

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 CITIZENS AGAINST IRRESPONSIBLE GROWTH,
5 BAKER ROCK CRUSHING CO., and
6 FISHER FARMS, LLC.,
7 *Petitioners,*
8

9 vs.

10 METRO,
11 *Respondent.*
12

13 LUBA No. 2000-141
14

15 ORDER ON MOTION TO DISMISS AND SUSPEND
16

17 The decision challenged in this case is the adoption of Ordinance 00-869A, which in
18 relevant part adopts a Regional Transportation Plan (RTP) and amends portions of Metro’s
19 Regional Framework Plan (RFP). The petition for review, filed January 19, 2001, presents
20 two assignments of error. The first assignment of error argues that the RTP is not consistent
21 with Metro’s 2040 Growth Concept policies or RFP transportation performance standards.
22 The second assignment of error argues that the RTP does not comply with the transportation
23 planning rule at OAR chapter 660, division 12, specifically OAR 660-012-0015, 660-012-
24 0020, and 660-012-0060.

25 Metro challenges our jurisdiction to consider the matters at issue in the second
26 assignment of error. According to Metro, Ordinance 00-869A has been submitted to the
27 Land Conservation and Development Commission (LCDC) pursuant to ORS 197.251 for
28 review for compliance with the statewide planning goals, including Goal 12
29 (Transportation).¹ Metro argues that LUBA’s jurisdiction over Ordinance 00-869A does not

¹ORS 197.251(1) provides in relevant part:

“Upon the request of a local government, the Land Conservation and Development Commission shall by order grant, deny or continue acknowledgment of compliance of comprehensive plan and land use regulations with the [statewide planning] goals. * * *”

1 extend to any matters over which LCDC has review authority under ORS 197.251, *i.e.*
2 compliance with the statewide planning goals. ORS 197.825(2)(c);² *see Commercial Real*
3 *Estate Economic Coalition v. Metro*, 37 Or LUBA 171, 190 (1999) (declining to review
4 amendments to Metro’s Urban Growth Management Functional Plan for compliance with
5 statewide planning goals, because those amendments had been forwarded to LCDC pursuant
6 to ORS 197.251 and 197.274). Further, Metro argues that LCDC’s review under Goal 12
7 will necessarily involve review under the transportation planning rule, which implements
8 Goal 12. Therefore, Metro concludes, LUBA lacks jurisdiction to consider the matter alleged
9 under the second assignment of error: whether the RTP complies with the transportation
10 planning rule.

11 Metro also requests that LUBA suspend this proceeding for 120 days pursuant to
12 ORS 197.840(1) and (4).³ According to Metro, both assignments of error involve matters
13 that fall within or arguably could be affected by LCDC’s review of Ordinance 00-869A for

²ORS 197.825(2)(c) provides that LUBA’s jurisdiction 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.”

³ORS 197.840(1) provides in relevant part:

“The following periods of delay shall be excluded from the 77-day period within which the
board must make a final decision on a petition under ORS 197.830(14):

“(a) Any period of delay up to 120 days resulting from the board’s deferring all or part of
its consideration of a petition for review of a land use decision or limited land use
decision that allegedly violates the goals if the decision has been:

“(A) Submitted for acknowledgment under ORS 197.251[.]”

ORS 197.840(4) provides:

“The board may defer all or part of its consideration of a land use decision or limited land use
decision described in subsection (1)(a) of this section until the Land Conservation and
Development Commission has disposed of the acknowledgment proceeding described in
subsection (1)(a) of this section. If the board deferred all or part of its consideration of a
decision under this subsection, the board may grant a stay of the comprehensive plan
provision, land use regulation, limited land use decision or land use decision under ORS
197.845.”

1 goal compliance. Suspension under ORS 197.840(1) and (4) is appropriate, Metro argues,
2 because LCDC’s review may clarify which issues raised in the petition for review are goal
3 compliance issues. Moreover, Metro argues, LCDC’s review and any Metro responses to
4 that review may affect the resolution of any non-goal issues raised in the petition for review.

5 With respect to our jurisdiction over matters alleged in the second assignment of
6 error, petitioners do not dispute that LCDC’s review of the RTP under ORS 197.251 includes
7 review for compliance with the transportation planning rule. However, petitioners argue that
8 the transportation planning rule *also* implements ORS 197.712(2)(e).⁴ Therefore, petitioners
9 argue, LUBA *and* LCDC have concurrent jurisdiction to review the RTP for compliance with
10 the transportation planning rule.

11 With respect to suspension under ORS 197.840(1) and (4), petitioners respond that, as
12 relevant here, the statutes authorize LUBA to extend the statutory time limit for resolution of
13 an appeal of a land use decision only if (1) the decision is before LCDC under ORS 197.251
14 and (2) the petition for review alleges violations of statewide planning goals. Petitioners
15 contend that the petition for review does not allege violation of any statewide planning goals
16 and, therefore, there is no basis to suspend LUBA’s proceedings under ORS 197.840(1). In
17 any case, petitioners argue, LCDC’s review and any remedial measures may take longer to
18 complete than 120 days, and judicial efficiency is best served by proceeding to address those
19 challenges in the petition for review that do not involve the statewide planning goals.

⁴ORS 197.712(2) provides in relevant part:

“By the adoption of new goals or rules, or the application, interpretation or amendment of existing goals or rules, [LCDC] shall implement all of the following:

“* * * * *

“(e) A city or county shall develop and adopt a public facility plan for areas within an urban growth boundary containing a population greater than 2,500 persons. The public facility plan shall include rough cost estimates for public projects needed to provide sewer, water and transportation for the land uses contemplated in the comprehensive plan and land use regulations. Project timing and financing provisions of public facility plans shall not be considered land use decisions.”

1 We agree with Metro that it is appropriate to suspend these proceedings for 120 days
2 under ORS 197.840(1) and (4). ORS 197.251 and 197.825(2)(c) demarcate exclusive areas
3 of jurisdiction between LUBA and LCDC. The second assignment of error, and possibly
4 portions of the first assignment of error, raise issues that arguably fall within LCDC's
5 exclusive jurisdiction. It is by no means clear that the petition for review does not allege
6 violation of the statewide planning goals, as petitioners argue. LCDC's review of Ordinance
7 00-869A may clarify which issues in the petition for review involve the goals. Further,
8 LCDC's review may affect resolution of issues that do not involve the goals. Even if
9 LCDC's review is not completed within 120 days, suspension would allow LCDC to appear
10 in these proceedings by means of an agency brief under OAR 661-010-0038, in order to
11 express its view of the scope of its jurisdiction under ORS 197.251, and our jurisdiction
12 under ORS 197.825(2)(c).⁵

13 Accordingly, these proceedings are suspended for 120 days from the date of this
14 order. If LCDC completes its review prior to expiration of the 120 days, the parties will so
15 advise and may submit further motions regarding the conduct of this proceeding. Absent
16 further order of this Board, the response brief (and any agency brief) is due 141 days from
17 the date of this order.

18 Dated this 22nd day of March, 2001.

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Tod A. Bassham
Board Member

⁵A copy of this order will be forwarded to the Department of Land Conservation and Development.