BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL KEATING, Petitioner, vs. HECETA WATER DISTRICT, Respondent, and JOHN WHITE and ROSEMARIE WHITE, Intervenors-Respondent.	LUBA No. 92-121 FINAL OPINION AND ORDER

Appeal from Heceta Water District.

Daniel J. Stotter, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

Michael E. Farthing, Eugene, filed the response brief. With him on the brief was Gleaves, Swearingen, Larsen & Potter. Michael E. Farthing and Dale Riddle argued on behalf of intervenors-respondent.

SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON, Referee, participated in the decision.

DISMISSED 10/22/92

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals an order of the Heceta Water District (district) Board of Directors approving an application for a residential hookup to the district's water system.

MOTION TO INTERVENE

John and Rosemarie White, the applicants below, move to intervene in this proceeding on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

The district is a domestic water supply district, formed in 1966 pursuant to ORS chapter 264. The district is located in Lane County (county). The district's primary source of water is Clear Lake. The watershed of Clear lake includes Collard Lake, a smaller tributary lake, and its watershed.

On February 27, 1991, intervenors applied to the district for a residential water hookup. The subject property is undeveloped, owned by intervenors and zoned Rural Residential by the county. The subject property is within the watershed of Collard Lake, and is located approximately 1,400 feet from Collard Lake. Intervenors propose to construct a residence on the subject property and to serve that residence with water from the district's

system and an on-site septic sewage disposal system.[1]

After considering intervenors' application at several meetings, on August 5, 1991, the district board of directors issued an order denying intervenors' application, citing concerns about the impacts of the proposed residential development on the phosphorous levels of Collard Lake. Record 630. Intervenors filed suit against the district in state circuit court, challenging this denial. The case was removed to federal district court.

While intervenors' hookup application was pending before the district, the board of directors considered and held a public hearing on the adoption of a regulation establishing permanent standards for the approval of water hookups. On August 19, 1991, the board of directors adopted Regulation Two, establishing standards for obtaining a hookup to the district's water system to serve property within the Clear Lake watershed. Regulation Two was appealed to this Board. On May 1, 1992, we remanded the

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[1]In December 1990, the Environmental Quality Commission (EQC) amended OAR 340-41-270 to establish total phosphorous annual loading limits for Clear Lake and Collard Lake. This rule also prohibits the issuance of on-site sewage system construction/installation permits and favorable site evaluation reports for on-site sewage systems within the Clear Lake watershed "until a plan is submitted to and approved by the Department [of Environmental Quality (DEQ)] showing how [the] total phosphorous loadings limitations required by [the rule] will be achieved and maintained." OAR 340-41-270(5). No such plan has yet been submitted, by the county or any other entity, or approved by DEQ. However, intervenors and six or seven other owners of property within the Clear Lake watershed had obtained on-site sewage system construction/installation permits prior to EQC's promulgation of the aforedescribed rule. Accordingly, intervenors' ability to use this on-site sewage system permit is not affected by OAR 340-41-270.

district's decision for failure to coordinate the adoption of Regulation Two with the county, as required by Statewide Planning Goal 2 (Land Use Planning). Adkins v. Heceta Water District, ___ Or LUBA ___ (LUBA No. 91-139, May 1, 1992) (Adkins).

On May 13, 1992, the district's counsel, citing Adkins, wrote to intervenors that the district would vacate its August 5, 1991 order denying intervenors' application. Record 11. On May 26 and June 2, 1992, the board of directors held public hearings on intervenors' application. On June 8, 1992, the board of directors issued an order approving the application. This appeal followed.[2]

MOTION TO DISMISS

LUBA's review jurisdiction is limited to local government, special district and state agency "land use decisions." The district's decision is a "land use decision" if it meets either (1) the statutory definition in ORS 197.015(10); or (2) the significant impact test established by City of Pendleton v. Kerns, 294 Or 126, 133-34, 653 P2d 996 (1982). Billington v. Polk County, 299

[2]We note that after this appeal was filed, the federal district court issued a Final Judgment of Dismissal and Permanent Injunction in White v. Heceta Water District, Case No. 91-816-TC (September 11, 1992), of which we take official notice. OEC 202(1). This judgment orders the district to grant intervenors a water hookup and permanently enjoins the district from denying intervenors a water hookup. Because we determine, infra, that the challenged decision is not a "land use decision" over which we have review jurisdiction, we do not determine what effect the federal court's judgment would have on our review of the challenged decision.

