

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CITY OF WEST LINN,
5 *Petitioner,*

6
7 and

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9 CURTIS SOMMER, ANDREA L.
10 HUNGERFORD and RICHARD COHN-LEE,
11 *Intervenors-Petitioner,*

12
13 vs.

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15 METRO,
16 *Respondent,*

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18 and

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20 CLACKAMAS COUNTY and HOMEBUILDERS
21 ASSOCIATION OF METROPOLITAN PORTLAND,
22 *Intervenors-Respondent.*

23
24 LUBA No. 2003-015

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26 FRIENDS OF FOREST PARK, ARNOLD ROCHLIN,
27 CHERYL COON, JIM COON, FRED BACHER,
28 CORINNE BACHER and NANCY BROSHOT,
29 *Petitioners,*

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31 and

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33 ANDREA L. HUNGERFORD
34 and RICHARD COHN-LEE,
35 *Intervenors-Petitioner,*

36
37 vs.

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39 METRO,
40 *Respondent,*

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42 and

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1 CLACKAMAS COUNTY, JOSEPH W. ANGEL,
2 HOMEBUILDERS ASSOCIATION OF
3 METROPOLITAN PORTLAND,
4 *Intervenors-Respondent.*

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6 LUBA No. 2003-016

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8 FINAL OPINION
9 AND ORDER

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11 Appeal from Metro.

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13 Peggy Hennessy, Portland, filed a petition for review and argued on behalf of petitioner City
14 of West Linn. With her on the brief was Reeves, Kahn and Hennessy. Christine M. Cook,
15 Portland, filed a petition for review and argued on behalf of petitioners Friends of Forest Park et al.

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17 Curtis Sommer, West Linn, represented himself. Andrea L. Hungerford, Oregon City,
18 represented herself and Richard Cohn-Lee.

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20 Richard P. Benner, Senior Attorney, Portland, filed the response brief and argued on behalf
21 of respondent.

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23 Michael E. Judd, County Counsel, Oregon City, represented intervenor-respondent
24 Clackamas County. Robert D. Van Brocklin, Portland, represented intervenor-respondent Joseph
25 W. Angel. William C. Cox, Portland, represented intervenor-respondent Homebuilders
26 Association of Metropolitan Portland.

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28 DAVIES, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
29 participated in the decision.

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31 DISMISSED

05/05/2005

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

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2 **NATURE OF THE DECISION**

3 This appeal involves Metro Ordinance No. 02-0969B, a decision to expand the Metro
4 Urban Growth Boundary (UGB) to include an additional 18,638 acres.

5 **FACTS**

6 As part of periodic review, Metro is required to assess the region’s need for additional
7 capacity for development within its UGB and to increase that capacity, if necessary. In response to
8 that work task, Metro adopted Ordinance No. 02-0969B. Exhibit P to that ordinance includes
9 findings of fact and conclusions of law regarding the different areas studied and explanations why
10 particular study areas were chosen to be included in the UGB. Petitioner Friends of Forest Park et
11 al. (Friends of Forest Park) appeal the inclusion of Area 94, and West Linn appeals the inclusion of
12 Area 37.¹

13 **JURISDICTION**

14 Metro argues that LUBA lacks jurisdiction over the consolidated appeals in this case
15 because the “matters” on appeal are within the exclusive jurisdiction of LCDC pursuant to ORS
16 197.825(2)(c).² Our determination of jurisdiction under this statute requires review of the particular

¹ Petitioner City of West Linn moves to strike a document attached as an appendix to respondent Metro’s response brief. That document contains excerpts from a periodic review order of the Land Conservation and Development Commission (LCDC). City of West Linn also moves to strike the portions of Metro’s brief that quote from that order. We need not rule on the motion to strike because we dispose of this case on jurisdictional grounds that do not require our consideration of those portions of the brief that are subject to the motion.

² ORS 197.825 provides, in relevant part:

“(1) Except as provided in ORS 197.320 and subsections (2) and (3) of this section, [LUBA] shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

“(2) The jurisdiction of the board:

“* * * * *

1 assignments of error and issues raised by petitioners. We, therefore, briefly describe petitioners’
2 arguments.

