BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM HATLEY,
Petitioner,

vs.

UMATILLA COUNTY,
Respondent.

LUBA No. 2012-030

ORDER ON MOTION TO DISMISS

Petitioner appeals Order No. 2012-21, which adopts additional findings in support of Ordinances No. 2011-05, 2011-06, and 2011-07, following LUBA's remand of those ordinances. The county moves to dismiss this appeal.

In 2011, the county adopted three ordinances amending the county's land use regulations with respect to the siting of wind energy facilities (collectively, the 2011 ordinances). Ordinance No. 2011-05 amended Umatilla County Zoning Ordinance (UCZO) 152.616(HHH) in several particulars, most relevantly here to allow cities and owners of land zoned Unincorporated Communities to waive a two-mile setback from wind energy facilities. Ordinance No. 2011-06 added UCZO 152.616(HHH)(3) to provide the same waiver authority to owners of rural residences. Ordinance No. 2011-07 added UCZO 152.616(HHH)(11) to address impacts of wind energy facilities on natural resources in the Walla Walla valley that are protected under Statewide Planning Goal 5.

In *Cosner v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2011-070/071/072), LUBA remanded the three 2011 ordinances on three separate grounds. LUBA sustained the first assignment of error, holding that the setback waiver provisions in Ordinance Nos. 2011-05 and 2011-06 were unconstitutional. LUBA sustained the second assignment of error, concluding that in adopting Ordinance 2011-07 to protect Goal 5 resources in the Walla

Walla valley the county was required to address the requirements of Goal 5, but failed to do so. Finally, LUBA sustained the sixth assignment of error, concluding that the county was required to address whether the three 2011 ordinances are consistent with certain comprehensive plan policies regarding energy, but failed to do so.

On remand, the county board of commissioners conducted a single proceeding resulting in adoption of two ordinances and two orders, directed at complying with the three different bases for remand. Ordinance No. 2012-04 deleted the setback waiver provisions of Ordinances Nos. 2011-05 and 2011-06, in response to LUBA's remand of the first assignment of error. On March 20, 2012, petitioner appealed Ordinance No. 2012-04 to LUBA, and that appeal is assigned LUBA No. 2012-017.[1]

Ordinance 2012-05 modified the provisions of Ordinance No. 2011-07 with respect to Goal 5, and adopted findings explaining that UCZO 152.616(HHH)(11) as amended by Ordinance 2012-05 is consistent with the requirements of Goal 5. On March 20, 2012, petitioner appealed Ordinance No. 2012-05 to LUBA, and that appeal is assigned LUBA No. 2012-018. The two appeals of the two 2012 ordinances were then consolidated for our review.

The decision challenged in this appeal is Order No. 2012-21, one of the two orders adopted concurrently in the same proceeding as Ordinances 2012-04 and 2012-05. Order No. 2012-21 became final on February 27, 2012. Order No. 2012-21 is entitled "In the Matter of Adoption of Additional Findings on Remand in support of Ordinance Nos. 2011-05, 2011-06 and 2011-07 for Wind Power Generation Facilities Siting Requirements." The order responds to LUBA's remand under the sixth assignment of error in *Cosner*, and in relevant

[1] One of the concurrently adopted orders, Order No. 2012-020, initiates a planning commission proceeding to draft text amendments to replace the deleted setback waiver provisions with an adjustment-type process. Order No. 2012-020 is not at issue on appeal.

part concludes that the 2011 ordinances are consistent with a number of comprehensive plan policies concerning energy.

On February 29, 2012, the county provided notice to petitioner and others that it had adopted the two 2012 ordinances and the two 2012 orders, including Order No. 2012-21. As noted, petitioner filed timely appeals of the two 2012 ordinances, but petitioner did not appeal Order No. 2012-21 to LUBA until April 18, 2012, more than 21 days after the date that order became final. Petitioner's appeal of Order No. 2012-21 is styled a "precautionary appeal," because, as explained below, petitioner takes the position that Order No. 2012-21 is part of the findings supporting Ordinance Nos. 2012-04 and 2012-05, and that it is unnecessary to separately appeal the order.

The county moves to dismiss the appeal of Order No. 2012-21 as untimely filed under the 21-day deadline to appeal set out in the first sentence of ORS 197.830(9). ORS 197.830(9) provides, in relevant part:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. * * *"

Petitioner responds that the appeal of Order No. 2012-21 is timely under the second sentence of ORS 197.830(9). According to petitioner, Order No. 2012-21 is a "plan and land use regulation amendment[] processed pursuant to ORS 197.610 to 197.625." Petitioner contends that because the county failed to provide a copy of decision to Department of Land Conservation and Development (DLCD) as required by ORS 197.615(1), the deadline to file the appeal is effectively tolled under the second sentence until 21 days after the county provides that copy to DLCD.[2] In the alternative, petitioner argues that it is unnecessary to

[2] ORS 197.615 provides, in relevant part:

separately appeal Order No. 2012-21, because it is not a separately appealable decision, but rather an integral part of Ordinance Nos. 2012-04 and 2012-05, which are the subject of petitioner's consolidated appeals in LUBA Nos. 2012-017 and 2012-018.

