



**NATURE OF THE DECISION**

Petitioners appeal Ordinance 1160, which approves comprehensive plan and zoning map designations for 15 parcels that were previously removed from the City of St. Paul urban growth boundary (UGB).

**FACTS**

The county’s decision is before us for a second time. *Manning v. Marion County*, 42 Or LUBA 56 (2002) involved an appeal of Marion County Ordinance 1152, which adopted comprehensive plan and zoning map designations for 15 parcels that were previously removed from the City of St. Paul UGB. The city decision that removed the parcels from the UGB was made as part of the city’s periodic review. The county, which was also in periodic review, then initiated a legislative process that resulted in Ordinance 1152.

In Ordinance 1152, the county determined that 13 of the 15 parcels removed from the city’s UGB are suitable for agricultural uses, including petitioner’s, and designated these parcels Primary Agriculture.<sup>1</sup> The county also adopted committed exceptions to Statewide Planning Goal 3 (Agricultural Lands) for two of the 15 parcels, and planned and zoned them for rural residential uses.

Petitioner appealed Ordinance 1152 to LUBA, challenging the county’s finding regarding the appropriate comprehensive plan designation and zoning of petitioner’s property. In an opinion dated April 15, 2002, LUBA sustained part of petitioner’s assignment of error, concluding that the county’s findings were inadequate because the county failed to demonstrate that it had considered all potentially suitable comprehensive

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<sup>1</sup> Our decision in *Manning* describes petitioner’s property in some detail. Given our resolution of the issues raised in this case, those details need not be repeated in this opinion.

1 plan map designations for petitioner's property.<sup>2</sup> The county also submitted Ordinance 1152  
2 to the Department of Land Conservation and Development (DLCD) and as part of the *city's*  
3 periodic review work tasks 1 and 5. In an order dated June 24, 2002, DLCD remanded  
4 Ordinance 1152 to the county because it found that the committed exceptions did not comply  
5 with Goal 14 (Urbanization).<sup>3</sup>

6 On May 22, 2002, following remand from LUBA, the board of commissioners issued  
7 an order requesting planning staff to prepare findings regarding the appropriate  
8 comprehensive plan and zoning map designations for petitioner's property. On July 17,  
9 2002, the board of commissioners issued an order directing staff to prepare findings  
10 addressing DLCD's remand. On July 26, 2002, petitioner requested by letter that the county  
11 reopen the evidentiary record on remand from LUBA and conduct additional evidentiary  
12 proceedings. On August 1, 2002, the county sought and obtained permission from DLCD to  
13 include the issue of the appropriate comprehensive plan and zoning map designations for  
14 lands removed from the city's UGB as a new work task 11, as part of the *county's* periodic  
15 review. On August 26, 2002, the county accepted additional evidence regarding one of the  
16 two parcels for which a committed exception was taken, but did not otherwise conduct any  
17 evidentiary proceeding or accept additional evidence.

18 On October 4, 2002, the board of commissioners adopted Ordinance 1160. Exhibit B  
19 of Ordinance 1160 contains findings addressing petitioner's property, while other exhibits

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<sup>2</sup> No issue was raised before LUBA regarding the Board's jurisdiction to review the issues the Board addressed in *Manning*.

<sup>3</sup> The June 24, 2002 order also noted LUBA's remand in *Manning* for inadequate findings. The order concluded that, based on LUBA's remand, Ordinance 1152 was inconsistent with the Statewide Planning Goal 2 (Land Use Planning) requirement that land use plans include identification of factual information, evaluation of alternative courses of action, and ultimate policy choices. Record 86.

1 address other properties. The county submitted Ordinance 1160 to DLCD as a completed  
2 periodic review work task.<sup>4</sup> At the same time, petitioner appealed Ordinance 1160 to LUBA.

