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

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| **IN THE MATTER OF THE ENFORCEMENT ORDER FOR LAKE OSWEGO, TUALATIN, WEST LINN, METRO, AND CLACKAMAS COUNTY PURSUANT TO ORS 197.324** | **)<br>)<br>)<br>)** | **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION ON REMAND FROM COURT OF APPEALS** |

## INTRODUCTION

This matter came before the Land Conservation and Development Commission (Commission) on September 25, 2020, for consideration of its Hearings Officer's recommendation regarding a petition from David Marks for an enforcement order against the cities of Lake Oswego, Tualatin, and West Linn (Cities), Metro, and Clackamas County (County) pursuant to ORS 197.319 to 197.335, and specifically ORS 197.320(12). As background, the Cities, the County, and Metro entered into an intergovernmental agreement (IGA) in 2017 regarding Metro's designation of the area referred to as the "Stafford Area" or "Stafford" as an urban reserve (5-Party IGA), and in 2019 the Cities entered into an IGA (3-Party IGA) regarding planning for future development of the Stafford Area. Mr. Marks, who owns property in the Stafford Area and is concerned about the process for the potential urbanization of the Stafford Area, filed an enforcement petition, the basis of which is that by entering into the two IGAs and taking other actions, the parties have engaged in a pattern or practice of decision-making that violates a requirement of Metro's Regional Framework Plan (RFP), specifically Metro Code (MC) 3.07.1110. As relief, Marks is requesting that the Commission issue an order requiring the Cities to nullify and invalidate the 3-Party IGA and requiring the Cities, Metro and the County to amend and clarify the 5-Party IGA to ensure that the concept planning process for the Stafford Area will be implemented in a manner consistent with the applicable statutes, administrative rules and MC Chapter 3.07, Title 11.

With respect to process, after recommendation from the Department of Land Conservation and Development (department) on Marks's request for an enforcement order, the Commission determined that there was good cause to proceed to a contested case hearing to determine whether the Cities, the County, and Metro are in violation of a requirement of the RFP. The Commission appointed a hearings officer to conduct the contested case proceeding and prepare findings of facts, conclusions of law, and recommended actions. In the Notice of Contested Case Hearing, the Commission identified the following four issues to be considered in this proceeding: (1) Are the 3-Party IGA and 5-Party IGA "decisions" that are subject to an enforcement order under ORS 197.320(12)? (2) Do the two IGAs 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)? And (4) does the 3-Party IGA violate a provision of Metro's Functional Plan?

Marks, the Cities, the County, and Metro submitted hearing memoranda and provided oral argument on these issues. The hearings officer, after conducting the hearing, made recommendations on the four issues for the Commission's consideration. The Commission considered the hearings officer's recommendations, the parties' submittals to the hearings officer, the department's staff report, exceptions to the department staff report submitted by the parties, and presentations by the department and each of the parties at the Commission's September 25, 2020 hearing.

On January 6, 2021, the Commission issued its Final Order, entitled Findings of Fact, Conclusions of Law, and Decision, in which the Commission decided not to issue an enforcement order. The Commission based its decision on its determination that there are no disputed facts necessary to resolve the matter, and its conclusion that its enforcement authority under ORS 197.320(12) pertains to those local decisions that are "land use decisions," not to other "actions," and that neither the 3-Party IGA, the 5-Party IGA, nor any of the other actions, decisions or decisions not to act that Marks asserts warrant enforcement are land use decisions because they are neither statutory land use decisions nor significant impact land use decisions. Because the Commission concluded that the local governments' decisions or actions were not land use decisions that could warrant an enforcement order, it declined to reach the additional questions that assess whether it should issue an enforcement order.

Marks appealed the Commission's Final Order to the Oregon Court of Appeals based on his position that the Commission erred in determining that it did not have jurisdiction to issue an enforcement order pursuant to ORS 197.320(12) because the 3-Party IGA and the 5-Party IGA were not "land use decisions." By opinion issued on September 7, 2023, the Court of Appeals held that both IGAs are likely to have a significant impact on land use in Stafford and the surrounding area within the meaning of the significant impact test and therefore are "land use decisions," and it reversed the Commission's Final Order and remanded the case to the Commission "for further consideration consistent with [the court's] opinion." *Marks v. LCDC*, 327 Or App 708, 739, 536 P2d 995 (2023). Accordingly, on remand the Commission acknowledges that the Court has answered the threshold jurisdictional question and determined that the 3-Party and 5-Party IGAs are "land use decisions" for purposes of enforcement orders pursuant to ORS 197.320(12) and proceeds to analyze whether to issue an enforcement order.

