

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4
5 SWALLEY IRRIGATION DISTRICT,
6 *Petitioner,*

7
8 and
9

10 ROSE & ASSOCIATES, LLC
11 and CENTRAL OREGON LANDWATCH,
12 *Intervenors-Petitioners,*

13
14 vs.

15
16 CITY OF BEND,
17 *Respondent,*

18
19 and
20

21 BROOKS RESOURCES CORPORATION,
22 NEWLAND COMMUNITIES, LLC,
23 SHEVLIN SAND & GRAVEL, LLC, TUMALO CREEK
24 DEVELOPMENT, LLC, MILLER TREE FARM, LLC, MARK ANDERSON,
25 RICHARD CARPENTER, JELINDA CARPENTER,
26 and JOHN McGILVARY,
27 *Intervenors-Respondents.*

28
29 LUBA Nos. 2009-012, 2009-013, 2009-031 and 2009-032
30

31 FINAL OPINION
32 AND ORDER
33

34 Appeal from City of Bend.
35

36 Wendie L. Kellington, Lake Oswego, represented petitioner Swalley Irrigation
37 District.
38

39 Robert S. Lovlien, Bend and Edward P. Fitch, Redmond, represented intervenor-
40 petitioner Rose & Associates, LLC.
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42 Paul D. Dewey, Bend, represented intervenor-petitioner Central Oregon Landwatch.
43

44 Mary A. Winters, Bend and Roger A. Alfred, Portland, represented respondent City
45 of Bend.

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2 Jeffrey G. Condit and Kelly S. Hossaini, Portland, represented intervenor-respondent
3 Brooks Resources Corporation.

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5 Liz Fancher, Bend, represented intervenor-respondent Newland Communities, LLC.

6
7 Corinne C. Sherton, Salem, represented intervenor-respondent Shevlin Sand &
8 Gravel, LLC.

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10 David C. Allen, Madras, represented intervenor-respondent Tumalo Creek
11 Development, LLC.

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13 Steven W. Abel, Portland, represented intervenor-respondent Miller Tree Farm, LLC.

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15 Andrew H. Stamp, Lake Oswego, represented intervenor-respondent Mark Anderson.

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17 Bruce W. White, Bend, represented intervenors-respondents Richard Carpenter,
18 Jelinda Carpenter, John McGilvary.

19
20 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
21 participated in the decision.

22
23 DISMISSED

05/08/2009

24
25 You are entitled to judicial review of this Order. Judicial review is governed by the
26 provisions of ORS 197.850.

MOTIONS TO INTERVENE

Rose & Associates, LLC and Central Oregon Landwatch move to intervene on the side of the petitioner in these appeals. The motions are granted.

Brooks Resources Corporation, Newland Communities, LLC, Shevlin Sand & Gravel, LLC, Tumalo Creek Development, LLC, Miller Tree Farm, LLC, Mark Anderson, Richard Carpenter, Jelinda Carpenter and John McGilvary move to intervene on the side of the respondent in these appeals. There is no opposition to the motions and they are granted.

NATURE OF THE DECISIONS

A number of appeals resulted from the City of Bend's amendment of its urban growth boundary (UGB) to add approximately 5,900 acres. On January 5, 2009, the city adopted three separate ordinances that were subsequently appealed to LUBA. On February 11, 2009, Deschutes County adopted two ordinances that have also been appealed to LUBA. We briefly describe each of those decisions before turning to this challenge to the City of Bend's decisions.

A. City of Bend UGB Amendment

City of Bend Ordinance NS-2112 amended the text and map of the Bend General Plan (BGP) to reflect the UGB expansion and the assignment of plan designations to the new areas, and also amended several other elements of the BGP. Record 1050-1051. Ordinance NS-2112 was appealed in LUBA Nos. 2009-012 and 2009-031.¹

¹ In LUBA Nos. 2009-031 and 2009-032, petitioner filed new notices of intent to appeal Ordinances NS-2112 and NS-2113, apparently due to confusion over whether the ordinances had become final at the time that the appeals in LUBA Nos. 2009-012 and 2009-013 were filed. In an order issued this date we bifurcate LUBA Nos. 2009-031 and 2009-032 from LUBA Nos. 2009-033 and 2009-034 and consolidate LUBA Nos. 2009-031 and 2009-032 with LUBA Nos. 2009-012 and 2009-013.

1 **B. City of Bend Development Code Amendments**

2 City of Bend Ordinance NS-2113 amended Chapter 10 of the Bend Development
3 Code to adopt new urban holding zones for the expanded UGB. Ordinance NS-2113 was
4 appealed in LUBA Nos. 2009-013 and 2009-032.

5 **C. Bend Public Facilities Plan Amendments**

6 City of Bend Ordinance NS-2111 adopted Water Public Facilities Plans and Sewer
7 Public Facilities Plans as amendments to the Public Facilities Element of the Bend General
8 Plan (BGP). Record 35-36. Ordinance NS-2111 was appealed in LUBA Nos. 2009-010,
9 2009-011, and 2009-020.²

10 **D. Deschutes County Amendments**

11 On February 11, 2009, Deschutes County adopted Ordinance Nos. 2009-001 and
12 2009-002, which amended the Deschutes County Code, the county’s comprehensive plan
13 goals and policies, the comprehensive plan map and the county’s transportation systems plan
14 in conjunction with the City of Bend UGB expansion. Deschutes County Ordinance Nos.
15 2009-001 and 2009-002 were appealed in LUBA Nos. 2009-033 and 2009-034. *See* n 1.

