

1 **A. Finality**

2 As relevant here, LUBA’s jurisdiction is limited to land use decisions. ORS 197.825(1).
3 As defined by ORS 197.015(10)(a), a land use decision must be “[a] final decision.” LUBA does
4 not have jurisdiction to review interlocutory decisions that may be rendered in advance of a local
5 government’s final decision in a land use matter. *E & R Farm Partnership v. City of Gervais*, 37
6 Or LUBA 702, 705 (2000); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748,
7 752, *aff’d* 93 Or App 73, 761 P2d 533 (1988); *CBH Company v. City of Tualatin*, 16 Or
8 LUBA 399, 405 n 7 (1988). On the other hand, LUBA’s jurisdiction over a land use decision is
9 not affected by local charters or codes that delay the effective date of an otherwise final decision.
10 *Friends of Clean Living v. Polk County*, 36 Or LUBA 544, 552 (1999); *Club Wholesale v.*
11 *City of Salem*, 19 Or LUBA 576, 578 (1990); *Hazen Investments, Inc., v. Lane County*, 2 Or
12 LUBA 151, 152 (1980). The question presented under the city’s first legal theory is whether the
13 appealed ordinances are not yet final, in which case those appeals must be dismissed, or whether
14 they merely have delayed effective dates, in which case we do have jurisdiction.

15 Each of the 13 ordinances includes language similar to the language in Ordinance 2004-30,
16 which is set out below:

17 “Section 6. The general welfare of the public will be promoted if this Ordinance
18 takes effect following the adoption of a final implementation order by the City
19 Council, and the expiration of any lawful appeal period or appeals of the Council’s
20 final implementation order decision. The general welfare of the public will also be
21 promoted if the adoption of this final implementation order by the City Council takes
22 place following receipt by the City of acknowledgment of the revised
23 Comprehensive Plan Map and Text by the State of Oregon Department of Land
24 Conservation and Development, and the expiration of any lawful appeal period or
25 appeals of the Department’s decision. Therefore, implementation of the revised
26 Comprehensive Plan Text as outlined in this Ordinance shall take effect following:
27 the receipt by the City Community Development Department of written
28 acknowledgment of the Comprehensive Plan Text Amendment * * * by the State
29 Department of Land Conservation and Development and the expiration of any
30 lawful appeal period, or the resolution of lawful appeals pursuant to ORS 197; and
31 the adoption of a final implementation order by the City Council, and the expiration
32 of any lawful appeal period or lawful appeals of the Council’s final implementation
33 order decision. Respondent’s Motion to Dismiss Ex. 2, p. 6.

1 The city explains that the ordinances challenged in this appeal may or may not take effect in their
2 current form. We understand the city to contend that if LCDC requires further changes in any of
3 those 13 ordinances, those ordinances may be amended to meet LCDC’s requirements. Because
4 future action by the city council in the form of a final implementation order will be required before
5 the ordinances can ever take effect, and the ordinance may be further amended before any such
6 final implementation order is adopted, the city contends those ordinances are not final.

7 The requirement for a final implementation order in the future and the possibility that these
8 ordinances may never take effect in their current form does distinguish these decisions from other
9 cases where LUBA has found that it had jurisdiction over decisions that had delayed effective dates.
10 In those cases where we have retained jurisdiction over land use decisions with delayed effective
11 dates, in almost all cases it was local legislation that delayed the effective date, and no further
12 affirmative action by the city was required for the decision to become effective—just the passage of
13 time.

14 In this case we find that the requirement for another decision by the enacting body before an
15 otherwise final land use decision can take effect is not sufficient to make the 13 ordinances
16 something other than a final decision, within the meaning of ORS 197.015(10). Although we need
17 not and do not decide the question here, it is at least questionable under LCDC’s periodic review
18 rules whether anything other than a final decision is appropriately submitted to comply with a
19 periodic review work task. OAR 660-025-0020(2) sets out the following definition:

20 “(2) ‘Final Decision’ means the completion by the local government of a work
21 program task, including the adoption of supporting findings and any
22 amendments to the comprehensive plan or land use regulations. A decision
23 is final when the local government’s decision is transmitted to the
24 Department for review.”

25 In the portion of LCDC’s rule that governs submission of completed work tasks, the rule imposes
26 the following requirement on DLCD upon receipt of a work task:

27 “After receipt of a work task, [DLCD] shall determine whether the submittal is
28 complete. To be complete a submittal shall be a *final decision* containing all

1 required elements identified for that task in the work program.” OAR 660-0025-
2 130(2) (emphasis added).

