



1           You are entitled to judicial review of this Order.  
2   Judicial review is governed by the provisions of ORS  
3   197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 The challenged ordinance amends Beaverton's  
4 comprehensive plan to add a new section titled "Urban  
5 Service Area and Boundary" and a map establishing the  
6 Beaverton Urban Service Area and Boundary (USB).<sup>1</sup>

7 **MOTIONS TO INTERVENE**

8 Washington County, Beaverton School District No. 48J,  
9 Tualatin Hills Park and Recreation District and Tualatin  
10 Valley Fire & Rescue move to intervene in this proceeding on  
11 the side of respondent. There is no opposition to the  
12 motions, and they are allowed.

13 **INTRODUCTION**

14 This appeal is one of three related appeals concerning  
15 the establishment of a USB for the unincorporated area of  
16 eastern Washington County located between the City of  
17 Portland (hereafter Portland) and the City of Beaverton  
18 (hereafter Beaverton). Beaverton, Portland and Washington  
19 County have attempted over a number of years to reach  
20 agreement on a location for a USB in the unincorporated area  
21 between Beaverton and Portland. Such a USB would separate  
22 those portions of the unincorporated area that ultimately  
23 will receive urban services from and be annexed by

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<sup>1</sup>The Urban Service Area and Boundary is sometimes referred to as the Urban Service Boundary (USB). We use the shortened acronym USB in this opinion.

1 Beaverton, from those portions that ultimately will receive  
2 urban services from and be annexed by Portland.<sup>2</sup> Those  
3 negotiations have not produced agreement among the county  
4 and two cities on the appropriate location for Portland's  
5 and Beaverton's USB.

6 In this appeal, Portland challenges Beaverton's  
7 adoption of its preferred USB. In Washington County v. City  
8 of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-142, May 6, 1994),  
9 decided this date, Washington County and Beaverton challenge  
10 Portland's adoption of its preferred USB. In City of  
11 Portland v. Washington County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-  
12 195, May 6, 1994), also decided this date, Portland  
13 challenges Washington County's amendment of its  
14 comprehensive plan to incorporate Beaverton's preferred USB.

15 As we explain in City of Portland, v. Washington  
16 County, supra, slip op at 6-8, the acknowledged  
17 comprehensive plans of both cities and Washington County  
18 defer determinations concerning which city ultimately will  
19 annex, and be responsible for providing urban services in,  
20 this unincorporated area of the county. However, the  
21 acknowledged comprehensive plans of both cities assert  
22 potential interests in annexing and providing such urban

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<sup>2</sup>Portland generally provides urban services directly. While Beaverton provides some urban services directly, it provides a number of urban services indirectly, through special districts.

1 services within this unincorporated area.<sup>3</sup> We conclude in  
2 City of Portland v. Washington County that the county  
3 improperly amended its comprehensive plan to adopt  
4 Beaverton's USB, because Beaverton's USB, as defined and  
5 incorporated into the county's comprehensive plan, conflicts  
6 with provisions in Portland's acknowledged comprehensive  
7 plan. We explain that the county may not unilaterally alter  
8 the acknowledged land use planning status quo concerning  
9 provision of urban services within and annexation of this  
10 unincorporated area, where such action will make the  
11 county's plan inconsistent with Portland's acknowledged  
12 comprehensive plan. Unless Portland agrees to amend its  
13 plan to be consistent with the Beaverton USB, under  
14 ORS 197.190(1)<sup>4</sup> and 268.385(1), the Metropolitan Service  
15 District (Metro) must agree that the USB should be located

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<sup>3</sup>We also explain that since these appeals all result in remand of the challenged comprehensive plan amendments, it is the provisions of the acknowledged comprehensive plans, as they existed prior to the challenged amendments, that are important. Id., slip op at 6 n 3.

<sup>4</sup>During the 1993 legislative session, the legislature amended a number of statutory provisions concerning intergovernmental coordination and adopted new provisions. Some of those new and amended provisions may be relevant to the decision challenged in this appeal on remand. However, the 1993 legislative amendments were not in effect when the challenged decision was adopted and all statutory references in this opinion are to the Oregon Revised Statutes as they existed on the date of the challenged decision. ORS 197.190(1) was recodified in 1993 and now appears at ORS 195.025(1)(1993).

