

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

IN THE MATTER OF A REQUEST TO)	FINDINGS OF FACT,
PLACE AND ENFORCEMENT ORDER)	CONCLUSION AND
AGAINST THE CITY OF GRANTS PASS)	FINAL ORDER
PURSUANT TO ORS 197.324)	09-EO-01

I. INTRODUCTION AND FINDINGS OF FACT

1. ORS 197.319 requires that before a person may request adoption of an enforcement order pursuant to ORS 197.320, the person shall present in writing the reasons for such an order to the affected local government and the proposed revisions to the local comprehensive plan, land use regulations, or decision-making process that are the basis for the order.

2. After complying with ORS 197.319, ORS 197.324(2)(a) allows a person to petition the Land Conservation and Development Commission (LCDC or Commission) to consider an enforcement proceeding against the affected local government. The Commission must determine if there is good cause to proceed on the petition. ORS 197.324(2)(b). If the Commission determines that there is not good cause to proceed on the petition, the Commission is required to issue a final order stating the reasons for dismissing the petition. ORS 197.324(2)(c).

3. In a letter dated February 20, 2008, Perry Wickham (petitioner), pursuant to ORS 197.319 and OAR 660-045-0040, alleges that the City of Grants Pass (City) has been violating the terms of an intergovernmental agreement (IGA) between the City and Josephine County (County). Petitioner requested, under ORS 197.319(1)(b)(B), that the City refund charges and assessments made against him, and others similarly situated, for deferred public improvements and that the city exonerate him, and others similarly

situated, from annexation and deferred development agreements made as a required condition of developing property subject to the IGA.

4. The City responded in a letter dated April 16, 2008 (within the 60 days required by OAR 660-045-0050(1)). The city's letter explained why the City does not believe that it has violated the terms of the IGA, and stated that it would not take corrective action.

5. Petitioner responded to the City's letter with another letter, dated July 8, 2008, which indicated that the petitioner believed the City's response was inadequate. The City responded to this letter on August 26, 2008, again explaining that it does not believe that it violated the IGA, and will not take corrective action.

6. On October 13, 2008, petitioner petitioned the Commission to issue an enforcement order. The Department of Land Conservation and Development (DLCD or Department) reviewed the petition pursuant to OAR 660-045-0070 and rejected it because it was materially deficient.

7. On February 9, 2009 the petitioner initiated enforcement proceedings with the City a second time citing the same issues as his February 20, 2008 letter. The City responded, within the 60 days required, with a letter dated March 12, 2009, again stating that there was no basis for taking corrective action.

8. On April 3, 2009, petitioner petitioned the Commission for an enforcement order. DLCD determined that the petition was complete and in compliance with the procedural requirements of ORS 197.319 to 197.325 and OAR 660-045-0040 to -0060.

9. Under ORS 197.320 the Commission has the power to order a local government to comply with its acknowledged comprehensive plan and land use

regulations when the Commission has “good cause to believe” the existence of one of the twelve circumstances listed in ORS 197.320. In his petition to LCDC, the petitioner asserts that LCDC’s authority is under ORS 197.320(6) which provides:

A local government has engaged in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. In making its determination under this subsection, the commission shall determine whether there is evidence in the record to support the decisions made. The commission shall not judge the issue solely upon adequacy of the findings in support of the decisions.

and under ORS 197.320(10) which provides:

A local government is applying approval standards, special conditions on approval of specific development proposals[,] or procedures for approval that do not comply with ORS 197.307(6)

where ORS 197.307(6) states that the local government can not impose approval standards that discourage needed housing through unreasonable cost or delay.

10. Petitioner alleges that there is a pattern and practice of noncompliant decisions by the City as demonstrated by the City’s decisions to impose conditions on the development of 171 Canyon Drive, 165 Canyon Drive, 2016 Fruitdale Drive, 270 Canyon Drive, and 1914 Fruitdale Drive. Petitioner alleges that the decisions made on each of these properties ignored section IV.3 of the IGA, which states that Category I properties “shall not be required to execute an agreement for future annexation or to extend water as a condition of development unless annexation or extension is otherwise required by state statute or administrative rule.” The petitioner alleges that the City has not amended its development code to differentiate between Category 1 and Category 2 developments and, therefore, it is incorrectly imposing conditions on Category 1 developments.

11. The petitioner also contends that the deferred development agreements and deposits that the City required as conditions to the development of the petitioner's property have caused him, and others, to incur unreasonable costs and delay, which have discouraged the development of needed housing.

12. Before initiating an enforcement order, the Commission is required to determine that there is good cause to proceed to a contested hearing based on the standard(s) in ORS 197.320 under which the petitioner asserts its authority to issue an enforcement order. If the Commission determines that there is good cause, it must also decide whether the Commission or a hearings officer should hold the hearing and when the hearing should be held as required by OAR 660-045-0080.