As a preliminary matter to this decision on remand, after the department set this matter for the Commission to consider the remand on January 24, 2025 and provided notice to the parties that the Commission would not be receiving new arguments or taking new evidence, Marks objected to the department regarding these remand procedures. Marks asserted that OAR 660-045-0140 pertains to the Commission's consideration of the remand. However, OAR 660-045-0140 expressly applies to the Commission's consideration of a hearings officer's proposed order, not to the Commission's decision on remand from the Court of Appeals. Consistent with OAR 660-045-0140, at the Commission's September 25, 2020 hearing Marks had the opportunity to submit exceptions to the Hearing's Officers proposed order and present argument.

Marks also requested to present new developments, including Metro's 2024 UGB expansion decision, at the January 24, 2025 remand hearing. Assuming for purposes of analysis that OAR 660-045-0140 applies to a Commission consideration of a remand, that rule expressly provides that in adopting its final order, the Commission "shall not consider new evidence." OAR 660-045-0140(4). Marks provided no valid legal basis for the asserted requirement to present argument again or new evidence to the Commission on remand.

Ignoring the procedures for the Commission consideration of the remand, Marks submitted to the department a letter dated January 16, 2025, addressed to the Commission. That letter both objected to the remand process and presented substantive concerns. The Cities objected to the attempt to circumvent the remand process and to address the Commission. The department did not provide the January 16, 2025 letter to the Commission, consistent with the process provided to the parties in the department's notice of the Commission consideration of the remand. This process also aligns with the Court's direction that the Commission further consider the remaining issues now that the Court has resolved the jurisdiction question.

## FINDINGS OF FACT

As stated above, in its Final Order the Commission determined that this case does not present any disputed facts necessary for its resolution. No party challenged this aspect of the Final Order, and the Commission maintains this determination.

## CONCLUSIONS OF LAW

Marks petitioned the Commission for an enforcement order pursuant to ORS 197.320, which provides in relevant part:

> "The Land Conservation and Development Commission shall issue an order requiring a local government * * * to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions or actions into compliance with the goals, acknowledged comprehensive plan provisions, land use regulations * * * if the commission has good cause to believe:
>
> "* * * * *
>
> "(12) *A local government within the jurisdiction of a metropolitan service district* has failed to make changes to the comprehensive plan or land use regulations to comply with the regional framework plan of the district or *has engaged in a pattern or practice of decision-making that violates a requirement of the regional framework plan*[.]" (Emphasis added.)

As stated above, the Court of Appeals determined that the 3-Party IGA and the 5-Party IGA are significant impact land use decisions. Therefore, the Commission's task is to determine whether by entering into the IGAs, the three cities, Metro, and the County, or a subset of those local governments, has engaged in a pattern or practice of decision-making that violates a requirement of Metro's RFP. This analysis first entails the Commission determining whether the two IGAs constitute a "pattern or practice" of decision-making. If the Commission determines that two decisions are sufficient to constitute a pattern or practice of decision-making and that one decision is not sufficient, the Commission will proceed to determine whether the two IGAs violate a requirement of the RFP. If one of the IGAs does not violate a requirement of the RFP, the Commission will discontinue its analysis because it will not have a basis to issue an enforcement order pursuant to ORS 197.320(12). If the Commission determines that both of the IGAs violate a requirement of the RFP, it will continue its analysis to determine whether Metro and the County are parties to the 3-Party IGA, and what relief is appropriate.

### I. Do the 3-Party IGA and the 5-Party IGA constitute a "pattern or practice of decision making"?

To implement ORS 197.320, the Commission adopted the following definitions of "pattern of decision making" and "practice of decision making":

> "(10) Pattern of decision making means a mode, method, or instance of decision making representative of a group of decisions with these characteristics:
>
> "(a) The decisions involve the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;
>
> "(b) The decisions involve the same or similar geographic areas, plan designations, zones, or types of land use; and
>
> "(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request in OAR 660-045-0040, or the decisions are likely to occur after that date.
>
> "(11) Practice of decision making means a series or succession of decisions with these characteristics:
>
> "(a) The decisions involve the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;
>
> "(b) The decisions involve the same or similar geographic areas, plan designations, zones, or types of land use; and
>
> "(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request in OAR 660-045-0040, or the decisions are likely to occur after that date."

