

1 BEFORE THE LAND USE BOARD OF APPEALS
2
3 OF THE STATE OF OREGON
4
5 CITY OF SANDY,
6 *Petitioner,*
7 vs.
8
9 CLACKAMAS COUNTY,
10 *Respondent.*
11
12 LUBA No. 2013-012
13
14 ORDER

15 JURISDICTION

16 Petitioner City of Sandy (the city) appeals a county board of commissioners' decision
17 to terminate an intergovernmental agreement between the county, the city, and other
18 governmental entities. The county moves to dismiss the appeal.

In 1998, the county, the city and Metro signed an Intergovernmental Agreement on Green Corridor and Rural Reserves and Population Coordination (the 1998 Agreement), among the county, the city, Metro, and the Oregon Department of Transportation (ODOT). Although the 1998 Agreement had provisions directed at rural reserves and population coordination, the bulk of the 1998 Agreement concerned a green corridor along Highway 26, and was intended to coordinate planning and to preserve and protect the rural and natural resource character of areas along the corridor. Section III of the 1998 Agreement established temporary corridor boundaries extending 200 feet from both edges of the Highway 26 right-of-way, and contemplated permanent boundaries to be established later, via a coordinated process set out in the Agreement. Most of the subsequent sections required or encouraged future planning efforts by or between the parties, and set out notice and coordination procedures for future planning efforts. However, some sections included mandatory requirements that presumably applied as soon as the agreement became effective. For

1 example, Section V required the county to retain current zoning within the corridor, and to
2 agree not to expand rural commercial or rural industrial zones unless approved by the city.
3 Section IX provided that the county shall not upzone existing exception areas or non-
4 resources lands to allow density greater than that permitted by zoning existing on the
5 effective date of the agreement, unless the city agrees.

6 Section VII of the 1998 Agreement required ODOT to develop an access management
7 plan to limit access within the corridor. However, ODOT has not signed the 1998
8 Agreement. One of the disputed issues in this appeal is whether the 1998 Agreement ever
9 became effective, given that ODOT has to date not executed the agreement. Because that
10 issue is unresolved at this point, we assume for purposes of this order only that that the 1998
11 Agreement is effective.

12 Section XIV of the 1998 Agreement provides that any party may unilaterally
13 terminate the agreement following 60 days' notice to the other parties. On February 7, 2013,
14 the county commissioners adopted Resolution 2013-02, the decision challenged in this
15 appeal. Resolution 2013-02 recites that ODOT has not signed the 1998 agreement, and that
16 many of the agreement's provisions have been superseded by subsequent actions of the
17 signatories. The resolution concludes that it is in the best interest of the county's citizens to
18 terminate the agreement, and so terminates it, effective 60 days from the date of notice to the
19 parties to the agreement. The city filed a timely appeal of the resolution to LUBA.

20 The county moves to dismiss this appeal, arguing that the challenged resolution does
21 not qualify as a land use decision as defined at ORS 197.015(10), because a decision to
22 terminate the agreement does not concern the application of any statewide planning goal,
23 comprehensive plan provision or land use regulation.¹

¹ ORS 197.015(10)(a)(A) defines "land use decision" to include a final decision or determination made by a local government or special district that concerns the adoption, amendment or application of the statewide planning goals, a comprehensive plan provision, a land use regulation or a new land use regulation.

1 In addition, the county argues that the 1998 Agreement never became effective,
2 because its effectiveness and many of its provisions were contingent on ODOT becoming a
3 party to the agreement. Without ODOT as a party to the agreement, the county argues, the
4 agreement was ineffective, and therefore the decision to withdraw from the agreement had no
5 legal effect. The county contends that a decision that has no legal effect cannot constitute a
6 land use decision subject to LUBA's jurisdiction as defined under ORS 197.015(10) or under
7 the significant impacts test set out in *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653
8 P2d 992 (1982).

