

**BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON**

IN THE MATTER OF THE ENFORCEMENT) ORDER FOR LAKE OSWEGO, TUALATIN,) WEST LINN, METRO, AND CLACKAMAS) COUNTY PURSUANT TO ORS 197.324)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
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INTRODUCTION

This matter came before the Land Conservation and Development Commission (Commission) on September 25, 2020, for consideration of its Hearings Officer’s recommendation regarding a petition from David Marks for an enforcement order against the cities of Lake Oswego, Tualatin, and West Linn (cities), Metro, and Clackamas County (county) pursuant to ORS 197.319 to 197.335. Underlying this enforcement proceeding is Mr. Marks’ concern about the process for the potential urbanization of the Stafford Area. Mr. Marks owns property in the Stafford Area and initiated a request for enforcement proceeding against the cities, the county, and Metro for failing to be in compliance with Metro’s regional framework plan (RFP) pursuant to ORS 197.320(12). The cities, the county, and Metro entered into an intergovernmental agreement (IGA) in 2017 regarding designation of the Stafford Area as an urban reserve (5-Party IGA). In 2019, the cities entered into an IGA (3-Party IGA) regarding planning for future development of the Stafford Area.

After a recommendation from the Department of Land Conservation and Development (department) on Mr. Marks’s request for an enforcement order, the Commission determined that there was good cause to proceed to a contested case hearing to determine whether the cities, the county, and Metro are in violation of the RFP. The Commission appointed a hearings officer to conduct the contested case proceeding and prepare findings of facts, conclusions of law, and recommended actions.

The Commission identified four issues in the Notice of Contested Case Hearing to be considered in this proceeding: (1) Are the 3-Party IGA and 5-Party IGA “decisions” that are subject to an enforcement order under ORS 197.320(12)? (2) Do the two IGAs constitute a “series of decisions” that in turn constitute a “pattern or practice” of decision making? (3) Are Metro and Clackamas County considered parties to a “series of decisions” that constitute a “pattern or practice” of decision-making pursuant to ORS 197.320(12)? And (4) does the 3-Party IGA violate a provision of Metro’s Functional Plan? Commission Order No. 001915?

Mr. Marks, the cities, the county, and Metro submitted hearing memoranda and provided oral argument on these issues. The hearings officer, after conducting the hearing, made recommendations on the four issues for the Commission’s consideration. The Commission considered the hearings officer’s recommendations, the parties’ submittals to the hearings officer, the department’s staff report, and exceptions to the department staff report submitted by the parties. At its September 25, 2020 hearing, the Commission considered the department’s presentation and presentations from each of the parties.

FINDINGS OF FACT

The Hearings Officer identified no disputed facts necessary to resolve this matter. The issues are legal questions, as described in the Notice of Contested Case Proceedings.

CONCLUSIONS OF LAW

Mr. Marks petitions this Commission for an enforcement order pursuant to ORS 197.320, which provides in part:

“The Land Conservation and Development Commission shall issue an order requiring a local government¹ * * * to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or *other land use decisions or actions* into compliance with the goals, acknowledged

¹ ORS 197.015(13) defines “Local government” to mean “any city, county or metropolitan service district formed under ORS chapter 268[.]”

comprehensive plan provisions, land use regulations or housing production strategy if the commission has good cause to believe:

“* * * * *

“(12) A local government within the jurisdiction of a metropolitan service district has failed to make changes to the comprehensive plan or land use regulations to comply with the regional framework plan of the district or has engaged in a *pattern or practice of decision-making* that violates a requirement of the regional framework plan[.]” (Emphases added.)

Under that provision, the Commission first tasked the Hearings Officer with making a recommendation on the threshold question of law: whether one or both of the IGAs is a “decision” within the scope of ORS 197.320(12) and thus within the authority of the Commission.

1. Are the 3-Party and 5-Party IGAs “decisions” that are subject to an enforcement order under ORS 197.320(12)?

The Hearings Officer considered three arguments presented by Mr. Marks contending that the IGAs are the type of decisions that this Commission is authorized to enforce under ORS 197.320(12). While ORS 197.320(12) by its terms applies to “land use decisions,” Mr. Marks argues that ORS 197.320(12) also applies to “actions” and “decision-making” that do not constitute land use decisions. Second, Mr. Marks contended that the IGAs are statutory land use decisions pursuant to the definition at ORS 197.015(10). Finally, Marks argues that even if the IGAs are not statutory land use decisions that they are significant impact land use decisions. The cities disputed all of these arguments.

