

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

MAY 31 3 30 PM '85

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

METROPOLITAN SERVICE DISTRICT,)
)
Petitioner,)
)
vs.)
)
MULTNOMAH COUNTY,)
)
Respondent.)

LUBA No. 85-005
FINAL OPINION AND ORDER

Appeal from Multnomah County.

Eleanore S. Baxendale, Portland, filed the Petition for Review and argued the cause on behalf of Petitioner.

Peter Kasting, Portland; Cynthia S.C. Shanahan, Portland; James S. Coon, Portland; filed the response brief and Jay Waldon argued the cause on behalf of Respondent Multnomah County, Respondent-Intervenor West Hills and Island Neighbors Association and Respondent-Intervenor Sierra Club.

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

AFFIRMED 05/31/85

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner, Metropolitan Service District (Metro), appeals
4 Multnomah County Ordinance 445. The ordinance amends Multnomah
5 County Framework Plan policies and zoning code standards
6 controlling approval of sanitary landfills.

7 FACTS

8 Ordinance 445 amends Multnomah County Framework Plan
9 Policies on solid waste and amends the County Zoning Code at
10 Sections 11.15.7015, et seq. The plan amendment adds language
11 to Policy 31 recognizing that siting a sanitary landfill will
12 "entail some adverse impacts." Changes to the zoning code
13 include mitigation of adverse impacts which might be occasioned
14 by the siting of a sanitary landfill, and other provisions
15 liberalizing the standards for siting sanitary landfills.

16 The portion of Ordinance 445 petitioner asks us to overturn
17 is Section IV. Section IV limits the applicability of new
18 siting criteria to applications filed after the effective date
19 of the ordinance. Section IV provides:

20 "This ordinance shall not be applied to any proposed
21 regional or other sanitary landfill site which has
22 previously been the subject of an application for a
23 community service designation as a regional or other
24 sanitary landfill. Such proposal shall be considered
25 under the Multnomah County Ordinance provisions
26 applicable to such landfills which were in effect at
the time of the initial application."

25 As a matter of fact, the only site previously subject to an
26 application is one considered in West Hills and Island

1 Neighbors, ___ Or LUBA ___ (LUBA No. 83-018, 1983). This site,
2 known as the Wildwood Site, is favored by Metro. In our review
3 of the previous application to site a sanitary landfill at
4 Wildwood, we found, in part, that the existing siting criteria
5 were violated by approval of the proposed sanitary landfill.

6 STANDING

7 Standing is not an issue in this case.¹

8 ASSIGNMENT OF ERROR NO. 1

9 "Multnomah County Board of Commissioners Violated ORS
10 459.095 by Adopting Section IV

11 Petitioner argues Section IV of Ordinance 445 misconstrues
12 applicable law and exceeds the authority granted to the county
13 over solid waste issues. Specifically, petitioner says Section
14 IV violates ORS 459.095. ORS 459.095 provides:

15 "No ordinance, order, regulation or contract affecting
16 solid or liquid waste disposal, resource recovery or
17 solid waste management shall be adopted by a local
18 government unit if such ordinance, order, regulation
19 or contract conflicts with regulations adopted by the
20 [Environmental Quality] commission pursuant to ORS
459.045 or with a solid waste management plan or
program adopted by a metropolitan service district and
approved by the department [of Environmental Quality]
or any ordinances or regulations adopted pursuant to
such plan or program."

21 As explained by petitioner, the "Solid Waste Management
22 Plan" referred to in the statute is not defined; but "Solid
23 Waste Management" is defined to include "processing and final
24 disposal of solid waste...; and facilities necessary and
25 convenient to such activities." ORS 459.005(19). A solid
26

1 waste disposal site includes lands and facilities used for
2 disposal of solid wastes, including landfills. ORS
3 459.005(18). Petitioner argues, therefore, that solid waste
4 management plans properly include provisions calling for use of
5 specific landfill sites. Petitioner advises Metro's plan
6 includes specific reference to the Wildwood Site. Because the
7 statute prohibits a local government order or ordinance in
8 conflict with solid waste management plans, petitioner argues
9 Section IV of Ordinance 445 is in violation of the statute as
10 it prohibits a site included in Metro's approved management
11 plan.

