

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).¹

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

¹The 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.² 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

²Portland 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.³ 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)⁴ and 268.385(1), the Metropolitan Service
15 District (Metro) must agree that the USB should be located

³We 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.

⁴During 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.⁵ 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.⁶

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.⁷ It amends

⁵As 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).

⁶The 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.

⁷No 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.

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.⁸

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:

⁸Beaverton'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.⁹ See City of Portland v.
25 Washington County, supra, slip op at 6-8. The

⁹The 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."¹⁰ 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

¹⁰The 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.¹¹

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.

¹¹At 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.