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 RECOMMENDATION**

INTRODUCTION

This matter involves an enforcement action initiated by David Marks (Marks) against the cities of Lake Oswego, West Linn, and Tualatin (the Cities), Clackamas County (the County), and Metro. This enforcement proceeding involves the potential urbanization of the Stafford Area.[1] There is a long convoluted history involving the Stafford Area and its potential inclusion in the urban reserve and urban growth boundary (UGB).[2] Metro proposed that the Stafford Area be included in the urban reserve in 2010. In 2012, the Land Conservation and Development Commission (LCDC) acknowledged inclusion of the Stafford Area into the urban reserve. The Cities appealed LCDC's decision to the Court of Appeals, who reversed and remanded the decision. *Barkers Five, LLC v. Land Conservation and Development Commission*, 261 Or App 259, 323 P3d 368 (2014). On remand, Metro again submitted the Stafford Area for inclusion in the urban reserve, and again LCDC acknowledged inclusion of the Stafford Area into the urban reserve. To resolve ongoing litigation regarding inclusion of the Stafford Area in the urban reserve the Cities, the County, and Metro entered into an intergovernmental agreement (IGA) to settle the dispute (5-Party IGA) in 2017. In 2019, the Cities entered into an IGA (3-Party IGA) regarding future development of the Stafford Area.

Marks owns property in the Stafford Area that he intends to gift, and he is concerned that the Cities are improperly preventing the Stafford Area from being included in the UGB. Marks

[1] The specific area at issue are urban reserve areas 4A (Stafford), 4B (Rosemont), 4C (Borland), and 4D (Norwood). For simplicity, these four urban reserve areas are referred to as the Stafford Area.
[2] The petitioner's brief and the Cities' brief provide detailed histories of the efforts to include and to oppose the inclusion of the Stafford Area into the urban reserve and UGB.

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 197.324. After a recommendation from the Department of Land Conservation and Development (DLCD), the Land Conservation and Development Commission (LCDC) determined that there was good cause to initiate enforcement proceedings against the Cities, the County, and Metro to determine whether the parties are in violation of the RFP. When LCDC decided to initiate enforcement proceedings, LCDC appointed a hearings officer to conduct the contested case proceeding and prepare findings of facts, conclusions of law, and recommended actions.

As identified in the Notice of Contested Case Hearing, there are four issues to be considered in this proceeding: (1) Are the 3-Party and 5-Party IGAs "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?[3]

Marks, the Cities, the County, and Metro submitted hearing memoranda and provided oral argument on these issues. These findings of fact, conclusions of law, and recommended actions follow.

FINDINGS OF FACT

There do not appear to be any disputed facts. The issues appear to be legal questions, as described in the Notice of Contested Case Proceeding.

[3] The parties acknowledged that the Cities, the County, and Metro could raise whatever defenses they wished to the enforcement proceeding, in addition to the questions presented in the Notice of Contested Case Hearing.

CONCLUSIONS OF LAW

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

Marks seeks an order from LCDC pursuant to ORS 197.320, which provides:

> "The Land Conservation and Development Commission shall issue an order requiring a local government, state agency or special district 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 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.)

In order for Marks to obtain the relief he seeks, the IGAs must be the type of decisions that ORS 197.320(12) gives LCDC the authority to regulate. ORS 197.320(12) clearly applies to "land use decisions." Marks argues that ORS 197.320(12) also applies to "actions" and "decision-making" that do not constitute land use decisions. Even if ORS 197.320(12) only applies to land use decisions, Marks argues 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. Unsurprisingly, the Cities dispute all of these arguments.

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

Marks argues that the earlier emphasized 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. Initially, I agree with Marks that the addition of the words

"or actions" in ORS 197.320 indicates that the statute applies to more than just land use decisions. Absent any other argument, I might be inclined to agree with Marks that the IGAs could be other such "actions" subject to ORS 197.320(12). The Cities, however, explain that the language "or actions" was added in 2019 to reflect the addition of ORS 197.320(13) as a basis for an enforcement order, which provides:

> "A city is not making satisfactory progress in taking *actions* listed in its housing production strategy under ORS 197.290." (Emphasis added.)

While the addition of the words "or actions" does expand the reach of ORS 197.320(12) beyond land use decisions, it seems reasonably clear that the expansion is limited to actions listed in a city's "housing production strategy." I do not think the addition of the words "or actions" expands the reach of ORS 197.320(12) to include IGAs that are not also land use decisions.

Marks also argues that the language "pattern of practice of decision-making" expands the scope of ORS 197.320(12) beyond land use decisions. The Cities cite the definitions of "pattern of decision making" and "practice of decision making" to support their claim that the IGAs must apply the Cities' comprehensive plan provisions or land use regulations in a way that violates the RFP in order for ORS 197.320(12) to apply.

OAR 660-045-0020(10 & 11) provide:

> "(10) Pattern of decision making means a mode, method, or instance of decision making representative of a group of decisions with these characteristics:
>
> "(a) The decisions involve the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;
>
> "(b) The decisions involve the same or similar geographic areas, plan designations, zones, or types of land use; and
>
> "(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040, or the decisions are likely to occur after that date.
>
> "(11) Practice of decision making means a series or succession of decisions with these characteristics:

"(a) The decisions involved the same or similar provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;

"(b) The decisions involved the same or similar geographic areas, plan designations, zones, or types of land use; and

"(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040."

