on appeal in this case. OAR 660-31-035 was in existence before ORS 197.180(7) was passed and became effective. We understand petitioners to complain that the statute is too late to save a rule adopted without clear legislative authority, but there is now clear and expressed authorty for LCDC's rule. We will treat the rule as effective.

We do not believe the rule conflicts with the law. We view the rule only to fill in a gap left by the prior statute. We consider the rule effective.

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[5] The rule has been amended. The rule presently provides that in the case of Class B permits

> "state agencies may rely on the effected local government's determination of consistency with the statewide planning goals and compatibility with the acknowledged comprehensive plan when the local government makes written findings demonstrating compliance with the goals or compatibility with the acknowledged plan and in accordance with 661-31-025(2)(b)(B)."

All three of the permits at issue here are Class B permits.

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[6] Also, we do not believe ORS 197.180(7) or OAR 660-31-035 requires reliance on local government determinations of consistency. That is, the agency may make its own determination of consistency, which may differ from that of the affected local government.

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[7] There also appears a statement that a determination to

issue the permit "is based on findings and technical information included in the permit record." Record, pp. 124, 202, 847.

At two places in the record, similar memos addressed to the "Trans-Energy Files" and to simply "File" appear. The memo of December 16, 1983, lists as its subject "Trans-Energy Land Use Compatibility Statement." That memo recites:

> "On November 17, 1983, the Land Conservation and Development Commission acknowledged the Marion County Comprehensive Plan except for certain geographical areas, none of which include the location of the proposed Trans-Energy facility.
>
> "For this reason the compatibility statement made by the County on October 18, 1983, will be adequate and no additional findings of compatibility with the Statewide Planning Goals will be necessary." Record, Vol. 1, p. 23.

The memo of December 19, 1983, lists as its subject "Land-Use Compatibilty of Proposed Trans-Energy Resource Recovery Facility." The memo recites:

> "Land-use compatibility findings dated October 18, 1983 were submitted by Marion County, where the proposed project is to be located.
>
> "These findings indicate that the proposed development is compatible with the Marion County Comprehensive Plan and Ordinance and will be relied on by DEQ in the issuance of permits for the proposed Trans-Energy resource recovery facility." Id, p. 4(a).

The findings referred to by these memos are found in the record at pages 77 to 106. The findings explain how the facility complies with statewide planning goals and other applicable criteria.

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[8] Respondent would have us affirm issuance of this permit on the basis of our holding Swenson v. DEQ, ___ Or LUBA ___ (LUBA No. 83-032, 1983). We do not believe Swenson is applicable. In the Swenson case, we were faced with similar language on the face of a permit referencing a county compatibility statement. Also on the face of the permit in the Swenson case was a statement that

"[t]he determination to issue this permit is based on findings and technical information included in the permit record." Swenson, Slip Op at 6.

In the Swenson case, however, DEQ made findings of its own on applicable land use regulations. The record showed DEQ to have conducted its own proceeding to determine whether or not the requested use complied with statewide planning goals and local regulations. In so doing, the director of the agency (also the person responsible for issuing the permit) stated in a memo to the permit files that he had reviewed the testimony and considered the evidence. The director made the following finding in the memo:

"In this case, to avoid any possible delay which will result from statutory changes, rule changes or litigation of the validity of this rule [the state permit consistency rule], the Department has determined that the Lane County Board of Commissioners' findings are persuasive and adopt them as a determination of the land use compatibility of the proposed project." Swenson, Slip Op at 6.

We believe DEQ's action in the Swenson case is different from its action in the case of the waste discharge permit on review here. The statement on the face of the waste discharge permit refers to other findings and technical information, but the findings in the record simply consist of two memos by a public information officer. The memos were not prepared by one authorized to issue the permit.

We stress that generally, reference to a body of material in a file is not an indication of what the decisionmaker believes to be the facts in a particular case. Such a general statement does nothing to indicate what facts were relied upon by the decisionmaker. South of Sunnyside Neighborhood League v. Clackamas County, 280 Or 3, 569 P2d 1063 (1977).

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[9] Respondent Trans-Energy claims that petitioners' challenge should not be allowed because our determination in Schreiner's Gardens and David Schreiner v. Marion County and Trans-Energy Systems, ___ Or LUBA ___ (LUBA No. 83-065, 1983), aff'd without opinion, 66 Or App 194 (1983), prevents petitioners from bringing this appeal. We disagree. The Board never reached the issues in that case, dismissing the case for procedural reasons having nothing to do with the merits of Marion County's decision to site the garbage burner. The petitioners failed to file the petition for review on time. We do not view this

failure to result in a judgment on the merits as when a defendent fails to appear and a default is taken against him. See Gwynn v. Wilhelm, 226 Or 686, 360 P2d 312 (1961).

The matter of whether alternate sites are available is most logically a matter for determination by Marion County and not the Department of Environmental Quality. Nonetheless, ORS 197.180(7) requires state agencies to take actions in compliance with land use planning goals, and it would appear the statute creates an obligation to insure that statewide land use planning criteria are complied with even if the particular issue is outside the expertise of the agency. DEQ relied on Marion County's choice of site. This reliance is at the agency's peril. Friends of Lincoln County v. Newport, 5 Or LUBA 346 (1982). In other words, DEQ is responsible for compliance with all applicable criteria. See West Hill and Island Neighbors v. Multnomah County, ___ Or LUBA ___ (LUBA No. 83-018, 6/29/83), aff'd, 68 Or App 782, ___ P2d ___ (1984); Abrego v. Yamhill County, 2 Or LUBA 101 (1980).

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10 Marion County's ordinance requires:

"(c) Uses in 136.030(b), (c) and (d) shall be situated on generally unsuitable land for farm use considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of the parcel. MCZO 136.040(c)."

* * *

"(e) The following criteria apply to uses in 136.030(k), (l), (m), (n), (o) and (p), if the criteria in 136.040(c) cannot be satisfied.

"(1) There is a demonstrated need that the use will satisfy for area residents or the general public which outweighs the need for, or benefits of, the existing or potential farm or forest use; and

"(2) There is no other feasible location for the proposed use that would satisfy 136.040(c); and

"(3) It will not cause adverse long term environmental, economic, social and energy consequences for the area, the region or the state." MCZO 136.040(e).