3 **JURISDICTION**

4 As we noted in two previous orders in this appeal, LUBA’s jurisdiction does not  
5 include those matters over which the Land Conservation and Development Commission  
6 (LCDC) has review authority. ORS 197.825(2)(c).<sup>5</sup> LCDC has exclusive jurisdiction to  
7 review the evaluation, work program, and all work program tasks for compliance with the  
8 statewide planning goals. OAR 660-025-0040(1).<sup>6</sup> LUBA has exclusive jurisdiction over  
9 land use decisions described in OAR 660-025-0040(1) for other issues. OAR 660-025-  
10 0040(2). Thus, the issues that we may address in this appeal of Ordinance 1160 do not  
11 include issues regarding compliance with statewide planning goals. *DLCD v. City of*  
12 *McMinnville*, 40 Or LUBA 591, 599 (2001).

13 The county argues that because the challenged decision was adopted as a periodic  
14 review work task, and because the issues raised in petitioner’s assignments of error fall

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<sup>4</sup> A final order on the county’s submittal was issued on December 18, 2002. We discuss that order later in this opinion.

<sup>5</sup> ORS 197.825(2) provides, 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[.]”

<sup>6</sup> OAR 660-025-0040 provides, in relevant part:

“(1) The commission, pursuant to ORS 197.644(2), has exclusive jurisdiction to review the evaluation, work program, and all work program tasks for compliance with the statewide planning goals. \* \* \*

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

1 within or implicate matters that are within LCDC’s exclusive jurisdiction, LUBA lacks  
2 jurisdiction to consider any of the issues raised in this case. Because petitioner has failed to  
3 raise any issues within LUBA’s jurisdiction, the county argues, LUBA must affirm the  
4 county’s decision.

5 In the first assignment of error, petitioner argues that the procedures the county  
6 followed on remand of Ordinance 1152 were flawed and resulted in prejudice to petitioner’s  
7 substantial rights. In the second assignment of error, petitioner argues that the county’s  
8 findings that petitioner’s property is properly designated Primary Agriculture are not  
9 supported by substantial evidence. Under the third assignment of error, petitioner challenges  
10 the county’s denial of petitioner’s request for a committed exception to Goal 3, pursuant to  
11 Goal 2 and related statutory and administrative rule standards. In the fourth assignment of  
12 error, petitioner argues that the county’s findings fail to respond to issues petitioner raised  
13 regarding compliance with Goal 14.

14 **A. Third and Fourth Assignments of Error**

15 We agree with the county that the issues raised under the third and fourth assignments  
16 of error raise issues regarding compliance with statewide planning goals and, therefore, are  
17 matters outside our jurisdiction.

18 **B. Second Assignment of Error**

19 The second assignment of error presents a closer question. In responding to LUBA’s  
20 remand, the county adopted additional findings addressing the appropriate plan designation  
21 for petitioner’s property. The initial question the county asked, and answered, was whether  
22 petitioner’s property is properly considered “agricultural land” under Goal 3 and as described  
23 in the Agricultural Lands element of the comprehensive plan, or whether petitioner’s  
24 property should instead be considered non-agricultural land, as petitioner argued.<sup>7</sup> The

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<sup>7</sup> The Marion County Comprehensive Land Use Plan (MCCLUP) Agricultural Lands element describes land subject to agricultural goals and policies, under four “criteria.” Those four criteria are:

1 county discussed the four “criteria” set out in the Agricultural Lands element, and  
2 determined that petitioner’s property met three of the four criteria, and is properly considered  
3 agricultural land.<sup>8</sup> The second question the county asked, and answered, was which of two

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- “a. Soils that are suitable for agricultural production using accepted farming practices, especially Class I-IV soils.
  - “b. Areas of open land that are relatively free [from] non-farm conflicts.
  - “c. Areas that are presently in farm production or are capable of being farmed now or in the future.
  - “d. Those other lands that are necessary to protect farm uses by limiting adjoining non-farm activities.” MCCLUP 17.

<sup>8</sup> The county’s findings state, in relevant part:

“The evidence in the record establishes that all soils on this property are Class I-IV soils. All of the soils on the property are also considered High-Values Farmland Soils because they are either Class II soils or prime soils. (OAR 660-033-0020(8)(a)(B)). The property fits [criterion a] above.