According to the Cities, a pattern or practice of decision making only applies to decisions that involve the same or similar provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement.[4] The RFP is not a comprehensive plan provision or land use regulation. Therefore, under the Cities' view it does not matter how many IGAs violate the RFP as long as no comprehensive plan provisions or land use regulations are involved. That is certainly a plausible interpretation of the statute and rule.

In construing the meaning of a statute, the task is to determine the legislature's intent in adopting the statute, looking at the text, context, and legislative history, and resorting, if necessary to maxims of statutory construction. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042(2009). Unlike OAR 660-045-0020(10 & 11), ORS 197.320(12) does not restrict "pattern or practice" to comprehensive plan provisions or land use regulations. ORS 197.320(12) seems more focused on RFP violations rather than comprehensive plan provisions or land use regulations. It would be odd if a statute that appears designed to remedy violations of the RFP could not be utilized merely because the violations did not involve comprehensive plan provisions or land use regulations. That being said, however, the first paragraph of ORS 197.320 limits the scope of LCDC's order to correcting the Cities' "comprehensive plan, land use regulation, limited land use decisions or other land use decisions or actions." While Marks argues that "pattern or practice of decision-making in ORS 197.320(12) includes various non-land use decisions, I think the "decision-making" language in ORS 197.320(12) refers back to the circumstances that LCDC has authority over: amending the comprehensive plan, amending land use regulations, correcting limited land use decision,

[4] The RFP, which is part of the Metro Code, is not a provision of a special district cooperative agreement.

correcting land use decisions, and correcting actions related to its housing production strategy. Even though I think a "pattern or practice" of decision making need not necessarily involve comprehensive plan provisions or land use regulations, I think LCDC only has the authority to issue enforcement orders that relate to the circumstances in the first paragraph of ORS 197.320(12). The only type of circumstance that could be applicable to the IGAs is if they are land use decisions. Therefore, Marks must demonstrate that the IGAs are land use decisions in order to obtain an enforcement order under ORS 197.320(12).

B. Are the IGAs Statutory Land Use Decisions?

Under ORS 197.015(10)(a)(A), a statutory "land use decision" "includes "[a] final decision or determination made by a local government or special district that concerns the * * * application of the goals; a comprehensive plan provision; [or a] land use regulation* * *." Although the IGAs do not specifically cite any goals, comprehensive plan provisions, or land use regulations, a decision may still "concern" the application of the goals, comprehensive plan provisions, or land use regulations if the decision maker was required to consider the goals, comprehensive plan provisions, or land use regulations. *MGP X Properties, LLC v. Washington County and City of Sherwood*, 74 Or LUBA 378, 382 (2016).

Marks argues that the IGAs concern the application of state goals as well as comprehensive plan provisions and land use regulations. According to Marks, because the IGAs address concept planning for the Stafford Area to eventually become part of the UGB the IGAs considered Goal 14 (Urbanization) and Goal 10 (Housing). According to Marks, because the IGAs require that urban service area boundaries and agreements be established that the IGAs considered Goal 11 (Public Facilities and Services). According to Marks, because the IGAs emphasize transportation impacts and infrastructure need that the IGAs considered Goal 12 (Transportation). Marks also argues that the IGAs therefore considered their comprehensive plan provisions and land use regulations relating to Goals 10, 11, 12, and 14.

While I agree that the IGAs conceptually involve issues such as housing, public facilities, transportation and urbanization, I do not think that is the same thing as actually considering the goals involving those issues. The IGAs do not mention the goals or comprehensive plan provisions or land use regulations implementing the goals. The IGAs do not decide anything that involves

application of the goals or comprehensive plan provisions or land use regulations implementing the goals. While the question of whether an agreement "considers" the goals is not a particularly straightforward, I do not think general recitals regarding transportation or housing or provisions regarding timing for concept planning rise to the level of "considering" the goals.

Marks also argues that the IGAs consider comprehensive plan and land use regulations by requiring the Cities to follow the "procedures and requirements for comprehensive plan amendments contained in that Party's comprehensive plan and land use regulations" as part of concept planning. 3-Party IGA, Section 2.3 Section 2.3 merely requires the Cities to follow their established comprehensive plan policies. While there is language requiring coordination with current County neighborhood groups in the same way the Cities would coordinate with current City neighborhood groups, I do not see that that involves consideration of any specific comprehensive plan provisions. Marks further argues that the IGAs consider comprehensive plan and land use regulations by placing restrictions on amendments to the County's comprehensive plan and land use regulations regarding new uses in the urban reserve area. 5-Party IGA, Section 2.d. The apparent purpose of this provision is "to preserve lands for potential future urban development, not to facilitate or expedite their development under County zoning." I think this is a different situation than in *MGP X Properties* where the city had to consider its transportation system plan in order to conclude that the city had no land use process established for a proposed road improvement project. 74 Or LUBA at 383. While this is a closer call, I do not think that agreeing not to allow uses not currently allowed in the urban reserves in the future involves consideration of the County's comprehensive plan or land use regulations.[5]

I agree with the Cities that the IGAs are not statutory land use decisions.