12 We find ORS 450.095 does not limit the County's authority
13 to enact land use legislation. Review of ORS Chapter 459 does
14 not reveal a grant of authority to metropolitan service
15 districts or other municipal bodies which would enable them to
16 override the terms of a land use plan for a particular
17 area.² Further, ORS 459.095 does not empower a metropolitan
18 service district to site a sanitary landfill in violation of
19 statewide planning goals or a local comprehensive plan or
20 zoning ordinance. We do not believe the statute implies such
21 authority. To imply such authority is to read ORS 459.095 to
22 be in conflict with ORS 197.175 and 215.050, statutes requiring
23 enactment of comprehensive plans and zoning regulations. Such
24 a construction is not favored. 2A Sands, Sutherland Statutory
25 Construction, Sec. 51.02 (4th Ed, 1984).

26 We conclude the provisions of ORS Chapter 459 do not suggest

1 the legislature intended the law to have the effect of
2 overruling a local land use regulation. Without a clear
3 indication the legislature intended solid waste management
4 plans to pre-empt local plans, we will not find such
5 pre-emption to exist. Id.

6 A more consistent reading of ORS 459.095 recognizes the
7 statute as a limitation on local authority over solid waste
8 disposal operations. That is, once a site for a sanitary
9 landfill has been designated in accordance with, or consistent
10 with, the comprehensive plan and zoning ordinance, the manner
11 in which the site is to be used is the primary responsibility
12 of Metro (in this case). However, the designation of a site as
13 appropriate for landfill uses is within the primary land use
14 planning and zoning responsibility of the county.³

15 We conclude, therefore, that Ordinance 455, even as it may
16 limit the sites available for sanitary landfill purposes, does
17 not violate ORS 197.095.

18 The first assignment of error is denied.

19 ASSIGNMENT OF ERROR NO. 2

20 "Multnomah County Violated Its Framework Plan by
21 Adopting Section IV

22 Petitioner argues Section IV of the county's ordinance does
23 not comply with Comprehensive Plan Policy 31, as amended.

24 Policy 31 state as follows:

25 "SOLID WASTE MANAGEMENT

26 "Solid waste is a regional concern requiring regional

1 solutions. Multnomah County recognizes METRO's
2 responsibility and authority to prepare and implement
3 a solid waste management plan and the METRO's
4 procedures for siting a Sanitary Landfill and will
5 participate in the procedures as appropriate.

6 "The County recognizes that METRO may find a public
7 need for a Regional Sanitary Landfill and that such a
8 Landfill, wherever located, will entail some adverse
9 impacts. The county further recognizes that
10 environmental impacts are also within the review
11 authority of other agencies, such as the Department of
12 Environmental Quality.
13 (new material underlined) "
14

15 Petitioner says that adoption of Section IV, which
16 precludes use of Metro's preferred site (the Wildwood Site),
17 ignores Metro's role in selecting sanitary landfill sites.
18 Petitioner argues the purpose of the amendment was to establish
19 criteria, not to exclude particular sites. Petitioner points
20 to findings supporting the changes to Policy 31 as follows:

21 "Goal 11 (Public Facilities and Services). By
22 establishing clear and detailed Approval Criteria, the
23 Ordinance complies with the requirements of this Goal
24 to provide public services in an orderly and timely
25 fashion. Unnecessary expenditures and time delays
26 will be avoided if applicants are aware of the
27 requirements.

28 "Multnomah County recognizes its responsibility in
29 providing adequate public services. It also
30 recognizes that landfills should be buffered to reduce
31 adverse impacts to surrounding lands.

32 "Policy 31 (Community Facilities and Uses Location).
33 Sanitary landfills are considered under a section
34 entitled 'Solid Waste Management.' This policy makes
35 it clear that the County recognizes Metro's and DEQ's
36 authority in siting landfills. The County also
37 recognizes the importance of this public facility by
38 providing a separate Policy and Community Service
39 Section (created by this Ordinance)."

