

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 PETER O. WATTS,
5 *Petitioner,*
6

7 vs.

11/27/18 AM 8:21 LUBA

8
9 METRO,
10 *Respondent,*
11

12 and
13

14 WASHINGTON COUNTY, CITY OF
15 TUALATIN and CITY OF WILSONVILLE,
16 *Intervenors-Respondents.*
17

18 LUBA No. 2018-055
19

20 SHERMAN LEITGEB,
21 *Petitioner,*
22

23 vs.
24

25 METRO,
26 *Respondent,*
27

28 and
29

30 WASHINGTON COUNTY, CITY OF
31 TUALATIN and CITY OF WILSONVILLE,
32 *Intervenors-Respondents.*
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34 LUBA No. 2018-057
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36 FINAL OPINION
37 AND ORDER

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Appeal from Metro.

Peter O. Watts, Portland, filed a joint petition for review and argued on his own behalf. With him on the brief was Sherman Leitgeb.

Sherman Leitgeb, Sherwood, filed a joint petition for review and argued on his own behalf. With him on the brief was Peter O. Watts.

Roger A. Alfred, Portland, filed a joint brief and argued on behalf of respondent. With him on the brief was Jacquilyn Saito-Moore.

Jacquilyn Saito-Moore, Assistant County Counsel, Hillsboro, filed a joint brief on behalf of intervenor-respondent Washington County. With her on the brief was Roger A. Alfred.

Sean T. Brady, City Attorney, Tualatin, filed a response brief and argued on behalf of intervenor-respondent City of Tualatin.

Barbara A. Jacobson, City Attorney, Wilsonville, filed a response brief and argued on behalf of intervenor-respondent City of Wilsonville.

BASSHAM, Board Member; RYAN, Board Chair; ZAMUDIO, Board Member, participated in the decision.

DISMISSED 11/27/2018

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

NATURE OF THE DECISION

Petitioners appeal a decision by the Metro Council adopting a resolution that resolves a dispute between two cities regarding a proposed concept plan.

FACTS

This dispute arises over a longstanding disagreement between the cities of Wilsonville and Tualatin (the cities) regarding a concept plan for the future zoning of a 52-acre portion of the Basalt Creek Planning Area known as the Central Subarea, located within Washington County.

Metro is a metropolitan service district organized under ORS chapter 268, whose primary responsibilities under its charter and governing statutes include managing the Portland metropolitan area’s urban growth boundary (UGB) and coordinating the growth of the cities in the region, along with planning for regional parks, open spaces and recreational facilities, and the regional transportation system.

In 2002, Metro expanded the UGB to add 17,458 acres of land, with 15,047 acres added for residential purposes and 2,411 acres for employment purposes (commercial and industrial). Record 18. In its 2002 decision, Metro found that the amount of land being added for employment purposes was insufficient to meet the identified 20-year need.

In 2004 Metro adopted Ordinance No. 04-1040B “to increase the capacity of the [UGB] to accommodate growth in industrial employment.”

1 Record 18. As a result, the UGB was expanded to include 1,940 acres of land
2 for industrial use, including the 646-acre Basalt Creek Planning Area which lies
3 between the cities of Tualatin and Wilsonville. The Metro Council adopted the
4 following findings in support of adding the Basalt Creek area to the UGB:

5 “The [Metro] Council chose this area because it is exception land
6 (rural residential and rural industrial) with characteristics that make
7 it suitable for industrial use. It lies within two miles of the I-5
8 corridor and within one mile of an existing industrial area, and
9 portions of the area are relatively flat. These characteristics render
10 it the most suitable exception area under consideration for
11 warehousing and distribution, a significant industrial need facing
12 the region.” *Id.*

13 Under Title 11 of Metro’s Urban Growth Management Functional Plan
14 (UGMFP), cities and counties are required to prepare concept plans for new
15 UGB areas in order to guide future comprehensive plan and land use
16 regulations for those areas, and to promote efficient urbanization in a manner
17 that is coordinated between the affected local governments. Metro Code
18 3.07.1105-1120. In 2007, Metro awarded a grant to Wilsonville and Tualatin to
19 perform concept planning for the Basalt Creek Planning Area, which was then
20 outside city limits in Washington County.