“The property is nearly completely undeveloped with very few structures on the property. The farmer currently farming the property has expressed concern that future development could hinder the ability of the land to be farmed, but there is no evidence in the record as to exactly what the nature of that conflict might be. There is also no evidence that the current farming taking place is being affected by non-farm conflicts in the area. The property fits [criterion b] above.

“Evidence in the record establishes that the property is being farmed now; thus, it is capable of being farmed. The farmer who is currently farming the land has stated his intention to cease farming it in the future, but the record does not include a time frame for this to happen. The record also does not contain any evidence that shows that, if the current farmer ceases to farm the land, the property would not be farmed by others in the area. The property fits [criterion c] above.

“Except for a thirty-foot strip of land adjoining the northwest portion of this parcel, no adjoining land is currently in farm use. Therefore, it would not be necessary to put this property in a farm resource zone in order to protect other farming uses on adjoining properties. Also, the record demonstrates that this property is currently in farm use. [Criterion d] above does not apply.

“The evidence in the record demonstrates that the property meets three of the criteria that reveal property defined as farmland to which farm zoning and farmland protection policies apply under the [MCCLUP]. The property is agricultural land under the comprehensive plan.

“Because the land has been identified as Goal 3 significant agricultural land and it meets the definition of agricultural land in the [MCCLUP], the appropriate designation is an agricultural resource designation and its appropriate implementing zone. \* \* \*” Record 21.

1 potential agricultural designations, Primary Agriculture or Special Agriculture, should be  
2 applied to petitioner’s property. The county concluded that Primary Agriculture and not  
3 Special Agriculture was the appropriate designation.

4 Petitioner challenges the evidentiary support for the county’s initial conclusion that  
5 his property is properly considered agricultural land under the plan criteria. Petitioner argues  
6 that, particularly when viewed in light of more recent evidence, it is clear that his property is  
7 not agricultural land as defined by the comprehensive plan, and that the most appropriate  
8 comprehensive plan map designation is a non-agricultural one that allows for rural residential  
9 uses.

10 The county responds that the issue of whether property is considered agricultural or  
11 nonagricultural land is a quintessential Goal 3 inquiry, and that when that issue is resolved in  
12 a decision adopted to satisfy a periodic review work task, the authority to review the county’s  
13 conclusion that the property is agricultural land is vested solely in LCDC. We understand  
14 petitioner to reply that the issues raised in the second assignment of error have only a  
15 coincidental relationship to Goal 3. According to petitioner, the gravamen of this assignment  
16 of error is the alleged lack of evidentiary support for findings addressing comprehensive plan  
17 criteria. We understand petitioner to argue that simply because the relevant comprehensive  
18 plan criteria implement or are otherwise related to Goal 3 does not make an evidentiary  
19 challenge to findings addressing those criteria a matter of compliance with Goal 3, and hence  
20 a matter within LCDC’s exclusive jurisdiction.

21 Goal 3 defines “agricultural land” in Western Oregon as

22 “\* \* \* land of predominantly Class I, II, III and IV soils \* \* \* as identified in  
23 the Soil Capability Classification System of the United States Soil  
24 Conservation Service, and other lands which are suitable for farm use taking  
25 into consideration soil fertility, suitability for grazing, climatic conditions,  
26 existing and future availability of water for farm irrigation purposes, existing  
27 land-use patterns, technological and energy inputs required, or accepted  
28 farming practices. \* \* \*”

1 Criterion 1 appears to directly implement the first clause of the above definition, while  
2 criteria 2-4 appear to implement the remaining clauses. We agree with the county that the  
3 question of the evidentiary support for the county’s finding that tax lot 200 is agricultural  
4 land under the MCCLUP criteria is inseparable from the question of whether the tax lot 200  
5 qualifies as agricultural land under Goal 3. Therefore, the issue raised under the second  
6 assignment of error is within LCDC’s exclusive jurisdiction.<sup>9</sup>

7 **C. First Assignment of Error**

8 Petitioner contends that the county was required to conduct additional evidentiary  
9 hearings on remand, and the county’s failure to do so or otherwise afford petitioner an  
10 opportunity to update the evidentiary record with respect to the appropriate comprehensive  
11 plan and zoning map designation for his property is procedural error.

