

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 WILLIAM H. KINSEY,)
4 Petitioner,) LUBA No. 89-001
5 vs.) ORDER ON MOTION
6 DESCHUTES COUNTY,) TO DEFER
7 Respondent.)

8 This appeal concerns two ordinances, both amending the
9 county's comprehensive plan. Ordinance No. 88-039 adopts a
10 mineral and aggregate resource inventory. Ordinance No. 88-040
11 amends "the introductory statement, goal and policies for the
12 surface mining chapter of the plan * * * ." Notice of Intent
13 to Appeal, Appendix A.

14 Respondent Deschutes County asks that LUBA defer
15 "consideration of this matter until the county's
16 comprehensive plan and surface mining element and
17 implementing land use regulations, from a portion of
18 which this appeal has been filed, are submitted to and
19 acknowledged by the Land Conservation and Development
20 Commission." Motion to Defer 1.

19 Part of Deschutes County's comprehensive plan remains
20 unacknowledged. Following the Court of Appeals' decision in
21 Coats v. LCDC, 67 Or App 504, 679 P2d 898 (1984), reversing
22 LCDC's order acknowledging the county's comprehensive plan,
23 LCDC adopted a limited acknowledgment order under ORS 197.251.
24 The limited acknowledgment order did not grant acknowledgment
25 to the surface mining element and land use regulations
26 implementing that element. Those portions of the Deschutes

1 County Comprehensive Plan are subject to a continuance order
2 under which the county must adopt amendments to bring the plan
3 and ordinances into compliance with Statewide Planning Goal 5.
4 The county is in the process of adopting amendments to its
5 comprehensive plan's surface mining element and implementing
6 regulations. When the process is complete, the county plans to
7 resubmit the amended surface mining element of the
8 comprehensive plan and implementing regulations to LCDC for
9 acknowledgment review.

10 Before the amended plan element and regulations will be
11 ready for resubmittal to and review by LCDC, the county must
12 perform and adopt economic, social, environmental and energy
13 (ESEE) analyses for the sites included in the inventory adopted
14 by Ordinance 88-039.¹ Petitioner is concerned that the
15 challenged ordinances and the ESEE analyses for inventoried
16 mineral and aggregate sites will not properly take into
17 consideration the Deschutes County/City of Bend River Study
18 (river study) adopted by the county in April, 1986. We
19 understand petitioner to argue the river study must be
20 considered in the county ESEE analyses for sites within the
21 area covered by the river study and that many or all of the
22 Goal 5 issues properly considered in ESEE analyses for such
23 sites are already resolved by the river study.

24 During oral argument on the motion, the county advised the
25 Board that the river study is part of the county's
26 comprehensive plan and, therefore, will be addressed during the

1 ESEE analyses for sites affected by the study. We understand
2 the county to argue that any action by LUBA to determine the
3 legal effect of the river study is properly deferred so that it
4 may be determined by the county in the first instance. The
5 county will make that determination in the actions it will take
6 between now and June 30, 1989 to complete the ESEE analyses and
7 to resubmit the revised surface mining element and implementing
8 regulations to LCDC for acknowledgment review.²

9 We agree with the county that it would unnecessarily
10 complicate and delay the county's efforts to obtain
11 acknowledgment of its comprehensive plan if we were to proceed
12 with this appeal while the county is completing its ESEE
13 analyses. Petitioner is free to present to the county his view
14 of the legal effect of the river study on the ESEE analyses to
15 be performed for sites in the area covered by the river study.
16 If petitioner does not agree with the county's interpretation
17 and application of the river study during its consideration of
18 the ESEE analyses and completion of amendments to the plan
19 surface mining element, he may challenge the county's decisions
20 in the acknowledgment proceeding before LCDC.

21 ORS 197.251(2)(a); ORS 197.650(1)(a). If issues remain
22 unresolved when LCDC's acknowledgment review is concluded and
23 its decision becomes final, petitioner may request that we
24 proceed with our review of the disputed ordinances.³

25 It is ordered that this appeal proceeding be deferred until
26 LCDC takes action to approve or deny Deschutes County's request

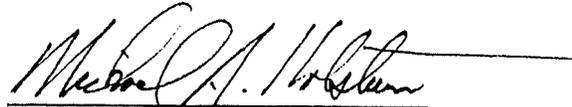
1 for acknowledgment of its amended surface mining element and
2 implementing regulations.⁴

3 Dated this 17th day of February, 1989.

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Michael A. Holstun
Chief Referee

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1 FOOTNOTES

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4 Under OAR 660-16-005, the county is required to perform
5 ESEE consequences analyses for inventoried Goal 5 resource
6 sites. Under OAR 660-16-010, the county must develop a program
7 to comply with Goal 5 based on its ESEE analyses.

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9 The inventory adopted by Ordinance 88-039 includes
10 approximately 450 mineral and aggregate resource sites. The
11 county will perform ESEE analyses for all of these sites. The
12 county has requested and expects to receive approval for an
13 extension of LCDC's continuance order to allow a revised
14 surface mining element and implementing regulations to be
15 resubmitted to LCDC for acknowledgment by June 30, 1989.

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17 There is some question whether the ordinances challenged in
18 this proceeding properly fall within the scope of
19 ORS 197.840(1)(a)(A) and ORS 197.840(4) which allow us to defer
20 our consideration of an appeal until LCDC adopts an
21 acknowledgment order where the decision involves "a
22 comprehensive plan or land use regulation submitted for
23 acknowledgment under ORS 197.251." In this case, although the
24 challenged ordinances themselves have not yet been formally
25 submitted to LCDC for acknowledgment review under ORS 197.251,
26 they amend the county plan's original surface mining element
27 which was submitted for such acknowledgment review. That
28 submittal resulted in a continuance order directing that
29 amendments to the surface mining element necessary for Goal 5
30 compliance be adopted. A continuance order specifies
31 amendments that must be completed within a stated time period
32 in order for acknowledgment to occur and is not a final order
33 for purposes of judicial review of the portions of the county's
34 plan and implementing regulations not found to be in compliance
35 with the goals. ORS 197.251(13)(a). An LCDC continuance
36 order, in essence, continues LCDC's acknowledgment review to a
37 later date. Since the appealed ordinances involve amendments
38 to the county plan's surface mining element, and that plan
39 element is the subject of a continued LCDC acknowledgment
40 review, we conclude that the appealed ordinances involve a plan
41 provision submitted for acknowledgment review under ORS 197.251.

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43 In view of our decision to suspend this proceeding pursuant

1 to ORS 197.840, we need not decide the county's motion to delay
2 filing of the record and we defer consideration of the county's
3 motion to dismiss.

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