

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 PARTNERSHIP FOR SENSIBLE GROWTH
5 and HOME BUILDERS ASSOCIATION OF
6 METROPOLITAN PORTLAND,

7 *Petitioners,*

8
9 vs.

10
11 METRO,
12 *Respondent.*

13
14 LUBA No. 99-184

15
16 FINAL OPINION
17 AND ORDER

18
19 Appeal from Metro.

20
21 Mark J. Greenfield, Portland, represented petitioners.

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23 Daniel B. Cooper, General Counsel, Portland, and Larry Shaw, Senior Assistant
24 Counsel, Portland, represented respondent.

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26 BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member,
27 participated in the decision.

28
29 DISMISSED

01/25/2000

30
31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.

33

NATURE OF THE DECISION

Petitioners appeal Metro’s resolution accepting an update to Metro’s 1997 inventory of buildable lands and analysis of housing needs.

MOTION TO DISMISS

A. Background

Metro is the regional government responsible for the Portland metropolitan area urban growth boundary (UGB). Pursuant to ORS 197.296(2), local governments including Metro must provide sufficient buildable lands within their UGBs to accommodate estimated housing needs for 20 years.¹ To that end, ORS 197.296(3) requires Metro to inventory the existing supply of buildable lands within the UGB, determine the actual density and mix of housing types that have occurred recently within the UGB, and analyze housing needs to determine the amount of land needed for the next 20 years.² If the result of that analysis shows that the UGB does not contain sufficient buildable lands to accommodate housing

¹ORS 197.296(2) provides:

“At periodic review or any other legislative review of the urban growth boundary, comprehensive plans or functional plans shall provide sufficient buildable lands within urban growth boundaries established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years.”

²ORS 197.296(3) provides:

“As part of its next periodic review pursuant to ORS 197.628 to 197.650 following September 9, 1995, or any other legislative review of the urban growth boundary, a local government shall:

- “(a) Inventory the supply of buildable lands within the urban growth boundary;
- “(b) Determine the actual density and the actual average mix of housing types of residential development that have occurred within the urban growth boundary since the last periodic review or five years, whichever is greater; and
- “(c) Conduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the amount of land needed for each needed housing type for the next 20 years.”

1 needs for 20 years, ORS 197.296(4) requires that Metro take one of several prescribed
2 actions.³

3 ORS 197.299 sets forth specific deadlines for Metro’s compliance with ORS 197.296.
4 Pursuant to ORS 197.299(1), Metro must complete the initial inventory and analysis required
5 by ORS 197.296(3) by January 1, 1998, and conduct that inventory and analysis at least
6 every five years thereafter.⁴ ORS 197.299(2) requires Metro to take such “final action”
7 under ORS 197.296(4) as is necessary to accommodate a 20-year buildable lands supply, in
8 two stages: one-half within one year of completing the analysis, and the remainder within
9 two years of completing the analysis.⁵ Pursuant to ORS 197.299(3), Metro may seek an

³ORS 197.296(4) provides, in relevant part:

“If the determination required by subsection (3) of this section indicates that the urban growth boundary does not contain sufficient buildable lands to accommodate housing needs for 20 years at the actual developed density that has occurred since the last periodic review, the local government shall take one of the following actions:

- “(a) Amend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for 20 years at the actual developed density during the period since the last periodic review or within the last five years, whichever is greater. * * * ;
- “(b) Amend its comprehensive plan, functional plan or land use regulations to include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for 20 years without expansion of the urban growth boundary. * * * ; or
- “(c) Adopt a combination of the actions described in paragraphs (a) and (b) of this subsection.”

⁴ORS 197.299(1) provides:

“[Metro] shall complete the initial inventory, determination and analysis required under ORS 197.296 (3) not later than January 1, 1998, and conduct the inventory and analysis at least every five years thereafter.”

⁵ORS 197.299(2) provides:

- “(a) [Metro] shall take such action as necessary under ORS 197.296 (4) to accommodate one-half of a 20-year buildable land supply determined under ORS 197.296 (3) within one year of completing the analysis.