3 Although the rule requirement that a decision that is submitted to complete a work task must
4 be a “final decision” and the ORS 197.015(10)(a) requirement that a land use decision be a “final
5 decision” do not necessarily impose identical finality requirements, the rule provides some support
6 for viewing the disputed ordinances as final decisions. We also note that under the city’s theory, if
7 LCDC finds the ordinances are sufficient to comply with the work task or work tasks they were
8 adopted to complete, the ordinances would be deemed acknowledged by LCDC before the city
9 adopts a final implementation order to make them final city decisions.² While strangeness is no
10 stranger in land use, that result seems pretty strange.

11 Finally, we note that all 14 of the ordinances are accompanied by separate orders that
12 include the following language at the bottom:

13 “If you wish to appeal this decision, an appeal must be filed with the State Land Use
14 Board of Appeals within 21 days from the date of the decision.”

15 Had the city instead provided notice that the ordinances were not appealable to LUBA until a final
16 implementation order was adopted in accordance with section six of the ordinance, we might agree
17 with the city that the ordinances should not be viewed as final decisions. However, the city did not
18 do so, and the appeal notice that the city did give is inconsistent with the position that the city is now
19 taking with regard to the finality of the ordinances. The city makes no attempt to reconcile the
20 apparent inconsistency between its decision to provide notice to parties they must appeal the
21 ordinances to LUBA and its current position that LUBA lacks jurisdiction to entertain the appeals
22 that have been filed.

23 For the reasons set out above, we conclude that the 13 ordinances that include delayed
24 effective dates nevertheless are final decisions and subject to LUBA’s review. The ordinance

² OAR 660-0025-0160(8) provides that a work task is deemed acknowledged if no appeal of a decision that approves the work task is timely filed.

1 language that the city relies on delays the effective date of those ordinances, but it does not delay
2 their finality. As we note in our discussion below, our scope of review over the appealed
3 ordinances is limited by statute, but we have jurisdiction to apply that limited scope of review.

4 The city’s motion to dismiss LUBA Nos. 2005-005, 2005-006, 2005-007, 2005-008,
5 2005-009, 2005-010, 2005-011, 2005-012, 2005-013, 2005-014, 2005-015, 2005-016 and
6 2005-017 is denied.

7 **B. LCDC’s and LUBA’s Shared Jurisdiction over Matters in Periodic Review**

8 Under current statutes, LCDC and LUBA have shared jurisdiction to review land use
9 decisions that are adopted to comply with periodic review. ORS 197.628 to 197.650 set out
10 statutory provisions that govern LCDC periodic review. ORS 197.644(2) provides:

11 “[LCDC] shall have exclusive jurisdiction for review of the evaluation, work
12 program and completed work program tasks as set forth in ORS 197.628 to
13 197.650. The commission shall adopt rules governing standing, the provision of
14 notice, conduct of hearings, adoption of stays, extension of time periods and other
15 matters related to the administration of ORS * * * 197.628 to 197.650 * * *.”³

16 LCDC also has adopted administrative rules that elaborate on its periodic review process,
17 OAR chapter 660, division 25. OAR 660-025-0040 provides:

18 “(1) [LCDC], pursuant to ORS 197.644(2), has exclusive jurisdiction to review
19 the [periodic review] evaluation, work program, and all work program
20 tasks *for compliance with the statewide planning goals.* * * *

21 “(2) [LUBA] shall have exclusive jurisdiction over land use decisions described
22 in section (1) of this rule for *issues that do not involve compliance with*
23 *the statewide planning goals*, and over all other land use decisions as
24 provided in ORS 197.825.” (Emphases added.)

25 Under the above authorities, it is clear that although both LCDC and LUBA have
26 jurisdiction over land use decisions that are adopted in whole or in part to comply with period

³ Consistent with ORS 197.644(2), ORS 197.825(2)(c) provides that LUBA’s jurisdiction:

“Does not include those matters over which the Department of Land Conservation and Development or the Land Conservation and Development Commission has review authority under ORS * * * 197.628 to 197.650[.]”

1 review requirements, LCDC's and LUBA's scope of review concerning such decisions is different.
2 LCDC reviews such decisions to ensure, among other things, that the local government's plans and
3 land use regulations are "achieving the statewide planning goals." ORS 197.628(3)(d); OAR 660-
4 0025(70)(4). Under current statutes and LCDC rules, periodic review proceeds by development
5 of a work program and work tasks, and LCDC review of those work tasks for compliance with the
6 statewide planning goals. OAR 660-0025-0040(1).

