BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITY OF SANDY,
Petitioner,

vs.

METRO,
Respondent,

and

BILES FAMILY, LLC
and CITY OF WILSONVILLE
Intervenors-Respondent.

LUBA NO. 2004-107

CITY OF HILLSBORO,
Petitioner,

and

ROBERT BAILEY and PATRICIA BAILEY
Intervenors-Petitioner,

vs.

METRO,
Respondent,

and

1000 FRIENDS OF OREGON,
BILES FAMILY, LLC
and CITY OF WILSONVILLE,
Intervenors-Respondent.

LUBA NO. 2004-108

CLACKAMAS COUNTY,
Petitioner,

vs.

METRO,
Respondent'

and

1000 FRIENDS OF OREGON,
BILES FAMILY, LLC
and CITY OF WILSONVILLE,
Intervenors-Respondent.

LUBA NO. 2004-109

FINAL OPINION
AND ORDER

Appeal from Metro.

David F. Doughman, Portland, filed a petition for review and argued on behalf of petitioner City of Sandy. With him on the brief was Beery, Elsner and Hammond, LLP.

Timothy J. Sercombe, Portland, filed a petition for review and argued on behalf of petitioner City of Hillsboro. With him on the brief was Carra L. Sahler and Preston, Gates and Ellis, LLP.

Michael E. Judd, Assistant County Council, Oregon City, filed a petition for review on behalf of petitioner Clackamas County.

Robert Bailey and Patricia Bailey, Hillsboro, represented themselves.

Richard P. Benner, Portland, filed the response brief and argued on behalf of respondent.

Mary Kyle McCurdy, Portland, represented intervenor-respondent 1000 Friends of Oregon.

Gregory S. Hathaway, Portland, represented intervenor-respondent Biles Family, LLC.

Paul A. Lee, Assistant City Attorney, Wilsonville, represented intervenor-respondent City of Wilsonville.

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

DAVIES, Board Member, dissenting.

Affirmed 01/07/2005

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

Opinion by Holstun.

NATURE OF THE DECISION[1]

The Metropolitan Service District (Metro) adopted Ordinance No. 04-1040B to comply with certain requirements in a Land Conservation and Development Commission (LCDC) periodic review work order.[2] The ordinance adopts certain amendments regarding a 90-acre parcel located at the southern edge of the City of Gresham (Gresham). The City of Sandy (Sandy) challenges those amendments. The ordinance also adopts amendments to a Metro Functional Plan that have the effect of requiring that cities within Metro's jurisdiction take future action to amend their zoning ordinances and subdivision regulations to include specific limitations on certain lands that are planned for industrial and employment uses. The City of Hillsboro (Hillsboro) challenges those amendments, as well as Metro's decision to

[1] We use a number of acronyms in this opinion. We set out several of the less common acronyms here in alphabetical order to provide a single point of reference to assist in keeping up with them.

IGA	A 1998 intergovernmental agreement between the City of Sandy, Metro and other parties.
MC	Metro Code
Metro 2040	The Metro 2040 Growth Concept (a component of the RFP)
RFP	Metro Regional Framework Plan (a regional planning document that incorporates Metro 2040 and a number of Functional Plans).
RSIA	Regional Significant Industrial Area (a Metro 2040 map designation and design concept)
UGM Functional Plan	Urban Growth Management Functional Plan (a component of the RFP)

[2] LCDC conducts periodic review pursuant to ORS 197.628 to 197.650 and OAR chapter 660, division 025. The Ordinance is also under review by LCDC. As we explain later, two of the assignments of error that petitioner Hillsboro presents in this appeal are within LCDC's periodic review jurisdiction and are therefore not within LUBA's review jurisdiction.

include one site in the Urban Growth Boundary (UGB) instead of another site that Hillsboro prefers.[3]

INTRODUCTION

Metro is a regional government with a popularly elected president and six popularly elected councilors. Metro encompasses parts of Clackamas, Multnomah and Washington Counties and a number of cities, including Hillsboro. Metro operates under authority granted by the Oregon Constitution, state statutes and Metro's charter. Sandy argues that Metro improperly exercised its land use planning powers; Hillsboro argues that Metro exceeded its land use planning powers and failed to coordinate its decision making with Hillsboro.[4]

Pursuant to its charter and statutory authorities, Metro has adopted a Regional Framework Plan (RFP).[5] One of the components of the RFP is the Urban Growth Management Functional Plan (UGM Functional Plan). The UGM Functional Plan is codified at Metro Code (MC) Chapter 3.07. The challenged ordinance amends the UGM Functional Plan and the RFP. We briefly describe below the amendments that are the subject of Sandy's appeal and the amendments that are the subject of Hillsboro's appeal before turning to petitioners' assignments of error.

