

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

IN THE MATTER OF THE ENFORCEMENT)	NOTICE OF
ORDER FOR LAKE OSWEGO, TUALATIN,)	CONTESTED CASE
WEST LINN, METRO, AND CLACKAMAS)	HEARING
COUNTY PURSUANT TO ORS 197.324)	

On May 22, 2020, the Land Conservation and Development Commission (the “Commission”) determined there was good cause to initiate enforcement proceedings under ORS 197.324 against the cities of Lake Oswego, Tualatin, and West Linn, Metro, and Clackamas County (“local governments”) to determine whether the five-party inter-governmental agreement entered into by the cities, Metro and Clackamas County (local governments) and the three-party inter-governmental agreement entered into by the cities constitute engagement in a pattern or practice of decision-making that violates a requirement of the Metro regional framework plan.

At a pre-hearing conference on June 8, 2020, the parties stipulated to an extension of the final hearing date by the Commission to its September, 2020 meeting. This allows for a lengthened time period to prepare for and conduct the contested case hearing.

Mr. David Marks (requester), and the local governments are parties to this proceeding. Persons eligible to request party or limited party status in the contested case proceeding may petition for party status by submitting a written request to the Hearings Officer. **The Hearings Officer must receive the petition by 5:00 pm on Monday, July 6, 2020.** Petitions untimely filed shall not be considered, and the requesting persons will have waived any right to participate in the contested case, unless the Hearings Officer determines that good cause has been shown for failure to file timely. The requirements for eligibility and the contents of the petition for party status are discussed in detail below.

Pursuant to OAR 660-045-0110 and ORS 183.413(2), you are entitled to be informed of the following:

Time and Place of Hearing

The contested case hearing will begin at **1:00 PM on Wednesday, July 29, 2020.** The Hearings Officer will conduct the contested case hearing as a teleconference. The Hearings Officer and the Department of Land Conservation and Development (DLCD) will provide additional information to all the parties regarding the teleconferencing details at least five days prior to the hearing.

Date of Pre-Hearing Conference

The pre-hearing conference will begin at **10:00 AM on Monday, July 13, 2020.** The hearings officer will conduct the pre-hearing conference as a teleconference. Parties and persons who have requested party or limited party status may participate in the pre-hearing conference. The hearings officer and the Department of Land Conservation and Development (DLCD) will

provide additional information to all the parties regarding the teleconferencing details at least three days prior to the meeting.

Failure to raise an issue in the prehearing conference constitutes waiver of that issue in the contested case. Parties must also provide at the pre-hearing conference copies of all documents intended to be offered as evidence, and the names of all witnesses expected to testify.

Following the pre-hearing conference the Hearings Officer will issue a pre-hearing order, which will establish the schedule for the contested case hearing. The Hearings Officer will also issue an order on requests for party status.

Issues to Be Considered

The issues to be considered at the hearing are:

1. Are the three-party and five-party inter-governmental agreements “decisions” that are subject to an enforcement under ORS 197.320(12)?
2. Do the two inter-governmental agreements constitute a “series of decisions” that in turn constitute a “pattern or practice” of decision-making?
3. Are Metro and Clackamas County considered parties to a “series of decisions” that constitute a “pattern or practice” of decision-making pursuant to ORS 197.320(12)?
4. Does the three-party inter-governmental agreement violate a provision of Metro’s Functional Plan?

Parties have the right to respond to all issues properly before the Hearings Officer and to present evidence and witnesses on those issues. Parties also have the right to raise other issues relevant to the proceeding, in a manner to be determined by the hearings officer that allows for notice to other parties and an opportunity to respond to such other issues.

Authority and Jurisdiction for Hearing

The matter set for hearing is a contested case. The hearing will be conducted as provided in Chapter 183 and Chapter 197 of the Oregon Revised Statutes; the Oregon Administrative Rules (OAR) of the Department of Land Conservation and Development. OAR chapter 660, division 45 and OAR 660-001-0005 (which adopts the Attorney General’s Model Rules and Uniform Rules of Procedure under the Administrative Procedures Act, effective January 1, 2008); and the Attorney General’s Model Rules and Uniform Rules of Procedure under the Administrative Procedures Act, OAR 137-003-0001 to 137-003-0092 as modified in OAR 660-001-0005.

A list of the statutes and rules applicable to this proceeding is attached to this notice (Attachment A).

Right to Attorney

Pursuant to OAR 660-001-0005(2), parties and limited parties may be represented by an attorney or an authorized representative, subject to the requirements of ORS 183.457 and OAR 137-003-

0008. Parties are ordinarily and customarily represented by counsel. A party is not required to be represented by counsel, unless it is an agency, trust, corporation, or association. If a party is not represented at the hearing and during the hearing it determines that representation by an attorney is necessary, such party may not request a recess to secure the services of an attorney. Legal aid organizations may be able to assist a party with limited financial resources.

Hearings Officer

The person presiding at the hearing is known as the Hearings Officer. The Hearings Officer will rule on all matters that arise out of the hearing. The Hearings Officer does not have the authority to make the final decision in the case. The final decision will be made by the Commission.

Notice to Active Duty Service members

Active duty service members have a right to stay these proceedings under the federal Service members Civil Relief Act. For more information, contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

Persons Eligible to Request Party Status or Limited Party Status

Individuals and organizations have the right to request party or limited party status in the contested case proceeding as provided in OAR 137-003-0005.

The requester David Marks and the local governments are parties to the contested case and therefore are not required to petition for party status.

