BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. CITY OF DONALD, Respondent, and MARION COUNTY and FARGO INTERCHANGE SERVICE DISTRICT, Intervenors-Respondent.	LUBA No. 93-227 FINAL OPINION AND ORDER

Appeal from City of Donald.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief were Theodore R. Kulongoski, Attorney General; Thomas A. Balmer, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

Jane Ellen Stonecipher, Assistant County Counsel, Salem, and Thomas J. Rastetter, Oregon City, filed a joint response brief on behalf of respondent and intervenors-respondent. Jane Ellen Stonecipher and Edward J. Sullivan, Portland, argued on behalf of intervenors-respondent.

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

REMANDED 05/10/94

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an agreement between the City of Donald and the Fargo Interchange Service District in which the city agrees to treat sewage from the district.

MOTIONS TO INTERVENE

Fargo Interchange Service District and Marion County move to intervene on the side of respondent in this appeal proceeding. There is no objection to the motions, and they are allowed.

FACTS

The Fargo Interchange Service District (district) is a county service district formed for the purpose of providing sewerage facilities to approximately 117 acres of land, developed with a variety of freeway service uses. This Board affirmed the county decision approving the formation of the district in DLCD v. Marion County, 23 Or LUBA 619 (1992). The Fargo Road interchange area served by the district is subject to acknowledged exceptions to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands). The district's service area and the exception area are coterminous.

The sewerage needs of the district are currently served by private sewerage facilities utilizing lagoons located within the district. The current sewerage facilities are inadequate. See DLCD v. Marion County, supra.

The district evaluated various alternatives for provision of public sewerage facilities to the Fargo Interchange exception area. The district ultimately approved an underground pressure line running between the district and the City of Donald sewage treatment plant. The underground pressure line would traverse several miles of rural land zoned Exclusive Farm Use (EFU) before reaching the City of Donald treatment facility. In addition to the district decision, the county also adopted a decision determining the proposal for the district to treat its sewage at the City of Donald plant was consistent with the county plan. In DLCD v. Fargo Interchange Service District, ___ Or LUBA ____ (LUBA Nos. 93-181 and 93-182, April 22, 1994) (DLCD v. Fargo), we remanded both the district and county decisions.

The challenged decision reflects the city's agreement to provide sewage treatment services to the district.

MOTION TO DISMISS

LUBA has exclusive jurisdiction to review "land use decisions" and "limited land use decisions."[1] ORS 197.825(1). ORS 197.015(10)(a) defines "land use decision" as follows:

> "(A) A final decision or determination made by a * * * special district that concerns the

[1]No party contends the challenged decision is a limited land use decision, and we do not believe that it is.

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;

"* * * * *"

Respondents argue this Board lacks jurisdiction to review the challenged intergovernmental agreement because it is not a "land use decision." They point out the challenged agreement does not amend the city's acknowledged comprehensive plan and, therefore, the goals do not apply directly to the challenged decision. Further, respondents contend that no comprehensive plan provision or land use regulation applies to the proposal. They maintain the challenged agreement simply examines certain plan provisions and determines they are inapplicable and concludes that no goal, plan or land use regulation provision governs the challenged agreement. Respondents argue that simply explaining in an intergovernmental agreement that land use regulations and plan provisions are inapplicable to a particular proposal does not convert the agreement to a land use decision subject to this Board's jurisdiction.

Following the court of appeals' decision in Weeks v. City of Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992), this Board lacks authority to render an independent determination of the applicability of local comprehensive

plan and code provisions. Rather, local decision makers must determine the applicability of such local provisions in the first instance.[2] Here, the city interpreted various provisions of its plan and determined no plan provision governs the proposal.[3] Therefore, the challenged intergovernmental agreement applies comprehensive plan provisions, and is a land use decision subject to our review authority.

ASSIGNMENTS OF ERROR

Petitioner contends the following city Urban Growth Program policies, among other plan policies, apply to the proposal:

> "Urban Growth Program Policies:
>
> "1. Annexations of the City should be discouraged until a major portion of the City's buildable vacant land is developed.
>
> "2. Since the City is the provider of urban services, development outside the city limits should be discouraged and should be rural agricultural uses only. City services should not be extended outside the city limits.

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[2]In Gage v. City of Portland, 123 Or App 269, 860 P2d 282, on reconsideration 125 Or App 119 (1993), the court of appeals stated that there may be some circumstances where local provisions are so unambiguous, that this Board could apply its own interpretation of those provisions. This is not such a case.