C. Are the IGAs Significant Impact Land Use Decisions?

Even if a decision is not a statutory land use decision under ORS 197.015(10)(a), it can still be a land use decision if it will have a "significant impact on present or future use of land." *Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985). A decision qualifies under the significant impact test if the decision creates an 'actual, qualitatively or quantitatively significant

[5] Even if this did involve consideration of the County's comprehensive plan and land use regulation, that would only make the 5-Party IGA a statutory land use decision – not the 3-Party IGA.

impact on present or future land uses." *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994). Marks argues that 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.[6] 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.

I tend to agree with Marks. The Stafford Area is a very large area. The Stafford Area contains over 25% of the current urban reserves. If the Stafford Area is not added to the UGB then other areas will have to be added. There are no other urban reserves near the Cities, so if the Stafford Area is not urbanized there would likely be little to no urbanization near the Cities. Whether or not properties in the Stafford Area will be able to add housing and/or other urban uses would have a significant impact on the use of those properties. Whether or not the Stafford Area is urbanized will in my opinion have very significant impacts. That is the one of the reasons there is so much controversy and litigation over the issue.

The Cities argue that the impacts of the IGAs on land uses are only speculative. The Cities cite *Many Rivers Group v. City of Eugene*, 25 Or LUBA 518 (1993) for the proposition that the IGAs are "too speculative." In *Many Rivers Group*, Lane County transferred part of Alton Baker Park to the Cities of Eugene and Springfield. As part of the transfer of ownership certain limitations were placed on the operation of the park, such as golf would no longer be a permitted potential

[6] This is often referred to as the 10-year moratorium.

activity. LUBA emphasized that the significant impacts test requires that "the challenged decision *will* have a *significant* impact on present or future land uses, not merely that it 'would have potential impact' or 'would have an impact' on present or future land uses." *Id*. at 523-24. In other words, to qualify as a significant impacts land use decision the decision must have a certain versus potential impact and have a significant impact rather than merely some impact. Granting the Cities unilateral authority to determine the process for bringing the area into the UGB is more than a potential impact. While there is no guarantee that the Stafford Area would be brought into the UGB in the next ten years, preventing the Stafford Area from even being considered would have cascading effects on other areas to be considered and the availability of housing for the Cities.[7] In *Many Rivers Group*, LUBA apparently did not think the impact of limiting a small number of uses in the park was significant. In the present case, I think the future impacts would certainly be significant rather than merely some impact.

LUBA has also stated that "in the very rare cases when the significant impacts test is deemed met, LUBA's review is typically conducted under statutes or other laws * * * that provide standards for the decision, and that have some direct bearing on the use of land." *Northwest Trail Alliance v. City of Portland*, 71 Or LUBA 339, 346 (2015). Marks alleges that the IGAs violate the Metro RFP – that is the type of "other laws * * * that have some direct bearing on the use of land" described by LUBA.

I agree with Marks that the IGAs are significant impacts test land use decisions.

2. Do the two IGAs constitute a "series of decisions" that in turn constitute a "pattern or practice" of decision making?[8]

As quoted earlier, ORS 197.320(12) provides that LCDC may issue an order if:

> "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

[7] Furthermore, as Marks points out, the 10 year moratorium is a floor for preventing concept planning not a ceiling. The Cities could potentially push out concept planning much further.

[8] The "series of decisions" language comes from the OAR definition of "practice of decision making." There is also a definition of "pattern of decision making." LCDC may enter an enforcement order if there is a "pattern" or "practice" of decision making that violates the RFP. Thus, it not absolutely necessary to establish that there is a "series" of decisions. This section analyses whether there are enough decisions to constitute a pattern or practice.

pattern or practice of decision-making that violates a requirement of the regional framework plan[.]" (Emphasis added.)

The second issue is what constitutes a "pattern or practice of decision-making." ORS 197.320(12) is silent on how many decisions is necessary to constitute a "pattern or practice." As quoted earlier, OAR 660-045-0020(10 & 11) provide:

> "(10) Pattern of decision making means a mode, method, or instance of decision making representative of a group of decisions with these characteristics:
>
> "(a) The decisions involve the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;
>
> "(b) The decisions involve the same or similar geographic areas, plan designations, zones, or types of land use; and
>
> "(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040, or the decisions are likely to occur after that date.
>
> "(11) Practice of decision making means a series or succession of decisions with these characteristics:
>
> "(a) The decisions involved the same or similar provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;
>
> "(b) The decisions involved the same or similar geographic areas, plan designations, zones, or types of land use; and
>
> "(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040."

Initially, the definitions of "pattern" and "practice" in the OARS both describe decisions that involve "the same or similar provisions of an acknowledged comprehensive plan, land regulation, or special district cooperative agreement[.]" ORS 197.320(12) applies to decision-making that "violates a requirement of the regional framework plan[.]" Metro's RFP is not a comprehensive plan provision, land use regulation, or special district cooperative agreement. As ORS 197.320(12) clearly envisions a remedy for violations of an RFP, I do not think that the

omission of RFPs from the definitions of "pattern" and "practice" mean ORS 197.320(12) can never be utilized. I think that if Marks can show that the other parties engaged in a pattern or practice of violating the RFP then relief can be obtained under ORS 197.320(12).

