

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 1000 FRIENDS OF OREGON and)
5 KRISTI DeSYLVIA,)
6) LUBA Nos. 90-135, 90-136,
7 Petitioners,) 90-137, 90-138, 90-139,
8) 90-140 and 90-141
9 vs.)
10) FINAL OPINION
11 CITY OF TROUTDALE,) AND ORDER
12)
13 Respondent.)

14
15
16 Appeal from City of Troutdale.

17
18 Robert L. Liberty, Portland, filed a petition for
19 review and argued on behalf of petitioner 1000 Friends of
20 Oregon.

21
22 Kristi DeSylvia, Troutdale, filed a petition for review
23 and argued on her own behalf.

24
25 E. Shane Reeder, Gresham, filed the response brief and
26 argued on behalf of respondent. With him on the brief was
27 Jennings & Vanagas.

28
29 HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,
30 Referee, participated in the decision.

31
32 DISMISSED 05/04/92

33
34 You are entitled to judicial review of this Order.
35 Judicial review is governed by the provisions of ORS
36 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners challenge four ordinances. The challenged
4 ordinances adopt amendments to the city's acknowledged
5 comprehensive plan and land use regulations affecting land
6 described as the County Farm property.

7 **FACTS**

8 The County Farm property includes 11 parcels and
9 encompasses 330 acres. One of the ordinances challenged in
10 this appeal creates a new plan map designation, "Regional
11 Mixed Use" (RMU). A second ordinance amends the Troutdale
12 Development Code. The amended development code includes a
13 General Commercial (GC) zoning designation. The third and
14 fourth ordinances apply the RMU plan designation to the
15 County Farm property and apply GC zoning to a significant
16 portion of the County Farm property. The RMU and GC plan
17 and zoning designations would allow the County Farm property
18 to be developed for a variety of intensive regionally
19 oriented commercial uses, including a regional shopping
20 center.

21 Petitioners argue the new plan and zoning designations
22 for the County Farm property will permit approval of a level
23 and type of commercial development that will violate a
24 number of Statewide Planning Goal 12 (Transportation), city
25 comprehensive plan and Metropolitan Service District
26 Regional Transportation Plan (RTP) requirements designed to

1 assure an efficient public transportation system and reduce
2 reliance on the automobile as a means of transportation.

3 The nature of the issues raised by petitioners in this
4 appeal is important in determining whether we have
5 jurisdiction to consider those issues. Two of the
6 ordinances challenged in this appeal simply adopt the
7 disputed plan and zoning designations and do not apply those
8 designations to particular properties. The other two
9 ordinances apply those plan and zoning designations to the
10 County Farm property. However, the issues petitioners raise
11 in this appeal all concern the propriety of the RMU and GC
12 plan and zoning designations, as the city has applied them
13 to the County Farm property. We do not understand
14 petitioners to argue the RMU and GC plan and zoning
15 designations themselves conflict with Goal 12, the
16 comprehensive plan or the RTP. With this understanding of
17 the issues presented in this appeal, we turn to the question
18 of whether we have jurisdiction to consider those issues.

19 **JURISDICTION**

20 **A. Jurisdictional Exception for Matters Subject to**
21 **Periodic Review by the Department of Land**
22 **Conservation and Development (DLCD)**

23 The challenged plan and land use regulation amendments
24 were submitted to DLCD for periodic review in 1990. Like
25 the parties, we assume the provisions of ORS 197.640 to
26 197.650 (1989) and the provisions of OAR Chapter 660,
27 Division 19 govern DLCD's periodic review of the challenged