21 In 2011 Wilsonville, Tualatin, Metro and Washington County (the
22 parties) entered into an Intergovernmental Agreement (IGA), which provided
23 that the parties would agree upon a concept plan for the Basalt Creek Planning
24 Area, which is required before it can be annexed into and developed by the
25 cities. Record 651. By 2016, the concept planning process was moving forward,

1 albeit slowly, and the cities appeared to have reached agreement. The cities
2 agreed they would each designate their respective portions of the planning area
3 for industrial uses. At that point, however, the Tualatin City Council received
4 testimony from the public, including from petitioner Peter Watts (Watts),
5 asking that the proposed designation of a 52-acre portion of the planning area
6 be designated as residential, not industrial. Record 114. The Tualatin City
7 Council changed its designation of its portion of the Central Subarea to
8 residential, leading to a stalemate between the cities.

9 In 2017, in order to attempt to resolve the dispute, the cities approached
10 Metro and asked that it arbitrate the matter. Accordingly, the cities, Washington
11 County, and Metro entered into another IGA (2017 IGA), this time to agree to
12 bind themselves to a decision made pursuant to a process created by Metro to
13 arbitrate their dispute, and where Metro would act as arbitrator. The 2017 IGA
14 states:

15 “Metro will have sole discretion to determine what to call this
16 decision making process, where and when to hold the process, who
17 Metro will appoint to make the decision, a briefing schedule,
18 whether or not to hear oral argument, and ground rules that must
19 be adhered to by the Cities and County throughout the process.”
20 Record 38.

21 Metro determined that the decision-making process would provide the cities
22 and Washington County two open record periods for filing briefs and responses,
23 followed by a recommendation from the Metro Chief Operating Officer (COO)
24 to the Metro Council. The Council’s meeting would be an on the record

1 hearing, during which the Council would review the materials submitted by the
2 cities and county. Record 649.

3 On March 26, 2018, the Metro COO issued her recommendation, which
4 provided a review of the evidence and arguments submitted by the cities and
5 Washington County, concluding that the Central Subarea should be designated
6 as an employment area. Record 16.

7 Metro's *sui generis* arbitration process did not allow for public
8 participation, because, according to Metro, "the point of the [2017] IGA was
9 solely to resolve a dispute between the two cities." Metro Response Brief 4.
10 However, Metro chose to accept written materials submitted by petitioner Watts
11 during the open record period. Record 171, 595. Petitioners Watts and Sherman
12 Leitgeb (Leitgeb) (together petitioners), property owners within the affected
13 area, were also permitted to testify in person before the Metro Council at its
14 April 19, 2018 meeting. Record 64-65.

15 At the April 19, 2018 meeting, the Metro Council voted unanimously to
16 adopt the Metro COO Recommendation that the Central Subarea should be
17 planned for industrial and employment purposes. Record 67. The Metro
18 Council directed staff to prepare a conforming resolution for adoption on May
19 3, 2018. Metro Resolution No. 18-4885, along with its supplemental findings,
20 responded, in part, to issues raised by petitioners in their written submittals and
21 oral testimony at the April 19, 2018 meeting. Record 58.

1 At Metro’s May 3, 2018 meeting, the Metro Council voted unanimously
2 in favor of Resolution 18-4885 and adopted the COO Recommendation as
3 supporting findings, along with the supplemental findings prepared by Metro
4 Staff. Record 14. The challenged decision in this matter is the May 3, 2018
5 Metro Council Resolution 18-4885, which states in relevant part:

6 “1. The Metro Council approves the COO Recommendation and
7 agrees that the cities should designate the 52-acre Central
8 Subarea of the Basalt Creek Planning Area for employment
9 purposes, as depicted on the Basalt Creek Land Use Concept
10 Map attached to the COO Recommendation as Exhibit C.

11 “2. The Metro Council adopts the COO Recommendation dated
12 March 26, 2018, attached as Exhibit A to this Resolution
13 and incorporated herein, as the Council’s findings and
14 conclusions in support of this decision.

15 “3. The Metro Council also adopts the Supplemental Findings
16 attached as Exhibit B to this Resolution and incorporated
17 herein as the Council’s supplemental findings and
18 conclusions in support of this decision.” Record 15.

