Comm. precluded from discretion? If no, why not... Gar

MEMORANDUM

no valid order from court
no bar from LCDC changing position

October 19, 1984

TO: Michael B. Huston

FROM: Edward J. Sullivan

RE: Response to Questions Posed by Representatives of the Department of Justice

ISSUES:
Discretion
Consistency
Wasco Co Goal 14
Linkage between cases

In our meeting of October 18, 1984 you requested that I respond to three issues which you then felt were "serious legal questions" to Land Conservation and Development Commission action on the Response to its Continuance Order by the City of Rajneeshpuram.

As I understand it, those questions relate to the following issues:

1. Commission consistency under ORS 183.482(8)(b)(B) in view of its action in LUBA 81-132 and the "self-destruct clause" of the City's Continuance Order
2. Whether the Commission could consider the revised UGB of the City without County "signoff" of a City-County Urban Growth Management Agreement*.
3. Whether a valid municipal entity had requested acknowledgment under ORS 197.251.

Let me deal with these questions in order.

*This issue was fully discussed in our memorandum of October 13, 1983 which you received during the meeting of October 18.

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I. <u>The Commission Has the Discretion to Interpret or Re-Interpret the Goals - ORS 183.482(8)(b)(B) is Not A Bar</u>

This portion of the memorandum is directed to judicial interpretation and application of ORS 183.482(8)(b)(B). This subsection, as amended in 1979, directs the court, upon review of contested cases of agency decisions, to remand that decision if the court finds it to be inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, <u>if the inconsistancy is not explained</u>.

In the present case, the issue has arisen as to whether or not LCDC may re-examine its intrepretation of Goal 14 which requires exceptions within applications for incorporations of cities. Since application of that rule is subject to agency interpretation , a re-examination of that rule as to the incorporation of Rajneeshpuram would necessarily raise the issue of inconsistency in agency decision-making if LCDC reversed its decision. Consequently, ORS 183.482(8)(b)(B) might be applied to such a decision in any challenge of that changed position.

ORS 183.482(8)(b)(B) is new to Oregon law, having been incorporated into the Oregon Administrative Procedures Act in 1979. In interpreting this subsection, it is apparent that the "inconsistency" doctrine might be defined to have procedural or substantive application, or both. The Oregon Supreme Court, through Justice Linde, evaluated the subsection in a 1980 case, <u>Megdal v. Oregon State Board of Dental Examiners</u>, 288 Or 293, 605 P2d 273 (1980). Although the court found that this section did not apply to the case, it nevertheless addressed the scope of this subsection. Finding no Oregon precedent to apply to the new law, the court turned to the Florida Administrative Procedure Act and Florida case law for guidance, specifically citing McDonald v. Dept. of Banking and Finance, 346 So 2d 569, 582-584 (Fla App, 1977), in which the Florida Appellate Court held that "inconsistency" rules applies to an "officially stated agency policy", but not only to an agency rule, per se. Such statutory language requires an agency to adhere to such policies or to explain adequately to the court, the basis for any deviation. To that end, all such rules and orders, catalogued by a subject matter index, could be made available to the public for establishing precedents to which the agency must adhere or explain its deviation. The Florida case is interesting in that the Oregon Supreme Court has yet to address this subsection after its initial review in Megdal.

Oregon appellate cases which followed Megdal did not utilize substantive interpretation of the subsection. Two cases of particular importance are Maresh v. Yamhill County, 68 Or App 471, 683 P2d 124 (1984), and Roth v. LCDC, 57 Or App 611, 646 P2d 85 (1982). In Maresh, the court reviewed a challenge that in reviewing areawide post-acknowledgment ordinances, and an order confirming an individual site ordinance, LCDC ruled inconsistently in approving the former while rejecting the latter. Specifically, the petitioner claimed that LCDC made inconsistent rulings as to its review of Goal 5 issues without explaining such inconsistency. The court rejected the argument because there was no inconsistency apparent on the face of the LCDC orders, and the record was found to be inadequate for finding such inconsistency.

In Roth, the court again adopted the stance that the record must clearly indicate an inconsistency with an "officially stated position" previously adopted. The question arises whether the court is restricting itself in these cases to strictly procedural applications of ORS 183.482(8)(b)(B), that is to say, whether the court will only apply a procedural standard, requiring the agency to explain its inconsistencies in the record without reaching the substantive strength of such explanations. This applies to the existing interpretation in Oregon, whereby the court, upon review of agency decision-making, will reach no further than procedural sufficiency by reviewing merely whether or not the agency has gone on record as recognizing and "explaining" its inconsistencies. The burden appears to be on the complaining party to demonstrate, on the record, such inconsistencies.