1 extension of the deadlines for final action set forth in ORS 197.299(2), upon a demonstration
2 of “good cause.”

3 In December 1997, Metro met the first deadline, the inventory and analysis required
4 by ORS 197.296(3)(a), by adopting by resolution a study called the Urban Growth Report
5 (1997 Report). The 1997 Report, based on data compiled through 1994, estimated a need
6 over the period 1997-2017 for an additional 32,370 dwelling units that could not otherwise
7 be accommodated by the supply of buildable land within the UGB. In December 1998,
8 Metro met the second deadline by adopting ordinances amending the UGB to add land
9 necessary to accommodate approximately one-half of the 20-year land supply determined to
10 be needed.

11 Throughout 1999, Metro worked to complete an update to the 1997 Report (the 1999
12 Update). The 1999 Update contains new data reflecting the period 1994-1998, and revises
13 several assumptions supporting the inventory of buildable lands; in particular, assumptions
14 regarding the amount of land that must be set aside for riparian protection. According to
15 petitioners, the 1999 Update includes the following new data and revised assumptions:

- 16 • New information resulting from clearer aerial photographs taken in July
17 1998.
- 18 • The 1997 Report considered lands within 200 feet of watercourses
19 unbuildable; the 1999 Update considers such lands buildable.
- 20 • The 1997 Report assumed development at a rate of one dwelling unit per
21 five acres in Title 3 riparian areas; the 1999 Update applies a rate of 8.5
22 dwelling units per five acres.
- 23 • The 1997 Report considered slopes steeper than 25 degrees unbuildable;
24 the 1999 Update considers such slopes buildable at historic rates.

“(b) [Metro] shall take all final action under ORS 197.296 (4) necessary to accommodate a 20-year buildable land supply determined under ORS 197.296 (3) within two years of completing the analysis.”

- 1 • The 1997 Report applied a 22 percent reduction for streets; the 1999
2 Update applies an 18.5 percent reduction.
- 3 • Revised assumptions regarding the amount of land needed for future
4 parks.
- 5 • New zoning data compiled by cities and counties through May 1999.
6 Memorandum in Opposition to Motion to Dismiss 6-7.

7 According to petitioners, the revised data and assumptions in the 1999 Update indicate that
8 the supply of buildable lands in the UGB is significantly higher than estimated in the 1997
9 Report, to the point where the “final action” required by ORS 197.299(2)(b) may not need to
10 include further UGB amendments.

11 In December 1999, the Metro council adopted Resolution 99-2855C, the decision
12 challenged in this appeal. The first numbered paragraph of Resolution 99-2855C directs the
13 Metro executive officer to request an extension of the third deadline for final action imposed
14 by ORS 197.299(2)(b), to October 31, 2000.⁶ The third and fourth numbered paragraphs
15 state that:

16 “[T]he Metro Council accepts the [1999 Update] with more work to be
17 completed on the density estimated for environmentally sensitive lands, and
18 estimated accessory dwelling units. The calculated range of the dwelling unit
19 capacity of environmentally sensitive lands is scheduled in Exhibit ‘C’ [to
20 Resolution 99-2855C] to receive additional [Statewide Planning] Goal 5-
21 based regulation. This calculation indicates that the scheduled additional
22 regulation will reduce the 20-year buildable residential land inventory inside
23 the UGB by as many as 15,000 dwelling units. In addition work will also be
24 completed on the location of jobs/housing imbalances.

25 “* * * [F]inal action to attain Metro compliance with ORS 197.299 by
26 October 31, 2000 in determining the need for additional UGB amendments
27 shall include the density estimated for environmentally sensitive land, the
28 estimated number of accessory dwelling units, consideration of the effects of
29 newly adopted Goal 5-based regulations and the location of jobs/housing
30 imbalances.”

⁶Petitioners do not argue that the aspect of Resolution 99-2855C that seeks an extension of time to comply with ORS 197.299(2)(b) is an action that renders the resolution a “final land use decision” subject to our jurisdiction.