OAR 660-045-0020.

The Commission agrees with and incorporates herein the reasoning in the Hearings Officer's Findings of Fact, Conclusions of Law, and Recommendation, and concludes that the 3-

Party IGA and the 5-Party IGA constitute a practice of decision making. In short, this is because the two IGAs are a series or succession of two decisions that: (a) involve the same provision of Metro's RFP (MC 3.07.1110); (b) involve the urban reserve known as Stafford; and (c) occurred within the timeframe described in OAR 660-045-0020(11)(c). In addition, the Commission incorporates the Hearings Officer's decision and explanation that one decision is insufficient to constitute a pattern or practice of decision-making. Having made this determination, the Commission turns its analysis to whether the 3-Party IGA violates a requirement of the RFP.

## II. Does the 3-Party IGA violate a requirement of the RFP?

The Commission begins this section by introducing MC 3.07.1110, the RFP provision at issue, and with an overview of the two IGAs. It then continues to analyze Marks' claim that the 3-Party IGA violates various requirements of Metro's RFP.

### A. Introduction to MC 3.07.1110 - Planning for Areas Designated Urban Reserve

Marks asserts that the 3-Party IGA violates MC 3.07.1110(a), (b), (c) and (e). MC 3.07.1110, which is entitled Planning for Areas Designated Urban Reserve, begins by establishing the general requirement for concept plans, and then specifies which entities are responsible for developing the concept plan, the timing or sequence requirement that the concept plan be complete before the Metro Council adds the urban reserve area to the UGB, and the process for, and entities involved in, determining the concept plan completion date. MC 3.07.1110(a). The next two paragraphs, MC 3.07.1110(b) and (c), contain a list of outcomes that the local governments must consider actions to achieve, and a list of plan components depending on the planned uses, needs that the area will accommodate, and the size of the expansion area. Finally, MC 3.07.1110(e) contains an exception to the requirement in MC 3.07.1110(a) that a concept plan must be complete prior to adding the urban reserve to the urban growth boundary (UGB). The exception is that if the entities involved in developing the concept plan do not reach agreement on the concept plan before the agreed upon completion date, Metro Council may nonetheless add the area to the UGB.

The text of MC 3.07.1110 reads:

> "(a) The county responsible for land use planning for an urban reserve and any city likely to provide governance or an urban service for the area, shall, in conjunction with Metro and appropriate service districts, develop a concept plan for the urban reserve prior to its addition to the UGB pursuant to sections 3.07.1420, 3.07.1430 or 3.07.1435. The date for completion of a concept plan and the area of urban reserves to be planned will be jointly determined by Metro and the county and city or cities.
>
> "(b) A local government, in creating a concept plan to comply with this section, shall consider actions necessary to achieve the following outcomes:
>
> "(1) If the plan proposes a mix of residential and employment uses:

“(A) A mix and intensity of uses that will make efficient use of the public systems and facilities described in subsection (c);

“(B) A development pattern that supports pedestrian and bicycle travel to retail, professional and civic services;

“(C) A range of housing of different types, tenure and prices addressing the housing needs in the prospective UGB expansion area in the context of the housing needs of the governing city, the county, and the region if data on regional housing needs are available, in order to help create economically and socially vital and complete neighborhoods and cities and avoiding the concentration of poverty and the isolation of families and people of modest means;

“(D) Sufficient employment opportunities to support a healthy economy, including, for proposed employment areas, lands with characteristics, such as proximity to transportation facilities, needed by employers;

“(E) Well-connected systems of streets, bikeways, parks, recreational trails and public transit that link to needed housing so as to reduce the combined cost of housing and transportation;

“(F) A well-connected system of parks, natural areas and other public open spaces;

“(G) Protection of natural ecological systems and important natural landscape features; and

“(H) Avoidance or minimization of adverse effects on farm and forest practices and important natural landscape features on nearby rural lands.