[3]It is also the case that here, petitioner contends specific plan provisions govern the proposal. In this regard, this appeal differs from Many Rivers Group v. City of Eugene, 25 Or LUBA 518 (1993). In Many Rivers Group, the petitioner made no attempt to identify any specific plan provisions governing the decision.

"3. Zoning and land uses between the city limits and the [Urban Growth] Boundary should be reviewed by the City and administered by the County.

"4. Areas outside the [Urban Growth] Boundary should be maintained in a rural agricultural use.

"5. Lands within the Urban Growth Boundary shall be available for urban development concurrent with the provision of key urban facilities."

"* * * * *

"Application of Criteria:

"The Urban Growth Boundary was determined by applying the factors listed above. Since a good portion of the land within the city is vacant and the population projections indicate a moderate growth rate, the City of Donald chose to establish an Urban Growth Boundary that is contiguous to the city limits. * * *" (Emphases supplied.)

The city interpreted these plan provisions to be nonmandatory, aspirational provisions and, therefore, concluded they do not govern the proposal. Petitioner argues that because these plan provisions constitute the city's urban growth management program, the city must interpret these policies consistently with Goals 11 (Public Facilities and Services) and 14 (Urbanization), which they are designed to implement. According to petitioner, viewed in this context, the city's interpretation is inconsistent with these goals and subject to remand under

ORS 197.829(4).[4]

Before the enactment of ORS 197.829, this Board would have deferred to the city's interpretation that these plan policies are simply aspirational statements. Before the enactment of ORS 197.829(4) this Board was precluded from requiring a local government's interpretation to be consistent with the goals so long as the contrary local interpretation was within the interpretative discretion extended to local governments under Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992) (Clark). Friends of the Metolius v. Jefferson County, 125 Or App 122, ____ P2d ____ (1993) (Friends of the Metolius).

Friends of the Metolius was decided under Clark, supra. In Friends of the Metolius, the court noted that even though ORS 197.829 did not yet apply, ORS 197.829(1)-(3)

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[4]ORS 197.829 provides:

"The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

"(1) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(2) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(3) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

"(4) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

essentially codifies Clark. However, the court stated that regarding the bearing of the goals on local interpretations of acknowledged local comprehensive plan provisions and land use regulations, ORS 197.829(4) may "have profound effects on the Clark standard and on future cases." Friends of the Metolius, supra, 125 Or App at 125.

We determined in DLCD v. Fargo, supra, that ORS 197.829(4) means exactly what it says. That is, where a plan provision or land use regulation is clearly designed to implement a goal or goals, the local government may not interpret such a plan provision or land use regulation in a manner inconsistent with the goals it implements. Here, petitioner identifies specific plan provisions that, read together, comprise the city's urban growth management program. We agree with petitioner that these plan provisions are clearly designed to implement Goals 11 and 14. Goals 11 and 14 together prohibit the extension of urban public facilities and services outside of urban growth boundaries (UGBs). 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 508, 724 P2d 268 (1986); Hammack & Associates, Inc. v. Washington County, 16 Or LUBA 75, 84, aff'd 89 Or App 40 (1987); Conarow v. Coos County, 2 Or LUBA 190, 193 (1981); Sandy v. Clackamas County, 3 LCDC 139, 148 (1979). Extending urban public facilities and services outside of UGBs is what the challenged decision allows. Therefore, we agree with petitioner that the city erred by

interpreting its plan to allow the extension of city public facilities and services outside the city's UGB, as that interpretation is inconsistent with Goals 11 and 14. The city must either amend its plan or take exceptions to these goals to extend its sewage treatment services outside the UGB.

Finally, petitioner argues the findings supporting the challenged decision are erroneous. Essentially, the findings determine the proposal is consistent with Goals 11 and 14 because it is not the city that is extending services outside of the UGB, but rather the district that is extending its line to the UGB. We agree with petitioner that the proposal authorizes the city to use its urban sewage treatment facility to treat sewage from outside of the city's UGB. In this regard the challenged decision is the city authorization to extend its urban sewerage services outside of its UGB. This is inconsistent with Goals 11 and 14, which the city's plan policies were adopted to implement.[5]

Petitioner's assignments of error are sustained.

The challenged decision is remanded.

[5]Because we determine the findings are inadequate, we need not consider petitioner's challenges to the evidentiary support for those findings.