16 **MOTION TO DISMISS**

17 **A. The City’s Motion**

18 On March 9, 2009, the city moved to dismiss the appeals of Ordinance NS-2112
19 (LUBA Nos. 2009-012 and 2009-031) and Ordinance NS-2113 (LUBA Nos. 2009-013 and
20 2009-032). The city argues that under ORS 197.825(2)(c)(A), LUBA does not have
21 jurisdiction over the decisions that are the subject of those appeals. The city argues that
22 pursuant to ORS 197.626, those ordinances are subject to review by the Land Conservation
23 and Development Commission (LCDC), through the Department of Land Conservation and

² In orders dated January 20, 2009 and January 29, 2009 we consolidated the appeals of NS-2111 (LUBA Nos. 2009-010, 011, and 020) with the appeals of NS-2112 (LUBA No. 2009-012) and NS-2113 (LUBA No 2009-013). In an order issued this date, we bifurcated LUBA Nos. 2009-010, 011 and 020 from LUBA Nos. 2009-012 and 2009-013.

1 Development (DLCD) under the provisions of ORS 197.628 through 197.650 (periodic
2 review statutes). Subsequent to filing its motion to dismiss, on April 17, 2009, the city filed
3 a “Notice of Submittal to DLCD Pursuant to ORS 197.825(2)(c)” indicating that Ordinances
4 NS 2112 and NS 2113 have been submitted to DLCD under ORS 197.626.

5 **B. Jurisdictional Statutes and Rules**

6 ORS 197.825(2)(c) was enacted in its current form by the 2005 legislature and took
7 effect on January 1, 2006. That statute provides that, as relevant, LUBA’s jurisdiction:

8 “(c) Does not include a local government decision that is:

9 “(A) Submitted to the Department of Land Conservation and
10 Development for acknowledgment under ORS 197.251,
11 197.626 or 197.628 to 197.650 or a matter arising out of a local
12 government decision submitted to the department for
13 acknowledgment, unless the Director of the Department of
14 Land Conservation and Development, in the director’s sole
15 discretion, transfers the matter to [LUBA] * * *.”

16 ORS 197.626 provides:

17 **“Expanding urban growth boundary or designating urban or rural**
18 **reserves subject to periodic review. * * * [A] city with a population of 2,500**
19 *or more within its urban growth boundary that amends the urban growth*
20 *boundary to include more than 50 acres or that designates urban reserve*
21 *under ORS 195.145, or a county that amends the county’s comprehensive plan*
22 *or land use regulations implementing the plan to establish rural reserves*
23 *designated under ORS 195.141, shall submit the amendment or designation to*
24 *the Land Conservation and Development Commission in the manner provided*
25 *for periodic review under ORS 197.628 to 197.650.” (Bold in original, italics*
26 *added.)*

27 Swalley Irrigation District (Swalley) and Rose & Associates, LLC oppose the city’s
28 motion to dismiss. First, Swalley argues that even if the city has now submitted Ordinances
29 NS-2112 and NS-2113 to DLCD for review, the decisions that were submitted to DLCD did
30 significantly more than merely amend the UGB. Swalley contends that DLCD’s jurisdiction
31 only extends to the UGB amendment portion of the submitted ordinances, and DLCD’s
32 scope of review extends only to review of the ordinances for compliance with the statewide

1 planning goals. Swalley contends that LUBA retains jurisdiction over the same decisions
2 and has exclusive authority to review the same decisions for all other non-goal issues.

3 In support of its argument, Swalley argues that ORS 197.626 refers only to UGB
4 amendments and requires the city to submit UGB amendments to DLCD, and that DLCD is
5 without authority to review any other part of the submitted decisions other than the UGB
6 amendment. Swalley argues that the use of the phrase “arising out of” in ORS
7 197.825(2)(c)(A) indicates that the legislature intended that LCDC’s authority over local
8 government decisions submitted to DLCD for review under ORS 197.626 would be limited.
9 Swalley also cites OAR 660-025-0040(1), which provides that LCDC has exclusive
10 jurisdiction to review UGB amendments for compliance with the statewide planning goals.³
11 Finally, Swalley cites several cases in support of its position.

12 Prior to the 2005 amendments to ORS 197.825(2)(c), LUBA and LCDC shared
13 jurisdiction over different aspects of the same land use decisions, and that shared jurisdiction
14 sometimes created confusion over whether issues raised in various appeals should be decided

³ OAR 660-025-0040 provides in its entirety:

“Exclusive Jurisdiction of LCDC

“(1) The commission, pursuant to ORS 197.644(2), has exclusive jurisdiction to review the evaluation, work program, and all work tasks for compliance with the statewide planning goals and applicable statutes and administrative rules. Pursuant to ORS 197.626, the commission has exclusive jurisdiction to review the following land use decisions for compliance with the statewide planning goals:

“(a) If made by a city with a population of 2,500 or more inside its urban growth boundary, amendments to an urban growth boundary to include more than 50 acres;

“(b) If made by a metropolitan service district, amendments to an urban growth boundary to include more than 100 acres;

“(c) plan and land use regulations that designate urban reserve areas.