This proposition has some support based upon the theory that agencies necessarily change "official" policy in reaction to changing conditions. See e.g., In re Perman Basin Area Rate Cases, 390 US 747, 88 S Ct 1344 (1968) reh den 88 S Ct 2050..

Alternatively, the court may make substantive evaluations in conjunction with procedural review of agency "inconsistencies." Such substantive review would, in the present case, require LCDC to explain not only why it will not apply the Goal 14 exception process to incorporation of cities in Oregon, but also will require the agency to substitute that position based upon general standards of *administrative* review. Such a mixed review process would place LCDC in a difficult position of adequately explaining why circumstances have sufficiently changed so as to justify a change in the interpretation of the incorporation rules. The court may review LCDC's treatment of the exception process, in general, and force the agency to justify its inapplicability to the purposes of the policies of the incorporation rule, when the agency had claimed its applicability in prior decision. ORS 183.482(8)(2).

This position is sound in that any decision of an administrative body is subject to judicial review for some measure of substantive adequacy. The primary question, however, is to what extent the court will review agency decisions for substantive merit. A variety of tests exist including "substantial evidence" in land use cases, "arbitrary and capricious" in APA cases and "rational relationship" in equal protection/due process cases. This question of scope of review is important here in anticipating how the court will apply ORS 183.482(8)(b)(B) to a valid claim of "inconsistency" of decisions by LCDC in this matter.

From the above, I conclude that thre is no statutory bar from the language of (or the case law interpreting) ORS 183.48(8)(b)(B) to prevent the Commission from taking another approach.

That approach could be based upon a desire not to "change the goalposts" in not requiring an exception to Goal 14 under either its policy papers or rules, or cases thereunder, until July 1983. The Commission could state that its new approach would apply to incorporation after that date. It could also note that it had acknowledged Wasco County on Goal 14 without an exeption for Rajneeshpuram (and with no appeal being taken on that point.)

The legal issue before the Commission is not whether it should reconsider its position, but whether it legally could do so. The above indicates that the Commission could do so.

II. Rajneeshpuram is a Local Government for Purposes of Review of a Comprehensive Plan.

It is too early to tell what the ultimate result of LUBA's decision in 81-132 will be, because the effect of that decision has not yet been determined.

Wasco County III held that LUBA was correct in determining that Wasco County's decision to allow an incorporation election for the City of Rajneeshpuram, violated statewide planning goals. The question of what effect that determination has on the incorporation election which took place over two years ago, on the positions of the city council members who have been elected and on the subsequent charter adoption by the voters, is a complicated one which is now pending before the Wasco County Circuit Court in McGreer v. Rajneeshpuram, CC 83-202.

It is our position that LUBA's order in 81-132 does not have the effect of nullifying the City of Rajneeshpuram. Even assuming, arguendo, that the City of Rajneeshpuram does not enjoy de jure status due to an imperfection in its creation, the city, nonetheless, exists as a valid de facto corporation, until a court of competent jurisdiction in a proper proceeding rules otherwise.

McQuillin, _Municipal Corporations_, (3rd Ed) § 3.48.

The elements of a _de facto_ municipal corporation were identified by the Oregon Supreme Court in _State v. School Dist. No. 23_, 179 Or 441, 172 P2d 655 (1946):

> Municipal bodies organized in imperfect compliance with the statute under which they could have achieved _de jure_ status, but which exercised in good faith the powers which they imperfectly secured, are recognized as _de facto_ municipal incorporations.

_Id_. at 661.

McQuillin, upon whom the court relied, expressed these general requirements as follows:

> In order to be a _de facto_ municipal corporation, there must be (1) a charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempted compliance in good faith with the requirements of the statute as to incorporation; (3) a colorable compliance with the statutory requirements; and (4) an assumption of corporate powers.