Or 471, 479, 703 P2d 232 (1985); City of Portland v. Multnomah County, 19 Or LUBA 468, 471 (1990). Intervenors contend the challenged decision meets neither the statutory definition nor the significant impact test.

A. Statutory Definition

ORS 197.015(10)(a)(A) provides that "land use decision" includes:

> "A final decision or determination by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The [statewide planning] goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

Petitioner contends the challenged decision meets the above quoted statutory definition because it concerns the application of the statewide planning goals.[3] Petitioner argues that Adkins establishes that where a district and county have not entered into a cooperative agreement, as is the case here, under ORS 197.185(1), the statewide planning goals continue to apply to a district's actions.

Intervenors contend their application for a water hookup is simply an application for service from a utility provider, no different from a request for electric, natural

[3]Petitioner does not contend the challenged decision concerns the adoption, amendment or application of a comprehensive plan provision or land use regulation.

gas or garbage service. Intervenors argue district review of their hookup application with regard to land use issues is neither "authorized by law" nor performed as part of a "program affecting land use," as required by ORS 197.185(1). According to intervenors, ORS 197.185(1) requires special districts to apply the statewide planning goals only when they exercise planning duties or take actions authorized by law under programs affecting land use, in accordance with a cooperative agreement executed with the appropriate county, as provided in ORS 197.185(2).

ORS 197.185 provides in relevant part:

> "(1) Special districts shall exercise their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use, * * * in accordance with [the statewide planning] goals * * *.
>
> "(2) Each special district operating within the boundaries of a county assigned coordinative functions under ORS 197.190(1) * * * shall enter into a cooperative agreement with the county * * *. Such agreements shall include a listing of the tasks which the special district must complete in order to bring its plans or programs into compliance with the goals, including a generalized time schedule showing when the tasks are estimated to be completed and when the plans or programs which comply with the goals are to be adopted. In addition, a program to coordinate the development of the plans and programs of the district with other affected units of local government shall be included in the agreement. Such agreements shall be subject to review by the [Land Conservation and Development Commission]. * * *"

In Adkins, slip op at 10-11, we stated that where no cooperative agreement has been entered into by a district and the applicable county, as is the case here, it is clear that pursuant to ORS 197.185(1), the goals continue to apply to a district's actions with respect to programs affecting land use.[4] However, the district action challenged in Adkins is quite different from that challenged in this appeal. With regard to the district's adopted of Regulation Two, we stated in Adkins, slip op at 12:

> "The district has adopted a system of standards for obtaining approval for new water hookups and increased use of existing water hookups. These standards are designed to protect the water quality of Clear Lake and will significantly affect development activity within the Clear Lake watershed. Therefore, the district's adoption of Regulation Two is an action with respect to a program affecting land use. [T]he coordination requirement of Goal 2 applies to the challenged decision. Accordingly, the challenged decision concerns the application of the goals and, therefore, is a 'land use decision' which this Board has jurisdiction to review." (Emphasis added; footnotes omitted.)

At the time the subject hookup application was filed with the district, and at the time it was approved, the district had not adopted any regulations or standards governing the approval of hookups to its water system to

[4]As in Adkins, we do not determine whether, where a district enters into a cooperative agreement with the applicable county and LCDC approves that agreement pursuant to ORS 197.185(2), the district must still make decisions with respect to programs affecting land use in accordance with the goals.

achieve land use purposes.[5] Additionally, there is no dispute that intervenors' application for a residential hookup is to provide water service to a use allowed under the acknowledged county comprehensive plan and land use regulations. We conclude that in the absence of an adopted district program regulating the approval of water hookups for land use purposes, a district action to approve an individual water hookup for a use consistent with the applicable acknowledged county plan and land use regulation is not an "action with respect to a program affecting land use."[6]

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[5]We express no opinion regarding the dispute between the parties concerning whether the district has the statutory authority to adopt any such regulations or standards.

[6]We note that even in the absence of an adopted district program regulating hookup approvals for land use purposes, special district decisions demonstrating "a pattern or practice of delaying or stopping issuance of permits, authorizations or approvals necessary for the [division] of, or construction on, urban or urbanizable land" can constitute a "moratorium" subject to this Board's review under ORS 197.505 to 197.540.

