

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 TERRA HYDR INC.,
5 TONQUIN INDUSTRIAL LLC,
6 BOB ALBERTSON, DONNA ALBERTSON,
7 ALBERTSON TRUCKING INC., MARK BROWN,
8 MCCAMMANT PROPERTIES INC.,
9 BROWN TRANSFER INC., MCGUIRE BROTHERS LLC.
10 and STEVE MCGUIRE,
11 *Petitioners,*

12
13 vs.

14
15 WASHINGTON COUNTY,
16 *Respondent.*

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18 LUBA No. 2013-017

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20 TERRA HYDR INC.,
21 TONQUIN INDUSTRIAL LLC,
22 BOB ALBERTSON, DONNA ALBERTSON,
23 ALBERTSON TRUCKING INC., MARK BROWN,
24 MCCAMMANT PROPERTIES INC.,
25 BROWN TRANSFER INC., MCGUIRE BROTHERS LLC.
26 and STEVE MCGUIRE,
27 *Petitioners,*

28
29 vs.

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31 CITY OF TUALATIN,
32 *Respondent.*

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34 LUBA No. 2013-018

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36 TERRA HYDR INC.,
37 TONQUIN INDUSTRIAL LLC,
38 BOB ALBERTSON, DONNA ALBERTSON,
39 ALBERTSON TRUCKING INC., MARK BROWN,
40 MCCAMMANT PROPERTIES INC.,
41 BROWN TRANSFER INC., MCGUIRE BROTHERS LLC.
42 and STEVE MCGUIRE,
43 *Petitioners,*

44
45 vs.

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2 CITY OF SHERWOOD,
3 *Respondent.*

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5 LUBA No. 2013-019

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7 TERRA HYDR INC.,
8 TONQUIN INDUSTRIAL LLC,
9 BOB ALBERTSON, DONNA ALBERTSON,
10 ALBERTSON TRUCKING INC., MARK BROWN,
11 MCCAMMANT PROPERTIES INC.,
12 BROWN TRANSFER INC., MCGUIRE BROTHERS LLC.
13 and STEVE MCGUIRE,
14 *Petitioners,*

15
16 vs.

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18 METRO,
19 *Respondent.*

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21 LUBA No. 2013-025

22 ORDER ON MOTIONS TO DISMISS

23 **NATURE OF THE DECISIONS**

24 Petitioners appeal Resolution Nos. 13-18, 5133-13, 2013-008, and 13-4415, adopted
25 by respondents Washington County, City of Tualatin, City of Sherwood, and intervenor-
26 respondent Metro, respectively, each of which concern the Ice Age Tonquin Trail Master
27 Plan or IATTMP. These four appeals have been consolidated as closely related appeals
28 pursuant to OAR 661-010-0055.

29 **FACTS**

30 For several years Metro, the Portland metropolitan area's regional planning authority,
31 has worked with local jurisdictions to plan for a trail connection between the Tualatin River
32 in the north and the Willamette River in the south. In January, 2013, Metro completed a draft
33 Ice Age Tonquin Trail Master Plan or IATTMP, a regional pedestrian and bicycle trail master
34 plan. The proposed Tonquin Trail alignment connects a number of natural areas together,
35 and uses portions of existing or planned trails along with new trail segments on lands that

1 Metro or local governments own or intend to acquire. When completed, the trail will be
2 approximately 22 miles long.

3 In February, 2013, the Metro Council approved the draft IATTMP by resolution.
4 Metro’s decision states that approval of the IATTMP would allow the Tonquin Trail
5 alignment to be included in Metro’s 2035 Regional Transportation Plan. Concurrently,
6 Washington County, the City of Tualatin, and the City of Sherwood each passed resolutions
7 “approving” or “acknowledging” the draft IATTMP. On February 19, 2013, the City of
8 Sherwood adopted Resolution No. 2013-008, entitled “Resolution Acknowledging the
9 [IATTMP] as a Reference Document for Decision Making Purposes.” On February 25, 2013,
10 Washington County adopted Resolution and Order No. 13-18, entitled “In the Matter of the
11 Board of Commissioners’ Acknowledgement of the [IATTMP].” Also on February 25, 2013,
12 the City of Tualatin adopted Resolution No. 5133-13, entitled “Resolution Approving the
13 [IATTMP].”¹ The four resolutions were appealed to LUBA, and the appeals consolidated for
14 review.