1 where Beaverton and Washington County propose.<sup>5</sup> Because  
2 Metro has not taken such action, we remand the county's  
3 decision in City of Portland v. Washington County.

4 The only question we must address in this appeal is  
5 whether Beaverton's decision, like the decision subsequently  
6 adopted by Washington County to adopt the Beaverton USB,  
7 identifies the unincorporated area which Beaverton, rather  
8 than Portland, will ultimately annex and assume  
9 responsibility for providing urban services.<sup>6</sup>

10 **FIRST AND FOURTH ASSIGNMENTS OF ERROR**

11 Although the question is a close one, for the reasons  
12 explained below, we conclude the challenged decision adopts  
13 more than a nonbinding recommendation.<sup>7</sup> It amends

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<sup>5</sup>As we explain in City of Portland v. Washington County, Metro has authority under ORS 268.380(2) to require jurisdictions within the Metropolitan Service District to amend their plans where such amendments are necessary for compliance with the statewide planning goals. If Metro were to resolve the current controversy in favor of the Beaverton USB, Metro could direct Portland to amend its comprehensive plan to be consistent with the Beaverton USB, as required by Goal 2 (Land Use Planning).

<sup>6</sup>The subsequent county decision adopting the Beaverton USB challenged in City of Portland v. Washington County, explicitly states that Beaverton is the only city that will be responsible for providing urban services inside the Beaverton USB. Beaverton's earlier decision adopting a USB, which is the decision challenged in this appeal, does not state that position explicitly.

<sup>7</sup>No party questions our jurisdiction in this matter. If the decision is properly viewed as merely a proposal, we question whether the challenged decision is properly viewed as a final land use decision subject to review by LUBA. See Sensible Trans. v. Metro. Service Dist., 100 Or App 564, 787 P2d 498 (1990). However, because the decision amends the city's acknowledged comprehensive plan, see ORS 197.015(10)(a)(A)(ii), and we

1 Beaverton's acknowledged comprehensive plan to provide that,  
2 within the Beaverton USB, Beaverton will be the city to  
3 provide urban services to and annex the unincorporated area,  
4 to the extent any city will provide urban services to or  
5 annex such unincorporated area.

6 **A. The Challenged Decision**

7 The legal significance of the USB adopted by Beaverton  
8 is not readily discernible from the words the city uses in  
9 its decision. The challenged decision adopts the following  
10 addition to the acknowledged Beaverton Comprehensive Plan:

11 "URBAN SERVICE AREA AND BOUNDARY

12 "A long term objective of the City has been to  
13 establish an area for planning of urban public  
14 facilities and services. The [USB] establishes  
15 the limit of that planning area.

16 "In 1986 the cities of Tigard and Beaverton agreed  
17 on Annexation Planning Areas of Agreement, in  
18 effect, an urban services boundary between the two  
19 cities \* \* \*.

20 "Between 1985 and 1992 the cities of Beaverton and  
21 Portland discussed the location of an appropriate  
22 [USB] between the two cities. The City of  
23 Beaverton [in the challenged decision adopts a  
24 USB] that generally recognizes the Washington  
25 County/Multnomah County boundary \* \* \*.

26 "\* \* \* \* \*

27 "It is the City's belief that, in the long run,  
28 the citizens residing within the urban growth  
29 boundary of the Portland Metropolitan Area will be  
30 best served by eventually being part of a city.

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conclude in this opinion that the challenged decision is more than a mere proposal, we conclude the challenged decision is a land use decision.

1 Cities are established \* \* \* to be urban service  
2 providers and to provide a system of governance  
3 tailored to responding to and delivering urban  
4 services. Toward that end, the [USB] is  
5 established for two primary purposes:

6 "1. In planning for urban public facilities and  
7 services, the boundary establishes the extent  
8 of the City of Beaverton's direct interest  
9 and involvement for planning and coordination  
10 of such services. This planning and  
11 coordination will be accomplished through  
12 working with Washington County and the  
13 special districts which currently provide  
14 services within the area. It is not  
15 necessarily assumed that the City will  
16 provide, directly, all of the services within  
17 that boundary in the future. Service  
18 planning with the County and special  
19 districts will determine, over the long run,  
20 the most effective and efficient method of  
21 providing these services without further  
22 complicating the existing pattern of urban  
23 service provision.