3 Both Friends of Forest Park and the City of West Linn (petitioners) argue that the inclusion
4 of Areas 94 and 37 violate and misconstrue Metro Code (MC) 3.01.020(b).³ For purposes of
5 determining what areas to include within the UGB, that code provision requires that Metro
6 demonstrate “that the recommended site was better than alternative sites, balancing factors 3
7 through 7.” The crux of petitioners’ appeal in this case is that Metro’s findings in support of Metro
8 Ordinance No. 02-0969B fail to demonstrate compliance with MC 3.01.020(b) because they do
9 not explain how the sites chosen for inclusion in the UGB are “better than” other sites considered for
10 inclusion but rejected.

11 While LUBA has jurisdiction over “land use decisions,” LUBA’s jurisdiction does not
12 include “matters” that fall within LCDC’s jurisdiction under ORS 197.628 to 197.650 (periodic
13 review). *See* n 2. LCDC has jurisdiction, for example, to review post-acknowledgment
14 comprehensive plan and land use regulation amendments adopted through periodic review for
15 compliance with the statewide planning goals. We recently explained this split jurisdiction issue as
16 follows:

“(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[.]”

³ MC 3.01.020 Legislative Amendment Criteria provides, in relevant part:

“(b) While all of the following Goal 14 factors must be addressed, the factors cannot be evaluated without reference to each other. Rigid separation of the factors ignores obvious overlaps between them. Demonstration of compliance with one factor or subfactor may not constitute a sufficient showing of compliance with the goal, to the exclusion of the other factors when making an overall determination of compliance or conflict with the goal. *For legislative amendments, if need has been addressed, Metro shall demonstrate that the priorities of ORS 197.298 have been followed and that the recommended site was better than alternative sites, balancing factors 3 through 7.*

“* * * * *” (emphasis added).

1 “As we explained in *Citizens Against Irresponsible Growth v. Metro*, 40 Or
2 LUBA 426, 430-31, *aff’d* 179 Or App 468, 40 P3d 556 (2002) (*CAIG*), where
3 a land use decision is subject to review by LCDC under periodic review for
4 compliance with the statewide planning goals, LUBA only has jurisdiction to review
5 such a land use decision for compliance with other legal requirements ‘that go
6 beyond or are different from’ the requirements of the statewide planning goals. In
7 *Manning v. Marion County*, 45 Or LUBA 1 (2003), we clarified that this split
8 jurisdiction principle extends to preclude LUBA review of (1) challenges to the
9 evidentiary support for findings of compliance with comprehensive plan criteria that
10 directly implement the statewide planning goals and (2) ‘allegations of procedural
11 error that are based on requirements stated in the statewide planning goals’ or
12 administrative rules that implement the goals. 45 Or LUBA at 8-10. From these
13 cases, Metro describes the scope of LCDC’s exclusive jurisdiction in periodic
14 review as follows:

15 “LCDC’s exclusive jurisdiction in periodic review extends to issues that
16 arise under the statewide planning goals and rules and under those planning
17 statutes whose requirements do not differ in substance from goal
18 requirements, or relate so closely to those requirements that LCDC cannot
19 determine goal compliance without applying or interpreting those statutory
20 requirements.’ Motion to Dismiss 3.

21 “We agree with Metro’s description of LCDC’s exclusive jurisdiction in periodic
22 review.” *City of Sandy v. Metro*, ___ Or LUBA ___ (LUBA Nos. 2004-107,
23 2004-108, 2004-109, January 7, 2005) slip op 9, *appeal pending* (A127336).

24 Petitioners argue that although MC 3.01.020(b) implements Statewide Planning Goal 14
25 (Urbanization), the requirements of MC 3.01.020(b) go beyond the requirements of Goal 14 and
26 that their assignments of error challenging Ordinance No. 02-0969B because it fails to comply with
27 MC 3.01.020(b) are not within the exclusive jurisdiction of LCDC.⁴ Petitioner Friends of Forest
28 Park argues:

⁴ Goal 14 is to “provide for an orderly and efficient transition from rural to urban land use.” Goal 14 provides that amendment of a UGB shall be based upon consideration of the following factors:

- “(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;
- “(2) Need for housing, employment opportunities, and livability;
- “(3) Orderly and economic provision for public facilities and services;

1 “MC 3.01.020(b) requires Metro to determine that the recommended site for UGB
2 expansion was *‘better* than alternative sites,’ balancing Factors 3 through 7, a
3 substantive mandate not required by the goal. In addition, a cursory reading of MC
4 3.01.020(b) reveals a number of methodological requirements and conclusions that
5 are not explicitly or otherwise part of the more general Goal 14 mandate. MC
6 3.01.020(b) thus goes further and demands more than Goal 14 itself, which does
7 not require a determination that the selected location for a UGB expansion is better
8 than the alternatives. The selection under Goal 14 must result from consideration
9 and balancing, but the site selected for inclusion need not be the best among all
10 alternatives. The Metro Code requires that the selected site for the UGB expansion
11 have been better than all the other alternatives.