15 JURISDICTION

16 As defined at ORS 197.015(10)(a), a “land use decision” subject to LUBA’s
17 jurisdiction must be a “final” decision.² Respondents move to dismiss the appeals in LUBA

¹ On that same date, the city council adopted an ordinance that amended the city’s transportation system plan (TSP) to reflect portions of the IATTMP. That ordinance is the subject of a separate appeal, LUBA No. 2013-016, that is not consolidated with these appeals.

² Under ORS 197.015(10)(a)(A), a land use decision includes:

“A *final decision or determination* made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]” (Emphasis added.)

1 Nos. 2013-17, 2013-18, and 2013-19, which challenge the resolutions adopted by
2 Washington County, the City of Tualatin and the City of Sherwood, respectively.
3 Respondents claim that their respective resolutions are not land use decisions subject to
4 LUBA’s jurisdiction because they are not “final” decisions.³ According to respondents, final
5 decisions regarding the IATTMP will occur when and if each jurisdiction adopts or
6 incorporates relevant portions of the IATTMP into its comprehensive plan, transportation
7 system plan, or master parks plan, as appropriate. For the following reasons, we agree with
8 respondents that Washington County’s resolution and the City of Tualatin’s resolution are not
9 final decisions, but we agree with petitioners that the City of Sherwood’s resolution is a final
10 decision.

11 Generally, a decision that merely initiates a legislative proceeding leading to future
12 amendments to a local governments’ comprehensive plan or zoning regulations is not a final
13 decision. *Setniker v. Polk County*, 58 Or LUBA 87 (2008); *No Tram to OHSU v. City of*
14 *Portland*, 40 Or LUBA 411 (2001); *City of North Plains v. Washington County*, 24 Or LUBA
15 78 (1992). Thus, if a resolution merely constitutes a non-binding initial step in a legislative
16 process, then the resolution is not final, even though it may lead to separate, future decisions
17 to amend a jurisdiction’s comprehensive plan to include or incorporate relevant portions of
18 the IATTMP adopted by Metro. The strongest basis for evaluating whether the challenged
19 resolutions are final decisions for purposes of ORS 197.015(10) is the language of each
20 resolution. We therefore turn to the pertinent language of each resolution.

³ Although Metro adopted the IATTMP by resolution and the IATTMP that was adopted by Metro is labeled a “draft,” it appears that Metro has taken final action to adopt the IATTMP. Metro has not argued that its resolution is not a “final” decision and has not moved to dismiss LUBA No. 2013-025. For purposes of this order, we assume without deciding that Metro Resolution No. 13.4415 is a “final” decision.

1 **A. Washington County Resolution No. 13-18**

2 Washington County’s Resolution No. 13-18 states in relevant part that the board
3 “hereby acknowledges its support of the [IATTMP].” Wash. Record 5.⁴ The resolution states
4 that approval of the plan is “not a binding land use decision, hence it is important that trail
5 partner jurisdictions adopt the trail alignment into relevant land use documents[.]” Wash.
6 Record 4. The resolution also states that the county “will adopt the Ice Age Tonquin Trail
7 alignment into its Transportation System Plan and other relevant land use planning
8 documents[.]” Wash. Record 5.

9 Petitioners argue Washington County’s resolution is a final decision, because one of
10 its recitals states that approval of the IATTMP will allow Metro to begin purchasing trail
11 easements from willing sellers “in earnest.” Wash. Record 5. Petitioners also note that
12 exhibits attached to the resolution state that the Metro 2035 Regional Transportation Plan call
13 for “near-term construction” of the trail alignment. According to petitioners, the resolution
14 constitutes the county’s final decision to approve and allow construction of the Tonquin
15 Trail, and any subsequent proceedings to adopt or incorporate the IATTMP into the county’s
16 transportation system plan at some undetermined point in the future will be ministerial, post-
17 hoc implementations of the present decision.