Submittal Requirements-Petition to Request for Party or Limited Party Status

Persons eligible to request party or limited party status in the contested case proceeding must send a written petition to the Hearings Officer. Two copies of the petition for party status must be submitted by first class or certified mail to the Hearings Officer by July 6, 2020. Petitions should be sent to:

Hearings Officer in the Matter of Enforcement for the Stafford Area
Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, Oregon 97301
Email: fred.wilson@state.or.us

Additionally, please submit one copy of the petition to the Department, c/o Gordon Howard:

Gordon Howard
Department of Land Conservation and Development
635 Capitol Street, N.E., Suite 150
Salem, Oregon 97301
Email: gordon.howard@state.or.us

The Hearings Officer must receive the petition by 5:00 p.m. on July 6, 2020. If the Hearings Officer does not receive the petition within the time stated, the requesting person(s) will have waived any right to participate in the contested case, unless the Hearings Officer determines that good cause has been shown for failure to timely file. The petition must contain all of the information described below.

Contents of a Petition for Party or Limited Party Status

A petition for party or limited party status must comply with the requirements of OAR 137-003-0005(3) and include:

- a. Names and addresses of the petitioner and of any organization the petitioner represents;
- b. Name and address of the petitioner's attorney, if any;
- c. A statement of whether the request is for participation as a party or a limited party, and if, as a limited party, the precise area or areas in which participation is sought;
- d. If the petitioner seeks to protect a personal interest in the outcome of the proceeding, a detailed statement of the petitioner's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;
- e. If the petitioner seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the petitioner's qualifications to represent such public interest; and
- f. A statement of the reasons why existing parties to the proceeding cannot adequately represent the interest identified in OAR 137-003-0005(3)(d) or (e).

Consideration of Submitted Petitions

The Hearings Officer will decide whether to grant party status based on the above and the following factors, as provided under OAR 137-003-0005(7):

- a. Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;
- b. Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;
- c. When a public interest is alleged, the qualifications of the petitioner to represent that interest;
- d. The extent to which the petitioner's interest will be represented by existing parties.

Written Testimony

The Hearings Officer will receive written testimony submitted at least seven days before the hearing, July 22, 2020, 5:00 PM. Parties must submit written testimony to:

Hearings Officer in the Matter of Enforcement for the Stafford Area
Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, Oregon 97301
Email: fred.wilson@state.or.us

Additionally, please submit one copy of the petition to the Department, c/o Gordon Howard:

Gordon Howard
Department of Land Conservation and Development
635 Capitol Street, N.E., Suite 150
Salem, Oregon 97301
Email: gordon.howard@state.or.us.

Contested Case Hearing

The contested case hearing will begin on July 29, 2020, at 1:00 PM. The hearing schedule will be determined by the Hearings Officer and will include oral argument before the Hearings Officer. The Hearings Officer will notify the parties and any limited parties of the order of arguments and rebuttal. The Hearings Officer will receive limited additional written testimony from the parties, not to exceed ten pages in length, at the hearing.

Mediation

Mediation is available and will be provided by the Department as an alternative to a contested case hearing, if requested by both the local governments and the Requestors before July 13, 2020, at 10:00 AM. Choosing to enter into mediation will not affect a party's right to a contested case hearing if the matter is not resolved through mediation.

Discovery

It is not anticipated that discovery will not be permitted in this proceeding. The hearings officer and the parties will discuss any requests for discovery at the pre-hearing conference.

Witnesses

It is not anticipated that witnesses will not be permitted in this proceeding. The hearings officer and the parties will discuss any requests for discovery at the pre-hearing conference.

Record

The record of the proceeding to date, including information in the Department files on the subject of this contested case, will automatically become part of the contested case record upon default for the purpose of proving a prima facie case. The hearings officer and the parties will discuss any additional documents requested to be part of the record at the pre-hearing conference.

Default

If no other person requests party status and the local government or David Marks (Requestor) fail to appear at the hearing, an order by default may be entered.

Proposed Order and Exceptions

The Hearings Officer will issue a proposed order in the form of findings of fact, conclusions of law, and recommended action by the Commission. Parties will be provided with a copy and will be given an opportunity to make written objections, called “exceptions,” to the Hearing Officer’s recommendations. Parties will be notified when exceptions to the proposed order must be filed, and whether parties may appear and make oral argument to the Commission on their exceptions.

Final Order

The Commission will make the final order in this case. The Commission may choose to not issue an enforcement order modify the proposed order issued by the Hearings Officer. If the Commission modifies the proposed order in any substantial manner, the Commission in its order will identify the modification and explain why the Commission made the modification. The Commission may modify a proposed finding of “historical” fact only if the proposed finding is not supported by a preponderance of the evidence in the record.

Appeal

If you wish to appeal the final order, you must file a petition for judicial review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See* ORS 183.482.



June 29, 2020

Jim Rue, Director
Oregon Department of Land Conservation and Development

Attachment A: LIST OF STATUTES AND RULES PURSUANT TO ORS 183.415

OREGON ADMINISTRATIVE PROCEDURES ACT

Statutes

ORS Chapter 183

ORS 183.310 to 183.315

ORS 183.411 to 183.497

Administrative Rules

OAR Chapter 137, Division 3

OAR 137-003-0000 to 137-003-0092

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Statutes

ORS Chapter 197

ORS 197.015

ORS 197.040

ORS 197.045(4)

ORS 197.303

ORS 197.307

ORS 197.319 to ORS 197.335

ORS 197.350(3)

Administrative Rules

OAR Chapter 660, Division 45

OAR 660-045-0020

OAR 660-045-0100 to OAR 660-045-0150

OAR 660-045-0170 to OAR 660-045-0180

OAR 660-001-0005

OAR Chapter 660, Division 8

OAR 660-008-0005

OAR 660-008-0010

OAR 660-008-0015