Authority for the incorporation of the City is found at ORS 221.005-221.106, which sets out the statutory framework by which the new city could have achieved _de jure_ corporate status. There can be no question as to Wasco County's attempt to comply in good faith with the statutory requirements of incorporation. The county court conducted the requisite public hearing, received and considered testimony in evidence relating to the narrow issues before it and adopted a written order, complete with 40 pages of findings, documenting its application of these statutory criteria. Moreover, the county court applied each of the applicable statewide planning goals to its deicsion, despite the obvious uncertainty at the time as to whether these criteria were even applicable to incorporations. The incorporation of the City of Rajneeshpuram clearly meets the test for conferring de facto status.

Historically, the incorporation of a de facto municipal corporation could only be challenged in quo warranto proceedings brought by the state. See, McQuillin, Municipal Corporations, § 3.48, 3.49(a); State v. School District No. 23, 179 Or 441, 172 P2d 655 (1946). In Oregon, the common law writ was abolished (ORS 34.810), and quo warranto was codified in ORS 30.510 and 30.570. See, State ex rel Boe v. Straub, 282 Or 387, 578 P2d 1247 (1978). Under both statutory provisions, the historical requirement that such action must be maintained "in the name of the state ... or upon the relation of a private party" has been preserved. No action in quo warranto has been brought to challenge the incorporation of the City of Rajneeshpuram.

There are other reasons why a LUBA decision could not invalidate an election. Prior to an incorporation election, opponents can file suit to enjoin the election because the county court has not properly applied land use laws. An additional remedy, a statutory contest of the election, is available to persons eligible to vote in the election but only if the contest is initiated with 40 days of the election. ORS 258.036. Petitioners in this case and in LUBA No. 81-132 did seek an injunction against the incorporation election for Rajneeshpuram, but their application was denied by the trial court, and they did not appeal. They did not enjoin or challenge the election of the City Council members or the election where the City Charter was approved by the voters.

The Constitution also provides for a right of self-government. The drafters of the Oregon Constitution have required that the Oregon legislature accord due deference to home rule. Article XI, Section 2 of the Oregon Constitution, the state's "home rule" provision, mandates, inter alia, that the legislature shall not "repeal ... an act of incorporation ...".

The courts are appropriately reluctant to assume that the fundamental right of self-government and home rule has been curtailed. The Oregon Supreme Court in McManus v. Skoko, 225 Or 374, 467 P2d 426 (1970) held that a court may not imply a repeal or modification of the right of 150 inhabitants of a particular area to incorporate:

> [T]he legislative purpose was to give the county courts control over the boundaries of the proposed city ... There is not the slightest implication of any intent to authorize the county court, on political grounds, to deny the right of 150 inhabitants of a particular area to decide by a majority vote whether to incorporate their area as a city. We are satisfied that if the legislature had intended to give such power to a county court it would have expressed its intention in plain terms.

The courts will not lightly find that the proper remedy for an alleged error in land use planning is the disincorporation of the entire City of Rajneeshpuram.

In fact, there has been no order which has the effect of declaring Rajneeshpuram invalid. Wasco County Circuit Court's October 24, 1983 preliminary injunction in McGreer v. Rajneeshpuram, CC 83-202 does not have that effect. The law is well settled in Oregon and elsewhere, that a court may not reach the merits of an action on complaint in a hearing on a motion for preliminary injunction. A preliminary injunction is to preserve the positions of the parties, preserve the status quo, while litigation on the merits is pending. See, Fleming v. Woodward, 180 Or 186, 177 P2d 428 (1947); Coopey v. Keady, 81 Or 218, 139 P 108 (1914); American Life and Accident Ins. Co. v. Ferguson, 166 Or 417, 134 P 1029, 1030 (1913); Helen v. Gilroy, 20 Or 520, 26 P 852 (1891). This rule has also been followed by the federal courts. See, University of Texas v. Camenisch, 451 US 390, 101 S Ct 352, (1981); Tanner Motor Livery Limited v. Avis, Inc., 316 F2d 804 (9th Cir 1963).

The order in Perkins v. Rajneeshpuram, LUBA 83-094 95 (1984) does not have that effect. LUBA does not have the power to make that determination.

The power of state agencies is strictly limited to the power conferred on them by the legislature. Harrison v. Port of Cascade Locks, 27 Or App 377, 556 P2d 160 (1976); Bay River, Inc. v. Environmental Quality Commission, 26 Or App 717, 554 P2d 620 (1976); Hawkins v. Board of Medical Examiners, 23 Or App 270, 542 P2d 152 (1975). Under sections 4 to 6A, chapter 772, Oregon Laws 1979 as amended by sections 35 to 37, chapter 748, Oregon Laws 1981, LUBA had the power to review land use decisions. LUBA did not have the power to decide the effect of its decision in 81-132.