18 We disagree with petitioners. As the resolution recites, Metro has long had voter-
19 approved authority and funding to acquire land for future parks and open spaces, and has in
20 fact acquired property in contemplation of the Tonquin Trail. That the county’s
21 “acknowledgment” of support for the IATTMP may encourage Metro to step up its
22 acquisition program does not make the county’s resolution a final decision that approves or
23 adopts the IATTMP. The county decision clearly contemplates that the county’s final

⁴ Each jurisdiction filed separate records. We follow petitioners in citing to Washington County’s record as “Wash. Record,” the City of Tualatin’s record as “Tual. Record.,” and the City of Sherwood’s record as “Sher. Record.”

1 decision to approve or adopt the Tonquin Trail alignment will occur when the county adopts
2 the alignment into its transportation plan and other relevant planning documents. Further,
3 that the IATTMP contemplates “near-term” construction of the trail does not mean that the
4 challenged resolution adopts the IATTMP as decisional authority to approve construction of
5 the trail. More plausibly, it merely presumes that the respective local governments will
6 amend their plans and codes to reflect relevant portions of the IATTMP and then, and only
7 then, issue construction approvals under those amended plans and codes. We conclude that
8 Washington County Resolution and Order No. 13-18 is not a final decision for purposes of
9 ORS 197.015(10).

10 **B. City of Tualatin Resolution No. 5133-13**

11 The City of Tualatin’s resolution states in relevant part that the IATTMP is
12 “approved,” and that “approval of the [IATTMP] will allow the City of Tualatin and partner
13 jurisdictions to bring trail implementation in earnest.” Tual. Record 5. However, the
14 resolution directs staff “to prepare appropriate documents for the Council to consider
15 adopting the [IATTMP] into the [city’s] Parks and Recreation Master Plan, the Development
16 Code, and Transportation System Plan.” Tual. Record 16. As noted, on the same date, the
17 city council adopted an ordinance that amends the city’s transportation system plan in
18 relevant part to reflect the Tonquin Trail alignment. That ordinance is the subject of a
19 separate appeal, LUBA No. 2013-016, and is not consolidated with these appeals.

20 Petitioners again argue that the City of Tualatin’s resolution makes a final decision to
21 approve the IATTMP, and that final decision is merely being implemented in separate
22 legislative plan and code amendments. However, it is reasonably clear that Tualatin intends
23 the separate and subsequent plan and code amendments to be the vehicles that finally “adopt”
24 the IATTMP as decisional authority. The city clearly intended that such adoption or
25 incorporation will occur as part of separate proceedings, including future proceedings to
26 amend the parks master plan and development code. The city’s resolution merely initiates or

1 furthers those amendments, and those amendments are the final decisions that will give effect
2 to the IATTMP within the city. We conclude that City of Tualatin Resolution No. 5133-13
3 is not a final decision for purposes of ORS 197.015(10).

4 **C. City of Sherwood Resolution No. 2013-008**

5 The language of Resolution No. 2013-008, adopted by respondent City of Sherwood,
6 presents a closer question. The City of Sherwood resolution states in relevant part that the
7 city council “acknowledges the contents of the Tonquin Trail as published on January 2013
8 and acknowledges the study as a reference document for decision-making purposes.” Sher.
9 Record 1. It further states that “[s]taff is directed to utilize the [IATTMP] * * * as a guide for
10 the development and design of the Cedar Creek Trail and other trail segments within
11 Sherwood.” Sher. Record 2. Unlike the other two resolutions discussed above, the City of
12 Sherwood’s resolution does not include language directing staff to prepare amendments to
13 the city’s plans or codes, or contemplating such future amendments. The staff report to the
14 city council similarly does not suggest that staff believes that future plan or code amendments
15 are necessary to implement the IATTMP. The staff report notes that the Sherwood portion of
16 the Tonquin Trail, known as the Cedar Creek Trail, is planned and that design and
17 construction are “currently funded.” Sher. Record 125. The staff report states that the
18 IATTMP will be used to “guide” the determination of the preferred trail alignment for the
19 Cedar Creek Trail. *Id.*