Additionally, in Price v. Arch Cape Service District, ___ Or LUBA ___ (LUBA No. 91-138, January 31, 1992), we reviewed a county service district decision limiting approval of water and sewer hookups within the district's quasi-urban service area to one water and one sewer hookup per tax lot, due to concern over exceeding the capacity of the service district's facilities. We concluded the service district's decision was an "action with respect to a program affecting land use" under ORS 197.185(1), to which the statewide planning goals apply. Although the basis for our conclusion is not explicitly set out in the opinion, we acknowledged that the regulation in question would severely limit land divisions and development within the district that would otherwise be allowable under the county's acknowledged comprehensive plan and land use regulations. In contrast, the decision at issue in this appeal is merely to provide service for the development of one property, as allowed under the acknowledged county plan and regulations.

Accordingly, the district is not required to apply the statewide planning goals to the challenged decision; and, therefore, the challenged decision does not satisfy the statutory definition of "land use decision."

B. Significant Impact Test

Petitioner argues there is ample evidence in the record that the challenged decision will result in "significant biological, economic and social impacts to present and future land uses in the Clear Lake watershed, which are neither de minimis nor speculative in nature." Petition for Review 12. According to petitioner, approving the subject hookup will have the effect of accelerating eutrophication of Clear Lake, increasing district water treatment costs and limiting the uses of neighboring properties. Petitioner cites evidence that "increased residential development within this watershed will result in phosphorous loading into the lakes from both point and nonpoint sources, causing eutrophication of the Clear Lake system." Record 362. Petitioner also argues the record shows that even a single additional residence will have significant impact on the phosphorous loading of Clear Lake.

Intervenors contend most of petitioner's argument on this point reflects scientific speculation about the impacts of residential development in general around Clear Lake and Collard Lake. Intervenors cite evidence that construction and use of their proposed dwelling and septic tank system

will have minimal impact on Collard Lake and Clear Lake. Record 137, 408, 442-43. Intervenors also point out that the county comprehensive plan and zoning allow a residence on the subject property, and that the EQC moratorium specifically allows the use of septic systems for which permits were previously issued by DEQ. According to intervenors, the land use decisions regarding their property have already been made by the county and DEQ, and decisions approving water, electricity or other such services for the property simply provide utilities to the property.

The Oregon Supreme Court's decisions in City of Pendleton v. Kerns, and Billington v. Polk County, supra, emphasize that the impact of a decision not otherwise subject to LUBA review under ORS 197.015(10) and 197.825(1) must be qualitatively or quantitatively significant in order for LUBA to have review jurisdiction. Additionally, there must be both a demonstrated relationship between the decision and the expected impacts, and evidence demonstrating that the expected impacts are likely to occur as a result of the decision. Anderson Bros. v. City of Portland, 18 Or LUBA 462, 471 (1989). Decisions found by this Board or the appellate courts to be in this category include decisions on street vacations, street improvements and amendments to local improvement districts. Flowers v. Klamath County, 17 Or LUBA 1078, 1088 (1989).

In this case, petitioner does not contend that the

extension of water service to the subject property, of itself, will have significant impacts on land use. Rather, petitioner argues that construction of a dwelling on and residential (including septic tank) use of intervenors' property will have impacts on the water quality of Clear and Collard Lakes, district water treatment and the use of other properties in the Clear Lake watershed. Assuming, for the purpose of argument, that these impacts are likely to occur and constitute significant impacts, petitioner's arguments could provide a basis for determining that decisions authorizing residential use of the property are "significant impact test" land use decisions. However, those decisions have been or will be made by the county. The challenged decision by the district simply authorizes the provision of domestic water service to the subject property.[7] We therefore agree with intervenors that the challenged decision does not have significant impact on present or future land uses.

Because the challenged decision does not satisfy either the statutory definition of or significant impact test for a

[7]It is possible petitioner may intend to argue that the challenged decision indirectly has significant impacts on future land use because residential use of the subject property is not possible unless the district approves a hookup to its water system. However, we note (1) petitioner neither contends nor cites evidence that the property cannot be put to residential use using another source of water, and (2) even if a hookup to the district water system were essential to residential development of the property, we do not believe that every utility or construction approval that is part of the residential development process thereby becomes a significant impact land use decision.

"land use decision," the motion to dismiss is granted.

This appeal is dismissed.