> "(1) When a local government adopts a proposed change to an acknowledged comprehensive plan or a land use regulation, the local government shall submit the decision to the Director of the Department of Land Conservation and Development within 20 days after making the decision.
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> "(2) The submission must contain the following materials:
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> "(a) A copy of the signed decision, the findings and the text of the change to the comprehensive plan or land use regulation;
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> "* * * * *
>
> "(3) The director shall cause notice of the decision and an explanation of the requirements for appealing the land use decision under ORS 197.830 to 197.845 to be provided to:
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> "(a) Persons that have requested notice of changes to the acknowledged comprehensive plan of the particular local government, using electronic mail, electronic bulletin board, electronic mailing list server or similar electronic method; and
>
> "(b) Persons that are generally interested in changes to acknowledged comprehensive plans, by posting notices periodically on a public website using the Internet or a similar electronic method.
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> "(4) On the same day the local government submits the decision to the director, the local government shall mail, or otherwise deliver, notice to persons that:
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> "(a) Participated in the local government proceedings that led to the decision to adopt the change to the acknowledged comprehensive plan or the land use regulation; and
>
> "(b) Requested in writing that the local government give notice of the change to the acknowledged comprehensive plan or the land use regulation.
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> "(5) The notice required by subsection (4) of this section must state how and where the materials described in subsection (2) of this section may be obtained and must:
>
> "(a) Include a statement by the individual delivering the notice that identifies the date on which the notice was delivered and the individual delivering the notice;
>
> "(b) List the locations and times at which the public may review the decision and findings; and
>
> "(c) Explain the requirements for appealing the land use decision under ORS 197.830 to 197.845."

For the reasons set out below, we conclude that even if Order No. 2012-21 is a plan or land use regulation amendment subject to ORS 197.615, and therefore the second sentence of ORS 197.830(9) supplies the applicable deadline to appeal to LUBA, petitioner's appeal was untimely filed under the second sentence. We address petitioner's alternative argument regarding the relationship between Order No. 2012-21 and the two concurrently adopted ordinances in a separate order issued this date in the consolidated appeals of the two ordinances. *Hatley v. Umatilla County*, __ Or LUBA __ (LUBA Nos. 2012-017 and 2012-018, Order, July 2, 2012).

ORS 197.615(1) and its implementing administrative rule, OAR chapter 660, division 018, require that, when a local government adopts a proposed "change" to an acknowledged comprehensive plan or a land use regulation, the local government must submit the decision to the Director of DLCD within 20 days after making the decision. OAR 660-018-0010(1)(a) defines "change" as follows:

> "A 'change' to an acknowledged comprehensive plan or land use regulation means an amendment to the plan or implementing land use regulations, including an amendment to the plan text or map. This term includes additions and deletions to the acknowledged plan or regulations, the adoption of a new plan or regulation, or the repeal of an acknowledged plan or regulation."

On its face, Order No. 2012-21 simply adopts additional findings to respond to LUBA's remand under the sixth assignment of error in *Cosner*. The findings adopted by Order No. 2012-21 conclude that the 2011 ordinances are consistent with applicable comprehensive plan policies. If that is all Order No. 2012-21 does, then it is clearly not a "change" to an acknowledged comprehensive plan or land use regulation under the OAR 660-018-0005(1)(a) definition of "change," for purposes of ORS 197.615(1). And, if so, the appeal deadline is supplied by the first sentence of ORS 197.830(9).

Nonetheless, petitioner argues that Order No. 2012-21 implicitly *re-adopts* the 2011 ordinances, which amended the text of the county's land use regulations, and which were clearly "changes" to the county's acknowledged land use regulations when they were initially

adopted. Petitioner contends that *re-adopting* the 2011 ordinances similarly constitutes a "change" to the acknowledged land use code, and therefore ORS 197.615(1) requires the county to provide notice of that adoption to DLCD and parties entitled to notice under the statute. In turn, petitioner argues, that means that the deadline to appeal Order 2012-021 to LUBA is supplied by the second sentence of ORS 197.830(9), 21 days from the date "notice of the decision sought to be reviewed is mailed" to parties entitled to notice.

Petitioner argues that *Cosner*, by remanding the three 2011 ordinances for the county to take corrective action, necessarily rendered those ordinances ineffective, until further formal action is taken to readopt them. According to petitioner, the county understood and intended that Order 2012-21 be the vehicle to re-instate or re-adopt the three 2011 ordinances. The minutes of a February 28, 2012 county board of commissioners' meeting to adopt Order No. 2012-21 are attached to petitioner's Response as Exhibit 4. In those minutes a commissioner expresses his understanding, confirmed by county counsel, that the remanded 2011 ordinances are in "limbo" and that by "adopting the proposed order, it takes us out of limbo and what was approved in July [2011] becomes the governing document again[.]"