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[3] Clackamas County filed a brief in which it joins Hillsboro's arguments. Associated General Contractors, Oregon Columbia Chapter, filed an amicus brief in which it supports Hillsboro.

[4] As will become clear later, Metro derives what we refer to generally as its land use planning authority from a number of sources. One of those sources is ORS 268.030 which provides that Metro "shall provide for those aspects of land use planning having metropolitan significance."

[5] ORS 268.020(7) defines the RFP as "the Metro regional framework plan defined in ORS 197.015 and any [Metro] ordinances that implement the [RFP]." ORS 197.015(16) provides:

> "'Metro regional framework plan' means the regional framework plan required by the 1992 Metro Charter or its separate components. Neither the regional framework plan nor its individual components constitute a comprehensive plan."

THE DISPUTED AMENDMENTS

A. The 90-Acres

In 1998, Sandy, the Oregon Department of Transportation, Clackamas County and Metro entered into an intergovernmental agreement (IGA). Pursuant to the IGA, the parties agreed to establish "Rural Reserves." The 90 acres that are the subject of Sandy's appeal are located along State Highway 26, near the southern boundary of Gresham and over 10 miles northwest of Sandy. Pursuant to the 1998 IGA, those 90 acres were designated as Rural Reserves by Metro. At that time the 90 acres were located outside the UGB.

In Ordinance 02-969B (hereafter the 2002 Ordinance), Metro adopted a number of UGB amendments and other amendments to its planning legislation to comply with periodic review. Among other things, the 2002 Ordinance amended the Metro UGB to include the 90 acres that are the subject of Sandy's appeal. The 2002 Ordinance also amended Metro's 2040 Growth Concept Map to apply an "Inner Neighborhood" design type designation to the 90 acres. The 2002 Ordinance was not appealed to LUBA. The 2002 Ordinance was submitted to LCDC and was acknowledged in 2003.

The 2002 Ordinance did not complete Metro's periodic review. Metro adopted Ordinance 04-0104B (hereafter the 2004 Ordinance or the challenged decision) to complete Metro's periodic review work tasks. Among other things, the 2004 Ordinance amends the Metro 2040 Growth Concept to replace the "Inner Neighborhood" design type designation for the 90 acres to a "Regionally Significant Industrial Area" (RSIA) design type. In its appeal of the 2004 Ordinance, Sandy argues that Metro's decision to include the 90 acres inside the UGB and to apply the RSIA design type is inconsistent with its status as a Rural Reserve and violates provisions of the Metro Code, RFP and IGA.

B. The Required Industrial Land Restrictions

The UGM Functional Plan is divided into a number of "Titles." Title 4 concerns Industrial and Other Employment Areas and is codified at MC 3.07.410 through MC

3.07.440. Like Hillsboro, we generally refer to the amendments it challenges in this appeal as the Title 4 amendments. The UGM Functional Plan distinguishes between RSIAs and other Industrial Areas and Employment Areas.

1. MC 3.07.420 Protection of RSIAs

Metro has adopted a map that designates RSIAs, Industrial Areas, and Employment Areas. The challenged decision adopts amendments to the UGM Functional Plan provisions for RSIAs. Record 7-9. As amended by the 2004 Ordinance, MC 3.07.420(A) directs that "[e]ach city and county with land use planning authority over RSIAs shown on the Employment and Industrial Areas Map shall derive specific plan designation and zoning district boundaries of RSIAs within its jurisdiction from the Map * * *." MC 3.07.420(B) goes further and requires that cities and counties amend their land use regulations to impose specific square footage limits on new retail development in RSIAs.[6] MC 3.07.420(C) requires that cities and counties amend their land use regulations to prevent approval of non-industrial uses in RSIAs that will require road improvements or reduce the performance of roads below standards.[7] MC 3.07.420(D) prohibits cities and counties from authorizing non-industrial uses in RSIAs that were not already allowed in RSIAs prior to July 1, 2004. MC 3.07.420(E) imposes a number of specific requirements when lots of more than 50 acres

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[6] The relevant text of MC 3.07.420(B) provides:

> "Cities and counties shall review their land use regulations and revise them, if necessary, to include measures to limit the size and location of new buildings for retail commercial uses - such as stores and restaurants - and retail and professional services that cater to daily customers – such as financial, insurance, real estate, legal, medical and dental offices - to ensure that they serve primarily the needs of workers in the area. One such measure shall be that new buildings for stores, branches, agencies or other outlets for these retail uses and services shall not occupy more than 3,000 square feet of sales or service area in a single outlet, or multiple outlets that occupy more than 20,000 square feet of sales or service area in a single building or in multiple buildings that are part of the same development project[.]"