While I have a hard time seeing much daylight between a "pattern" of decision-making and a "practice" of decision-making, there are separate definitions. Both definitions have three identical subsections that the decisions: (a) involve the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement; (b) involve the same or similar geographic area, plan designations, zones, or types of land use; and (c) essentially occurred within the last three years. There does not seem to be any dispute that the IGAs satisfy the three subsections of the definitions, or at least the same or related provisions of the RFP.

Under OAR 660-045-0020(10), a "pattern" of decision making "means a mode, method, or instance of decision making representative of a group of decisions * * *." Under OAR 660-045-0020(11), a "practice" of decision making "means a series or succession of decisions." OAR 660-045-0040 provides the requirements for when a requester (such as Marks) seeks an enforcement order as in the present proceedings. OAR 660-045-0040(4) provides:

> "(4) If the requester alleges that a *pattern* of noncompliant decisions by the affected local government or district is the reason for seeking enforcement, the requester's statement of facts also shall describe the following:
>
> "(a) The *mode, method, or instance* of decision making that constitutes the pattern;
>
> "(b) An estimate of *the total number of decisions* that make up the pattern; and
>
> "(c) The period within which the decisions constituting the pattern were made." (Emphases added.)

OAR 660-045-0040(5) provides:

> "If the requester alleges that a *practice* of noncompliant decisions by the affected local government or district is the reason for seeking enforcement, the requester's statement of facts also shall contain the following:

> "(a) A detailed description of *two or more decisions that are part of the practice*;
>
> "(b) Copies of the findings (if any) adopted by the affected local government or district in support of the decisions specified in subsection (a);
>
> "(c) An estimate of *the total number of decisions that make up the practice*; and
>
> "(d) A description of the period within which the decisions constituting the practice were made." (Emphases added.)

The parties place a great amount of weight on the nuances of these definitions. Marks argues that the definitions of "pattern" and "practice" under OAR 660-045-0020(10 & 11) refer to "decisions" in the plural which requires more than one decision but does not require more than two decisions. Marks also argues that under OAR 660-045-0040(5)(a) an allegation of a "practice" only requires a "detailed description of two or more decisions * * *." According to Marks, this means that two decisions are sufficient to constitute a practice. The Cities respond that the rest of OAR 660-045-0040(5)(a) explains that the "two or more decisions" must be "part" of the practice. According to the Cities, if two or more decision are only part of the practice then the practice must necessarily involve more than two decisions – otherwise the two decisions would not be "part" of the practice as a part in less than the whole.

Although the definition of "pattern" and the requirements for describing a "pattern" do not contain the same "two or more" decisions being "part" of something larger, the Cities rely on *Landwatch Lane Cty. v. LCDC*, 290 Or App 694, 415 P3d 1064 (2018) for the proposition that a "pattern" must also be more than two decisions. The Court of Appeals stated:

> "* * * a 'pattern of decision making' * * * requires proof of: (1) a 'mode, method, or instance of decision making;' (2) is 'representative;' (3) of a larger group of decision that share common characteristics. 290 Or App at 705.[9]

[9] Although *Landwatch Lane Cty.* involved an enforcement proceeding under ORS 197.320(6) rather than ORS 197.320(12), both provisions have the identical "pattern or practice" language. I do not see that that "pattern or practice" should be interpreted any differently under the two provisions.

The Cities argue that the *Landwatch Lane Cty.* requires that the examples relied on by a requester must be part "of a larger group of decision" so if the two IGAs are the examples then there must be a larger group in addition to the two IGAs to constitute a pattern.

While these are reasonable arguments, I think the parties are placing too much emphasis on administrative rules that cannot envision every situation. In general, enforcement action involve a much larger number of decisions. For instance, in *Landwatch Lane Cty.* the alleged pattern or practice of decision making involved 34 alleged violations out of 757 decisions. The Court of Appeals had no reason to consider whether two decisions was sufficient to constitute a "pattern or practice." The OAR also presumes a general situation involving many alleged violations. The OAR definitions are clear that more than one decision is required, but it much less clear whether more than two – and/or how many more than two – decisions are required.

I think what "pattern or practice" is trying to describe is a situation when there is a regular or repeated violation rather than an isolated or accidental violation. I also think the denominator matters. In *Landwatch Lane Cty.*, the Court of Appeals found that 34 out of 357 was not representative of the larger group. In other words, the violations were the exception rather than the rule. In the present case, the denominator is two, and Marks alleges that the other parties are two for two in violating the RFP. The Department of Land Conservation and Development (DLCD) staff report stated that two decisions could be a "series or succession" of decisions to constitute a "practice" if "those decisions were unique, and if they are significant import." The Cities take DLCD to task for this position, arguing that DLCD is improperly adding elements to the statute and rule that are not present. I think DLCD's point about "unique" decisions pertains to the denominator issue. If there are only two decisions regarding a subject or issue – in other words they are unique – then if both decisions violate applicable provisions that can constitute a pattern or practice. I think the point about "significant import" goes more towards what corrective action LCDC should take if Marks establishes a violation of ORS 197.320(12). In other words, if the alleged violations are not of much importance then it would be less necessary to take significant action to correct the violations.