1 plan and land use regulation amendments.¹

2 This Board has exclusive jurisdiction to review land
3 use decisions. ORS 197.825(1). As the term "land use
4 decision" is defined by ORS 197.015(10)(a), comprehensive
5 plan and land use regulation amendments are land use
6 decisions subject to our review. However, ORS 197.825(2)(c)
7 (1989) provides that our review jurisdiction "[d]oes not
8 include those matters over which [DLCD] has review authority
9 under ORS * * * 197.640 to 197.650." Because a single land
10 use decision may include matters subject to review by LUBA,
11 as well as other matters subject to review by DLCD,
12 ORS 197.840(1)(a)(B) (1989) provides that LUBA may defer its
13 review where the challenged decision involves a plan or land
14 use regulation provision that has been submitted to DLCD for
15 periodic review. Thus, ORS 197.840(1)(a)(B) (1989) allows
16 LUBA to wait until DLCD has completed its review of all
17 periodic review matters before proceeding with review of
18 matters that are not subject to review by DLCD in periodic
19 review. This appeal was suspended by stipulation of the
20 parties on January 30, 1991. On October 18, 1991, citing

¹The legislature adopted amendments to the statutory provisions governing periodic review of acknowledged comprehensive plans and land use regulations in 1991. Those new provisions are codified at ORS 197.628 through ORS 197.650. DLCD also adopted new administrative rules governing periodic review in 1991. OAR Chapter 660, Division 25. However, OAR 660-25-190 provides that in certain circumstances where periodic review proceedings were begun prior to the 1991 legislative amendments, the local government may continue under the prior periodic review statutory provisions and OAR Chapter 660, Division 19.

1 lack of progress in the periodic review proceeding before
2 DLCD, petitioner 1000 Friends of Oregon moved to reactivate
3 this appeal.

4 Respondent previously moved to dismiss this appeal,
5 arguing DLCD has exclusive jurisdiction to review the
6 challenged decisions under ORS 197.825(2)(c) (1989).
7 However, as we explain above, LUBA and DLCD share review
8 jurisdiction over postacknowledgment plan and land use
9 regulation amendments submitted to DLCD for periodic review
10 pursuant to ORS 197.640 to 197.650 (1989). Respondent did
11 not offer any argument explaining why it believes
12 petitioners in this appeal seek to raise "matters over which
13 [DLCD] has review authority under [periodic review]."
14 Citing that failure, we denied the motion to dismiss.
15 However, we also stated that respondent was free to argue in
16 its brief on the merits that the issues raised in the
17 petition for review are reviewable by DLCD under ORS 197.640
18 to 197.650 (1989) and, therefore, beyond our review
19 jurisdiction by virtue of ORS 197.825(2)(c) (1989). We now
20 consider whether the issues petitioners raise in this appeal
21 are matters over which DLCD has jurisdiction under
22 ORS 197.640 to 197.650 (1989).

23 **B. The Periodic Review Process**

24 Following acknowledgment, DLCD is required to
25 "periodically review each local government's
26 comprehensive plan and land use regulations to
27 insure they are in compliance with the goals * *

1 *." (Emphasis added.) ORS 197.640(1) (1989).

2 The purpose of periodic review is to assure that
3 comprehensive plans and land use regulations remain in
4 compliance with the statewide planning goals. However,
5 DLCD's review under ORS 197.640 to 197.650 (1989) is not the
6 same type of review that is followed in granting
7 acknowledgment under ORS 197.251, where comprehensive plans
8 and land use regulations are reviewed in their entirety for
9 compliance with the statewide planning goals. Periodic
10 review is more limited in nature.

11 Under ORS 197.641(1) (1989), a local government is
12 required to submit a final periodic review order which
13 includes any comprehensive plan and land use regulation
14 amendments adopted to satisfy the periodic review factors of
15 ORS 197.640(3) (1989). ORS 197.640(3) (1989) provides, in
16 relevant part, as follows:

17 "* * * Through [periodic review], the city * * *
18 shall determine if any of the following factors
19 apply and take any action necessary to bring the
20 plan and regulations into compliance with the
21 goals or to make them consistent with state agency
22 plans and programs:

23 "(a) There has been a substantial change in
24 circumstances, including, but not limited to,
25 the conditions, findings or assumptions upon
26 which the comprehensive plan or land use
27 regulations were based so that the
28 comprehensive plan or land use regulations do
29 not comply with the goals;

30 "* * * * *

31 "(d) The city * * * has not performed additional

1 planning that:

2 "(A) Was required in the comprehensive plan
3 or land use regulations at the time of
4 initial acknowledgment or that was
5 agreed to by the city or county in the
6 receipt of state grant funds for review
7 and update; and

8 "(B) Is necessary to make the comprehensive
9 plan or land use regulations comply with
10 the goals." (Emphases added.)

