

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

JUN 30 11 03 AM '87

1 UNITED CITIZENS,)
 2)
 3)
 4 Petitioner,)
 5)
 6 vs.)
 7)
 8 ENVIRONMENTAL QUALITY)
 9 COMMISSION OF THE STATE OF)
 10 OREGON,)
 11)
 12 Respondent,)
 13)
 14 and)
 15)
 16 CITY OF PORTLAND, CITY OF)
 17 GRESHAM and CENTRAL COUNTY)
 18 SERVICE DISTRICT NO. 3,)
 19)
 20)
 21 Participants.)
 22)

LUBA No. 86-032
FINAL OPINION
AND ORDER OF DISMSISAL

Appeal from City of Portland.

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

DISMISSED 06/30/87

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 appeals an order of the Environmental Quality
4 Commission (EQC) entitled

5 "In the Matter of the Proposal to Declare a Threat to
6 Drinking Water in a Specifically Defined Area in
Mid-Multnomah County Pursuant to ORS 454.275 et seq."

7 The order became final on April 25, 1986 and is (1) a
8 determination by EQC that a threat to drinking water exists and
9 (2) an order to the City of Portland, the City of Gresham and
10 Multnomah County to implement a plan for providing sewer
11 services in Mid-Multnomah County. The plan requires the three
12 jurisdictions to evaluate potential methods for reducing costs
13 during design and construction and, finally, to file with EQC
14 ordinances and governmental agreements as necessary to
15 implement the plan.

16 MOTION TO DISMISS

17 Environmental Quality Commission moves for dismissal of
18 this review proceeding claiming the order on appeal is not a
19 land use decision subject to review by this Board. EQC argues
20 that its order is part of a specific statutory process giving
21 the agency "virtually no decisionmaking discretion" over land
22 use matters.

23 The EQC order was issued under ORS 454.275 to 454.317. It
24 is the product of a process beginning with local government.
25 The statutes provide that a local governing body may adopt a
26 resolution or ordinance finding there is a threat to drinking

1 water in a particular area and proposing construction and
2 financing of sewage treatment works to alleviate the problem.
3 ORS 454.285. In addition, the local governing body is to
4 prepare a report and preliminary plans and specifications for
5 treatment works. The report is to include

6 "(a) Engineering plans demonstrating the feasibility
7 of the treatment works and conformance of the plan
with the regional treatment works plans.

8 "(b) Possible methods for financing the treatment
9 works.

10 "(c) The effect of the treatment works on property in
the affected area." ORS 454.290.

11 The resolution along with the report is submitted to EQC
12 which then investigates conditions in the affected area. If
13 EQC finds substantial evidence exists to reveal a threat to
14 drinking water "the commission shall set a time and place for a
15 hearing on the resolution or ordinance." ORS 454.295(1).

16 The commission's hearing

17 "shall be for the purpose of determining whether a
18 threat to drinking water exists in the affected area,
or whether the conditions could be eliminated or
19 alleviated by treatment works and whether the proposed
treatment works are the most economical method to
20 alleviate the conditions." ORS 454.300(1).

21 The commission then has four options. If it finds that a
22 threat to drinking water does exist but treatment works would
23 not alleviate the condition, it "shall terminate the
24 proceedings" (ORS 454.305(1), or it may order further review
25 and revision of plans by the affected local government. ORS
26 454.305(5). If it finds a threat to drinking water exists and

1 the conditions can be removed or alleviated by construction of
2 the sewage treatment works, the commission then orders the
3 governing body to proceed with construction. ORS 454.305(2).
4 The commission may also find that a threat to drinking water
5 exists only in part of the affected area, and it may alter the
6 boundaries of the affected area accordingly. ORS
7 454.305(3).¹

8 If sewage treatment facilities are ordered, the law
9 specifically provides the usual remonstrances and financing
10 procedures do not apply. The works may be financed

11 "by the sale of general obligation bonds, revenue
12 bonds or assessments against the benefited property
13 without a vote in the affected area or municipality or
14 without being subject to a remonstrations procedure,
15 when the findings and order are filed in accordance
16 with ORS 454.310." ORS 454.280.

17 Respondent EQC argues the foregoing procedures are very
18 similar to those utilized in ORS 222.850 to 222.915 providing
19 for compulsory city annexation of territory subject to health
20 hazards. EQC action to require annexation includes (1) the
21 determination the health hazard exists (ORS 222.880), (2) EQC
22 review of the affected city's proposed sewage treatment
23 facilities (ORS 222.898) and (3) the requirement that a city
24 annex the affected area and construct the sewage treatment
25 facility (ORS 222.900).

26 EQC cites West Side Sanitary District v. LCDC, 289 Or 409,
614 P2d 1148 (1980) and West Side Sanitary District v. LCDC,
289 Or 393, 614 P2d 1141 (1980) in which the Supreme Court held

1 issuance of findings about health hazards under ORS Chapter
2 222.840 to 222.975 is not an action with respect to programs
3 affecting land use under ORS 197.180(1). The court said the
4 Health Division and EQC were not required to consider statewide
5 planning goals when performing their respective
6 responsibilities under the health hazard annexation statutes.

7 EQC concludes statutes about health hazard annexation and
8 threats to drinking water are directed entirely toward solving
9 health problems, "and EQC has no discretion to apply land use
10 planning goals in its decisionmaking."² Motion to Dismiss at
11 9.

12 Petitioner claims the West Side cases are not dispositive
13 of this proceeding, because the health hazard annexation
14 statutes applicable in West Side, are quite unlike the statutes
15 controlling EQC's behavior in this case.