13. The Commission will make a finding of good cause if there is substantial evidence of noncompliance presented in the department's recommendation, the requester's petition, the citizen's request notice to the affected local government, the affected local government's response to the citizen request, and any testimony from the parties to the enforcement proceeding. OAR 660-045-0090(5) and (6).

14. On June 4, 2009, the Commission held a hearing to determine if there is good cause in this case. The Commission considered the Department's May 27, 2009 recommendation, the petitioner's February 20, 2008 request for enforcement order and subsequent correspondence between the City and petitioner, the petitioner's February 9, 2009 request for enforcement order and subsequent correspondence between the City and petitioner, related facts known to or ascertained by the Commission, and written and oral testimony from parties to the enforcement proceeding on June 4, 2009 to determine if there was substantial evidence of noncompliance, pursuant to OAR 660-045-0090.

II. ULTIMATE FINDINGS AND CONCLUSIONS OF LAW

1. The Commission finds that the petitioner has satisfied the procedural requirements of ORS 197.319 and ORS 660-045-0040.
2. The Commission finds that the City has met the requirements of OAR 660-045-0050.
3. The Commission considered whether the materials described in Finding of Fact 14 establish that there is substantial evidence of noncompliance as required by OAR 660-045-0090(6). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.482(8)(c); *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608, 612 (1993). Where the evidence in the record is conflicting, the Commission must make a reasonable choice between the conflicting evidence in view of all the evidence in the record to reach its decision. *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258, 890 P2d 455 (1995).
4. The Commission finds that the petitioner has not established good cause to proceed on the petition for an enforcement order against the City of Grants Pass. Under ORS 197.320, the Commission has the authority to issue an enforcement order to a local government to bring its comprehensive plan, land use regulation, limited land use decision or other land use decision into compliance with the statewide planning goals, acknowledged comprehensive plan provisions, or land use regulations. The petitioner alleges noncompliance under ORS 197.320(6) and 197.320(10) based on the City's failure to follow all of the provisions of the IGA. However, the IGA is not a land use regulation and therefore is not subject to an enforcement order under ORS 197.320.

ORS 197.015(11) defines a land use regulation as “any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046[,] or similar general ordinance establishing standards for implementing a comprehensive plan.” The IGA only establishes the City’s authority to apply its already established land development regulations to lands outside the city limits. In *City of Portland v. Multnomah County*, the Oregon Land Use Board of Appeals (LUBA) decided that urban area planning agreements (i.e. intergovernmental agreements) that have not been adopted by a local government by ordinance or resolution are not land use regulations. 19 Or LUBA 468, 476 (1990). The IGA was adopted by the City and County on August 5, 1998 but there are no ordinances or resolutions passed by the city during that time that adopt the IGA as a land use regulation. City of Grants Pass Ordinance and Resolution Index, <http://www.grantspassoregon.gov/Index.aspx?page=798>, last accessed July 6, 2009. The petitioner does not advance any evidence that the IGA has been adopted by ordinance or resolution.

Furthermore, even if the IGA were a land use regulation, ORS 197.175(2)(d) requires that a city make its land use decisions in compliance with acknowledged land use regulations. Article 17 of the Grants Pass Development Code, which specifies the City’s standards for partitioning land, is an acknowledged land use regulation, whereas the IGA is not. *Wickham v. City of Grants Pass*, 53 Or LUBA 261, 268-69. Therefore, the City is required to make decisions regarding partitions pursuant to Article 17. This does not mean that Article 17 cannot incorporate the IGA to reflect the agreement between the City and the County, but where the IGA exempts an action that Article 17 requires, Article 17 is the controlling regulation.

5. The Commission finds that the issue that the petitioner raises stems from a policy issue between the local governments and is not the proper type of issue to be resolved in a contested case before this Commission. The IGA itself contains provisions for the City and the County to resolve disputes as to the operation and interpretation of the agreement or to terminate the agreement if desired.

6. Because the IGA is not a land use regulation, the Commission cannot find substantial evidence of noncompliance with a land use regulation and, therefore, viewing the record as a whole, the Commission does not find good cause to proceed to a contested case hearing. The Commission orders that the petition be dismissed pursuant to OAR 660-045-0090(1).

III. ORDER

BASED ON THE FOREGOING FINDINGS AND CONCLUSIONS, IT IS HEREBY ORDERED THAT:

Pursuant to OAR 660-002-0010(6), the petition by Perry Wickham, requesting an enforcement order against the City of Grants Pass for engaging in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation and for applying special conditions on approval of development proposals that do not comply with ORS 197.307, is denied.

DATED THIS 30 DAY OF JULY 2009.

FOR THE COMMISSION:

Richard Whitman, Director
Department of Land Conservation and Development

NOTICE: You may be entitled to judicial review of this Final Order. Judicial Review may be obtained by filing a petition for review within 60 days from the effective date of this Final Order. Judicial review is pursuant to the provisions of ORS 183.482 and ORS 197.650.