In any event, the other parties only had two potential opportunities to make decisions regarding the RFP – the 5-Party IGA and the 3-Party IGA. Marks alleges that in both instances the other parties violated the RFP. In other words, the other parties were two for two. While it is

certainly a small sample size, I think going two for two in violating the RFP (allegedly) would be a regular or repeated violation rather than an isolated or accidental violation. Under these circumstances, I think that would constitute a pattern or practice for purposes of ORS 197.320(12).[10]

Marks also argues that the other parties made other decisions that could establish a pattern or practice. The 3-Party IGA includes a provision that agrees to the City of Lake Oswego requesting a UGB expansion for what is known as the Luscher Farms area. As discussed later, Marks alleges that allowing for publicly owned properties of less than 120 acres to be brought into the UGB despite the 3-Party IGA while placing a moratorium on all other properties violates the RFP. 3-Party IGA Section 4.1 & 4.2. As discussed later, I do not agree with Marks that the process to allow such amendments to the UGB violates the RFP. Even if it did, Marks has already alleged that the other parties violated the RFP in both the 5-Party IGA and the 3-Party IGA. Establishing that Section 4.1 or 4.2 of the 3-Party IGA violates the RFP would not add an additional decision to the tally for establishing a pattern or practice. Even if the City of Lake Oswego's decision to apply to add Luscher Farms to the UGB (which the City did) would only add another decision for the City of Lake Oswego – not the other parties.

Marks argues that the decision to terminate a transportation grant for widening of the I-205 corridor counts as a decision that could establish a pattern or practice. Originally, there was a $170,000 transportation study grant for widening of I-205 and to inform subsequent concept planning for the Stafford Area. The grant was for a one year period, but the one year period had been extended for an additional year four times. After the 3-Party IGA was entered the grant was not extended for another year. While Marks characterizes this as a termination of the grant, what occurred was a decision not to seek another extension rather than a termination. Metro explained that the situation on the ground had changed significantly since the grant had originally been made, so that the benefits of conducting the study would be minimal. Even if Marks is correct that the

[10] As discussed, I think the parties are placing too much emphasis on words like "part" or "group" when the OARs are describing the more likely enforcement proceeding involving lots of decisions. However, if a hyper-technical reading is required, under OAR 660-045-0020(10) a "pattern" of decision making means a "mode, method, or *instance* of decision making" that is "representative of a group of decisions." An instance only requires one decision. The 5-Party IGA is an instance. The 5-Party IGA is an "instance of decision making" that is "representative of [the] group of decisions" that includes the 5-Party IGA and the 3-Party IGA. When describing the "pattern" of noncompliant decisions pursuant to OAR 660-045-0040(4)(a), the 5-Party IGA would be the "instance" and the "total number of decisions" under OAR 660-045-0040(5)(b) would be two.

grant was not renewed because the other parties realized that no concept planning would take place in the Stafford Area due to the moratorium in the 3-Party IGA, I do not see how that is a violation of the RFP.

Marks also argues that the other parties have a long history of "delaying, frustrating and/or preventing the inclusion of the Stafford Area in the UGB." Marks cites a lengthy list of activities and actions in support of this proposition. While I tend to agree with Marks that at least the Cities have tried to prevent the Stafford Area from being included in the UGB, I do not see that that helps Marks. LCDC's authority to issue an order under ORS 197.320(12) is dependent upon a demonstration that that there has been a "pattern or practice of decision-making that *violates a requirement of the regional framework plan*." Even assuming the Cities have been actively trying to delay, frustrate, and/or prevent the inclusion of the Stafford Area in the UGB, none of the actions detailed by Marks involve a violation of any provision of the RFP. While Marks argues that all of the decision-making need not violate the RFP, I think that under ORS 197.320(12) any decisions that can be counted as part of a pattern or practice must indeed be shown to violate the RFP. Therefore, none of the other actions asserted by Marks help establish a pattern of practice that would support an enforcement order.

In order to obtain an enforcement order under ORS 197.320(12), Marks must establish a pattern or practice of decision making that violates a requirement of the RFP. The only decisions that could violate the RFP are the 5-Party IGA and the 3-Party IGA. I agree with DLCD and Marks that those two decisions could establish a pattern or practice for purposes of ORS 197.320(12).

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)?[11]

As discussed earlier, I think that the only decisions that can count towards the ORS 197.320(12) required "pattern of practice of decision-making that violates a requirement of the regional framework plan" are the 5-Party IGA and the 3-Party IGA. As also discussed earlier, I

[11] As with the second issue, the question is whether Metro and/or the County engaged in a "pattern or practice of decision-making" that violated the RFP. The "series of decisions" language comes from the definition of "practice of decision making." Marks may also satisfy ORS 197.320(12) by demonstrating a "pattern of decision making" which does not include the "series of decisions" language.

think that those two decisions are sufficient to establish a pattern or practice (if they violate the RFP). As discussed earlier, however, both of those decisions are necessary to establish a pattern or practice – one is not enough. While the two IGAs are sufficient to establish a pattern or practice, Metro and the County are not parties to the 3-Party IGA.