24 \* \* \* \* \*

25 "2. The [USB] establishes the extent of the  
26 City's annexation interests to provide  
27 services directly, jointly with other service  
28 providers, or through contract with other  
29 service providers. In this manner, property  
30 owners and citizens are notified of the  
31 City's interests and intent.

32 "While the establishment of the [USB] is  
33 important as a planning tool, and that is its  
34 most immediate importance, in the long run it  
35 also sets the framework for a future system  
36 of governance yet to be determined.

37 "The [USB] is not intended to imply direct  
38 changes to land use plans or regulations as  
39 established by Washington County. However,  
40 to the extent that the establishment of the  
41 [USB] creates a planning area for services,

1           it could indirectly influence changes in land  
2           use as a result of service planning.

3           "\* \* \* \* \*

4           "THE FOLLOWING SETS FORTH THE CITY'S POLICIES  
5           REGARDING THE URBAN SERVICE BOUNDARY:

6           "1. The [USB] shall establish the area of the  
7           City's planning of urban public facilities  
8           and services and areas of future annexation  
9           to the City.

10          "2. The City shall work cooperatively with  
11          service providers within the Urban Service  
12          Boundary to develop public facility plans  
13          which will determine, over the long run, the  
14          most effective and efficient methods of  
15          providing each service. The Urban Planning  
16          Area Agreement with Washington County shall  
17          be amended to reflect these relationships and  
18          this                general                responsibility.  
19          Intergovernmental agreements with the various  
20          jurisdictions shall be developed to specify  
21          roles and responsibilities for each service.

22          "3. The City will involve unincorporated property  
23          owners and residents in planning for  
24          facilities and services.

25          "4. The City will develop and maintain a policy  
26          for the annexation of unincorporated areas  
27          within the USB to the City which is  
28          commensurate with State annexation law and  
29          the City's ability to provide city services.

30          "\* \* \* \* \*" Record 1-3.

31          The plan language adopted by the city does not  
32          explicitly say Portland shall exercise no planning interest  
33          inside the Beaverton USB and cannot annex property included  
34          in the Beaverton USB. However, although the above quoted  
35          language explicitly acknowledges the continuing role to be

1 played by the county and various service districts through  
2 which Beaverton provides certain urban services, it  
3 carefully avoids any mention of a role for Portland in  
4 annexing or planning and providing urban services within the  
5 Beaverton USB.<sup>8</sup>

6 When the above plan language adopted by the challenged  
7 decision is viewed in context with the findings that support  
8 the challenged decision and the existing acknowledged  
9 comprehensive plans and urban planning area agreements  
10 (UPAAs) between the county and Portland and Beaverton, as  
11 explained below, Beaverton's intent and purpose in adopting  
12 the challenged plan amendment is clear.

13 **B. Findings**

14 One of the plan goals addressed in the city's findings  
15 is the following: "Make Beaverton one of the outstanding  
16 cities in the West." Record 8. The findings addressing  
17 this goal are as follows:

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<sup>8</sup>Beaverton's Community Development Director explained in a March 31, 1992 memorandum to the city planning commission, as follows:

"\* \* \* This decision does not, in itself, resolve all long-term issues of who will provide certain services to the area, or even whether the area will eventually annex to Beaverton. Rather, it allows the City and these service providers to go forward and discuss the options for future service with the assumption that Portland will not be a direct service provider. This does not mean, of course, that we would not continue cooperative efforts with Portland in many planning efforts, such as transportation and water supply planning, but it would mean that such cooperation would not specifically include the presence of Portland as a major governmental entity in Washington County." Record 452.

1 "Ultimately the urbanized area of eastern  
2 Washington County should be incorporated into a  
3 city. Beaverton is the logical city. The  
4 establishment of the USB recognizes this fact and  
5 sets the groundwork for it to occur." Id.

6 One of the city's plan policies regarding public  
7 facilities is as follows:

8 "The City should develop [a USB] to identify areas  
9 where the City is the appropriate long-term  
10 service provider." Record 11.

11 The findings adopted addressing this policy state "[t]he  
12 intent of this action is to implement this policy of the  
13 plan." Id. Although neither of these findings is  
14 dispositive, they do suggest the city intends by its action  
15 to designate Beaverton, rather than Portland, as the city  
16 that will provide urban services to and annex property  
17 within the area included in the Beaverton USB.

