

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND
5 CONSERVATION AND DEVELOPMENT,
6 *Petitioner,*

7
8 and

9
10 1000 FRIENDS OF OREGON,
11 *Intervenor-Petitioner,*

12
13 vs.

14
15 CLACKAMAS COUNTY,
16 *Respondent,*

17
18 and

19
20 PACIFIC NORTHWEST SOLAR LLC,
21 *Intervenor-Respondent.*

22
23 LUBA No. 2017-086

24
25 ORDER

26 The challenged decision is an August 24, 2017 land use decision that
27 approves a reasons exception under OAR 660-004-0022(1)(a) and OAR 660-
28 004-0022(3)(c) to Statewide Planning Goal 3 in order to approve a conditional
29 use permit for a 70-acre solar power generation facility located on agricultural
30 land adjacent to the City of Estacada’s urban growth boundary.

31 Under ORS 197.830(14), the statutory deadline for issuing LUBA’s final
32 opinion and order in this appeal was March 26, 2018. At oral argument, held

1 March 8, 2018, the parties agreed to extend the deadline to issue LUBA’s final
2 opinion and order to April 9, 2018. That two-week stipulated extension was
3 based on the understanding that the Oregon Court of Appeals was expected to
4 issue a decision on April 4, 2018, in an appeal of a LUBA decision that
5 involves similar facts and the same legal issues that are presented in this
6 appeal. *1000 Friends of Oregon v. Jackson County*, __ Or LUBA __ (LUBA
7 No. 2017-066, October 27, 2017), *appeal pending* (A166360). *1000 Friends of*
8 *Oregon* involves a reasons exception to Statewide Planning Goal 3 under OAR
9 660-004-0022(1)(a) and OAR 660-004-0022(3)(c) to allow a proposed 80-acre
10 solar power generation facility on agricultural land, located adjacent to the City
11 of Medford’s urban growth boundary.

12 On April 3, 2018, the Board learned that on March 19, 2018, the Court of
13 Appeals had issued an order extending its deadline to issue a decision in *1000*
14 *Friends of Oregon v. Jackson County*, to a date uncertain.

15 Under ORS 197.840, LUBA may on its own motion extend the deadline
16 for issuing its final opinion and order if it makes the findings required under
17 ORS 197.840(1)(d) and (2).¹ We conclude that an extension of the statutory

¹ As relevant, ORS 197.840 provides:

“(1) The following periods of delay shall be excluded from the 77-day period within which the board must make a final decision on a petition under ORS 197.830(14):

“* * * * *

1 deadline is appropriate in this case. Given the similar facts and legal issues that
2 are presented in this appeal and *1000 Friends of Oregon*, the Court of Appeals’
3 decision in the latter case is likely to be dispositive of the present appeal.
4 Delaying issuance of LUBA’s opinion in the present appeal until after the

“(d) Any reasonable period of delay resulting from a continuance granted by a member of the board on the member’s own motion or at the request of one of the parties, if the member granted the continuance on the basis of findings that the ends of justice served by granting the continuance outweigh the best interest of the public and the parties in having a decision within 77 days.

“(2) No period of delay resulting from a continuance granted by the board under subsection (1)(d) of this section shall be excludable under this section unless the board sets forth in the record, either orally or in writing, its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and the other parties in a decision within the 77 days. The factors the board shall consider in determining whether to grant a continuance under subsection (1)(d) of this section in any case are as follows:

“(a) Whether the failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible or result in a miscarriage of justice; or

“(b) Whether the case is so unusual or so complex, due to the number of parties or the existence of novel questions of fact or law, that it is unreasonable to expect adequate consideration of the issues within the 77-day time limit.”

1 Court of Appeals issues its decision in *1000 Friends of Oregon* would
2 potentially avoid an unnecessary appeal of our decision to brief and present
3 legal issues to the Court of Appeals that are already before that body and will
4 be decided shortly.

5 Accordingly, we adopt the following findings under ORS 197.840(1)(d)
6 and (2).

- 7 1. The Board finds that this appeal is of unusual complexity
8 because of potentially dispositive proceedings currently
9 before the Court of Appeals, and that the ends of justice
10 served by granting the continuance outweigh the best
11 interests of the public and the other parties in issuing a final
12 opinion within the statutory deadline.
- 13 2. The Board finds that this appeal presents complex and novel
14 legal issues, including novel questions of law regarding the
15 interpretation of state law applicable to the adoption of a
16 “reasons” exception to allow large solar power generation
17 facilities on resource land under OAR 660-004-0022(1)(a)
18 and -0022(3)(c). The Court of Appeals extended its own
19 deadline in *1000 Friends of Oregon* pursuant to ORS
20 197.855(2) and (3), which requires the Court to consider,
21 among other things, whether the case is “unusual or
22 complex,” and the “existence of novel questions of law[.]”
- 23 3. The Board finds that the failure to grant a continuance on
24 the appeal until such time as the Court of Appeals renders
25 its decision in *1000 Friends of Oregon* would cause
26 unnecessary rulings by this Board, and thus prejudice the
27 interests of the parties, which include an interest in
28 obtaining consistent rulings on the issues presented in the
29 appeals to the Court of Appeals and the appeal to LUBA.
- 30 4. Based on all of the above factors, an extension of the
31 statutory deadline is warranted.

1 The statutory deadline under ORS 197.830(14) for issuing our final
2 opinion and order in this appeal is hereby extended pending issuance of the
3 appellate judgment in *1000 Friends of Oregon*. Thereafter, the Board shall
4 notify the parties in this appeal regarding the deadlines for future events in this
5 appeal.

6 Dated this 5th day of April, 2018.

7

8

9

10

Tod A. Bassham
Board Member