19 Following Metro’s adoption of the resolution, petitioners appealed the
20 resolution to LUBA.

21 **JURISDICTION**

22 A threshold issue in this matter is whether LUBA has jurisdiction over
23 the appeal of Metro’s Resolution 18-4885, adopted pursuant to Metro’s 2017
24 IGA process. LUBA’s jurisdiction in relevant part is limited to “land use
25 decisions” as defined at ORS 197.015(10)(a), which includes a final decision by
26 a local government that concerns the adoption, amendment or application of the

1 statewide planning goals, a comprehensive plan provision, land use regulation
2 or new land use regulation.¹ Metro is a “local government” as that term is
3 defined at ORS 197.015(13).

4 As we explained in *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302, 308,
5 *aff’d* 260 Or App 782, 325 P3d 69 (2013), *rev den* 355 Or 688 (2014), LUBA’s
6 jurisdiction over Metro decisions is complicated, because Metro does not have a
7 comprehensive plan, and its ordinances are not “land use regulation[s].” ORS
8 917.015(11); ORS 197.015(16). As a result, a Metro decision fits within the
9 ORS 197.015(10)(a)(A) definition of a “land use decision” only if the decision
10 concerns the application of the statewide planning goals. *Id.*

11 Metro’s comprehensive land use planning document is referred to as the
12 Regional Framework Plan (RFP). The RFP has several components, called
13 functional plans. ORS 197.015(16) provides that Metro’s RFP and its
14 components do not constitute a comprehensive plan. Review of Metro’s RFP
15 and its components is governed by ORS 197.274(1), which provides:

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:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation[.]”

1 “The Metro regional framework plan, its separate components and
2 amendments to the regional framework plan or its separate
3 components are subject to review:

4 “(a) For compliance with land use planning statutes, statewide
5 land use planning goals and administrative rules
6 corresponding to the statutes and goals, in the same manner
7 as a comprehensive plan for purposes of:

8 “(A) Acknowledgement of compliance with the goals
9 under ORS 197.251; and

10 “(B) Post-acknowledgment procedures under ORS 197.610
11 to 197.651; and

12 “(b) As a land use decision under ORS 197.805 to ORS 197.855
13 and 197.860.”

14 Therefore, under ORS 197.015(10)(a) and ORS 197.274, a Metro decision is
15 subject to LUBA’s review if it is a final decision that (1) adopts or amends the
16 RFP or one of its components, such as a functional plan, or (2) otherwise
17 concerns the application of the statewide planning goals. 68 Or LUBA at 309.
18 No party argues that Resolution 18-4885 adopts or amends the RFP or its
19 components. The findings adopted in support of Resolution 18-4885 do,
20 arguably, include consideration of statewide planning goals that are concerned
21 with economic development and housing. If so, the Resolution potentially
22 qualifies as a “land use decision” as defined at ORS 197.015(10)(a)(A)(i), if it
23 constitutes a “final decision” that concerns the application of the goals.
24 However, in its response brief, Metro argues that Resolution 18-4885 is not a
25 “final” decision within the meaning of ORS 197.015(10)(a), and thus not a land

1 use decision appealable to LUBA. For the following reasons, we agree with
2 Metro.

3 **A. Final Decision**

4 The 2017 IGA states that “the governing bodies for the Cities and
5 [Washington] County agreed to ask Metro to settle the dispute and to make a
6 *final, binding, non-appealable decision* on the sole issue of designation of the
7 land use for the Central Subarea[.]” * * * Once designated by Metro, the Parties
8 agree that the Central Subarea will be designated in the final Concept Plans and
9 in the Urban Planning Area Agreement between the Parties, as determined by
10 Metro.” Record 38 (emphasis added). Thus, under the 2017 IGA, Metro’s
11 decision appears on its face to constitute a “final” decision, at least in the sense
12 that the decision is Metro’s last word on the dispute regarding how the Central
13 Subarea should be designated in the respective comprehensive plans of the
14 cities and the county.