Petitioner is correct that after remand in *Cosner* the 2011 ordinances were no longer effective, and required some formal action to render them effective again after the county addressed the bases for LUBA's remand. *Turner v. Jackson County*, 62 Or LUBA 199, 210 (2010); *NWDA v. City of Portland*, 58 Or LUBA 533, 541-42 (2009); *Western States v. Multnomah County*, 37 Or LUBA 835, 842-43 (2000). We do not understand the county to dispute that the commissioners intended that Order 2012-21 be the vehicle to render the 2011 ordinances effective again after remand.

For purposes of this appeal, we will assume without deciding that Order No. 2012-21 had the legal effect of readopting the 2011 Ordinances and should therefore be treated as a post-acknowledgment plan amendment. Under that assumption, Order No. 2012-21 was subject to the ORS 197.615(1) requirement that the county provide a copy of the decision to

DLCD and the ORS 197.615(4)(a) requirement that the county provide "notice to persons that * * * [p]articipated in the local government proceedings that led to the decision to adopt the change to the acknowledged comprehensive plan or the land use regulation[.]" *See* n 2. We also will assume without deciding that the deadline for the notice of intent to appeal Order No. 2012-21 is governed by the second sentence of ORS 197.830(9), which provides "[a] notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615."

Order No. 2012-21 was adopted on February 27, 2012. Even if we assume petitioner was a party entitled to notice under ORS 197.615(4), written notice of that decision was sent to petitioner and petitioner's counsel on February 29, 2012. Petitioner did not file its notice of intent to appeal Order No. 2012-21 until 50 days later, on April 19, 2012. Therefore, even if the deadline for filing petitioner's notice of appeal is governed by the second sentence of ORS 197.830(9), it was not timely filed.

Nonetheless, we understand petitioner to argue that the 21-day deadline for petitioner to appeal to LUBA is tolled until the county provides a copy of the decision to DLDC as required by ORS 197.615(1). We disagree. The 21 day period to appeal under the second sentence of ORS 197.830(9) commences on the date "notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615." ORS 197.615(1) obligates the county to provide DLCD a copy of the decision, not "notice" of the decision. *See* n 2. It is ORS 197.615(4) that requires that the local government "mail, or otherwise deliver, notice to persons" who become entitled to notice because they participated in the local proceedings and requested in writing that the local government provide notice of the decision. In short, the "notice of the decision" referred to in the second sentence of ORS 197.830(9) is not referring to the copy of the decision provided to DLCD

under ORS 197.615(1). Rather, the "notice of the decision" is referring to the notice of decision mailed to parties entitled to notice under ORS 197.615(4).[3] Accordingly, the 21-day deadline to appeal Order No. 2012-12 commenced on February 29, 2012, the date the county mailed notice of the decision to the parties entitled to notice, which included petitioner.

ODOT v. City of Oregon City, 153 Or App 705, 959 P2d 615 (1998), is not to the contrary. In *ODOT*, the Court of Appeals agreed with LUBA that the 21-day deadline for appealing a post-acknowledgment plan amendment under the second sentence of ORS 197.830(9) is measured from the date the local government mails notice of the decision to those entitled to notice under ORS 197.615, even for those persons who were *not* entitled to notice of the decision under ORS 197.615. Petitioner ODOT appealed within 21 days of the date the city mailed notice of the decision, but ODOT was not one of the parties entitled to notice of the decision. The city argued that the first sentence of ORS 197.830(9) supplied ODOT's appeal deadline. The Court rejected that argument, concluding that the second sentence controlled, and that because there is always a mailing requirement under ORS 197.615, the appeal deadline for all parties is measured from the date the notice is mailed, even for parties not otherwise entitled to notice.

ODOT v. City of Oregon City does not suggest that a party entitled to notice of the decision and who did receive notice may file an appeal more than 21 days from the date the notice was mailed, simply because DLCD was not provided a copy of the decision pursuant to ORS 197.615(1). Those facts were not present in *ODOT*, and we do not believe that the Court would conclude on the present facts that petitioner's appeal 50 days after notice was mailed to him was timely filed.

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[3] The phrase "notice of the decision" used in the second sentence of ORS 197.830(9) may also include the electronic notice that DLCD provides to persons who have requested notice from DLCD, pursuant to ORS 197.615(3). However, we need not address that question.

For the foregoing reasons, we conclude that we lack jurisdiction over the appeal of Order No. 2012-21.

Typically, we would at this point issue a final opinion and order dismissing this appeal. However, this appeal challenges a decision that is closely related to the two decisions at issue in LUBA Nos. 2012-017/018. The record of these appeals would, presumably, be identical, since all three decisions resulted from a single proceeding. If we issue a final opinion and order dismissing this appeal, and petitioner appeals that disposition to the Court of Appeals while we proceed on the appeals of the two ordinances at issue in LUBA Nos. 2012-017/018, it is possible that cross-over issues and disjointed timing will complicate either the Court's review or ours. Although it is rather unusual, we conclude that the most prudent course is to delay issuing our final opinion and order in this appeal until the date we issue the final opinion and order in LUBA Nos. 2012-017/018.

Accordingly, we consolidate LUBA No. 2012-030 with LUBA Nos. 2012-017/018 for the limited purpose of ensuring that the three appeals are disposed on the same review schedule.

Dated this 2nd day of July, 2012,

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Tod A. Bassham
Board Chair