12 Petitioner identifies three potential sources for the alleged requirement that the county  
13 conduct an evidentiary proceeding on remand. The first is the administrative rules governing  
14 conduct of periodic review at OAR 660-025-0080 and, relatedly, Statewide Planning Goal 1  
15 (Citizen Involvement). The second is the terms of LUBA’s remand in *Manning*. The third is  
16 based on an argument that adoption of Ordinance 1160 was a quasi-judicial decision, not a  
17 legislative decision, and therefore the county was required to provide petitioner the  
18 procedural protections described in *Fasano v. Washington County Comm.*, 264 Or 574, 581,  
19 507 P2d 23 (1973), prior to designating and zoning his property. We understand the county  
20 to respond that the question of what procedures are required in the context of a decision  
21 adopted to satisfy a periodic review work task is governed exclusively by OAR chapter 660,

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<sup>9</sup> At oral argument, the county suggested that the separate question of whether tax lot 200 should be designated Primary Agriculture or Special Agriculture is one that is driven solely by the MCCLUP and not by Goal 3. We understand the county to suggest that if petitioner had challenged the county’s failure to apply the Special Agriculture designation to tax lot 200, that issue might not fall within LCDC’s exclusive jurisdiction. Whatever the merits of that suggestion, we agree with the county that the issue of whether land is designated for agricultural or nonagricultural uses necessarily implicates Goal 3, and therefore the issue of whether tax lot 200 should be designated for agricultural uses or non-agricultural uses is subject to LCDC’s exclusive jurisdiction, when that issue is resolved in a decision that is adopted to satisfy a periodic review work task.



1 division 025, and that LUBA lacks jurisdiction to review any allegations of procedural error  
2 under that administrative rule. We address these arguments in turn.

3 **1. Goal or Periodic Review-Based Procedural Requirements**

4 We agree with the county that we lack jurisdiction to review allegations of procedural  
5 error that are based on requirements stated in the statewide planning goals or OAR 660,  
6 division 025. As noted, OAR 660-025-0080 requires local governments to provide, through  
7 its citizen involvement program, opportunities to participate “in all phases of the local  
8 periodic review.”<sup>10</sup> Periodic review includes several phases. The first is an evaluation by  
9 the local government as to whether a work program is necessary or not, pursuant to  
10 OAR 660-025-0090. OAR 660-025-0090(1)(a) requires the local government to “follow its  
11 citizen involvement program and the requirements of OAR 660-025-0080 for conducting the

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<sup>10</sup> OAR 660-025-0080 provides:

- “(1) The local government shall use its acknowledged or otherwise approved citizen involvement program to provide adequate participation opportunities for citizens and other interested persons in all phases of the local periodic review. Each local government shall publish a notice in a newspaper of general circulation within the community informing citizens about the initiation of the local periodic review. The local government shall also provide written notice of the initiation of the local periodic review to other persons who, in writing, request such notice.
- “(2) Each local government shall review its citizen involvement program and assure that there is an adequate process for citizen involvement in all phases of the periodic review process. Citizen involvement opportunities shall, at a minimum, include:
  - “(a) Interested persons shall have the opportunity to comment in writing in advance of or at one or more hearings on the periodic review evaluation. Citizens and other interested persons shall have the opportunity to present comments orally at one or more hearings on the periodic review evaluation. Citizens and other interested persons shall have the opportunity to propose periodic review work program tasks prior to or at one or more hearings. Citizens and other interested persons shall receive a response to their comments at or following the hearing on the evaluation.
  - “(b) Interested persons shall have the opportunity to comment in writing in advance of or at one or more hearings on a periodic review work task. Citizens and other interested persons shall have the opportunity to present comments orally at one or more hearings on a periodic review work task. Citizens and other interested persons shall receive a response to their comments at or following the hearing on a work task.”