11 Thus, a local government need only adopt, and submit for
12 periodic review, those plan and land use regulation
13 amendments necessitated by one or more of the periodic
14 review factors set out in ORS 197.640(3) (1989).

15 The city's final periodic review order includes the
16 following:

17 "Findings: LCDC's August 1983 acknowledgment of
18 the City's Plan included an update requirement 'to
19 determine uses on the County Farm property and to
20 assure that the City's housing mix and density
21 requirements are met.'

22 "The DLCD Periodic Review notice calls for
23 performing these planning tasks 'as part of the
24 periodic review process or else the review order
25 must explain why the requirement no longer
26 applies.'

27 "Response: The County Farm was rezoned in 1986 as
28 part of the rezoning of lands previously zoned SR
29 and A-1-B within the City. In 1990 the City
30 substantially modified the zoning of parts of the
31 County Farm as a part of the periodic review.
32 These new zoning changes recognize substantial
33 changes in circumstances which were not addressed
34 when the land uses were designated on this
35 property in 1986. Identified substantial changes
36 addressed by this plan amendment include: the
37 proposed Mt. Hood Parkway, improved economic

1 conditions and the sale and pending restoration of
2 the Edgefield Manor." Record 834.

3 The discussion that follows the language quoted above
4 makes it somewhat unclear whether the challenged ordinances,
5 so far as they affect the County Farm property, were adopted
6 (1) to comply with DLCD's directive that action be taken to
7 assure that housing density and mix requirements are met on
8 the County Farm property, (2) to respond to a "substantial
9 change in circumstances," or (3) to respond to both periodic
10 review factors. In any event, the final periodic review
11 order states that, with regard to the County Farm property,
12 the amendments were necessitated by at least one periodic
13 review factor. More importantly, there is no dispute that
14 the challenged plan and land use regulation amendments have
15 been submitted to DLCD for periodic review.

16 **C. DLCD's Scope of Review in Periodic Review**

17 While the scope of DLCD's review in periodic review is
18 limited, we do not believe it is as limited as petitioners
19 suggest in their response to the motion to dismiss. Here,
20 the city adopted plan and land use regulation provisions for
21 a particular property to respond to one or more period
22 review factors. Determining whether such plan and land use
23 regulation amendments comply with the statewide planning
24 goals, so that the acknowledged plan and land use
25 regulations as a whole remain in compliance with the goals,
26 is the very purpose of periodic review. That purpose could
27 not be achieved if DLCD's review of such amendments were

1 limited to review for compliance with the particular goal
2 requirement that may have triggered the periodic review
3 factor in the first place.

4 Of course it could be, as petitioners argue, that in
5 reviewing plan and land use regulation provisions in
6 periodic review DLCD's review is limited to the particular
7 goal requirements that may have operated in conjunction with
8 a periodic review factor to require that the new or amended
9 plan and land use regulation be adopted. In that event,
10 presumably, LUBA would retain jurisdiction to review such
11 new or amended plan and land use regulations for compliance
12 with all remaining goal requirements. However we see
13 nothing in ORS 197.640 to 197.650 (1989) to require that
14 DLCD's review be so limited. Those statutes, to the
15 contrary, repeatedly refer to the goals, not the particular
16 goal requirements that may initially trigger a periodic
17 review factor. Absent a clearer indication in the statutes
18 to suggest an intent that DLCD conduct such a limited
19 review, we do not agree such a limited review by DLCD is
20 required.