7 LUBA's scope of review over periodic review land use decisions extends to all other legal
8 issues that are properly within LUBA's scope of review, but it does not include review for
9 compliance with statewide planning goals. OAR 660-0025-0040(2). *Williams v. Clackamas*
10 *County*, 25 Or LUBA 812, 814 (1993); *1000 Friends of Oregon v. City of Troutdale*, 23 Or
11 LUBA 219, 221 (1992). With this understanding of our scope of review in this consolidated
12 appeal, we turn to the city's arguments concerning the remaining ordinance, which all parties agree
13 is a final decision and otherwise falls within the ORS 197.015(10)(a) statutory definition of land use
14 decision.

15 The city has been in periodic review for a long time, and its efforts to complete periodic
16 review have been driven by a number of periodic review work tasks. The city contends that
17 Ordinance 2004-29, which is the subject of LUBA No. 2005-004, was adopted to comply with
18 work task 13 and other work tasks as well. Petitioner contends that work task 13 is the city's sole
19 remaining obligation in periodic review, because LCDC has already issued orders that acknowledge
20 the city's compliance with all work tasks other than work task 13. Petitioner contends the
21 challenged ordinance goes considerably beyond the city's remaining obligations under work task
22 13. The documents that the parties cite us to are sufficiently complicated and ambiguous that we
23 are not certain at this point who is correct. But for purposes of resolving the remaining jurisdictional
24 question presented by the city's motion to dismiss, it does not matter who is correct.

25 The city's legal theory is that if Ordinance 2004-29 was adopted solely to respond to the
26 work tasks it cites, LCDC has exclusive jurisdiction to review Ordinance 2004-29 and LUBA

1 lacks jurisdiction to review the ordinance. As we have already explained, under current statutes,
2 LCDC and LUBA have shared jurisdiction over land use decisions that are adopted pursuant to
3 periodic review.⁴ Each has jurisdiction to apply its limited scope of review. LCDC has jurisdiction
4 to review such decisions to determine whether they are responsive to relevant work tasks. LUBA’s
5 scope of review is set out in several subsections of ORS 197.835. ORS 197.835(9) provides:

6 “In addition to the review under subsections (1) to (8) of [ORS 197.835, LUBA]
7 shall reverse or remand the land use decision under review if [LUBA] finds:

8 “(a) The local government or special district:

9 “(A) Exceeded its jurisdiction;

10 “(B) Failed to follow the procedures applicable to the matter before it in
11 a manner that prejudiced the substantial rights of the petitioner;

12 “(C) Made a decision not supported by substantial evidence in the whole
13 record;

14 “(D) Improperly construed the applicable law; or

15 “(E) Made an unconstitutional decision[.]”

16 The above statute must be read together with ORS 197.825(2)(c) and is qualified and
17 limited by that statute. *See* n 3. Precisely how our scope of review is limited by ORS
18 197.825(2)(c) is not always clear, but we need not attempt a precise description of that limitation
19 here. There can be no question that a land use decision could be narrowly tailored to comply with a
20 periodic review work task, and still be reversible by LUBA because it exceeds the city’s
21 jurisdiction, is based on an improper construction of a law that LCDC does not consider in periodic
22 review or because the city committed procedural errors in adopting the decision. Because we
23 cannot know for sure whether petitioner will allege errors that are within our scope of review,

⁴ We note that Senate Bill 431, which was adopted by the 2005 legislature, amends ORS 197.825. As amended by Senate Bill 431, ORS 197.825 provides that LCDC has exclusive jurisdiction over a land use decision that is submitted to LCDC to comply with periodic review, unless LCDC transfers the matter to LUBA. Senate Bill 431 takes effect January 1, 2006, operates prospectively, and does not apply here.

1 dismissal of this appeal is not appropriate at this point. *Williams v. Clackamas County*, 25 Or
2 LUBA 812, 815 (1993).

3 The city's motion to dismiss LUBA No. 2005-004 is denied.

4 **C. Conclusion**

5 Finally, there is an issue that we anticipate will arise if these appeals proceed at the same
6 time LCDC is completing periodic review. Petitioner appears to believe that any part of Ordinance
7 2004-29 that is not required to complete a remaining work task is beyond LCDC's scope of
8 review in periodic review. Specifically, we understand petitioner to assume that: (1) parts of
9 Ordinance 2004-29 are unnecessary to comply with the city's remaining periodic review work task
10 obligations, (2) those parts of Ordinance 2004-29 that are unnecessary to complete work task
11 obligations violate one or more statewide planning goals, and (3) LUBA rather than LCDC is the
12 appropriate tribunal to require that the city correct any such statewide planning goal violations.
13 Although we need not and do not decide here whether petitioner's third assumption is correct, we
14 seriously question that assumption. *See 1000 Friends of Oregon v. City of Troutdale*, 23 Or
15 LUBA 219, 223-26 (1992) (discussing LCDC's scope of review in periodic review). While we
16 recognize that the statutes governing periodic review have been revised since our decision in *1000*
17 *Friends of Oregon v. City of Troutdale*, we seriously question whether LCDC's scope of review
18 in periodic review to ensure goal compliance is as limited as petitioner suggests. Petitioner's third
19 assumption also seems inconsistent with the following discussion of the periodic review process in
20 *Hummel v. LCDC*, 152 Or App 404, 410, 954 P2d 824 (1998):