9 The city responds that the Clackamas County Comprehensive Plan (CCCP) includes
10 goals and policies that the county should have applied in deciding to terminate the 1998
11 Agreement. *See Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004) (a decision
12 "concerns" the application of a comprehensive plan provision or land use regulation where,
13 among other things, the local government decision maker was required to apply the provision
14 or regulation in making the decision, but did not). The city notes that the Urban Growth
15 Concept element of Clackamas County Comprehensive Plan (CCCP) Chapter IV includes
16 language, goals and policies addressing green corridors and the role they play in maintaining
17 the rural character of lands separating the city from the larger metropolitan area, consistent
18 with the purposes articulated in the 1998 Agreement. The Purpose section of the 1998
19 Agreement states in relevant part that the parties agree that they will work together to, among
20 other things, "[p]reserve and protect the rural and natural resource character and values of the
21 Rural Reserve areas along the Green Corridor that separate the City from the Metropolitan
22 Area." Record 23.

23 Turning to the CCCP, the preamble to the CCCP Urban Growth Concept element
24 states, in relevant part:

25 "The provisions of the Urban Growth Concept apply in addition to other
26 requirements identified in the Clackamas County Comprehensive Plan. The
27 Urban Growth Concept is designed to provide guidance for Comprehensive

1 Plan and Zoning Development Ordinance changes, as well as to identify
2 specific development review requirements. All provisions except Green
3 Corridors apply to lands inside the Portland Metropolitan Urban Growth
4 Boundary. Green Corridors apply to rural, agricultural and forest areas. Future
5 Urban Study Areas are areas in transition. When concept planning is
6 completed for these areas, growth concept design types will be adopted as
7 appropriate.” CCCP IV-12.

8 The element then defines “Green Corridors” as “[a]reas outside the Urban Growth
9 Boundary adjacent to major transportation routes to neighboring cities where the rural
10 character of the landscape and agricultural economy shall be maintained. The intent is to
11 preserve the view sheds and maintain the rural character between urban areas along the major
12 transportation routes.” CCCP IV-13. This definition is similar to the definition of “Green
13 Corridor” set out in the 1998 Agreement. Record 24 (defining “Green Corridor” as “the high
14 performance, multi-model transportation facilities connecting the City to the metropolitan
15 area along Hwy 26, and the surrounding identified rural lands within which the rural and
16 natural resource character will be preserved and protected to maintain separation between the
17 City and the metropolitan area and preserve the unique identifies of the City and the
18 metropolitan area”).

19 The CCCP Urban Growth Concept element then sets out, as one of its stated Goals,
20 the requirement that the county “[m]aintain the rural character of the landscape between the
21 Urban Growth Boundary and neighboring cities.” CCCP IV-14.

22 Finally, and most importantly, the CCCP Urban Growth Concept element sets out a
23 policy that is directly concerned with the 1998 Agreement. CCCP Urban Growth Concept
24 Policy 12.0 states that “[t]he goals and policies for Green Corridors shall be defined through
25 a separate study as outlined in the Intergovernmental Agreements on Green Corridor and
26 Rural Reserve and Population Coordination, signed by Clackamas County, City of Sandy,
27 City of Canby, ODOT and Metro.” CCCP IV-17.

28 The city argues that it is not clear whether the study required by Policy 12.0 has ever
29 been conducted, or whether the 1998 Agreement is itself the study. In either case, the city

1 argues, prior to terminating the 1998 Agreement the county was required to address the
2 language, goals and policies in the CCCP Urban Growth Concept element, including Policy
3 12.0, and explain why termination is consistent with the Goal and Policy. Because the Goal
4 and Policy should have been applied, the city argues, the decision qualifies as a statutory
5 “land use decision.”

6 The county replies that it was not required to consider the cited CCCP language, goal
7 and policy in adopting the resolution that terminated the 1998 agreement, because they are
8 not applicable approval criteria, and do not provide meaningful guidance to the county in
9 adopting the challenged decision to terminate the 1998 Agreement. Therefore, the county
10 argues, the city has not demonstrated that the decision concerns the application of any
11 comprehensive plan provision, for purposes of ORS 197.015(10)(a)(A).