12 “This requirement distinguishes the Metro Code provision from the requirements of
13 Goal 14, and also differentiates LUBA’s function in reviewing the UGB expansion
14 from that of LCDC. LUBA therefore has jurisdiction to review Metro’s
15 compliance with the requirement of MC 3.01.020(b) that Area 94 have been better
16 than the alternative sites, balancing Factors 3 through 7. * * *” Petition for Review
17 of Friends of Forest Park 8 (emphasis in original).

18 Petitioners are correct that Goal 14 does not include the same language contained in MC
19 3.01.020(b); *i.e.*, that the chosen sites be “better than” alternative sites. However, our inquiry does
20 not end there. We must determine whether MC 3.01.020(b) “differs in substance from goal
21 requirements” or whether the requirements of MC 3.01.020(b) are so closely related to the
22 requirement of the goal to render review for compliance with them subject exclusively to LCDC’s
23 jurisdiction. *See City of Sandy v. Metro*, slip op 9. Under Goal 14, the establishment or
24 amendment of a UGB must be based on the consideration of seven factors listed in the goal. *See n*
25 4. Factors 3 through 7 are considered the “locational factors,” and the factors referenced in MC
26 3.01.020(b) mirror those Goal 14 factors. It is petitioners’ position that Goal 14 requires

“(4) Maximum efficiency of land uses within and on the fringe of the existing urban area;

“(5) Environmental, energy, economic and social consequences;

“(6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and,

“(7) Compatibility of the proposed urban uses with nearby agricultural activities.”

1 consideration of those factors but does not require, as MC 3.01.020(b) does, a demonstration that
2 the land chosen to be included in the UGB is better than alternative sites. Because MC 3.01.020(b)
3 differs substantively from the Goal 14 requirements, petitioners argue, LUBA has jurisdiction to
4 review the challenged decision for compliance with that code provision.

5 At oral argument, Metro argued that although Goal 14 does not include the language found
6 in MC 3.01.020(b), the balancing of the five locational factors in Goal 14 essentially requires the
7 same thing. We have interpreted Goal 14 to include, implicitly, just such a requirement. *1000*
8 *Friends of Oregon v. Metro*, 38 Or LUBA 565, 584 (2000), *rev'd on other grounds* 174 Or
9 App 406, 26 P3d 151 (2001). In *1000 Friends*, we analyzed the same Metro Code provision that
10 is at issue in this case, and explained:

11 “MC 3.01.020(b) implements the seven factors of Goal 14 and requires in relevant
12 part a determination whether the recommended site is ‘better’ than alternative sites,
13 balancing factors 3 through 7. That standard is consistent with Goal 14, factors 3
14 through 7, which set forth five considerations that must be balanced in deciding
15 where to expand an urban growth boundary. The goal of that process is to
16 determine the ‘best’ land to include within the UGB, based on appropriate
17 consideration and balancing of each factor. Thus, Metro’s inquiry into whether Site
18 65 is a ‘better alternative’ to other potential sites is consistent with MC 3.01.020
19 and Goal 14, factors 3 through 7.” *Id.*

20 Thus, we have already determined that MC 3.01.020(b) does not go further or demand more than
21 Goal 14 itself. Rather, MC 3.01.020(b) directly implements the balancing required under Goal 14.
22 Accordingly, petitioners’ assignments of error challenging Ordinance No. 02-0969B for
23 noncompliance with MC 3.01.020(b) involve “matters” that fall within LCDC’s exclusive
24 jurisdiction pursuant to ORS 197.825(2) and are not subject to our review. These appeals are
25 dismissed.⁵

⁵ Because we dismiss for lack of jurisdiction, we do not address the merits of petitioners’ assignments of error.