Under the Due Process Clause of the Fourteenth Amendment, courts may not give preclusive effect to any agency or court proceeding on issues which the previous forum did not or could not resolve consistent with due process requirements. Kremer v. Chemical Construction Corp., 456 US 461, 102 S Ct 1883 (1982). The Supreme Court has pointed out that "redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of the procedures followed in the prior litigation." Montana v. United States, 440 US 164, 99 S Ct 970, (1979). See also Restatement of Judgments, 2d, Sec 83 "Adjudicative Determination by Administrative Tribunal."

Finally, LCDC's Approval of Wasco County's Plan on Goal 14 mooted any objection to Rajneeshpuram's incorporation. The Oregon Court of Appeals in Carmel Estates v. LCDC, 51 Or App 435, 625 P2d 1367 (1981), found that objections to planning decisions will be mooted if the local government makes plan changes relating to the planning decision, and its plan is subsequently acknowledged by LCDC.

Wasco County approved an incorporation election for the City of Rajneeshpuram on November 4, 1981. In November of 1982, it adopted the Rajneeshpuram Comprehensive Plan into its plan. On April 27, 1983, Wasco County included extensive inventory information about Rajneeshpuram in its plan, and revised the County's population projection to reflect the growth expected at Rajneeshpuram. It also changed its Goal 14, Policy 2, B to state that:

> Population growth will be encouraged within the Urban Growth Boundaries of Incorporated cities and unincorporated areas designed for residential use within the comprehensive plan.

The policy had previously listed all incorporated cities within the County except Rajneeshpuram. These changes in Wasco County's plan clearly were approvals of incorporation and urbanization of Rajneeshpuram.

In 1981, the Oregon Legislature made continuance orders, final orders. Oregon Laws 1981, Chapter 745, § 7(8)(a)(C). After the effective date of that legislation, continuance orders had the same effect as acknowledgement under Carmel Estates.

In a continuance order issued June 10, 1982, the LCDC found Wasco Plan II to be in compliance with Statewide Planning Goals 1,2, and 6-14. That continuance order was not appealed on the grounds that an exception should be included for the incorporation of Rajneeshpuram.

On August 25, 1983, LCDC acknowledged Wasco County's plan except for the areas of Rancho Rajneesh and Seven Mile Hill. That segmentation did not affect the plan policies and inventories relating to those areas. All appeals of the acknowledgment order hae been dropped.

~~100~~ 1,000 friends appeal Co plan's Goals 11 & 14 re: density. Had nothing to do w/ Rajneeshpuram.

The continuance order and acknowledgment order moot all issues that were raised or could have been raised concerning whether the incorporation decision complied with Goals Two, Three, and 14, including Goal Two's requirement that local land use decisions comply with local comprehensive plans, Goal Two's requirement that exceptions be taken if it is impossible to apply certain other goals, and Goal 14's requirements, if any, concerning incorporation.

As an at least de facto City, Rajneeshpuram has the power to submit a comprehensive plan for acknowledgment review. It will have that power as an at least de facto city until a court of competent jurisdiction rules otherwise. No such court has made a final determination of the issue, and no final determination is expected until the Supreme Court has ruled and a remand, if any, is completed. For the reasons set out here, and more, it is unlikely that any court will ever decide that the City of Rajneeshpuram is invalid. LCDC should proceed with Rajneeshpuram's acknowledgment as it would with any other city.

Conclusion

The concerns you stated are real ones, but they are answerable. The Commission does have the discretion to change its position on a goal interpretation, so long as it explains the inconsistency. The Commission can accept the Rajneeshpuram Comprehensive Plan and implementing regulations notwithstanding Wasco County's attempted veto by failing to coordinate. Finally, there is, at worst, a de facto city to submit its plan and regulations for acknowledgment..

This memorandum and our memorandum of October 13, 1984, are submitted as an attempt to settle some of the litigation arising out of the incorporation of Rajneeshpuram and subsequent events. I have an expectation of confidentiality that it will not be shared with persons outside the Governor's Office, LCDC and DLCD, and the Department of Justice

I hope the above is of assistance to you.