“(2) The director may transfer one or more matters arising from review of a work task, urban growth boundary amendment or designation or amendment of an urban reserve area to the Land Use Board of Appeals pursuant to ORS 197.825(2)(c)(A) and OAR 660-025-0250.” (Bold in original.)

1 by LUBA or LCDC under *former* ORS 197.825(2)(c).⁴ *See, e.g., Century Properties, LLC v.*
2 *City of Corvallis*, 50 Or LUBA 691, 701 (2005) (order denying city’s motion to dismiss, and
3 noting that LUBA’s scope of review of the challenged decisions was limited but not entirely
4 clear and that the possibility existed for different resolution by LUBA and LCDC of the same
5 legal issues); *Manning v. Marion County*, 45 Or LUBA 1, 14 (2003) (affirming county’s
6 decision after concluding that the issues identified by the petitioners were goal compliance
7 issues that LUBA did not have authority to review under *former* ORS 197.825(2)); *Citizens*
8 *Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001), *aff’d* 179 Or App 468, 40
9 P3d 556 (2002) (affirming the challenged decision because no bases for reversal or remand
10 that were within LUBA’s scope of review of the challenged decision had been presented). It
11 is fair to characterize the 2005 amendments to ORS 197.825(2)(c) as attempting to eliminate
12 some of the confusion created by shared jurisdiction over the same land use decisions by
13 requiring local government decisions amending a UGB to be submitted to DLCD, after
14 which certain matters may potentially be transferred to LUBA by DLCD.

15 After the 2005 amendments were enacted, DLCD adopted administrative rules to
16 govern its review of UGB amendments and to govern transfers under ORS 197.825(2)(c)(A)
17 to LUBA. OAR 660-025-0175(1) requires that land use decisions amending a UGB must be
18 submitted to DLCD “for review with the statewide planning goals and related statutes and

⁴ *Former* ORS 197.825(2)(c) provided in relevant part:

“The jurisdiction of [LUBA]:

“* * * * *

“(c) 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 197.251, 197.430, 197.445, 197.450, 197.455 and 197.628 to 197.650[.]”

1 rules * * *.” OAR 660-025-0250 specifies which matters that are raised in an appeal of a
2 UGB expansion may be transferred to LUBA under the statute:

3 “(1) When the department receives an appeal of a director’s decision
4 pursuant to OAR 660-025-0150(4), the director may elect to transfer a
5 matter raised in the appeal to the Land Use Board of Appeals (board)
6 under ORS 197.825(2)(c)(A).

7 “(2) Matters raised in an appeal may be transferred by the director to the
8 board when:

9 “(a) The matter is an urban growth boundary expansion approved
10 by the local government based on a quasi-judicial land use
11 application and does not require an interpretation of first
12 impression of statewide planning Goal 14, ORS 197.296 or
13 197.298; or

14 “(b) “(A) The matter alleges the work task submittal violates a
15 provision of law not directly related to compliance with a
16 statewide planning goal;

17 “(B) The appeal clearly identifies the provision of the task
18 submittal that is alleged to violate a provision of law and
19 clearly identifies the provision of law that is alleged to have
20 been violated; and

21 “(C) The matter is sufficiently well-defined that it can be
22 separated from other allegations in the appeal.”

23 Read together, ORS 197.825(2)(c)(A) and ORS 197.626, and the implementing rules
24 adopted by DLCD make clear that after the city of Bend submitted NS-2112 and NS-2113 to
25 DLCD for review under the statutes governing periodic review, LUBA ceased to have
26 jurisdiction over those submitted decisions or over matters arising out of those submitted
27 decisions unless the director of DLCD transfers matters to LUBA pursuant to OAR 661-025-
28 0250(2). The cases cited by Swalley predate the 2005 amendments to ORS 197.825(2)(c),
29 and are inapposite for that reason. And although OAR 660-025-0040(1) still contains
30 language regarding LCDC’s review of UGB amendments for goal compliance, subsection (2)
31 of that rule as well as the other rules that DLCD enacted subsequent to the statutory

1 amendments make clear that DLCD has sole jurisdiction over UGB amendment decisions
2 that are submitted to DLCD except for matters that are transferred to LUBA.

3 Because the city has submitted Ordinances NS-2112 and NS-2113 to DLCD, LUBA
4 does not have jurisdiction over those decisions or matters arising out of the submitted
5 decisions unless it receives a transfer from DLCD. Accordingly, LUBA Nos. 2009-012 and
6 2009-031 (which appeal Ordinance NS-2112) and LUBA Nos. 2009-013 and 2009-032
7 (which appeal Ordinance NS-2113) are dismissed.