12 We disagree with the county that the cited CCCP language, goal and policy are
13 inapplicable to a decision to terminate the 1998 Agreement. Reading the relevant CCCP
14 Urban Growth Concept plan language as a whole, it is reasonably clear that the county is
15 concerned as a matter of policy with maintaining separation between the city and
16 metropolitan area, in part by maintaining the rural character of the green corridors. Policy
17 12.0 suggests that the county chose to rely upon the 1998 Agreement to develop the specific
18 regulations that implement that policy concern with respect to the Highway 26 green corridor.
19 In addition, as noted above, the 1998 Agreement included several specific restrictions on
20 county zone changes that affect the Highway 26 green corridor. Terminating the 1998
21 Agreement leaves open the question of how the county intends to address the policy concerns
22 that are set out, and which remain, in the CCCP Urban Growth Concept element.

23 For that reason, we agree with the city that the challenged decision terminating the
24 1998 Agreement “concerns” the “application” of comprehensive plan provisions, in the sense
25 that the county was required to consider, and therefore apply, those plan provisions in

1 deciding whether or not to terminate the 1998 Agreement.² Accordingly, the challenged
2 decision is a “land use decision” as defined at ORS 197.015(10)(a)(A), unless some statutory
3 exception applies. No party argues that a statutory exception applies.

4 As noted, the county also argues that the 1998 Agreement was not effective when the
5 county chose to terminate it, because ODOT had not signed it. Because the agreement was
6 not effective, the county argues, its termination has no legal effect, which means the decision
7 to terminate the agreement does not constitute “land use decision” as defined at ORS
8 197.015(10)(a)(A). According to the county, ORS 197.015(10)(a)(A) presumes a decision
9 with some legal consequence.

10 The city argues that the 1998 Agreement was effective, at least between the three
11 signatories. According to the city, nothing in the 1998 Agreement specifies that the
12 agreement becomes effective only when all four parties have signed, and the city argues that
13 the three signatories have acted consistently with the agreement since signing it. The city
14 also argues that, even if the agreement was not effective, its termination has legal
15 consequences on the county’s planning obligations.

16 In the challenged decision, the recitals do not state or conclude that the 1998
17 Agreement is ineffective. We note that the county chose to terminate the 1998 Agreement
18 according to the terms of Section XIV of the agreement, which does not suggest that the
19 county believed the agreement was ineffective. If the county believed the agreement to be
20 ineffective, it is not obvious why the county felt it necessary to comply with Section XIV.
21 Similarly, if the county believed the 1998 Agreement was ineffective and therefore imposed
22 no potential obligations on the county, it is not clear why the county went to the trouble of
23 terminating it.

² We do not mean to suggest that termination of the 1998 Agreement is inconsistent with the relevant CCCP Urban Growth Concept element language, goals and policies, only that that language, goals and policies should have been considered when deciding whether or not to terminate the 1998 Agreement.

1 However, based on the pleadings submitted at this point, LUBA is in no position to
2 determine whether or not the 1998 Agreement was effective on the date the county chose to
3 terminate it, or assuming it was ineffective, whether its termination has no legal consequence,
4 as the county argues, and the jurisdictional consequences, if any. The county has leave to
5 refile its motion to dismiss to present a more focused argument. However, at this point we
6 conclude, for the reasons set out above, that the challenged decision concerns the application
7 of a comprehensive plan provision, and is therefore a land use decision as defined at ORS
8 197.015(10)(a)(A), and subject to our jurisdiction.

9 The motion to dismiss is denied.

10 **BRIEFING SCHEDULE**

11 Pursuant to the parties' stipulation, the next event in this review proceeding is the
12 filing of the petition for review. Accordingly, the petition for review is due 21 days from the
13 date of this order. The response brief is due 42 days from the date of this order. The Board's
14 final opinion and order is due 77 days from the date of this order.

15 Dated this 20th day of June, 2013.

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Tod A. Bassham
Board Member