

D. DLCD Jurisdiction

Objector Swalley Irrigation District (Swalley) contends that the Land Use Board of Appeals (LUBA or the Board), and not this department has jurisdiction over the city's submittal. Swalley rests the objection upon (1) the "tardiness" of the city's submittal, and (2) the contention that the submittals are not and do not arise from UGB amendments within the department's jurisdiction under ORS 197.825(2)(c)(A). Swalley objects that in order to invoke the exception to LUBA jurisdiction under ORS 197.825(2)(c)(A), a local government submittal to the department must occur closer to the time of adoption than occurred in this matter. Swalley objects that the city's submittal is not timely for purposes of ORS 197.825(2)(c)(A) because it occurred after the time for filing a LUBA appeal or intervention. Objector Swalley contends this is because transfers to LUBA can only occur within certain statutory limits, citing ORS 197.830(9). Objector Swalley expounds that under ORS 197.825(2)(c)(A), the director can only transfer a matter to LUBA within the 21-day period in which a notice of intent to appeal a land use decision may be filed under ORS 197.830(9). Swalley argues "DLCD director's transfer authority is only exercisable and thus necessarily must occur in the LUBA 21 day appeal period." [Swalley Objection 1, at 14]

a. Legal Standard

Under ORS 197.825, LUBA has exclusive jurisdiction to review any land use decision of a local government with specific statutory exceptions.⁴ One exception to the exclusive jurisdiction of the board is for certain matters submitted to the department. ORS 197.825(2) provides in part:

The jurisdiction of the board:

* * * * *

(c) Does not include a local government decision that is:

(A) Submitted to the Department of Land Conservation and Development for acknowledgment under ORS 197.251, 197.626 or 197.628 to 197.650 or a matter arising out of a local government decision submitted to the department for acknowledgment, unless the Director of the Department of Land Conservation and Development, in the director's sole discretion, transfers the matter to the board[.]”

ORS 197.825(2)(c)(A) excludes submittals pursuant to ORS 197.626, which provides:

⁴ ORS 197.825(1) provides:

Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the Land Use Board of Appeals 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.

[A] city with a population of 2,500 or more within its urban growth boundary that amends the urban growth boundary to include more than 50 acres or that designates urban reserve under ORS 195.145, or a county that amends the county's comprehensive plan or land use regulations implementing the plan to establish rural reserves designated under ORS 195.141, shall submit the amendment or designation to the Land Conservation and Development Commission in the manner provided for periodic review under ORS 197.628 to 197.650. (Emphasis added.)

The commission adopted OAR 660-025-0040⁵ to implement its exclusive jurisdiction under the statute and OAR 660-025-0250⁶ to provide for transfers of matters to LUBA.

⁵ OAR 660-025-0040 provides:

(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;
 - (b) If made by a metropolitan service district, amendments to an urban growth boundary to include more than 100 acres;
 - (c) plan and land use regulations that designate urban reserve areas.
- (2) The director may transfer one or more matters arising from review of a work task, urban growth boundary amendment or designation or amendment of an urban reserve area to the Land Use Board of Appeals pursuant to ORS 197.825(2)(c)(A) and OAR 660-025-0250.

⁶ OAR 660-025-0250 provides:

- (1) When the department receives an appeal of a director's decision pursuant to OAR 660-025-0150(4), the director may elect to transfer a matter raised in the appeal to the Land Use Board of Appeals (board) under ORS 197.825(2)(c)(A).
- (2) Matters raised in an appeal may be transferred by the director to the board when:
 - (a) The matter is an urban growth boundary expansion approved by the local government based on a quasi-judicial land use application and does not require an interpretation of first impression of statewide planning Goal 14, ORS 197.296 or 197.298; or
 - (b)(A) The matter alleges the work task submittal violates a provision of law not directly related to compliance with a statewide planning goal;
 - (B) The appeal clearly identifies the provision of the task submittal that is alleged to violate a provision of law and clearly identifies the provision of law that is alleged to have been violated; and
 - (C) The matter is sufficiently well-defined that it can be separated from other allegations in the appeal.
- (3) When the director elects to transfer a matter to the board, notice of the decision must be sent to the local jurisdiction, the appellant, objectors, and the board within 60 days of the date the appeal was filed with the department. The notice shall include identification of the matter to be transferred and explanation of the procedures and deadline for appeal of the matter to the board.
- (4) The director's decision under this rule is final and may not be appealed.