18 **C. Acknowledged Comprehensive Plans and UPAA's**

19 The existing acknowledged comprehensive plans, and the  
20 UPAA's entered into between the cities of Beaverton and  
21 Portland and Washington County, leave open the question of  
22 whether Portland or Beaverton will provide urban services to  
23 and annex property within the planning areas of interest  
24 identified in those agreements.<sup>9</sup> See City of Portland v.  
25 Washington County, supra, slip op at 6-8. The

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<sup>9</sup>The urban planning area in which Beaverton asserts a planning interest in the UPAA appears to include the area included within the USB challenged in this appeal. Intervenor-Respondent Washington County's Brief App 23.

1 Beaverton/Washington County UPAA provides, in part, as  
2 follows:

3 "E. The CITY is responsible for conducting an  
4 urban services study within its urban  
5 planning area \* \* \* . This study will  
6 identify the area for long-range provisions  
7 of urban level services and annexation to the  
8 CITY. Services to be studied shall include,  
9 but not be limited to: water, sanitary  
10 sewer, storm sewer and transportation and  
11 development services. The COUNTY will  
12 participate in this process as outlined in a  
13 Memorandum of Understanding and will forward  
14 the future proposed urban services boundary  
15 and policies to the County Planning  
16 Commission and Board of Commissioners for  
17 consideration as a possible amendment to the  
18 COUNTY Comprehensive plan."<sup>10</sup> Intervenor-  
19 Respondent Washington County's Brief App 18.

20 As noted earlier, the challenged decision is an  
21 amendment to the acknowledged Beaverton Comprehensive Plan.  
22 If the challenged decision is properly viewed merely as a  
23 nonbinding suggestion to Washington County, it is difficult  
24 to see what such a suggestion would add to the existing

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<sup>10</sup>The Portland/Washington County UPAA includes a parallel provision which provides as follows:

"7. The County and the City agree to initiate a process to determine the boundary of an urban service area suitable and appropriate for the provision of future urban services. Within this boundary, specific agreements, including standards and the coordination of service provision, shall be negotiated between affected jurisdictions. Neither the City nor the County will seek to finally determine said service boundaries until both City and County comprehensive land use plans are acknowledged by the Land Conservation and Development Commission." Intervenor-Respondent Washington County's Brief App 9.

1 acknowledged Beaverton Comprehensive Plan or the above  
2 quoted UPAA provision.<sup>11</sup>

3 **D. Conclusion**

4 Based on the above, we conclude the challenged decision  
5 represents a unilateral action by Beaverton to identify an  
6 area where Beaverton, rather than Portland, will assume  
7 responsibility for providing urban services, to the extent  
8 any city will provide such services. The decision  
9 admittedly is couched in terms of future planning and leaves  
10 open whether areas within the USB will actually be annexed  
11 or whether Beaverton ultimately will provide such city  
12 services directly or through special districts. However,  
13 what the decision does do, in our view, is make Portland  
14 essentially a nonplayer within the Beaverton USB, for  
15 purposes of direct provision of urban services or  
16 annexation.

17 We find Beaverton's unilateral change of the land use  
18 planning status quo within the disputed area violates Goal 2  
19 (Land Use Planning) and ORS 197.190(1) and 268.385(1), for  
20 the same reasons we conclude Washington County's subsequent  
21 action to adopt the Beaverton USB violates the goal and  
22 statutes. City of Portland v. Washington County, supra,  
23 slip op at 20-23.

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<sup>11</sup>At oral argument, the parties advised the Board that the memorandum of understanding referenced in the above quoted UPAA provision does not exist.

1           The first and fourth assignments of error are  
2 sustained.

3 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

4           Petitioner's remaining assignments of error challenge  
5 the adequacy of the factual base supporting the challenged  
6 plan amendment and a provision in the challenged plan  
7 amendment allowing certain adjustments to the USB without  
8 further amending the plan.

9           As explained above, Beaverton lacks authority to adopt  
10 the challenged decision, absent a decision by Metro under  
11 ORS 197.190(1) and 268.385(1) that the USB chosen by  
12 Beaverton is the one that, in Metro's view, accommodates the  
13 needs of all affected local governments as much as possible.  
14 In this circumstance, consideration of these assignments of  
15 error would serve no useful purpose, and we decline to do  
16 so.

17           The city's decision is remanded.