21 In this case, even if the challenged plan and land use
22 regulation amendments were adopted to respond to Goal 10
23 (Housing) or the Goal 10 administrative rule requirements
24 under the ORS 197.640(3)(d) (1989) factor, those amendments
25 clearly could have direct or indirect impacts on
26 transportation issues under Goal 12 as well as on the

1 requirements of a number of other goals. Petitioners argue
2 the challenged amendments raise significant and obvious Goal
3 12 issues. Assuming that is the case, those goal issues
4 must be resolved during periodic review by DLCD. To
5 construe ORS 197.640 to 197.650 (1989) otherwise, would mean
6 DLCD could be required to ignore obvious goal violations
7 caused by plan and land use regulation amendments, so long
8 as those amendments were adequate to respond to the
9 particular goal requirements that directly supported a
10 particular periodic review factor requirement in the first
11 place.

12 Similarly, even if the city in this case was relying
13 solely on a significant change in circumstances, the
14 particular changed circumstances that motivated the plan and
15 land use regulation amendments may have nothing to do with
16 certain goal requirements. However that does not mean the
17 plan and land use regulation amendments adopted to respond
18 to those changed circumstances will not impact those goal
19 requirements. Again, once a new or amended plan or land use
20 regulation provision is adopted to respond to a periodic
21 review factor and submitted to DLCD for periodic review,
22 DLCD is required to review the new or amended plan or land
23 use regulation provision for compliance with all the goals.
24 DLCD is not limited in its review to the goal requirements
25 that initially triggered the periodic review factor.

26 We reject petitioners' suggestion that requiring DLCD

1 to conduct a complete statewide planning goal compliance
2 review of new or amended plan and land use regulation
3 provisions adopted to comply with one or more periodic
4 review factors constitutes reacknowledgment of the entire
5 plan and land use regulations or is inconsistent with ORS
6 197.640 to 197.650 (1989). There can be no doubt that after
7 acknowledgment all new or amended plan and land use
8 regulation provisions must comply with the statewide
9 planning goals. 197.175(2)(a); 1000 Friends of Oregon v.
10 Jackson County, 79 Or App 93, 98, 718 P2d 753, rev den 301
11 Or 445 (1986); Ludwick v. Yamhill County, 72 Or App 224, 696
12 P2d 536, rev den 299 Or 443 (1985). The only question then
13 is whether that determination is made entirely by DLCD,
14 where the plan or land use regulation amendment is adopted
15 to comply with one or more periodic review factors and
16 submitted to DLCD for periodic review. We conclude
17 ORS 197.640 to 197.650 (1989) envision that in periodic
18 review DLCD will resolve all goal compliance issues
19 associated with new or amended plan or land use regulation
20 provisions adopted to comply with one or more periodic
21 review factors, regardless of whether those goal compliance
22 issues are directly related to the periodic review factor
23 that necessitated the new or amended plan or land use
24 regulation in the first place.

25 We emphasize that periodic review does not require or
26 allow DLCD to reconsider the plan and land use regulations

1 in their entirety for goal compliance. However, we see
2 nothing in the statutes to suggest that DLCD need not
3 conduct a complete goal compliance review of the new or
4 amended plan provisions that are adopted to respond to a
5 periodic review factor. DLCD's goal compliance review must
6 be limited to goal compliance issues raised directly or
7 indirectly by the new or amended provisions themselves, but
8 it must be a complete goal compliance review of such new or
9 amended provisions.

10 **D. Conclusion**

11 In conducting its periodic review of the disputed
12 ordinances, DLCD is required to determine whether the new
13 plan and zoning designations applied to the County Farm
14 property violate Goal 12. Under Goal 2 (Land Use Planning),
15 DLCD is required in periodic review to assure that the
16 challenged amendments do not conflict with provisions of the
17 comprehensive plan or applicable provisions of the RTP.
18 Because all of these matters are subject to review by DLCD,
19 they are beyond LUBA's review jurisdiction. ORS
20 197.825(2)(c) (1989).

21 This appeal is dismissed.

22