“(2) If the plan involves fewer than 100 acres or proposes to accommodate only residential or employment needs, depending on the need to be accommodated:

“(A) A range of housing of different types, tenure and prices addressing the housing needs in the prospective UGB expansion area in the context of the housing needs of the governing city, the county, and the region if data on regional housing needs are available, in order to help create economically and socially vital and complete neighborhoods and cities and avoiding the concentration of poverty and the isolation of families and people of modest means;

“(B) Sufficient employment opportunities to support a healthy economy, including, for proposed employment areas, lands with characteristics, such as proximity to transportation facilities, needed by employers;

“(C) Well-connected systems of streets, bikeways, pedestrian ways, parks, natural areas, recreation trails;

“(D) Protection of natural ecological systems and important natural landscape features; and

“(E) Avoidance or minimization of adverse effects on farm and forest practices and important natural landscape features on nearby rural lands.

“(c) A concept plan shall:

“(1) Show the general locations of any residential, commercial, industrial, institutional and public uses proposed for the area with sufficient detail to allow estimates of the cost of the public systems and facilities described in paragraph (2);

“(2) For proposed sewer, park and trail, water and stormwater systems and transportation facilities, provide the following:

“(A) The general locations of proposed sewer , park and trail, water and stormwater systems;

“(B) The mode, function and general location of any proposed state transportation facilities, arterial facilities, regional transit and trail facilities and freight intermodal facilities;

“(C) The proposed connections of these systems and facilities, if any, to existing systems;

“(D) Preliminary estimates of the costs of the systems and facilities in sufficient detail to determine feasibility and allow cost comparisons with other areas;

“(E) Proposed methods to finance the systems and facilities; and

“(F) Consideration for protection of the capacity, function and safe operation of state highway interchanges, including existing and planned interchanges and planned improvements to interchanges.

“(3) If the area subject to the concept plan calls for designation of land for industrial use, include an assessment of opportunities to create and protect parcels 50 acres or larger and to cluster uses that benefit from proximity to one another;

“(4) If the area subject to the concept plan calls for designation of land for residential use, the concept plan will describe the goals for meeting the housing needs for the concept planning area in the context of the housing needs for the governing city, the county, and the region if data on regional housing needs are available. As part of this statement of objectives, the concept plan shall identify the general number, price and type of market and nonmarket-provided housing. The concept plan shall also identify preliminary strategies, including fee waivers, subsidies, zoning incentives and private and nonprofit partnerships, that will support the likelihood of achieving the outcomes described in subsection (b) of this section;

“(5) Show water quality resource areas, flood management areas and habitat conservation areas that will be subject to performance standards under Titles 3 and 13 of this chapter;

“(6) Be coordinated with the comprehensive plans and land use regulations that apply to nearby lands already within the UGB;

“(7) Include an agreement between or among the county and the city or cities that preliminarily identifies which city, cities or districts will likely be the providers of urban services, as defined at ORS 195.065(4), when the area is urbanized;

“(8) Include an agreement between or among the county and the city or cities that preliminarily identifies the local government responsible for comprehensive planning of the area, and the city or cities that will have authority to annex the area, or portions of it, following additions to the UGB;

“(9) Provide that an area added to the UGB must be annexed to a city prior to, or simultaneously with, application or city land use regulations so the area intended to comply with subsection (c) of section 3.07.1120; and

“(10) Be coordinated with schools districts, including coordination of demographic assumptions.

“(d) Concept plans shall guide, but not bind:

“(1) The designation of 2040 Growth Concept design types by the Metro Council;

“(2) Conditions in the Metro ordinance that adds the area to the UGB; or

“(3) Amendments to city or county comprehensive plans or land use regulations following addition of the area to the UGB.

“(e) If the local governments responsible for completion of a concept plan under this section are unable to reach agreement on a concept plan by the date set under subsection (a), then the Metro Council may nonetheless add the area to the UGB if necessary to fulfill its responsibility under ORS 197[A.362] to ensure the UGB has sufficient capacity to accommodate forecasted growth.”

### B. Overview of the 5-Party IGA[1]

The 5-Party IGA begins with recitals that recognize that the Cities have long opposed the designation of Stafford as an urban reserve and reflect that the parties to the 5-Party IGA entered into it "in order to alleviate the concerns of the Cities and better support the designation of Stafford * * * by ensuring an orderly process for any urbanization of Stafford where the Cities will have control over the planning, process and timing for the urbanization of Stafford." In consideration for the promises and commitments made by Metro and Clackamas County in the 5-Party IGA, the Cities agreed that they would "not challenge the designation of Stafford as Urban Reserve either before the State of Oregon Land Conservation and Development Commission or by appeal to the Oregon Court of Appeals."