1 evaluation and determining the scope of a work program.” A person who participated in the  
2 local process leading up to the local government decision on the evaluation and work  
3 program, or the evaluation and decision that no work program is necessary, may object to  
4 LCDC, pursuant to OAR 660-025-0100. To be valid, the objection must demonstrate that the  
5 objecting party participated at the local level during the local process and “[c]learly identify  
6 an alleged deficiency in the evaluation, work program or decision that no work program is  
7 necessary.” OAR 660-025-0100(2). After objections and any appeals related to that  
8 decision are resolved, the local government must then complete the work tasks in the  
9 approved work program. OAR 660-025-0130. Again, a person may file objections to those  
10 completed work tasks. To be valid, such objections must “[c]learly identify an alleged  
11 deficiency in the work task” and “[d]emonstrate that the objecting party participated at the  
12 local level orally or in writing during the local process.” OAR 660-025-0140(2).

13 In the present case, work task 11 was added to the county’s approved periodic review  
14 program, pursuant to OAR 660-025-0170 (allowing the DLCD director to modify an  
15 approved work program at the request of a local government). Assuming without deciding  
16 that petitioner is correct that OAR 660-025-0080 and the county’s citizen involvement  
17 program required the county to provide an opportunity for persons such as petitioner to  
18 participate in the county’s decision leading up to adoption of the ordinance that is intended to  
19 complete work task 11, then it seems reasonably clear that the county’s failure to do so is a  
20 basis for an objection to LCDC under the rules governing periodic review. In short, LCDC’s  
21 rules appear to have reserved to LCDC the authority to address objections based on alleged  
22 violations of OAR 660-025-0080 or local implementing regulations governing the procedural  
23 conduct of periodic review. That being the case, we do not believe it to be consistent with  
24 ORS 197.825(2)(c) for LUBA to review an assignment of error alleging that the local

1 government's procedures under periodic review violated the statewide planning goals or  
2 OAR 660-025-0080 and related local implementing regulations.<sup>11</sup>

## 3                   2.       **Non-Periodic Review Procedural Requirements**

4           The foregoing does not entirely resolve the question of our jurisdiction over the  
5 issues raised in the first assignment of error. While allegations of procedural error involving  
6 goal or rule-based procedural requirements are subject to LCDC's exclusive jurisdiction in  
7 this case, it does not follow that allegations of procedural error involving procedures required  
8 by other sources are also subject to LCDC's exclusive jurisdiction. Assuming that petitioner  
9 has identified one or more sources of procedural requirements that are independent of goal or  
10 rule-based requirements, we see no reason why LUBA would lack jurisdiction to review  
11 allegations of error involving such procedural requirements.<sup>12</sup> We conclude that we have

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<sup>11</sup> We do not pretend to be an authority on how periodic review is conducted under OAR chapter 660, division 25, and we do not intend to interpret those rules any more than is necessary to resolve the jurisdictional issue before us. Our discussion of those rules is intended only to support our view that LCDC has reserved to itself exclusive jurisdiction to address objections that relate to the failure of a local government to comply with OAR 660-025-0080 or its citizen involvement program in conducting one or more phases of periodic review.

<sup>12</sup> We note that LCDC appears to have a similar view of the jurisdictional boundary between LCDC and LUBA. In LCDC's December 18, 2002 order regarding Ordinance 1160, provided to us by the parties, LCDC addressed two different sets of allegations regarding procedural error. The first set of allegations argued that Goal 2 and the administrative rules regarding adoption of an exception to the statewide planning goals required the county to conduct an evidentiary hearing on remand, in order to allow parties to submit evidence and testimony regarding the county's adoption of an exception to Statewide Planning Goal 14 (Urbanization). LCDC agreed that, because the county's original decision did not adopt an exception to Goal 14, and no notice was provided that the county might adopt an exception to Goal 14, Goal 2 required that the county provide a hearing on that issue. Work Task Approval and Remand Order 02-WKTASK-01447, at 12.