A. Does ORS 197.320(12) Only Apply to Land Use Decisions?

The Hearings Officer recommends that the Commission reject Mr. Marks argument that the legislature’s inclusion of the phrases “other land use decisions or actions” and “pattern or practice of decision-making” expands the universe of decisions subject to ORS 197.320(12) beyond “land use decisions.” The Commission agrees with the reasoning and conclusion of the

Hearings Officers that neither phrase expands the reach of ORS 197.320(12) to include IGAs that are not also land use decisions.

B. Are the IGAs Statutory Land Use Decisions?

The Hearings Officer recommended that the Commission conclude that the neither of the IGAs were a statutory “land use decision” under ORS 197.015(10)(a)(A).² The Commission adopts the recommended conclusion of law and rationale of the Hearings Officer that the IGAs are not statutory land use decisions.

C. Are the IGAs Significant Impact Land Use Decisions?

The Hearings Officer recommended that the Commission conclude that the IGAs are significant-impact test “land use decision” under case law. The Commission does not adopt the recommended conclusion of law or reasoning of the Hearings Officer that the IGAs are significant impact test land use decisions.

In general, the significant-impact test is used to determine whether the Land Use Board of Appeals (LUBA), which has exclusive jurisdiction under ORS 197.825 to review land use decisions, may decide a challenge to a local government action. The Oregon Supreme Court has held that an action that is not a statutory land use decision, may be subject to LUBA review if it will have a “significant impact on present or future use of land.” *Billington v. Polk County*, 299 Or 471, 478–479, 703 P2d 232 (1985); *Petersen v. Klamath Falls*, 279 Or 249, 254, 566 P2d 1193 (1977). Rather than simply duplicating the statutory definition of “land use decision,” the significant-impact test “encompasses a broader range of decisions than those that apply, or should apply, statewide planning goals, comprehensive plans, or land use regulations.” *Citizens for Better Transit v. Metro Service Dist.*, 15 Or LUBA 482, 484 (1987). Of importance to the Commission’s decision in this matter, LUBA has held that for an action to be a significant-impact test land use decision,

² ORS 197.015(10)(a)(A) defines a “land use decision” to include a “final decision or determination made by a local government * * * that concerns the * * * application of the goals; a comprehensive plan provision; [or a] land use regulation[.]”

“the decision must create an actual, qualitatively or quantitatively significant impact on present or future land uses. Further, the expected impacts must be likely to occur as a result of the decision, and not simply speculative.” *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994).

This LUBA jurisdictional inquiry is relevant here, because the Commission has concluded that its enforcement authority under ORS 197.320(12) pertains to those local government actions that are “land use decisions.”

Mr. Marks, as the party seeking the Commission’s enforcement, has the burden to establish that the IGAs are land use decisions. *See Billington*, 299 Or at 475 (Because the Billingtons were the parties seeking LUBA review of the vacating order, the burden was on them to establish LUBA’s jurisdiction, *i.e.*, that the Board decision was a “land use decision.”); *City of Pendleton v. Kerns*, 294 Or 126, 134 n 7, 653 P2d 992 (1982) (same). The Hearings Officer understood Mr. Marks argument as:

“the IGAs will have a significant impact on present and future uses in the Stafford Area because the IGAs establish the process, timing, and requirements for the concept plans that will dictate when and how the Stafford Area will be incorporated into the UGB and zoned and developed for urban uses. As discussed in greater detail later, areas in the urban reserve generally cannot be added into the UGB until completion of concept plans by the cities that will include the new areas in their UGBs. The 5-party IGA states that the ‘timing for commencement and completion of a concept plan will be up to the Cit[ies].’ Section 2.a. The 3-Party IGA states, among other things, that any concept plan proposal for areas north of the Tualatin River (a large part of the Stafford Area) cannot occur until at least December 31, 2028. According to Marks, preventing the consideration of the Stafford Area for inclusion in the UGB for approximately 10 years clearly has a significant impact on the future land use of the Stafford Area. Marks also argues that removing the Stafford Area from consideration for inclusion in the UGB would have a significant impact on the ability to meet housing needs in the area because the Stafford Area is the only area in the urban reserve that could be used to expand the UGB near the Cities.” Finding of Fact, Conclusions of Law, and Recommendation at 8 (footnote omitted).

The Hearings Officer framed the question as “[w]hether or not the Stafford Area is urbanized” in recommending to the Commission that the significant impacts test was met. *Id.*

The Commission concludes that Mr. Marks has not met the burden to establish that the IGAs are land use decisions because the IGAs do not “create an actual, qualitatively or

quantitatively significant impact on present or future land uses.” First, the IGAs make no change to the area’s land use designation. The Stafford Area is an acknowledged urban reserve area designated under ORS 195.145 and thus is the first priority of land for inclusion within the Metro regional urban growth boundary. ORS 197.298(1)(a); OAR 660-027-0070(1). Present land uses are regulated by the Commission’s rules at OAR chapter 660, division 27, specifically OAR 660-027-0070(2) through (7); thus, those rules, not either IGA control present land uses of the Stafford Area. Second, the Hearings Officer determined that the IGAs do not violate the RFP provisions that govern the planning for future uses of the Stafford Area. As such, the Commission concludes that the IGAs do not create an actual, qualitatively or quantitatively significant impact on future land uses.