Substantively, the 5-Party IGA provides that the parties to it agree that: (1) "Stafford will be governed by one or more of the Cities upon expansion of the urban growth boundary and annexation"; (2) the "governing City will have the authority to decide what land uses should be planned for, and when and how municipal services will be provided"; (3) "prior to adding any part of Stafford to the UGB, the City that will be responsible for annexing that part of Stafford must first have developed a concept plan for the area describing how the area will be planned and developed after inclusion in the UGB"; (4) the "timing for commencement and completion of a concept plan will be up to the City"; (5) "each governing City will be responsible for determining the pace and timing of future development within an area to be incorporated into the UGB"; (6) the parties will "participate in good faith in future planning efforts for Stafford"; (7) the parties "agree to continue to support the Joint Policy Advisory Committee on Transportation's decision to make widening I-205 from Oregon City to Stafford Road a top priority for regional transportation projects in order to help address the significant transportation infrastructure issues related to future urbanization of Stafford as well as other regional transportation needs"; (8) and that "[u]rbanization and urban development will be planned to coincide with transportation and infrastructure improvement necessary to serve such development."[2]

### C. Overview of the 3-Party IGA

In February 2019, after LCDC had acknowledged Metro's designation of Stafford as an urban reserve, the Cities entered into the 3-Party IGA. The recitals to the 3-Party IGA reflect the Cities' view that the 3-Party IGA "implements the Five-Party IGA and therefore, is necessary to support the determination by Metro and Clackamas County that the designation of Stafford as an urban reserve is supportable under the urban reserve factors contained in ORS 195.145(5) and OAR 660-027-0050."

Substantively, as relevant here, in the 3-Party IGA the Cities agree that a "key piece of infrastructure that must be planned for and funded before the parties can complete meaningful concept planning is the widening of Interstate 205 to three lanes in each direction from Oregon

[1] This overview, and the overview of the 3-Party IGA below, is largely excerpted from the Court of Appeals opinion *Marks v. LCDC*, 327 Or App 708, 536 P2d 995 (2023).
[2] 5-Party IGA, p. 2-4.

City to Stafford Road and the replacement or reconstruction of the Abernethy Bridge ('I-205 Widening Project')," which "will have to be a regional project funded by state and federal funds."[3] Therefore, the Cities agreed that:

> "[N]o Party will complete or adopt any concept plan for any part of Stafford under Title 11 of the Metro Urban Growth Management Functional Plan * * *, or that otherwise constitutes a concept plan under the terms of the Five-Party Agreement, or that otherwise constitutes a criterion for UGB expansion, nor will any Party apply for, promote or support any expansion of the UGB into any part of Stafford, until[:]
>
> "1.3.1 **South of Tualatin River.** For any concept plan proposal involving a portion of Stafford that is south of the Tualatin River:
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> "(a) The I-205 Widening Project has received preliminary design approval; and
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> "(b) Funds to construct the I-205 Widening Project have been identified and appropriated; and
>
> "(c) Construction of the I-205 Widening Project is scheduled to begin in two years or less.
>
> "1.3.2 **North of the Tualatin River.** For any concept plan proposal involving any portion of the Stafford that is north of the Tualatin River, the later of:
>
> "(a) December 31, 2028; or
>
> "(b) until all the conditions in subsections 1.3.1 (a), (b) and (c) are met."[4]

In addition to the provisions on timing of concept planning, the 3-Party IGA provides concept planning criteria that are in addition to those in the Metro Code. It states:

> "In addition to concept planning criteria under Metro Code Section 3.07.1110, *** the Parties agree that the following criteria will apply to Stafford area concept plans:
>
> "(a) Consider community character;
>
> "(b) Provide separation between communities and understandable borders;

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[3] 3-Party IGA, p. 2.
[4] 3-Party IGA, p. 2.

> "(c) Preserve natural features;
>
> "(d) Maintain functionality of transportation and other systems. Unless mitigated and addressed as provided in Section 2.2, no material impairment or degradation of the functionality of a transportation or utility facility or system of another Party."[5]

**D. Analysis of whether the 3-Party IGA violates a requirement of MC 3.07.1110**

As previewed, Marks contends that the 3-Party IGA violates MC 3.07.1110(a), (b), (c) and (e). The Commission considers these arguments in turn.