15 However, finality for purposes of ORS 197.015(10)(a) is not solely a
16 matter of whether the decision constitutes a local government’s last word on a
17 land use issue. Other important considerations include whether the decision is
18 an exercise of the local government’s land use planning authority, and the
19 extent to which the decision is binding on the local government and affected
20 parties. In the present case, Metro’s arbitration process under the 2017 IGA
21 was not an exercise of Metro’s own land use authority. Instead, Metro acted
22 purely as an arbitrator, a function that could have been performed by a private

1 entity or individual. That the chosen arbitrator in this case was a local
2 government, rather than private entity or individual, is irrelevant: Metro's role
3 as arbitrator in the present case was not an exercise of its function as a *local*
4 *government* at all, much less an exercise of Metro's own land use planning
5 authority.

6 Further, despite the binding language of the 2017 IGA, the outcome of
7 Metro's arbitration process is more accurately described in its legal context as a
8 *recommendation* to the cities and county regarding the proper designation of the
9 Central Subarea. Generally, Metro decisions that include only
10 recommendations to cities and counties are not final decisions potentially
11 appealable to LUBA. *Sensible Transportation Options for People (STOP) v.*
12 *Metro*, 100 Or App 564, 787 P2d 498 (1990). The obligation of the cities and
13 the county to accept Metro's resolution of the dispute is not based on any
14 statute, ordinance, plan, code or Metro regulation, but instead is purely
15 contractual in nature. The 2017 IGA is a contract, voluntarily entered into by
16 the parties. Like any contract, it can be breached or abrogated, if the breaching
17 party is willing to accept the consequences. That the cities and county have
18 contractually obligated themselves to implement Metro's arbitration of the
19 dispute between the parties does not mean that Metro's ruling is a binding
20 exercise of Metro's land use authority, and hence a "final" decision, within the
21 meaning of ORS 197.015(10)(a).

1 Finally, Metro's *sui generis* dispute resolution process should be
2 understood in the context of the statutes and administrative rules governing
3 post-acknowledgment plan amendments. As Metro's findings state:

4 "Metro disagrees with the implicit assertion by the property
5 owners that the process created by Metro results in a final land use
6 decision that is subject to Goal 1 and typical land use decision-
7 making procedures. At the request of the cities, Metro agreed to
8 create a unique arbitration process for the limited purpose of
9 resolving their dispute. The purpose and intent of Metro and the
10 cities was solely to resolve a dispute, and not to create a process
11 that would result in a final land use decision.

12 "The Metro Council's adoption of Resolution No. 18-4885 does
13 not result in the adoption or amendment of a concept plan or a
14 comprehensive plan map for the Basalt Creek area, and does not
15 itself have any effects on land use. Metro's decision has no effect
16 until it is implemented by the cities in their own future land use
17 decisions, as described in paragraph 2 of the IGA. Those local land
18 use decisions will need to be supported by substantial evidence in
19 the record, and will be appealable to LUBA." Record 59.

20 In other words, the arbitration process that Metro devised contemplates that the
21 final decision regarding the comprehensive plan designation of the Central
22 Subarea will be determined in the post-acknowledgement plan amendments
23 adopted by the cities and county, pursuant to ORS 197.610 to 197.625. Those
24 city and county ordinances must fully comply with all applicable procedures
25 and standards for amending the respective comprehensive plans, including
26 establishing consistency with the applicable statewide planning goals, and
27 further those decisions must be supported by adequate findings and substantial
28 evidence. The city and county decisions can be appealed to LUBA, and if

1 appealed, we see nothing in Metro’s arbitration process or elsewhere that would
2 preclude consideration of any issue or challenge to the adoption of the city or
3 county ordinances.

4 It is true that in considering applications for post-acknowledgment plan
5 amendments to designate the Central Subarea the elected members of the
6 governing city and county bodies might feel compelled—by contract, comity,
7 or other non-land use considerations—to follow Metro’s ruling that the subject
8 property should be designated for industrial and employment uses, regardless of
9 whether the governing body decision establishes that the designation is
10 consistent with applicable approval standards. If the opponents of such a city or
11 county decision believe that the city or county erred in that regard, the
12 opponents could appeal the decision to LUBA and assign error on that basis.
13 Even in that circumstance, however, it is reasonably clear that it is the city or
14 county decision that would be the final decision regarding the designation of the
15 Central Subarea, for purposes of ORS 197.015(10)(a), not the outcome of
16 Metro’s arbitration process.