1 This appeal followed.

2 **B. Decision**

3 Metro moves to dismiss this appeal, arguing that the challenged resolution is not a
4 final land use decision subject to LUBA's jurisdiction.⁷

5 Metro explains that Metro's amendment to the regional UGB becomes part of the
6 comprehensive plans of jurisdictions within Metro's boundaries, and thus such an
7 amendment constitutes an "amendment" of "comprehensive plans" within the meaning of
8 ORS 197.015(10)(a)(A). *League of Women Voters v. Metro. Service Dist.*, 99 Or App 333,
9 781 P2d 1256 (1989), *rev den* 310 Or 70 (1990). However, Metro argues, the challenged
10 resolution does not amend the regional UGB or take any final action with respect to the UGB
11 or any comprehensive plan. Metro characterizes the resolution's acceptance of the 1999
12 Update as merely a work component preliminary to the "final action" that Metro will
13 ultimately take to comply with ORS 197.299(2)(b).

14 Further, Metro argues that acceptance of the 1999 Update, and the description in the
15 resolution's third numbered paragraph of areas where further study is needed, was intended
16 to support Metro's request for a time extension under ORS 197.299(3) in two ways: first, by
17 demonstrating "good cause" for failing to meet the deadline; and second, by demonstrating
18 that the remaining work to be completed can be accomplished within the requested extension

⁷ORS 197.825 provides that LUBA has exclusive jurisdiction to review land use decisions of, *inter alia*, special districts, such as Metro. ORS 197.015(10)(a) defines "land use decision" to include:

"(A) 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; or

"(iv) A new land use regulation; * * *"

1 of time. Metro argues that even if “acceptance” of the 1999 Update in its current form could
2 constitute a land use decision, that action is not a *final* decision, because the resolution
3 expressly identifies areas of further study and requires that the “final action” taken pursuant
4 to ORS 197.299(2)(b) include consideration of those areas of further study. Metro contends
5 that the 1999 Update is essentially an incomplete draft, and that the resolution’s “acceptance”
6 for purposes of supporting the extension request cannot constitute a final decision of any
7 kind.

8 Petitioners respond, first, that the challenged resolution is a final land use decision, as
9 defined at ORS 197.015(10), because it “concerns” the future amendment of a
10 comprehensive plan (the regional UGB), which will presumably involve the application of
11 relevant statewide planning goals, in particular Goals 10 (Housing) and 14 (Urbanization).
12 Further, petitioners argue that the resolution is a “final” decision because it has immediate
13 and binding land use effects, in that it adopts new estimates of buildable lands that allow
14 Metro to avoid the statutory mandate of amending the UGB before January 1, 2000. But for
15 adoption of the 1999 Update, petitioners argue, Metro would have been required to amend
16 the UGB consistently with the estimates in the 1997 Report, and add another 15,000 acres to
17 the UGB by January 1, 2000. For essentially the same reasons petitioners argue that the
18 challenged decision is final, they also argue that the decision has “significant impacts” on
19 land uses and thus qualifies as a land use decision, pursuant to *Billington v. Polk County*, 299
20 Or 471, 479, 703 P2d 232 (1985) and *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992
21 (1982).

22 Finally, petitioners argue that Metro’s revision of the 1997 Report prior to its full
23 implementation exceeds Metro’s authority under ORS 197.299(1). Petitioners concede that
24 ORS 197.299(1) allows Metro to revise the 1997 Report sooner than five years from its
25 initial adoption, but argue that the statute does not permit Metro to revise the 1997 Report

1 until Metro completes “final action” based on that report as required by ORS 197.299(2)(a)
2 and (b).