**1. Does the 3-Party IGA violate MC 3.07.1110(a)?**

Marks' assertion that the 3-Party IGA violates MC 3.07.1110(a) is primarily focused on the provision in which the Cities agree that no city will complete or adopt any concept plan for the area North of the Tualatin River until at least December 31, 2028.[6] Marks supports this aspect of his petition with three related arguments. First, Marks argues that the delay violates the RFP because "[n]either MC 3.07.1110(a) nor any other RFP provision permit[s] a local government to impose arbitrary moratoriums on concept planning."[7] Second, Marks argues that "[t]he Cities did not jointly adopt the 10-year moratorium in coordination with Metro and the County."[8] Marks' third argument is that "MC 3.07.1110(a) expressly requires the timing to be jointly determined and does not permit Metro or the County to delegate their authority to the Cities."[9]

It is true that MC 3.07.1110(a) does not expressly permit or otherwise contemplate a local government delaying or, as Marks puts it, imposing a moratorium on concept planning. However, for the Commission to issue an enforcement order pursuant to ORS 197.320(12), the local government's decision must violate a *requirement* of the RFP. MC 3.07.1110(a) does not require that concept planning be completed or adopted within any certain timeframe; rather, the timing requirement in MC 3.07.1110(a) is that the entities "develop a concept plan for the urban reserve *prior to its addition to the UGB*."[10] The delay for concept planning completion and adoption that the Cities agreed to in the 3-Party IGA will not result in the Metro Council adding the Stafford Area to the UGB prior to concept plan development. Marks has not established that the 3-Party IGA violates a requirement of MC 3.07.1110(a).

The other requirement in MC 3.07.1110(a) to which Marks' arguments relate is that "the date for completion of a concept plan * * * will be jointly determined by Metro and the county

[5] 3-Party IGA, p. 3.
[6] 3-Party IGA, Section 1.3.2(a).
[7] Petitioner David Marks' Exceptions to the Hearings Officer's Findings of Fact, Conclusions and Recommendation ("Marks' Exceptions"), p. 21.
[8] Marks' Exceptions, p. 21-22.
[9] Marks' Exceptions, p. 22.
[10] MC 3.07.1110(a) (emphasis added.)

and city or cities." As explained above, in the 5-Party IGA the five local governments agreed that "the timing for commencement and completion of a concept plan will be up to the City."[11] In our determination, and consistent with the Hearings Officer's recommendation, this provision of the 5-Party IGA is properly viewed as the five parties jointly determining the date for completion of a concept plan. While the parties did not provide a date certain, given that the RFP contains no time parameters on concept plan completion such that the parties could jointly agree to any date whatsoever for completion, that Metro and the County agreed to the Cities making the final completion date determination rather than pinpointing any future date does not amount to unilateral action or inappropriate delegation. The 3-Party IGA implements the 5-Party IGA and is the first step in the Cities determining when concept plans will be complete, which at the time the Cities entered into the 3-Party IGA is a date after December 31, 2028. The five local governments jointly agreed to this approach, and by the Cities taking the first step to establish the timeframe for concept plan completion, the 3-Party IGA does not violate a requirement of the RFP. Finally, to the extent Metro did delegate its role in MC 3.07.1110(a) to the Cities, that did not happen in the 3-Party IGA so would not provide an avenue for the Commission to determine the 3-Party IGA violates a requirement of the RFP.[12]

In addition to the arguments addressed above, Marks asserts that the 3-Party IGA violates MC 3.07.1110(a) because that provision requires "the Cities, Metro and the County to coordinate the concept plans" and "[t]he Three Party IGA requires no involvement or coordination with Metro or the County. It only requires coordination among the Cities."[13] The formal title of the 3-Party IGA is "Three City Intergovernmental Agreement," and the agreement is just that – an agreement among the three cities in which they explicitly agree how they will interact with each other about an issue with which they have long-held concerns, the urbanization of the Stafford Area. Relevant here, the Cities agreed that each city will give notice to the other cities before initiating concept planning for any portion of the Stafford Area, and coordinate with and allow meaningful participation by the other cities in developing the concept plan. In establishing that relationship amongst themselves, it was not necessary for the Cities to also enumerate every requirement on concept planning set out in the RFP, and by the Cities not doing so we will not infer that the parties intend to disregard, nor does this amount to a violation of, a requirement of the RFP.

