

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 ORDER

15 **A. Background**

16 The challenged decision involves Polk County’s adoption of Ordinance 05-02, which
17 was adopted on March 9, 2005 and approved an application by the City of Dallas for an
18 exception to statewide planning goals 3 and 4 to change the comprehensive plan designation
19 for the subject property from “Farm Forest” and “Agriculture” to “Urban Reserve.” The city
20 of Dallas sought the goal exceptions and plan designation change as part of the city’s
21 compliance with Department of Land Conservation and Development (DLCD) Periodic
22 Review Work Task Number 6 (work program), in order to add the subject property to its
23 urban growth boundary (UGB). The city submitted its work program to DLCD for review.

24 Petitioners appealed the county’s adoption of Ordinance 05-02 to LUBA, but shortly
25 thereafter entered into a stipulated suspension of this appeal, with the stated purpose of
26 allowing “the parties an opportunity to explore resolution and further review the subject
27 decision.” Petitioners also appealed the City of Dallas’ adoption of its work program to
28 DLCD, and then to the Oregon Land Conservation and Development Commission (LCDC),
29 which ultimately approved the work program in an order dated March 13, 2006. On October
30 30, 2006, after receiving an inquiry from this Board regarding the status of the appeal,
31 petitioners requested that LUBA reactivate this appeal.

1 On November 28, 2006, respondent Polk County filed a motion to dismiss this
2 appeal. On December 7, 2006, we issued an order suspending the timeline for filing the
3 record in this appeal while we considered respondent’s motion to dismiss. On December 11,
4 2006, we received petitioners’ response to respondent’s motion to dismiss.

5 **B. Motion to Dismiss**

6 The county moves to dismiss this appeal, arguing that the challenged decision was
7 incorrectly appealed to LUBA. The county argues that we should dismiss this appeal
8 because, it asserts, LCDC has exclusive jurisdiction to review periodic work tasks for
9 compliance with statewide planning goals and applicable statutes and administrative rules.¹
10 We are not persuaded by the county’s arguments under OAR 660-025-0040 that we do not
11 have jurisdiction over this appeal.²

¹ The county cites OAR 660-025-0040, which provides:

“Exclusive Jurisdiction of LCDC

“(1) The commission, pursuant to ORS 197.644(2), has exclusive jurisdiction to review the evaluation, work program, and all work tasks for compliance with the statewide planning goals *and applicable statutes and administrative rules*. 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.”
(Emphasis added).

The above-quoted version of OAR 660-025-0040(1) became effective on May 15, 2006, after the Polk County decision in this case became final.

² Petitioners advance two arguments in response to the county’s motion to dismiss, neither of which is particularly persuasive. First, petitioners argue that most of the property that was the subject of the city and county proceedings below is wetlands and flood plains, and thus the acreage that should be considered for inclusion in the City of Dallas’ urban growth boundary is less than the 50 acre minimum required under OAR 660-024-0040(1)(a), quoted above. We are not persuaded that the jurisdictional issues under OAR 660-024-0040 depend on the quality of the acreage that was included in the UGB amendment. Second, petitioners complain that after the county’s initial decision was mailed, there was confusion about the proper forum for

1 First, the challenged *county* decision is not a periodic review work program or work
2 program task as described in OAR 660-025-0040(1), although it is related to or prompted by
3 a *city* periodic review work program or work task. Further, LCDC’s exclusive jurisdiction
4 set forth in OAR 660-025-0040(1)(a) over certain decisions “* * *made by a city with a
5 population of 2,500 or more * * *” does not apply to the challenged *county* decision. Finally,
6 although LCDC has exclusive jurisdiction over “plan and land use regulations that designate
7 urban reserve areas” under OAR 660-025-0040(1)(c), presumably that means decisions that
8 designate urban reserve areas outside of urban growth boundaries (UGBs) under
9 OAR chapter 660, division 021. We do not understand the county’s decision to have
10 designated urban reserve areas under that rule.

11 The county is correct that under *new* OAR 660-025-0040(1), LCDC has exclusive
12 jurisdiction to review work program decisions that involve compliance with the statewide
13 planning goals “and applicable statutes and administrative rules.” *See* n 1. However, *former*
14 OAR 660-025-0040(2), which applies to this appeal, gave LUBA exclusive jurisdiction over
15 those same periodic review decisions for issues that do not involve compliance with the
16 statewide planning goals “and over all other land use decisions as provided in ORS
17 197.825.”³ Therefore, even if the challenged *county* decision was a work program or work

appeal. We do not understand how petitioners’ confusion over the proper forum for appeal has any bearing on whether we have jurisdiction over this appeal.

³ Former OAR 660-025-0040 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.

1 task as described in OAR 660-025-0040(1), something the county has not established, we
2 have exclusive jurisdiction to review assignments of error that do not involve compliance
3 with the statewide planning goals, if any can be advanced by petitioners.

4 The record and briefs have not yet been filed in this case, and we cannot know what
5 kind of issues petitioners intend to raise. It may be that petitioners will not advance any
6 assignments of error that involve something other than compliance with statewide planning
7 goals. However, the fact that a petitioner does not advance any reviewable assignments of
8 error does not eliminate our jurisdiction over a decision.

9 **B. The Record**

10 Respondent shall file the record in this case not later than February 23, 2007.

11 Dated this 26th day of January, 2007.

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Melissa M. Ryan
Board Member

“(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.”