Marks argues that Metro and the County's "decision not to take any action to prevent the adoption of implementation of the 3-Party IGA" was a decision that could be part of a pattern or practice of decision making that violates the RFP. I do not see that the County declining to take some type of action to prevent the 3-Party IGA is a decision. As the County argues, at most Marks has alleged nonfeasance on the part of the County. The County was not party to the 3-Party IGA. Absent suing the Cities, there is little the County could do to prevent the 3-Party IGA. Marks' argument is that the County failed to act when it should have. I do not see that a failure to act is a decision under ORS 197.320(12). As the County argues, any reasonable interpretation of decision involves some affirmative action or knowing choice. Even if failure to take could action conceivably be a decision, there would at least have to be some official action deciding not to take action. There is no evidence that occurred in this case. As the County explains, there was never any specific decision involving the Board of County Commissioners or other County decision maker that considered, deliberated, or reached a conclusion to challenge the 3-Party IGA. The 3-Party IGA was never the subject of any County process or decision.[12] Even if the 5-Party IGA violates the RFP, the County did not engage in a pattern or practice of decision making that violated the RFP.

The same reasoning applies to Metro. Metro was not a party to the 3-Party IGA. While Metro expressed some concerns about the 3-Party IGA (that may or may not have been addressed), as with the County Metro did not make a decision – it failed to take action. Again, failure to essentially sue the Cities to invalidate the 3-Party IGA is not a decision for purposes of ORS 197.320(12).

[12] I also agree with the County that even if the failure to take action was a decision that it did not violate the RFP. Furthermore, Marks' argument that the 3-Party IGA's provisions such as the ten year moratorium violates the terms of the 5-Party IGA cuts against the argument that the 5-Party IGA violates the RFP by authorizing the ten year moratorium. If the 5-Party IGA already authorized violations of the RFP there would be no point in trying to prevent the 3-Party IGA from doing the same thing.

Neither Metro nor the County engaged in a pattern of practice of decision making that could have violated the RFP for purposes of an enforcement order pursuant to ORS 197.320(12).

4. Does the 3-Party IGA violate a provision of Metro's Functional Plan?

As discussed earlier, Marks must not only show that the 3-Party IGA violates the RFP, but also that the 5-Party IGA violates the RFP. Although Marks argues that numerous provisions of the 3-Party IGA violate the RFP, there is only one provision or aspect of the 5-Party IGA that allegedly violates the RFP. Marks' primary objection to the 3-Party IGA is that it allows the Cities to avoid concept planning (and therefore potential inclusion in the UGB) for the ten year moratorium if not longer. The 3-Party IGA clearly provides for the ten year moratorium, so if the ten year moratorium violates the RFP then the 3-Party IGA violates the RFP.

The question of whether the 5-Party IGA violates the RFP if the ten year moratorium violates the RFP is a more complicated issue. Section 2.a contains the provision that arguably violates the RFP:

> "The Parties recognize that the Cities will be the public bodies that have the responsibility to plan for any future urbanization of Stafford and that the urbanization of Stafford will only occur upon annexation to one or more of the Cities. Prior to adding any part of Stafford to the UGB, the City that will be responsible for annexing that part of Stafford must first have developed a concept plan for the area describing how the area will be planned and developed after inclusion in the UGB. *The timing for commencement and completion of a concept plan will be up to the City*." (Emphasis added.)

Marks argues that to the extent the 5-Party IGAs authorizes the ten year moratorium then the 5-Party IGA also violates the RFP. The emphasized language in Section 2.1 leaves the timing for beginning and completing the concept plan to the Cities. While there is nothing in Section 2.1 that would require the Cities to violate the RFP (for instance, they could begin concept planning immediately under this provision), it does leave the decision of when to begin and complete concept planning to the Cities. If leaving that decision up to the Cities instead of Metro and the County as well violates the RFP then the 5-Party IGA could violate the RFP as well.

This brings us to the crux of this case – whether allowing the Cities to determine the timing of the concept plan for the Stafford Area (including the ten year moratorium) violates the RFP.

Marks argues that this violates Metro Code (MC) 3.07.1110(a) (which is part of the RFP), which provides:

> "The *county* responsible for land use planning for an urban reserve and *any city* likely to provide governance or an urban service for the area, *shall, in conjunction with Metro* and appropriate service districts, *develop a concept plan for the urban reserve prior to its addition to the UGB* pursuant to sections 3.07.1420, 3.07.1430 or 3.07.1435 of this chapter. *The date for completion of a concept plan and the area of urban reserves to be planned will be jointly determined by Metro and the county and city or cities*." (Emphases added.)

MC 3.07.1110(a) requires that the "date for completion of a concept plan * * * will be jointly determined by Metro and the county and * * * cities." Marks argues that by allowing the Cities to determine the timing of concept plan development, the "date of completion of the concept plan" will not "be jointly determined by Metro and the county and * * * cities" – it will only be determined by the Cities. While at first blush, a ten year moratorium (and potentially longer) does *seem* problematic, MC 3.07.1110(a) does not set any deadlines for commencing or completing a concept plan. All MC 3.07.1110(a) does is require that the date of completion of the concept plan be jointly determined – by Metro and the applicable county and cities. Initially, Metro argues that the 5-Party IGA merely memorializes the existing law and therefore does not violate any provisions of the RFP. According to Metro, the 5-Party IGA just sets out what the existing law says and nothing more. As gleaned at oral argument, however, the Cities would not have settled their litigation if they did not think they were getting something out of the 5-Party IGA. According to the Cities, Metro agreed to allow the Cities to determine the timing of the concept plan as part of its discretion under MC 3.07.1110(a) in return for the Cities dropping further litigation. I agree with the Cities that the 5-party IGA does more than just set out the applicable law. Metro limited its input under MC 3.07.1110(a). The question is whether that was within Metro's discretion under MC 3.07.1110(a).