The second set of procedural allegations were from petitioner, and include issues raised under the first assignment of error in this case. In particular, petitioner argued to LCDC that because adoption of Ordinance 1160 is properly viewed as a quasi-judicial decision, the county was required to conduct a hearing on remand of Ordinance 1152. Petitioner further alleged that failure to do so denied petitioner due process of law. Petitioner also argued to LCDC, as he does in this appeal to LUBA, that the county erred in relying on time-sensitive (and, in petitioner's view, incorrect) evidence gathered during the county's evidentiary proceedings in 2000, and that the county should have allowed petitioner to submit more recent or updated evidence showing that no farming activity is currently taking place on his property and that the property is unsuitable for agricultural uses. LCDC concluded that it lacked jurisdiction over these issues: "[Petitioner] does not identify any goal or rule provision that the county has violated. [DLCD] finds that the substance of this [issue] is outside the scope of the commission's review authority, and properly resides with LUBA." *Id.* at 13. We understand that LCDC's order is currently on appeal to the Court of Appeals.

1 jurisdiction to review petitioner’s arguments that an evidentiary hearing on remand was  
2 required (1) under the terms of LUBA’s remand and (2) in order to afford petitioner the  
3 procedural protections described in *Fasano*.

4 Turning to the merits of those arguments, we understand petitioner to concede that  
5 the terms of LUBA’s remand did not order the county to conduct an evidentiary proceeding  
6 on remand. Nonetheless, petitioner argues that LUBA’s disposition necessarily required the  
7 county to review certain disputed evidentiary matters and adopt additional findings.  
8 According to petitioner, the findings the county adopted on remand rely on disputed facts  
9 that relate to what was happening on or near petitioner’s property in 2000, nearly three years  
10 prior to the county’s proceedings on remand. We understand petitioner to argue that implicit  
11 in LUBA’s remand was the requirement that the findings adopted on remand regarding the  
12 appropriate plan and zoning map designations for petitioner’s property be based on current,  
13 not stale, information.

14 Petitioner makes a similar argument under *Fasano*. According to petitioner,  
15 Ordinance 1160 is properly viewed as a quasi-judicial decision under the factors described in  
16 *Strawberry Hill 4-Wheelers v. Benton County Bd. of Comm.*, 287 Or 591, \_\_\_ P2d \_\_\_  
17 (1979). Petitioner argues that *Fasano* requires the county to provide petitioner with certain  
18 procedural protections, such as the opportunity to update time-sensitive evidence on remand,  
19 prior to adopting a quasi-judicial decision that amends the comprehensive plan and zoning  
20 map designation for his property.

21 We disagree with both contentions. Nothing in our remand explicitly or implicitly  
22 required the county to ensure that its decision on remand was based on the most recent  
23 information regarding petitioner’s property. Nor does *Fasano* address that issue. Petitioner  
24 participated in the county’s initial evidentiary proceedings leading to the adoption of the  
25 county’s initial decision. Therefore, even if that decision or the decision on remand is  
26 properly viewed as quasi-judicial rather than legislative, petitioner has been afforded the

1 opportunity to present evidence regarding the appropriate comprehensive plan and zoning  
2 designation for his property. Petitioner does not explain why *Fasano* must be read to require  
3 more. Petitioner offers no other potential source for a requirement that the county provide an  
4 additional evidentiary hearing on remand, or that the county ensure that its decision on  
5 remand is based on recent evidence.<sup>13</sup>

6 **D. Conclusion**

7 For the foregoing reasons, we conclude that we do not have jurisdiction to review the  
8 matters raised under the second through fourth assignment of error, or those issues raised  
9 under the first assignment of error involving compliance with statewide planning goals or  
10 administrative rules governing the conduct of periodic review. While we have jurisdiction to  
11 review other issues raised under the first assignment of error, petitioner has failed to  
12 demonstrate that those issues provide a basis for reversal or remand.

13 To the extent the first assignment of error raises issues within our jurisdiction, that  
14 assignment of error is denied.

15 The county's decision is affirmed.

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<sup>13</sup> One could argue that the Goal 2 requirement that the county's land use planning process assure an "adequate factual base" for land use decisions and actions imposes some obligation to ensure that the evidence relied upon in such decisions is relatively current or has not been overtaken by recent events. However, petitioner does not make that argument and, even if petitioner did, that issue is a goal compliance issue that would appear to fall within LCDC's exclusive jurisdiction, under the circumstances of this case.