

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

3
4 KELLY GORDON, JANE HENDERSON
5 and PAUL C. SMULL,
6 *Petitioners,*

7
8 vs.

9
10 POLK COUNTY,
11 *Respondent.*

12
13 LUBA No. 2005-054

14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from Polk County.

19
20 Kelly Gordon, Monmouth, filed the petition for review and argued on his own behalf.
21 Jane Henderson, Dallas and Paul C. Smull, Rickreall, represented themselves.

22
23 Mark Irick, Dallas, filed the response brief and David Doyle argued on behalf of
24 respondent. With him on the brief was Shetterly, Irick & Ozias.

25
26 RYAN, Board Member; BASSHAM, Board Member, participated in the decision.

27
28 HOLSTUN, Board Chair, did not participate in the decision.

29
30 AFFIRMED

08/30/2007

31
32 You are entitled to judicial review of this Order. Judicial review is governed by the
33 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision by the county approving an application to expand the
4 city of Dallas’ urban growth boundary (UGB) to include approximately 79 acres of land for
5 future industrial use, approving exceptions to Statewide Planning Goal 3 (Agricultural
6 Lands) and Goal 4 (Forest Lands), and amending the comprehensive plan map designation
7 for the property from Exclusive Farm Use to Urban Reserve.

8 **FACTS**

9 The challenged county decision arose out of the efforts of the City of Dallas (city) to
10 complete its final work task (Work Task 6) required by the Oregon Department of Land
11 Conservation and Development (DLCD) during the city’s most recent periodic review.
12 During periodic review, the city determined that its UGB contained insufficient amounts of
13 industrial land to meet the requirements of Statewide Planning Goal 9 (Economic
14 Development) and found the need to expand its UGB by 79 acres.

15 The city submitted an application to the county in connection with the contemplated
16 UGB expansion. The city and the county held a joint meeting on the proposed UGB
17 amendment. On March 9, 2005, the county adopted an ordinance approving the city’s
18 application for a UGB expansion to include 79 acres of land within the UGB, and approving
19 related goal exceptions and a county comprehensive plan map amendment. That decision is
20 the subject of this appeal.¹

¹ In our order dated January 26, 2007, we explained the procedural history of this appeal:

“Petitioners appealed the county’s adoption of [the ordinance] to LUBA, but shortly thereafter entered into a stipulated suspension of this appeal, with the stated purpose of allowing ‘the parties an opportunity to explore resolution and further review the subject decision.’ Petitioners also appealed the City of Dallas’ adoption of its work program to DLCD, and then to the Oregon Land Conservation and Development Commission (LCDC), which ultimately approved the work program in an order dated March 13, 2006. On October 30, 2006, after receiving an inquiry from this Board regarding the status of the appeal,

1 On April 4, 2005, the city adopted an ordinance expanding its UGB and amending the
2 city's comprehensive plan map to include the 79 acres of land within the city's UGB. On
3 April 6, 2005, the city submitted that ordinance, together with the county's ordinance
4 approving the application and its findings, to DLCD for approval of Work Task 6. On
5 August 4, 2005, DLCD issued its order approving Work Task 6 expanding the city's UGB to
6 include the property. Some of the petitioners in this appeal appealed that order to the Land
7 Conservation and Development Commission (LCDC). On March 13, 2006, LCDC issued its
8 order affirming DLCD's order and approving Work Task 6. No party appealed LCDC's
9 order.

10 **FIRST THROUGH THIRD AND FIFTH ASSIGNMENTS OF ERROR**

11 In their first, second, third, and fifth assignments of error, petitioners allege errors in
12 the county's decision based on Polk County Land Development Ordinance (LDO) provisions
13 and Polk County Comprehensive Plan (PCCP) provisions, all of which derive from the
14 statewide planning goals. Petitioners also allege error based on statutes and administrative
15 rules that implement the goals.

16 In their first assignment of error, petitioners challenge the decision's compliance with
17 ORS 197.298, which imposes priorities for including land within urban growth boundary
18 amendments, consistent with Statewide Planning Goal 14 (Urbanization). Petitioners also
19 cite OAR 660-04-0010(1)(c)(B)(iv) and OAR 660-04-0020(2)(d), which implement Goal 3,
20 and argue that the county's findings addressing the criteria set forth in those rules are
21 misleading and inadequate. Finally, petitioners also argue that the decision violates PCCP
22 policies regarding preservation of agricultural land.

23 In their second assignment of error, petitioners challenge the county's approval of the
24 UGB amendment under the LDO criteria for UGB amendments and PCCP provisions

petitioners requested that LUBA reactivate this appeal." *Gordon v. Polk County*, __ Or
LUBA __ (, January 26, 2007, Order, slip op 1).