Unfortunately for Marks, I do not think MC 3.07.1110(a) imposes much of burden or responsibility on Metro. MC 3.07.1110(a) only requires Metro to jointly determine the completion date of the concept plan with the County and the Cities. Metro, the County, and the Cities argue that is exactly what they did – they jointly determined that the timing for commencement and completion of a concept plan will be up to the Cities. According to Metro and the County, it is

within their discretion under MC 3.07.1110(a) to allow the Cities to determine the timing of the concept plan. The five parties jointly determined (for their own various reasons) to let the Cities determine the timing for the concept plan. While Marks understandably does not agree with Metro's decision to allow the Cities to control the timing of the concept plan, I cannot say that Metro did not jointly determine the date for the completion of the concept plan. Although Marks does not like Metro's exercise of discretion, I think it is within Metro's discretion to make such a joint determination.

Marks also argues that the 5-Party IGA violates MC 3.07.1110(a) because allowing the Cities to develop concept plans on their own violates the requirement that the County and Cities "shall" develop a concept plan in conjunction with Metro. Initially, I am not sure the 5-Party IGA or 3-Party IGA prohibits the Cities from developing a concept plan in conjunction with Metro and the County. The 5-Party IGA appears to anticipate that it will be done in conjunction as it states that "the Cities will coordinate concept planning with one another and with the County and special districts serving Stafford * * *." Section 2.a. I agree with the Cities. The IGAs only control the timing of the concept plan – they do not prohibit Metro or the County from participating once the Cities begin the process. Furthermore, even if Metro and the County were prohibited from participating in the concept process, as the Cities argue, under IGAs local governments have the authority to delegate their authority to other local governments. ORS 190.010(4) provides, in pertinent part:

> "A unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform. The agreement may provide for the performance of activity:
>
> "* * * * *
>
> "(4) By one of the parties for any other party[.]"

I do not see that Metro and the County are prohibited from participating in the concept plan process, and even if they were it is within their power to delegate such authority.

Finally, Marks argues that the 5-Party IGA violates MC 3.07.1110(e), which provides:

> "If the local governments responsible for completion of a concept plan under this section are unable to reach agreement on a concept plan by the date set under subsection (a), then the Metro Council may nonetheless add the area to the UGB if necessary to fulfill its responsibility under ORS 197.299 to ensure the UGB has sufficient capacity to accommodate forecasted growth."

According to Marks, Metro has abandoned its ability to add the Stafford Area to the UGB under MC 3.07.1110(e) by allowing the Cities to control the timing of the concept plan process. Marks argues that the Cities could continually extend the date for completing the concept plan and thereby permanently prevent the Stafford Area from being included in the UGB. Initially, even if that were true I am not sure that would constitute a violation of MC 3.07.1110(e) as the ability for Metro to unilaterally add area to the UGB is dependent on local governments failing to meet the deadline established in MC 3.07.1110(a). If there is no deadline established in MC 3.07.1110(a) then the trigger for unilaterally adding an area to the UGB is not applicable. While I agree that this again *seems* problematic, I do not see that it is a violation of the RFP. If Metro decides to use its discretion to allow the Cities to control the timing for the concept plan then Metro has also allowed the Cities to set the deadline under MC 3.07.1110(a) that could trigger application of MC 3.07.1110(e). While Marks understandably does not agree with Metro's use of its discretion, I do not see that it actually violates the RFP. Furthermore, the Cities explain that the 3-Party IGA does not prevent Metro from unilaterally adding the Stafford Area to the UGB. The 5-Party IGA requires all parties to act in good faith. According to the Cities, if Metro determines that any extension of the time lines are not in good faith, it has the authority to add the Stafford Area to the UGB under MC 3.07.1110(e). As the Cities state, the argument that "the 3-Party IGA somehow 'usurps' or overrides Metro's authority to add lands to the UGB is simply not accurate." Presumably, the Cities would be held to their word.

The 5-Party IGA does not violate the RFP.

Under the previous analysis, Marks must establish that both the 5-party IGA and the 3-Party IGA violate the RFP in order to establish a pattern or practice that could lead to an enforcement order. Because I find that the 5-party IGA does not violate the RFP, it is academic whether the 3-Party IGA violates the RFP. As this is just a recommendation to LCDC, however, and it may disagree with my analysis, I will also address Marks' other arguments that the 3-Party IGA violates the RFP.

Marks argues that the 3-Party IGA violates MC 3.07.1110(a) because it gives each City a veto right over other City's concept plans. Marks relies on the provision in MC 3.07.1110(a) that provides that the parties "shall" develop a concept plan in conjunction with Metro. According to Marks, allowing a City the veto power over another City would mean the concept plans were not being developed in conjunction with the other parties. Initially, I am not sure having a veto power would necessarily mean the parties were not developing concept plans in conjunction with one another. Even if it did, however, I do not see that any City has veto power over another City's concept plan. Section 2.1 of the 3-Party IGA requires a City to provide the other Cities with 90-day notice prior to commencement of concept planning. Section 2.2 of the 3-Party IGA requires a City to consider and address substantial evidence submitted by another City that a proposed concept plan will materially impair the functionality of a transportation, utility, or other facility of the other City. Section 5 of the 3-Party IGA provides for nonbinding mediation if the parties cannot agree. I agree with the Cities that these are reasonable coordination requirements given development of the Stafford Area will affect all three Cities. While the 3-Party IGA gives the Cities input into each other's concept plan, it does not provide Cities with a veto. Marks argues that Metro expressed concern about just such a veto power. Metro's concern, however, applied to an actual veto provision that was not suggested but not included in the 3-Party IGA.