The Commission disagrees that the IGAs determine “whether or not the Stafford Area is urbanized” and concludes that the IGAs do not create an actual, qualitatively or quantitatively significant impact on future land uses. The future urbanization of the Stafford Area must comply with state law. By way of short synopsis, state law requires Metro to identify and accommodate its need for housing, employment opportunities, and livability within the regional urban growth boundary. Goal 14; ORS 197.296. If the identified need cannot reasonably be accommodated on land already inside the regional urban growth boundary, Metro must determine which land to add by evaluating alternative urban growth boundary locations consistent with the priority of land specified in ORS 197.298 and the boundary location factors of Goal 14. OAR 660-024-0060(1). As noted above, because the Stafford Area is an acknowledged urban reserve area it is among the first priority of land for inclusion within the Metro regional urban growth boundary. ORS 197.298(1)(a); OAR 660-027-0070(1). As such, Metro must consider and balance the boundary location factors of Goal 14 for the Stafford Area urban reserves for comparison to other urban reserves in the alternative boundary locations and ultimately to determine the Metro UGB location. OAR 660-024-0060(3).

Nothing in the IGAs prohibits Metro from including the Stafford Area in the required boundary location analysis, nor could either IGAs lawfully do so. If Metro determined that inclusion of all or part of the Stafford Area is necessary to fulfill its responsibility under ORS 197.299, the Commission understands Metro to have retained that authority under the Regional

Framework Plan. *See* MC 3.07.1110(e) (Metro may add an area to the regional urban growth boundary absent a concept plan to satisfy state law requirements).

At most, the Commission concludes that the IGAs demonstrate coordination on a preferred timing for future urban land uses. Metro ultimately has responsibility under state law to coordinate, evaluate urban reserves for consideration, and under the Regional Framework Plan to move ahead in the absence of a concept plan if necessary to fulfill its obligations under state law. Metro has statutory power to require cities and counties to change their plans to conform to Metro's plans. ORS 268.380; ORS 268.390; *Citizens for Better Transit v. Metro Service Dist.*, 15 Or LUBA 482, 487 (1987). Thus, the Commission does not find that Mr. Marks has established that the IGAs are significant impact land use decisions. As the Oregon Supreme Court stated, "Admittedly, 'significant impact on present or future land uses' is a nebulous standard." *City of Pendleton v. Kerns*, 294 Or at 133. However, the Commission concludes that based on the foregoing discussion, it is evident that the IGAs do not significantly impact present or future land uses because such actual uses are determined under existing state law, regardless of the IGAs. Therefore, the Commission determines that the 3-Party and 5-Party IGAs are not "decisions" that are subject to an enforcement order under ORS 197.320(12).

- 2. Do the two IGAs constitute a "series of decisions" that in turn constitute a "pattern or practice" of decision making?**
- 3. Are Metro and Clackamas County considered parties to a "series of decisions" that constitute a "pattern or practice" of decision-making pursuant to ORS 197.320(12)?**
- 4. Does the 3-Party IGA violate a provision of Metro's Functional Plan?**

The hearings officer's recommendation included conclusions of law and recommendations on these three questions assigned by the Commission in its good cause order. However, these questions all rest on the premise that the IGAs are "decisions" subject to an enforcement order under ORS 197.320(12). Since the Commission finds that the 3-Party and 5-Party IGAs are not "decisions" that are subject to an enforcement order under ORS 197.320(12), the Commission does not need to reach these questions to decide this request for enforcement.

DECISION

Based on the preceding findings of facts and conclusions of law, the Commission declines to issue an enforcement order pursuant to ORS 197.320(12).

DATED THIS 6th DAY OF JANUARY, 2021.

FOR THE COMMISSION:

A handwritten signature in black ink, consisting of several overlapping loops and a final flourish, positioned above a horizontal line.

Jim Rue, Director

Department of Land Conservation and Development

NOTE: You may be entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this final order. Judicial review is pursuant to the provision of ORS 183.482(1).

CERTIFICATE OF SERVICE

I certify that on Wednesday, January 6, 2021, I served the attached **DECISION ON MARKS ENFORCEMENT ORDER PETITION FOR LAKE OSWEGO, TUALATIN, WEST LINN, METRO AND CLACKAMAS COUNTY** by mailing in a sealed envelope, with first-class postage prepaid, a copy thereof addressed as follows:

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