Finally, for the reasons explained in the Hearings Officer's recommendation, the Commission also disagrees that the 3-Party IGA gives the Cities veto power over each other's concept plan and that that amounts to a violation of a requirement of the RFP. For all of these

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[11] 5-Party IGA, Section 2.a.

[12] As stated above, the 3-Party IGA is intended to implement the 5-Party IGA. 3-Party IGA, p. 2. To the extent Metro's delegation of its authority prescribed in MC 3.07.1110 is imported into the 3-Party IGA by that implementation purpose, we note that the Metro Charter authorizes the Metro Council to adopt a Regional Framework Plan to address multiple issues including management and amendment of the UGB, and that the legislature expressly authorized Metro to enter into intergovernmental agreements pursuant to ORS 190.010 to carry out functions authorized pursuant to its charter. Metro Charter, effective January 8, 2015, p. 2; ORS 268.300(2)

[13] Marks' Exceptions, p. 26.

reasons, we conclude that Marks has not established that the 3-Party IGA violates a requirement of MC 3.07.1110(a).

**2. Does the 3-Party IGA violate MC 3.07.1110(b) and (c)?**

Marks next asserts that the 3-Party IGA violates MC 3.07.1110(b) and (c), which are set out in full above. In summary, MC 3.07.1110(b) requires that, in creating a concept plan, a local government consider actions necessary to achieve listed outcomes depending on the uses, scale and needs proposed in, or proposed to be addressed by, the concept plan. MC 3.07.1110(c) contains a list of concept plan components and requirements, for example that it provide multiple categories of information on proposed sewer, park and trail, water and stormwater systems and transportation facilities, and that it include certain agreements with involved counties and cities.

In Section 2.4 of the 3-Party IGA, the Cities agreed that:

> "In addition to concept planning criteria under Metro code Section 3.07.11[1]0 that is consistent with the Five-Party IGA, the Parties agree that the following criteria will apply to the Stafford area concept plans:
>
> "(a) Consider community character;
>
> "(b) Provide separation between communities and understandable borders;
>
> "(c) Preserve natural features;
>
> "(d) Maintain functionality of transportation and other systems. Unless mitigated and addressed as provided in Section 2.2, no material impairment or degradation of the functionality of a transportation or utility facility or system of another Party."

The basis of Marks' assertion of a violation is that the considerations and concept plan components required by MC 3.07.1110(b) and (c) are exclusive, and that by agreeing to also apply the four additional criteria in Section 2.4 of the 3-Party IGA the Cities violated the MC 3.07.1110. We disagree. While the text of MC 3.07.1110 is clear that the considerations and plan components in MC 3.07.1110(b) and (c) are required, it does not contain language to support that MC 3.07.1110(b) and (c) are the exclusive considerations and requirements for concept plans. By stating that the criteria listed in the 3-Party IGA are "[i]n addition to concept planning criteria under Metro code Section 3.07.1110", the 3-Party IGA is clear that the Cities are agreeing to additional criteria, not replacement criteria, and therefore we determine that Marks has not established that the 3-Party IGA violates a requirement of MC 3.07.1110 (b) or (c).

### 3. Does the 3-Party IGA violate MC 3.07.1110(e)?

Marks asserts that the 3-Party IGA "violates MC 3.07.1110(e) because it prohibits Metro from adding any portion of the Stafford Area to the UGB until at least the arbitrary 10-year moratorium expires."[14] For ease of reading, MC 3.07.1110(e) provides:

> "If the local governments responsible for completion of a concept plan under this section are unable to reach agreement on a concept plan by the date set under subsection (a), then the Metro Council may nonetheless add the area to the UGB if necessary to fulfill its responsibility under ORS 197[A.362] to ensure the UGB has sufficient capacity to accommodate forecasted growth."

We disagree with Marks' assertion. It is not the 3-Party IGA that prohibits Metro from adding an area to the UGB before the agreed-upon completion date; rather, that is a function of MC 3.07.1110(e).[15] Further, as we understand Marks' argument it is an extension of his position that the 3-Party IGA violates MC 3.07.1110(a) because the five local governments did not jointly determine the concept plan completion date. Rather, as discussed addressed above, Marks'

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[14] Marks' Exception, page 25.