17 Petitioners argue, nonetheless, that Resolution 18-4885 is a “zoning”
18 decision for purposes of ORS 268.393(6), which is part of the statute
19 implementing Ballot Measure 56 requiring that a metropolitan service district
20 such as Metro provide notice to property owners when it adopts an ordinance
21 that, in relevant part, requires a local government to change the base zoning

1 classification of the property.² We understand petitioners to argue that if
2 Resolution 18-4885 is a “zoning” decision for purposes of ORS 268.393(6) it is
3 also a land use decision for purposes of ORS 197.015(10)(a). However,
4 Resolution 18-4885 is not a “zoning” decision as defined at ORS 268.393(6),
5 for two reasons. First, it is not an ordinance. Second, as explained above, it is
6 not an exercise of Metro’s land use authority. While Metro presumably does
7 have land use authority to require local governments to change zoning
8 classifications, that authority is exercised by adopting ordinances that, for
9 example, amend Metro’s functional plans or other Metro land use plans to
10 which local governments are required by law to conform. As explained, to the
11 extent the cities and the county are obliged to implement the outcome of
12 Metro’s arbitration process, that obligation is purely contractual in nature.
13 Accordingly, Resolution 18-4885 does not “require[]” a local government to
14 change a zoning classification within the meaning of ORS 268.393(6) and is
15 therefore not a zoning decision subject to the requirements of that statute.

² ORS 268.393(6) provides:

“For purposes of this section, property is rezoned by a land use planning ordinance adopted by a metropolitan service district if the ordinance directly or indirectly requires a local government to:

“(a) Change the base zoning classification of the property; or

“(b) Modify land use regulations applicable to the property in a manner that would limit or prohibit land uses previously allowed.”

1 Petitioners also argue that Resolution 18-4885 is a “land use decision” as
2 defined at ORS 197.015(10)(a) because it concerns the application of a “land
3 use regulation,” which is defined at ORS 197.015(11) to mean a local
4 government zoning ordinance or similar general ordinance establishing
5 standards for implementing a comprehensive plan. However, we do not
6 understand the argument. Petitioners do not identify any “land use regulation”
7 that Resolution 14-4885 applies, or argue that the resolution is itself a land use
8 regulation. As noted, Metro’s functional plans and ordinances are not land use
9 regulations, because they do not implement a comprehensive plan. In any case,
10 even if Resolution 14-4885 applied a land use regulation the resolution can
11 constitute a land use decision only if it is also a final decision within the
12 meaning of ORS 197.015(10)(a). As explained above, Resolution 18-4485 is
13 not properly viewed as a final decision for purposes of ORS 197.015(10)(a).

14 In sum, Resolution 18-4885 is a not a legally binding exercise of Metro’s
15 land use authority, but is only an arbitration decision that is most accurately
16 viewed as an intermediate step in a larger process leading to final land use
17 decisions by the cities and the county. Consequently, Resolution 18-4885 is not
18 itself a final decision, and therefore not a land use decision as defined at ORS
19 197.015(10)(a).

20 **B. “Significant Impact” Land Use Decision**

21 Alternatively, under their third assignment of error, petitioners argue that
22 even if Resolution 18-4885 is not a land use decision as defined at ORS

1 197.015(10)(a), it nonetheless falls within LUBA’s jurisdiction as a “significant
2 impacts” land use decision, as described in *Billington v. Polk County*, 299 Or
3 471, 703 P2d 232 (1985), and *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d
4 992 (1982).

5 In response, Metro argues that the jurisdictional requirement—that a land
6 use decision must be “final”—applies both to the statutory as well as the
7 significant impact test. *See Knee Deep Cattle Company v. Lane County*, 28 Or
8 LUBA 288, 295 (1994), *aff’d* 133 Or App 120, 890 P2d 449 (1995) (“Under
9 either the statutory test or the significant impact test, a ‘land use decision’ must
10 be a final decision.”). We agree. Because we have determined that Metro’s
11 Resolution 18-455 is not a final decision, the significant impact land use
12 decision test does not apply.

13 **DISPOSITION**

14 For the foregoing reasons, we agree with Metro that we lack jurisdiction
15 over the appeal of Resolution 18-4885. Accordingly, this appeal is dismissed.