1 Petitioner continues that the only rationale offered to
2 support Section IV is based on citizen involvement. Metro
3 rejects this rationale. Metro argues that Goal 1 is to bring
4 citizens into the planning process and not insulate opponents
5 of a particular project from development.

6 We find Policy 31 recognizes Metro's role in selection of
7 potential disposal sites, but does not give Metro power to
8 determine whether a disposal site meets county land use
9 criteria. If we agree with petitioner that Section IV of
10 Ordinance 445 does, by its terms preclude use of the Wildwood
11 Site as a sanitary landfill, there is still no violation of
12 Policy 31. Policy 31 does not require any particular site for
13 a sanitary landfill.⁴

14 We do not believe the county has violated amended plan
15 Policy 31 in the manner urged by petitioner. The second
16 assignment of error is denied.

17 ASSIGNMENT OF ERROR NO. 3

18 "Adoption of Section IV Is a Quasi-Judicial Act

19 Under this assignment of error, petitioner argues adoption
20 of Section IV of Ordinance 445 is a quasi-judicial act
21 requiring quasi-judicial proceedings. Because the county
22 considered Ordinance 445, and all its parts, to be a
23 legislative act, the adoption is flawed, according to
24 petitioner.

25 Metro refers again to its argument that the effect of
26

1 Section IV of the ordinance is to rule out the Wildwood Site.
2 Petitioner then argues that since a specific piece of property
3 was the intended object of Section IV, enactment of Section IV
4 is rather like the granting or denial of a permit, not an act
5 of legislative policy making. See Fasano v. Washington County,
6 264 Or 574, 507 P2d 23 (1973) and Strawberry Hill Four Wheelers
7 v. Benton County, 287 Or 591, 601 P2d 769 (1979).

8 Petitioner then argues the indirect prohibition of
9 landfills at the Wildwood Site is "spot zoning." See Smith v.
10 County of Washington, 241 Or 380, 384, 406 P2d 545 (1965). The
11 county board, in petitioner's view, has singled out a sole
12 parcel for special treatment without procedural safeguards
13 necessarily attendant such an action. See 3 R. Anderson, The
14 American Law of Zoning, Section 18.04, 19.04 (2nd Ed, 1977).
15 Petitioner argues, therefore, the affending section, Section
16 IV, must be declared unlawful for failure of the board to
17 follow proper procedures.

18 On its face, Ordinance 445, is a legislative act. The
19 disputed Section IV outlines a general rule that the siting of
20 sanitary landfills must be considered under criteria applicable
21 at the time of the initial application. As the county notes,
22 Section IV applies to an open class of applications. That is,
23 Section IV controls applications for particular sites filed
24 before and after changes in siting criteria. The Wildwood Site
25 may be the only site affected now by Section IV of the
26 ordinance, but other similar situations may occur in the future

1 anytime a series of applications is filed for a particular site
2 and there are changes in criteria occurring between
3 applications.

4 We are sympathetic to petitioner's argument because the
5 effect of the ordinance is to exclude application for a
6 sanitary landfill at the Wildwood Site from the benefit of new,
7 more liberal criteria. Nonetheless, we do not see that this
8 otherwise legislative act is made a quasi-judicial act because
9 of its effect on applications for this one, particular site.
10 In addition, even if we agree with petitioner that an
11 application for a sanitary landfill at Wildwood would not be
12 successful, it can not be stated that an application would be
13 unsuccessful as a matter of law. Changes might be made in the
14 design of the landfill, its capacity, its placement at the
15 Wildwood Site and other matters which could effect compliance
16 with the old siting criteria. Therefore, this Board will not,
17 as required under petitioner's argument, assume the outcome of
18 a future application at the Wildwood Site under the old siting
19 criteria. We decline to find the enactment so specific in its
20 application as to make it quasi-judicial in nature.⁵

21 Because we believe the county's enactment to be a matter of
22 legislative procedure, we do not accept petitioner's argument
23 the county failed to follow procedures applicable only to
24 quasi-judicial proceedings.

