

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JUNE COLONY and MILDRED FRASER,
5 *Petitioners,*

6
7 vs.

8
9 WALLOWA COUNTY,
10 *Respondent,*

11
12 and

13
14 PACIFICORP,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2004-003

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Wallowa County.

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24 June Colony, Lostine, represented herself.

25
26 Dan Ousley, County Counsel, Enterprise, represented respondent.

27
28 Renee M. France, Portland, represented intervenor-respondent.

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30 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,
31 participated in the decision.

32
33 DISMISSED

03/09/2004

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

37

NATURE OF THE DECISION

Petitioners appeal (1) county Ordinance 2003-005 dated June 16, 2003, which adopts amendments to the county plan and land development code in response to a periodic review work task; (2) a Department of Land Conservation and Development (DLCD) periodic review order dated December 31, 2003, approving in part and remanding in part Ordinance 2003-005; or (3) both the county ordinance and the DLCD order.

MOTION TO INTERVENE

Pacificorp (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

On June 16, 2003, the county board of commissioners adopted Ordinance 2003-005, which amends the county’s comprehensive plan and land use regulations, in response to periodic review work task 4.¹ Work task 4 generally required that the county bring the planning and zoning for certain lands located around Wallowa Lake into compliance with Statewide Planning Goals 11 (Public Facilities and Services) and 14 (Urbanization). The county’s attempt to satisfy work task 4 included taking an exception to Goal 4 (Forest Lands) for certain lands. As required under ORS 197.615, the county submitted the adopted text of the comprehensive plan amendment along with the findings made in support of the amendment to DLCD for acknowledgment.² Petitioners

¹ ORS 197.628 requires periodic review of local comprehensive plan and land use regulations by the Land Conservation and Development Commission (LCDC). LCDC has delegated initial review authority to DLCD. 660-002-0010. ORS 197.633 further provides, in relevant part:

“The periodic review process is divided into two phases. Phase one is the evaluation of the existing comprehensive plan, land use regulations and citizen involvement program and, if necessary, the development of a work program to make needed changes to the comprehensive plan or land use regulations. Phase two is the completion of work tasks outlined in the work program.”

² ORS 197.615 provides, in relevant part:

1 submitted written objections to Ordinance 2003-005 to DLCD. On December 31, 2003, the
2 director of DLCD issued Order No. 001597, which approves in part and remands in part the
3 county's work task submittal.

4 Petitioners filed a Notice of Intent to Appeal (NITA) with LUBA on January 20, 2004.
5 The NITA states that petitioners intend to appeal "that land use decision or limited land use decision
6 of respondent [Wallowa County] entitled County Ordinance 2003-005 dated December 31, 2003
7 * * *." In response to the county's and intervenor's motions to dismiss, petitioner Colony filed on
8 February 15, 2004 a document that purports to amend the NITA to identify DLCD Order No.
9 001597 as the subject of the appeal and to identify the DLCD director as the respondent.

10 **MOTION TO DISMISS**

11 The county and intervenor move to dismiss this appeal, arguing that (1) if the NITA was
12 filed to appeal the county's June 16, 2003 decision, the appeal is untimely and (2) if the NITA was
13 filed to appeal DLCD's December 31, 2003 order, LUBA lacks jurisdiction to review a DLCD
14 periodic review order.

15 **A. County Ordinance 2003-005**

16 Petitioner Colony has clarified that she views the NITA to appeal the December 31, 2003
17 DLCD order rather than the county's June 13, 2003 ordinance. It is not clear whether petitioner
18 Fraser shares that view. To the extent the NITA filed January 20, 2004, appeals the county's June
19 13, 2003 decision, we agree with the county and intervenor that the appeal is untimely, because it

"A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation shall mail or otherwise submit to the Director of the Department of Land Conservation and Development a copy of the adopted text of the comprehensive plan provision or land use regulation together with the findings adopted by the local government. The text and findings must be mailed or otherwise submitted not later than five working days after the final decision by the governing body. If the proposed amendment or new regulation that the director received under ORS 197.610 has been substantially amended, the local government shall specify the changes that have been made in the notice provided to the director. If the text and findings are mailed, they shall include a signed statement by the person mailing them indicating the date of deposit in the mail."

1 was not filed within 21 days of the date notice of the county's decision was mailed, pursuant to
2 ORS 197.830(9).

3 **B. DLCD Order No. 001597**

4 Petitioner Colony argues that the DLCD order is subject to LUBA's jurisdiction under
5 ORS 197.825(1), which provides in relevant part: "[LUBA] shall have exclusive jurisdiction to
6 review any land use decision or limited land use decision of a local government, special district *or a*
7 *state agency.*" (Emphasis added.) However, petitioner fails to read the rest of that statute, which
8 clarifies that LUBA's jurisdiction "[d]oes not include those matters over which [DLDC] or [LCDC]
9 has review authority under ORS 197.251, 197.430, 197.445, 197.450, 197.455 and 197.628 to
10 197.650." ORS 197.825(2)(c). *See also* ORS 197.644(2) ("[LCDC] shall have exclusive
11 jurisdiction for review of the evaluation, work program and completed work program tasks as set
12 forth in ORS 197.628 to 197.650"). In addition, ORS 197.633(3) provides that "[a] decision by
13 the Director of [DLCD] to approve a work program or a work task, that no work program is
14 necessary or that no further work is necessary, may be appealed to the [Land Conservation and
15 Development Commission] or referred to the commission by the director [of DLCD]." Read in this
16 context, it is clear that exclusive jurisdiction to review the December 31, 2003 DLCD order lies
17 with LCDC. In turn, jurisdiction to review any LCDC decision regarding that December 31, 2003
18 order lies with the Court of Appeals. ORS 197.650.

19 Petitioner Colony points out, correctly, that in some circumstances LUBA may have what is
20 essentially joint jurisdiction with DLCD and LCDC over a local government decision adopting post-
21 acknowledgment plan amendments in response to a periodic review work task, although our scope
22 of review in such circumstances is limited to issues that are not within DLCD and LCDC's review
23 authority. *City of Woodburn v. Marion County*, 45 Or LUBA 423, 431-32 (2003), *aff'd*, 191
24 Or App 334, ___ P3d ___ (2003); *Citizens Against Irresponsible Growth v. Metro*, 40 Or
25 LUBA 426, 430-31 (2001), *aff'd* 179 Or App 468, 40 P3d 556 (2002); *see also* OAR 660-025-
26 0040 (administrative rule governing periodic review, providing that LCDC has exclusive jurisdiction

1 to review the evaluation, work program and all work program tasks for compliance with the
2 statewide planning goals, while LUBA has exclusive jurisdiction over the same decision for issues
3 that do not involve compliance with the statewide planning goals). We understand petitioner Colony
4 to argue that county Ordinance 2003-005 included exceptions to Goal 4 that petitioner asserts are
5 not required by periodic work task 4. According to petitioner, LUBA has jurisdiction to review the
6 exceptions to Goal 4, because those exceptions are beyond the scope of periodic review task 4 and
7 therefore beyond DLCD and LCDC's review authority.

8 Even assuming petitioner Colony is correct that County Ordinance 2003-005 included
9 matters that are potentially within our scope of review, petitioners failed to file a timely appeal of the
10 county's decision, and therefore we lack jurisdiction to review that decision and any matters therein.
11 For the reasons explained, we also lack jurisdiction to review DLCD Order No. 001597.

12 The motions to dismiss are granted.

13 This appeal is dismissed.