21 "Because work plans consist of a number of work tasks, and because the later
22 tasks often depend on the completion of the earlier tasks, the second phase of
23 periodic review is a sequential process. Work tasks are subject to DLCD review
24 and acknowledgment as they are completed, but the periodic review as a whole is
25 not acknowledged until DLCD, and LCDC if there are any appeals, have reviewed
26 and acknowledged all of the work tasks. As the statutes and rules recognize, the
27 sequential nature of a work program means that work on a later work task may
28 have an impact on a previously completed work task, even after its initial
29 acknowledgment. Thus, LCDC may modify the approved work program when,
30 among other things, issues of goal compliance are raised as a result of the

1 completion of a work task that results in a need to undertake further review or
2 revisions. ORS 197.644(1)(b). When a later work task conflicts with a work task
3 that has been deemed acknowledged, or when a later work task violates a goal
4 related to a previous work task, DLCD and LCDC will not approve the submission
5 until all conflicts and goal compliance issues are resolved. OAR 660-25-140(5).”

6 The court admittedly was addressing a somewhat different question concerning whether statewide
7 planning goal issues that were resolved in approval of early work tasks could be revived as plan and
8 land use regulation amendments were adopted later to respond to other work tasks. However, the
9 above discussion seems somewhat inconsistent with petitioner’s narrow view of LCDC’s scope of
10 review in periodic review.

11 Petitioner describes the split between LCDC’s and LUBA’s jurisdiction in this matter as
12 follows:

13 “The City has shipped all 14 ordinances to [LCDC] for acknowledgment as a
14 periodic review work product. Petitioner has appeared at [LCDC] with objections,
15 stating at the outset that jurisdiction for most of the package is with LUBA, due to
16 the narrow scope of what was left to be done in periodic review.

17 “There is a jurisdictional line between * * * LCDC and LUBA. The two
18 jurisdictional pieces fit together. The line is not straight, and it is not clear, but the
19 ‘fit’ is perfect – no gaps no overlaps. The task for both LUBA and * * * LCDC is
20 to correctly state its jurisdictional footprint and then completely occupy that
21 footprint. This exercise calls for some guesswork[.]” Response to Motion to
22 Dismiss 3.

23 We may misunderstand petitioner’s view of LCDC’s scope of review in periodic review.
24 Even if we understand petitioner correctly, we emphasize that we need not and do not reach any
25 final decision concerning the correctness of that view here. However, we tend to agree with
26 petitioner that the size of LCDC’s and LUBA’s respective footprints in this matter is less than clear,
27 which increases the possibility that if periodic review at LCDC and these appeals at LUBA proceed
28 at the same time there is a chance that LCDC and LUBA may resolve the footprint question
29 differently and that one or both of our decisions will be appealed and reversed by the Court of
30 Appeals. Given those possibilities it might be in all parties’ best interest to allow the pending LCDC
31 periodic review to be completed before deciding whether to pursue this consolidated LUBA appeal

1 further. If petitioner is correct, and little remains to complete period review, it should not take long
2 and any questions about whether LCDC correctly applied its scope of review could be resolved at
3 the Court of Appeals before any decision is made to pursue these appeals. On the other hand, if
4 petitioner is not correct, and LCDC takes up and addresses any statewide planning goal issues that
5 petitioner may have with parts of these ordinances that may exceed the city's remaining periodic
6 review work task obligations, it would seem a waste of everyone's resources to contemporaneously
7 press those same statewide planning goal issues in this consolidated LUBA appeal.

8 LUBA requests that the parties consult with each other and advise LUBA whether they
9 wish to proceed with this appeal or suspend the appeal pending a final decision by LCDC in
10 periodic review. If the decision is made to proceed with this appeal, the parties shall advise LUBA
11 of the status of the pending LCDC periodic review proceeding and provide LUBA with copies of
12 any rulings LCDC may have made in those proceedings concerning its scope of review.

13 Dated this 3rd day of August, 2005.

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Michael A. Holstun
Board Member