16 First, under ORS 222.898, EQC only decides whether the
17 conditions previously declared dangerous to public health by
18 the Oregon State Health Division may be alleviated or removed
19 by facilities proposed by the city. No public hearing is
20 required. Further, under ORS 454.300, EQC is to determine
21 whether the proposed treatment works are the most economical
22 method for removing or alleviating a threat to drinking water.
23 No such consideration is required under the health hazard
24 annexation statutes.

25 Petitioner notes that Goal 9 (Economy of the State), Goal
26 10 (Housing), and Goal 11 (Public Facilities and Services) are

1 relevant to whether a proposed treatment work is the most
2 economical method to alleviate a threat to drinking water.

3 Petitioner argues

4 "[f]or instance, under Goal 9 (Economy of the State),
5 the effect of construction of the proposed treatment
6 works on economic growth and activity in the region
7 would have to be considered. Under Goal 10 (Housing),
8 the economic effect of construction of the proposed
9 treatment works on providing needed housing would have
10 to be considered. Under Goal 11 (Public Facilities
11 and Services), whether the proposed treatment works
12 would provide a timely, orderly and efficient
13 arrangement of public facilities would be a relevant
14 consideration." Response to Motion to Dismiss at 4.

15 In addition, petitioner argues whether or not a proposed
16 treatment facility is the most economical method to alleviate a
17 threat requires consideration of alternative methods. These
18 alternative methods may have different land use impacts.

19 We are not convinced by petitioner's argument. Petitioner
20 is correct that EQC does have the opportunity to apply
21 statewide land use goal criteria in considering the boundaries
22 of the area subject to health hazard controls and in deciding
23 to terminate the proceedings or order alternative plans.
24 However, we find it need not do so.

25 The statutes under which the agency reached its decision
26 are not about land use planning, but are about threats to
drinking water, sewage plans and methods of financing a needed
public service. The issues before EQC are whether a threat to
drinking water does indeed exist, whether the local government
plan is adequate to deal with the hazard, and how improvements
will be financed.³ These are not land use planning issues.

1 It seems more appropriate that consideration of Goal 9, 10 and
2 11 occurs at the local level when the drinking water hazard is
3 determined and plans made for its cure. Indeed, ORS 454.290
4 clearly provides that the governing body's plan, to be
5 submitted to EQC, must include not only engineering plans and
6 possible methods of financing, but also the "effect of the
7 treatment works on property in the affected area." ORS
8 454.290. This determination would invite broad consideration
9 of land use factors. This opportunity to consider land use
10 planning issues is broader in scope than the statutory limits
11 on issues before EQC. EQC's determination of whether or not to
12 alter the boundaries of the affected area rests not on planning
13 criteria, but on (1) whether a threat exists to only part of
14 the affected area and (2) whether the treatment works would
15 remove or alleviate this threat. ORS 454.305(3). The
16 determination to send a proposal for sewage facilities back to
17 a local government under ORS 454.305(5) rests upon a commission
18 finding that the proposed treatment works "are not the most
19 economic method of removing or alleviating the conditions."
20 The commission's decision is simply to refer the matter back to
21 the local government to prepare "alternative plan,
22 specifications and financing methods." The local government
23 then reviews the matter for resubmittal to EQC, presumably
24 applying a broad range of considerations, including land use
25 considerations.⁴

26 Finally, it must be noted there is a clear legislative

1 purpose to avoid local restriction to construction of needed
2 facilities. As noted supra, ORS 454.280 provides for financing
3 of needed sewers. The financing is available notwithstanding
4 provisions of other statutes about special districts, water
5 supplies, county service facilities and sewage treatment
6 disposal systems (ORS Chapters 450, 451, and 454), or the
7 provision of any city or county charter. This provision makes
8 it clear that the end result of the local government and EQC
9 process is financing of needed sewers. The EQC role is to
10 issue the order forcing construction and payment, not to
11 evaluate the project under land use criteria.

12 We find this EQC process shows no legislative intent to
13 include land use planning criteria as part of EQC's evaluative
14 process.

15 This review proceeding is dismissed.

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FOOTNOTES

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4 Its determination of whether or not to alter the boundary
5 of the affected area must be based on
6 "whether or not exclusion would unduly interfere with
7 the removal or alleviation of the threat to drinking
8 water and whether the exclusion would result in an
9 illogical boundary for the provision of services."
10 ORS 454.305(4).

8 2
9 The agency does, however, note a possible exception in that
10 ORS 454.305(3), about reducing boundaries in the area affected
11 and ORS 454.305(5) regarding terminating the proceeding or
12 ordering alternative plans, may give some room to apply the
13 goals. EQC argues, however, that the determinations made under
14 these statutes are not applicable in this case.

12 We doubt the fact the agency did not need to use ORS
13 454.305(3) or (5) has much to do with an obligation to apply
14 the goals. Arguably, the fact the agency has room to apply the
15 goals in limited circumstances suggests a duty to consider the
16 relevant goals in each case, if only to decide they are not
17 applicable.

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17 Cf Heritage Enterprises, et al v. City of Corvallis, 300 Or
18 168, 708 P2d 601 (1985) wherein the Supreme Court noted that in
19 annexation proceedings, the decision subject to LUBA review was
20 the decision of the city council to submit an annexation plan
to the voters. The subsequent annexation vote by the
electorate was not a land use decision subject to LUBA review.

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22 For example, the local government may size its proposed
23 sewers based on consideration of affected area zoning, housing
24 trends and future land uses for the area.
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