25 The third assignment of error is denied.

26

1 ASSIGNMENT OF ERROR NO. 4

2 "Adoption of Section IV Is Not Justified and Is
3 Unconstitutional"

4 Petitioner argues that Section IV of Ordinance 445 treats
5 Wildwood differently from every other site. This treatment
6 creates a distinction between applicants for the Wildwood
7 landfill permit and applicants for other regional landfill
8 permits which is, according to petitioner, unjustified and
9 unconstitutional under Article I, §20 of the Oregon
10 Constitution and under the Fourteenth Amendment to the United
11 States Constitution.⁶ Petitioner further argues the
12 ordinance creates an unconstitutional distinction between
13 property owners living near Wildwood and all other property
14 owners in the county.

15 Petitioner explains a local government's power to create
16 separate classes subject to new regulatory requirements is
17 limited in that the distinctions must have some rational
18 relation to legislative purposes. Petitioner claims the
19 classes created by Section IV of the ordinance do not show a
20 rational basis for the enactment. That is, Ordinance 445
21 subjects persons who have previously made application for
22 sanitary landfills to criteria which persons making new
23 application (post-Ordinance 445) for sanitary landfills need
24 not concern themselves. It is petitioner's argument that this
25 distinction, based simply on the fact that persons may have
26 applied before Ordinance 445 was enacted, has no rational

1 basis. See Olson v. State ex rel Johnson, 276 Or 9, 554 P2d
2 139 (1972).

3 Petitioner explains the distinction created by Section IV
4 provides special benefits for the West Hills and Island
5 Neighbors residents which other county residents do not have.
6 West Hills and Island Neighbors individuals will not have to
7 contest the siting of a landfill at Wildwood, other residents
8 may have to contest requested landfills in their areas.

9 Petitioner dismisses the county's justification for the
10 distinction on the basis of citizen involvement. Petitioner
11 argues there is no evidence to show that enactment of Section
12 IV, granting Wildwood residents immunity from the siting of a
13 sanitary landfill in the area, furthers a legitimate public
14 interest. There is no legitimate public interest in rewarding
15 persons who have successfully contested a landfill siting
16 application, according to petitioner. There is nothing in the
17 record, states petitioner, to show that citizen involvement is
18 furthered by making this gift to the West Hills and Island
19 Neighbors group. In other words, Section IV is arbitrary and
20 unconstitutional.

21 We are unwilling to say that Section IV is without a
22 rational basis. The county argues that citizen participation
23 in the land use process is enhanced by "preserving citizen
24 confidence in the fairness of local government."⁷ Brief of
25 Respondents at 20-21. In this case, the intervenors persistent
26 refusal to accept the siting of a landfill at Wildwood has been

1 rewarded by an ordinance which requires any application for the
2 Wildwood Site to be made under old and comparatively more
3 strict requirements than those enacted under Ordinance 445.
4 While some may argue about whether the county's decision was a
5 "good decision" politically or under some other subjective
6 criteria, we cannot say the decision is irrational. We
7 understand the courts to apply wide latitude to such questions
8 and to uphold legislative classifications unless it can be
9 shown there can be no reasonable grounds for the enactment.
10 See Thompson v. Dixon, et al, 202 Or 394, 275 P2d 749 (1954).
11 Further, even though the ordinance may create a class of one,
12 that fact alone is not sufficient to invalidate the ordinance
13 as long as the ordinance has some rational basis for its
14 enactment. Morey v. Doud, 354 US 457, 77 Sup Ct 1344, ___ L Ed
15 2d ___ (1957).

16 We conclude the county had a reasonable basis for enactment
17 of Ordinance 445, including Section IV of the ordinance.

18 The fourth assignment of error is denied.

19 The decision of Multnomah County is affirmed.

20
21
22
23
24
25
26

1 FOOTNOTES

2
3

1

4 Petitioner objected to notices of intent to participate
5 filed by West Hills and Island Neighbors and Sierra Club.
6 Subsequently, West Hills and Island Neighbors and Sierra Club
7 filed motions to intervene. There is no objection to the
8 motions to intervene.