b. Summary of Local Actions

The city submitted notice of the city's and county's adoption of four ordinances to the department on April 16, 2009. Those four ordinances were the city's ordinances adopting the amended UGB and amending the city's development code in certain respects (Ordinances Nos. NS-2112 and NS-2113), and the county's ordinances co-adopting the amended UGB and making certain amendments to the county's comprehensive plan map and text for the lands within the UGB expansion area. [R. at 1050-1051 (city ordinance NS 2112 - UGB); R. at 1836-1844 (city ordinance NS 2113 – development code); [county ordinance 2009-1 – UGB map and DCC and TSP map]; [county ordinance 2009-2 – zoning map and certain DCC amendments]. The city did *not* submit ordinance NS 2111, amending the city's Public Facilities Plan element of its General Plan, to the department on April 16, 2009 (although the city included a copy of this ordinance, which the city adopted immediately before the UGB amendment ordinance, in the record for the submittal of the UGB ordinance (NS 2112), and the city submitted a separate notice of adoption of the Public Facilities Plan on January 9, 2009). However, on June 12, 2009, following LUBA's decision in *Swalley Irrigation District v. City of Bend*, ___ Or LUBA ___ (LUBA Nos. 2009-012, 2009-013, 2009-31 and 2009-032 , May 8, 2009) and order in *Swalley Irrigation District v. City of Bend*, ___ Or LUBA ___ (LUBA Nos. 2009-010, 2009-011, and 2009-020, May 8, 2009) the city separately submitted ordinance NS 2111 to the department, and provided notice to the objectors, as required by OAR 660-025-0175(3) and (4) and OAR 660-025-0130 and -0140.

c. Analysis

The director concludes that this objection is not well-taken. Nothing in ORS 197.830(9) addresses department transfers to LUBA. Nothing in ORS 197.825(2)(c)(A) or its statutory context prescribes a time frame in which the director must act to transfer some or all of a local government submittal to LUBA. In construing ORS 197.825(2)(c)(A), the department may not insert what the legislature has omitted – in this circumstance a 21-day time frame that constrains the director's statutory authority to otherwise transfer a matter to LUBA. ORS 174.010. Nor can the director read ORS 197.830(9) as context in such a manner as to give no effect to ORS 197.825(2)(c)(A) in the circumstances presented here. *Id.*

The director notes that LUBA had not issued its orders on the jurisdictional issues at the time of Swalley's objections. Swalley Objection 1, at 4. LUBA has subsequently ruled on substantively the same jurisdictional arguments presented in this objection. The Board held, "ORS 197.825(2)(c)(A) and ORS 197.626, and the implementing rules adopted by DLCD make clear that after the City of Bend submitted NS-2112 and NS-2113 to DLCD for review under the statutes governing periodic review, LUBA ceased to have jurisdiction over those submitted decisions or over matters arising out of those submitted decisions unless the director of DLCD transfers matters to LUBA pursuant to OAR 661-025-0250(2)." *Swalley Irrigation District*, ___ Or LUBA ___ (LUBA Nos. 2009-012, 2009-013, 2009-31 and 2009-032 , May 8, 2009) (Slip op at 8). The Board also has dismissed challenges to County Ordinances 2009-01 and 2009-02 submitted to the department on

April 16, 2009. *Swalley Irrigation District v. City of Bend*, __ Or LUBA __ (LUBA Nos. 2009-33 and 2009-034, July 1, 2009).

Swalley also asserts that the City of Bend's ordinance NS-2111, adopting the city's water public facilities plans and the sewer public facilities plans as amendments to the city's comprehensive plan, is not itself an amendment of the city's UGB or "a matter arising out of" the city's UGB amendment. ORS 197.825(2)(c)(A). The director does not agree. The decision concerning where to expand its UGB relies heavily on the amendments to the public facilities plans as a factor in determining where to expand the UGB. See, e.g., R. at 1192 (Collection System Master Plan, and exclusion of exception lands to the southwest due to the feasibility of providing sewer service during the planning period). The city's 45-day notice also identified amendments to its Public Facilities Plan as being a part of its proposed adoption of an amended UGB. As a result, the director finds that Ordinance NS-2111 "arises out of" the city's UGB amendment, declines to transfer jurisdiction for review to LUBA, and determines that the director has jurisdiction to review the ordinance.

d. Conclusion

The director denies this objection. Consistent with LUBA's decisions and orders regarding jurisdiction over the city and county submittals, unless and until the matters are transferred to LUBA pursuant to OAR 661-025-0250(2), jurisdiction lies with the department.