1 governing UGB expansions. In their third assignment of error, petitioners argue that the
2 county's analysis of the proposed UGB amendment failed to satisfy Goal 14's requirement of
3 analyzing the potential impact of the amendment on land already within the UGB. In their
4 fifth assignment of error, petitioners argue that the county failed to make adequate findings
5 under the PCCP regarding transportation facilities affected by the proposed UGB expansion.

6 Respondent answers that any assignments of error that petitioners raise that are
7 related to whether the county's decision is consistent with the statewide planning goals or
8 statutes, rules, or LDO or PCCP provisions that implement those goals, are beyond our scope
9 of review in this appeal. Respondent argues that LCDC considered whether the UGB
10 amendment complies with the goals in the proceedings related to periodic review Work Task
11 6, and that those issues have been conclusively decided by LCDC. Respondent also argues
12 that to the extent petitioners raise issues regarding compliance with LDO provisions or PCCP
13 policies that relate to the goals, those issues are beyond our scope of review. In the
14 alternative, respondent argues that those issues are being raised for the first time in the
15 petition for review, were not raised during the county proceedings, and therefore that
16 petitioners are precluded from raising those issues under ORS 197.763(1).²

17 We agree with respondent that our scope of review of the county's decision does not
18 extend to issues that involve the proposed UGB amendment's compliance with the statewide
19 planning goals. Under the applicable version of OAR 660-025-0040, LCDC exercised

² ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 exclusive jurisdiction to review the city’s ordinance adopting the UGB amendment for
2 compliance with the statewide planning goals.³

3 Petitioners argue that the county was not in periodic review and therefore the
4 county’s decision was not a “work program task.” According to petitioners, it follows that
5 LUBA may review the county’s decision adopting the UGB amendment for compliance with
6 the statewide planning goals. However, the county adopted the decision in coordination with
7 the city’s completion of its periodic review work task. The city submitted both its ordinance
8 and the county’s ordinance to LCDC, and it is clear from the record of LCDC’s proceedings
9 that LCDC had before it for review the county’s decision and findings when it reviewed the
10 city’s ordinance for compliance with the goals. The issue of whether the proposed UGB
11 expansion complies with the applicable statewide planning goals is the same whether it is the
12 city or the county making the decision. Under petitioners’ view, LUBA could review the
13 county’s ordinance adopting the UGB amendment and reach conclusions contrary to LCDC’s
14 conclusions as to whether the challenged UGB amendment complies with the statewide
15 planning goals. That view is inconsistent with the purpose of OAR 660-025-0040, which is

³ Former OAR 660-025-0040, which was in effect at the time the city adopted the UGB amendment, provided 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. 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;

“* * * * *

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

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

1 designed to avoid circumstances where LCDC and LUBA could reach conflicting
2 conclusions regarding whether a land use decision complies with the planning goals.
3 Therefore, issues regarding compliance of the UGB expansion with the statewide planning
4 goals have been conclusively and finally determined by LCDC during its proceedings.⁴

5 We reach a similar conclusion regarding petitioners' arguments based on statutes,
6 county comprehensive plan provisions and land use regulations that implement or are
7 directly related to the statewide planning goals. It would be inconsistent with the purpose of
8 OAR 660-025-0040 to review the county's UGB amendment for compliance with land use
9 standards that implement or are directly related to the very same statutes, statewide planning
10 goals and rules that LCDC reviewed in determining that the city's UGB amendment
11 complies with applicable goals and rules.

12 Petitioners' arguments in their first, second, third, and fifth assignments of error
13 relate entirely to compliance with the statewide planning goals and statutes, administrative
14 rules, and provisions of the PCCP that derive from those goals. Those issues are outside of
15 our scope of review of the county's decision.

16 The first, second, third, and fifth assignments of error are denied.

17 **FOURTH ASSIGNMENT OF ERROR**

18 In their fourth assignment of error, petitioners argue that the county failed to consider
19 wetlands issues. Respondent answers that petitioners are raising issues regarding wetlands
20 for the first time in their petition for review, and that such issues are therefore waived under
21 ORS 197.763(1). *See* n 2. Petitioners have not responded to respondent's assertion that
22 petitioners failed to raise issues regarding wetlands during the proceedings below or cited
23 any place in the record containing reference to wetlands issues. Therefore, petitioners are

⁴ The record of the proceedings before LCDC shows that the county's ordinance and findings approving the UGB amendment was submitted to DLCD along with the city's ordinance. LCDC approved the UGB expansion and found that Work Task 6 complied with the applicable statewide planning goals. LCDC Approval Order, 06-WKTASK-001694, March 13, 2006.

1 precluded under ORS 197.763(1) from raising the issues presented in their fourth assignment
2 of error.

3 The fourth assignment of error is denied.

4 The county's decision is affirmed.