9

2

10 The closest Chapter 459 comes to granting powers which
11 pre-empt local land use authority is a grant to the
12 Environmental Quality Commission. ORS 459.049 gives the
13 Environmental Quality Commission the authority to establish a
14 landfill disposal site. In making such a determination, the
15 statute requires the commission to give "due consideration" to
16 a number of factors including local land use plans and
17 ordinances "other than for solid waste management" and the
18 statewide planning goals. ORS 459.049(1)(c) and (d). The
19 commission also has the power to order a local government to
20 establish a landfill site within a particular period of time.
21 ORS 459.049(2). Further, if the commission determines the
22 establishment of a landfill is moving too slowly, the
23 commission may direct the Department of Environmental Quality
24 to establish the landfill. ORS 459.049(3). In establishing a
25 landfill, the department is required to take action consistent
26 with the statewide planning goals and applicable provisions of
a comprehensive plan. ORS 459.049(3)(a).

17 However, where the statute gives the Environmental Quality
18 Commission authority to direct that a landfill be established,
19 it is not at liberty to ignore statewide planning goals and the
20 provisions of local comprehensive plans and zoning ordinances.

21 Whether the Environmental Quality Commission might, under
22 some circumstances, site a landfill in violation of a local
23 comprehensive plan is not before us in this case.

24

3

25 In that regard, see Jackson County v. Bear Creek Valley
26 Sanitary Authority, 293 Or 121, 645 P2d 121 (1982). In that
case, the court upheld a county plan which included policies
concerning sewer services. As between a sanitary district and
a county, the court recognized the primary role the county
plays in developing a comprehensive land use plan. See ORS
197.175(2)(a). See also Bear Creek Sanitary Authority v.
Jackson County, 1 LCDC 99 (1977).

1
4

2 Because of the disposition of West Hills and Island
3 Neighbors, supra, a successful application to site a sanitary
4 landfill at Wildwood is uncertain. A successful application
5 may not, however, be impossible, and we are not willing to so
6 state as apparently invited by petitioner.

5
5

6 We add that the only indicia of a quasi-judicial decision
7 are not present here. The ordinance establishes new criteria,
8 it does not simply apply existing policy. Further, the
9 ordinance was initiated by the county itself. Nothing required
10 the county to initiate proceedings leading to adoption of
11 Ordinance 445. The county, in other words, was not required to
12 reach a decision as it might have been had an application for a
13 permit been submitted to it. See the discussion in Strawberry
14 Hill Four Wheelers v. Benton County, supra, and Neuberger v.
15 City of Portland, 288 Or 155, 603 P2d 777 (1979).

12
6

13 Article I, Section 20 of the Oregon Constitution provides:

14 "No law shall be passed granting to any citizen or class of
15 citizens privileges, or immunities, which, upon the same
16 terms, shall not equally belong to all citizens."

17 The Fourteenth Amendment to the U.S. Constitution provides:

18 "All persons born or naturalized in the United States, and
19 subject to the jurisdiction thereof, are citizens of the
20 United States and of the State wherein they reside. No
21 State shall make or enforce any law which shall abridge the
22 privileges or immunities of citizens of the United States;
23 nor shall any State deprive any person of life, liberty, or
24 property, without due process of law; nor deny to any
25 person within its jurisdiction the equal protection of the
26 laws."

22
7

23 The county characterizes its Section IV as a kind of
24 grandfather clause, that is, a provision limiting application
25 of new laws to certain persons or things. See 2A Sands,
26 Sutherland Statutory Construction, Sec. 47.12 (4th Ed, 1984).
We note, however, that generally a grandfather clause is a
clause exempting an existing entity from new regulation. See
Spaght v. Dept. of Transportation, 29 Or App 681, 564 P2d 1092
(1977), rev den, 281 Or 1 (1977). We are unaware of the term
being applied to an enactment which appears, in its effect, to

1 prohibit some benefit which would otherwise exist under new
2 regulations.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

Page