3 We agree with Metro that the challenged resolution is not a final land use decision as
4 defined at ORS 197.015(10)(a)(A). Petitioners do not argue, and it does not appear to be the
5 case, that either the resolution or the 1999 Update amends the UGB or adopts, amends or
6 applies any goal, comprehensive plan or land use regulation.⁸ We reject petitioners’
7 argument that the resolution is a land use decision because it “concerns” the (future)
8 amendment of the regional UGB. A decision subject to ORS 197.015(10)(a)(A) must
9 actually adopt, amend or apply the goals, a comprehensive plan provision, a land use
10 regulation, or a new land use regulation. Whatever the term “concerns” adds to the statutory
11 definition of “land use decision,” it does not expand the scope of that definition to include a
12 decision that merely touches upon or is related in some manner to *another* decision that
13 meets the definition at ORS 197.015(10)(a)(A).

14 We also agree with Metro that, even if Metro’s acceptance of the 1999 Update could
15 meet the definition of “land use decision,” the challenged action is not a *final* decision.
16 Considered in the context of the statutory scheme, it is clear that a decision to adopt (or
17 revise) the inventory and needs analysis required by ORS 197.296(3) is an interlocutory
18 action that is not a “final” decision or determination within the meaning of
19 ORS 197.015(10)(a). *See Oregon Department of Agriculture v. Metro*, ___ Or LUBA ___
20 (LUBA Nos. 99-004/008/014/020, February 26, 1999) (Metro resolution stating an intent to
21 amend the regional UGB if and when counties act to annex lands into the Metro district
22 boundary is not a final land use decision, but rather an interlocutory step in a three-stage
23 process). The final actions contemplated and required by the statutory scheme are those
24 described in ORS 197.296(4) and (5), pursuant to the timetable set forth in ORS 197.299(2).

⁸Metro has apparently not incorporated the 1997 Report or the 1999 Update into the Metro Code, the Urban Growth Management Functional Plan, or any of its regional framework plans.

1 Further, petitioners have not established that Metro’s acceptance of the 1999 Update has any
2 immediate or binding effects. What allows Metro to avoid the statutory mandate to complete
3 “final action” by January 1, 2000, is not Metro’s acceptance of the 1999 Update, but rather
4 Metro’s request for an extension of time to make that final action, an extension that
5 petitioners do not challenge and that the statute expressly allows.

6 We also disagree with petitioners that the challenged decision qualifies as a
7 “significant impact” land use decision pursuant to *Billington* and *Kerns*. To the extent the
8 doctrine of nonstatutory “significant impact” land use decisions has any continuing validity,
9 petitioners have not established that the challenged resolution has any land use impacts,
10 significant or otherwise. Further, as discussed above, Metro’s acceptance of the 1999 Update
11 is an interlocutory step in a multi-stage process prescribed by statute and is thus not final.
12 *Oregon Department of Agriculture*; see also *City of North Plains v. Washington County*, 24
13 Or LUBA 78, 81 (1992) (significant impact land use decisions must be final decisions);
14 *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 752 (1987), *aff’d* 93 Or App
15 73, 761 P2d 533 (1988) (same).

16 Finally, petitioners’ argument that adoption of the 1999 Update violates ORS 197.299
17 also fails to establish a basis for our jurisdiction. Nothing in ORS 197.299 or elsewhere
18 drawn to our attention prohibits Metro from revising the 1997 Report prior to expiration of
19 the statutory two-year period. ORS 197.299(1) clearly allows Metro to revise its inventory
20 and needs analysis sooner than the required five years, and contains no prohibition on doing
21 so prior to expiration of the initial two-year period.⁹ Even if petitioners are correct that
22 ORS 197.299 implicitly prohibits Metro from revising the 1997 Report prior to its full

⁹In addition, petitioners’ construction of the statute would have the anomalous result of requiring Metro to amend the UGB to include 15,000 acres of land that Metro, based on recent data, apparently no longer believes are necessary to accommodate the 20-year housing need.

1 implementation, petitioners fail to explain why Metro's violation of the statute would
2 constitute a final land use decision, as defined by ORS 197.015(10)(a)(A).

3 For the foregoing reasons, we agree with Metro that we lack jurisdiction over this
4 appeal.

5 This appeal is dismissed.