[15] The Commission has previously decided that it disagrees that the IGAs determine "whether or not the Stafford Area is urbanized." The future urbanization of the Stafford Area must comply with state law. By way of short synopsis, state law requires Metro to identify and accommodate its need for housing, employment opportunities, and livability within the regional urban growth boundary. Goal 14; ORS 197A.350. If the identified need cannot reasonably be accommodated on land already inside the regional urban growth boundary, Metro must determine which land to add by evaluating alternative urban growth boundary location factors of Goal 14. OAR 660-024-0060(1). Because the Stafford Area is an acknowledged urban reserve area it is among the first priority of land for inclusion within the Metro regional urban growth boundary. ORS 197A.355(1)(a); OAR 660-027-0070(1). As such, Metro must consider and balance the boundary location factors of Goal 14 for the Stafford Area urban reserves for comparison to other urban reserves in the alternative boundary location factors of Goal 14 for the Stafford Area urban reserves for comparison to other urban reserves in the alternative boundary locations and ultimately to determine the Metro UGB location. OAR 660-024-0060(3).

Nothing in the IGAs prohibits Metro from including the Stafford Area in the required boundary location analysis, nor could either of the IGAs lawfully do so. If Metro determined that inclusion of all or part of the Stafford Area is necessary to fulfill its responsibility under ORS 197A.362, the Commission understands Metro to have retained that authority under the Regional Framework Plan. *See* MC 3.07.1110(e) (Metro may add an area to the regional urban growth boundary absent a concept plan to satisfy state law requirements.)

At most, the Commission concludes that the IGAs demonstrate coordination on a preferred timing for future urban land uses. Metro ultimately has responsibility under state law to coordinate, evaluate urban reserves for consideration, and under the Regional Framework Plan to move ahead in the absence of a concept plan if necessary to fulfill its obligations under state law. Metro has statutory power to require cities and counties to change their plans to conform to Metro's plans. ORS 268.380; ORS 268.390; *Citizens for Better Transit v. Metro Service Dist.*, 15 Or LUBA 482, 487 (1987).

position is that the Cities imposed an “arbitrary moratorium” on concept planning and that Metro and the County unlawfully delegated their authority over determining the concept plan completion date to the Cities. Because Marks disagrees with the process for determining the concept plan completion date that the local governments agreed to in the 5-Party IGA, he also views that process as violating MC 3.07.1110(e). With those arguments rejected as explained above, Marks’ assertion of violation of MC 3.07.1110(e) is not sustained.

#### 4. Does the 3-Party IGA’s Section 4.2, which pertains to the Luscher Farm/Rosemont Open Space properties, violate the RFP?

Finally, Marks takes issue with Section 4.2 of the 3-Party IGA. In that provision, the Cities agree to Lake Oswego concept planning and requesting UGB expansion to include all or part of the Luscher Farm/Rosemont Open Space properties without adhering to the timing of concept planning provision in Section 1 of the 3-Party IGA. Consistent with the Hearings Officer’s recommendation, because Marks has not demonstrated, nor are we are aware of, any requirement in MC 3.07.1110 that Section 4.2 of the 3-Party IGA violates, we reject this argument.

### E. Conclusion

For all of the reasons discussed above, the Commission determines that the 3-Party IGA does not violate any requirements of the RFP. Because we have determined at least two decisions are necessary for there to be a practice of decision making that warrants enforcement pursuant to ORS 197.320(12), our analysis of the 5-Party IGA would serve no purpose and we decline to engage in that exercise.

## DECISION

Based on the preceding findings of fact and conclusions of law, the Commission declines to issue an enforcement order pursuant to ORS 197.320(12).

DATED THIS 18TH DAY OF JUNE 2026.

FOR THE COMMISSION:

Brenda G Bateman

Brenda Bateman, Ph. D. Director
Department of Land Conservation and Development

Note: You may be entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this final order. Judicial review is pursuant to the provision of ORS 183.482(1) and ORS 197.335(2).

CERTIFICATE OF SERVICE

Pursuant to ORS 183.470(3), I certify that on June 18, 2026, I served the attached **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION ON REMAND FROM COURT OF APPEALS** by mailing in a sealed envelope, with first-class postage prepaid, a copy thereof addressed as follows:

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