20 Because the Sherwood portion of the Tonquin Trail is already planned and funded, it
21 may be that the city believes that no further plan or code amendments are necessary in order
22 to construct that portion, and that the city intends to authorize completion of that portion
23 based on the city’s existing plans and code, applying the IATTMP as a “guide” for final
24 alignment determinations and as a “reference document for decision-making purposes,”
25 whatever that means. If so, then the city’s resolution does not merely initiate a legislative
26 process to implement the IATTMP, as the two resolutions discussed above, but rather

1 appears to be the city’s final (and only) decision to adopt the IATTMP as a basis for future
2 land use decisions.

3 In its motion to dismiss, the city suggests that the city may adopt future plan or code
4 amendments to implement portions of the IATTMP as decisional authority. However,
5 nothing in the city’s resolution or the record cited to us supports that suggestion. Absent a
6 more developed argument or some basis to conclude that the city’s resolution is merely
7 intended to initiate a legislative proceeding that would later adopt portions of the IATTMP,
8 or is otherwise not a final decision, we conclude that the City of Sherwood’s resolution is a
9 final decision for purposes of ORS 197.015(10).

10 **D. Significant Impact Test**

11 Alternatively, petitioners argues that the challenged resolutions fall within LUBA’s
12 jurisdiction under the “significant impact” test described in *Billington v. Polk County*, 299 Or
13 471, 703 P2d 232 (1985); *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982).
14 Under those cases, a decision that does not apply a land use regulation or otherwise satisfy
15 the statutory test may nevertheless, in some circumstances, be subject to LUBA review, if the
16 decision has a “significant impact” on present or future land uses. In the present case,
17 petitioner argues that implementation of the IATTMP in each jurisdiction will have
18 significant impacts on present and future land uses.

19 However, even a significant impact land use decision must be a final decision. *See*
20 *City of Pendleton v. Kerns*, *supra*; *McKenzie River Guides Assoc. v. Lane County*, 19 Or
21 LUBA 207 (1990); *CBH v. City of Tualatin*, 16 Or LUBA 399, 405 n 7 (1988). We
22 determined above that Washington County’s resolution and the City of Tualatin’s resolution
23 are not final decisions. Therefore, they do not constitute significant impact land use
24 decisions.

1 **MOTIONS TO TRANSFER TO CIRCUIT COURT**

2 In their notices of intent to appeal, petitioners included precautionary motions to
3 transfer the three appeals to circuit court, in the event we conclude that the challenged
4 decisions are not reviewable by LUBA as land use decisions. ORS 34.102(4); OAR 660-010-
5 0075(11). However, because circuit court jurisdiction under the writ of review statutes does
6 not include jurisdiction over non-final decisions, dismissal rather than transfer to circuit court
7 is the appropriate disposition where LUBA concludes that the appealed decisions are not final
8 decisions. *Grabhorn v. Washington County*, 46 Or LUBA 672 (2004), *aff'd without opinion*,
9 203 Or App 639, 129 P3d 281 (2006). Petitioners' motions to transfer are denied.

10 The appeals in LUBA Nos. 2013-17 and 2013-18 are hereby bifurcated from LUBA
11 Nos. 2013-019 and 2013-025 and will be dismissed in separate final opinions issued this
12 date.

13 **BRIEFING SCHEDULE**

14 Pursuant to the parties' stipulation, the deadline for filing the petition for review is 21
15 days from the date of this order. Response briefs are due 42 days from the date of this order.
16 The Board's final opinion and order is due 77 days from the date of this order.

17 Dated this 26th day of July, 2013.

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Tod A. Bassham
Board Member