The 3-Party IGA does not include a veto provision that violates MC 3.07.1110(a)

Marks argues that the 3-Party IGA violates MC 3.07.1110(b & c) because it allows the Cities to add additional criteria to the concept plan. Section 2.4 provides additional criteria for the concept plans such as to "consider community character." According to Marks, MC 3.07.1110(b & c) provide the exclusive criteria for concept plans. While MC 3.07.1110(b & c) provide necessary requirements for concept plans, I see nothing that makes them the exclusive criteria for concept plans. As long as concept plans include the necessary requirements from MC 3.07.1110(b &c), they do not violate the RFP if they include additional criteria.

Section 2.4 of the 3-Party IGA does not violate the RFP.

Finally, Marks argues that the 3-Party IGA violates the RFP by allowing the Cities to have an exception for bringing publicly-owned property into the UGB. In particular, Section 4.2 allows the City of Lake Oswego to bring the City-owned Luscher Farm open space area into the UGB. I

am not entirely clear which provision of the RFP this allegedly violates, but essentially Marks argues that it is improper to set up a separate method for City owned property to be added to the UGB. The parties' arguments get very convoluted regarding precisely what occurred with the Luscher Farms notice, application, and applicable approval criteria. My understanding of the 3-Party IGA, however, is not that it made a special exemption for the Luscher Farm area that would allow it to be included in the UGB when it does not meet the applicable requirements. I understand the 3-Party IGA to explain that the 3-Party IGA does not prevent the Luscher Farm area from proceeding under existing Metro provisions and that the City not be constrained by anything in the 3-Party IGA. In other words, the Luscher Farm UGB application could proceed as if the 3-Party did not exist.

Section 4.1 & 4.2 of the 3-Party IGA do not violate the RFP.

The Cities have thrown up numerous obstacles to Marks obtaining an enforcement order under ORS 197.320(12). Marks must prevail over almost all of those obstacles to succeed. Marks' attorney has done a valiant job attempting to overcome those obstacles and has prevailed over almost all of them. Unfortunately for Marks, I just do not see that allowing the Cities to control the timing of the concept plans violates the significant discretion granted to Metro in the RFP. Perhaps LCDC will feel differently.

5. Conclusion

(1) The IGAs are decisions that are subject to ORS 197.320(12) only if they are land use decisions. The IGAs are not statutory land use decision, but they are significant impacts test land use decisions. Therefore, the IGAs are decisions that are subject to ORS 197.320(12).

(2) The IGAs constitute a pattern or practice of decision making. None of the other actions raised by Marks constitute decisions for the purpose of establishing a pattern or practice.

(3) Metro and the County did not engage in a pattern or practice of decision making because the only decision they made was the 5-Party IGA. One decision is not enough to constitute a pattern or practice of decision making.

(4) In order to establish a pattern or practice of decision making that violates the RFP, Marks must demonstrate that both the 5-Party IGA and the 3-Party IGA violate the RFP. Neither the 5-Party IGA nor the 3-Party IGA violate the RFP.

RECOMMENDATION

Based on the preceding findings of facts and conclusions of law, my recommendation to LCDC is not to issue an enforcement order pursuant to ORS 197.320(12). If LCDC finds that both the 3-Party IGA and the 5-Party IGA violate the RFP then I would recommend Marks' proposal to nullify and invalidate the 3-Party IGA. If LCDC finds that Metro and the County engaged in more than one decision that violated the RFP then I would also recommend Marks' proposal to amend and clarify the 5-Party IGA to ensure that the concept planning process for the Stafford Area will be implemented in a manner consistent with the RFP. [13]

August 12, 2020

Fred Wilson
Hearings Officer

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[13] ORS 197.328(3) requires that I serve a copy of the proposed order on DLCD and all parties to the hearing. OAR 660-045-0140 requires that I also send a copy of the proposed order to LCDC. Once the proposed order is served on LCDC, OAR 660-045-0140(2) provides:

> "After the commission receives the proposed order from the hearings officer, the commission must do the following:
>
> "(a) Establish a date on which the commission will consider the proposed order;
>
> "(b) Mail the proposed order to all the parties; and
>
> "(c) Mail to all the parties the following information:
>
> "(A) The date on which the commission will consider the proposed order;
>
> "(B) A statement that the commission will limit its review as specified in Section (4) of this rule;
>
> "(C) A statement that exceptions to the proposed order may be filed by parties to the case; and
>
> "(D) A statement that exceptions to the proposed order must be received by the commission no later than 15 days after the order was mailed to the parties."

CERTIFICATE OF SERVICE

I certify that on August 18, 2020, I served the attached **HEARINGS OFFICER RECOMMENDATION IN THE MATTER OF THE ENFORCEMENT ORDER FOR THE STAFFORD AREA PURSUANT TO ORS 197.320** by mailing in a sealed envelope, with first-class postage prepaid, a copy thereof addressed as follows:

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