[7] For brevity, we will not set out the text of all the amendments. The text set out above in n 6 is sufficient to illustrate Hillsboro's pervasive complaint. Hillsboro contends that the geographic and textual specificity of the mandated changes to the city's zoning ordinance and subdivision regulations regarding RSIAs and Industrial designated lands exceeds Metro's functional planning authority and is inconsistent with other Metro authority and limits on Metro's authority.

in RSIAs are divided. MC 3.07.420(F) imposes specific limitations on expansions of nonconforming non-industrial uses in RSIAs.

2. MC 3.07.430 Protection of Industrial Areas

The challenged decision adopts amendments to MC 3.07.430(A) through (E) to impose requirements for Industrial areas that are similar or identical to the requirements imposed by MC 3.07.420(A) through (D) in RSIAs. Record 9-11.

FIRST ASSIGNMENT OF ERROR (SANDY)

According to Sandy, Metro's decision to include the disputed 90 acres within the UGB and to change the Inner Neighborhood Metro 2040 design type designation to the RSIA design type designation is not supported by substantial evidence, as required by MC 3.01.15(f), and is inconsistent with the RFP and UGM Functional Plan.[8]

Metro moves to dismiss Sandy's first assignment of error. Under ORS 197.825(2)(c), LUBA's review jurisdiction "[d]oes not include those matters over which the Department of Land Conservation and Development or [LCDC] has review authority under ORS * * * 197.628 to 197.650[.]" One of the purposes of periodic review under ORS 197.628 to

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[8] MC 3.01.015(f) provides:

> "Legislative [UGB] amendment decisions shall be based upon substantial evidence in the decision record which demonstrates how the amendment complies with applicable state and local law and statewide goals * * *."

The UGM Functional Plan provision cited by Sandy follows:

> "Metro shall attempt to designate and protect common rural reserves between Metro's Urban Growth Boundary and designated urban reserve areas and each neighbor city's urban growth boundary and designated urban reserves, and designate and protect common locations for green corridors along transportation corridors connecting the Metro region and each neighboring city. * * * These rural lands shall maintain the rural character of the landscape and our agricultural economy. * * * Zoning shall be for resource protection on farm and forestry land, and very low-density residential (no greater average density than one unit for five acres) for exception land." MC 3.07.520.

Sandy also contends that, prior to its amendment by the 2004 Ordinance, RFP Policy 1.12.2 provided that "[r]ural resource lands outside the UGB that have significant resource value should be actively protected from urbanization." Petition for Review 6.

197.650 is "to ensure that [comprehensive plans] and [land use] regulations remain in compliance with the statewide planning goals[.]" ORS 197.628(1). Metro argues that the issues presented in Sandy's first assignment of error are within LCDC's exclusive jurisdiction in proceedings that are now pending before LCDC concerning the 2004 Ordinance under ORS 197.628 to 197.650.

As we explained in *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426, 430-31, *aff'd* 179 Or App 468, 40 P3d 556 (2002) (*CAIG*), where a land use decision is subject to review by LCDC under periodic review for compliance with the statewide planning goals, LUBA only has jurisdiction to review such a land use decision for compliance with other legal requirements "that go beyond or are different from" the requirements of the statewide planning goals. In *Manning v. Marion County*, 45 Or LUBA 1 (2003), we clarified that this split jurisdiction principle extends to preclude LUBA review of (1) challenges to the evidentiary support for findings of compliance with comprehensive plan criteria that directly implement the statewide planning goals and (2) "allegations of procedural error that are based on requirements stated in the statewide planning goals" or administrative rules that implement the goals. 45 Or LUBA at 8-10. From these cases, Metro describes the scope of LCDC's exclusive jurisdiction in periodic review as follows:

> "LCDC's exclusive jurisdiction in periodic review extends to issues that arise under the statewide planning goals and rules and under those planning statutes whose requirements do not differ in substance from goal requirements, or relate so closely to those requirements that LCDC cannot determine goal compliance without applying or interpreting those statutory requirements." Motion to Dismiss 3.

We agree with Metro's description of LCDC's exclusive jurisdiction in periodic review.

As we have already noted, Metro's 2004 Ordinance is before LCDC for review under the statutory procedures for periodic review set out at ORS 197.628 to 197.650. An allegation that the 2004 Ordinance is inconsistent with the RFP or its component UGM Functional plan presents a Goal 2 consistency issue, which is a matter that is within LCDC's

exclusive jurisdiction. *CAIG*, 179 Or App at 472. Sandy's substantial evidence and findings arguments under the first assignment of error are similarly within LCDC's exclusive jurisdiction. *Manning*, 46 Or LUBA at 8-10.

Sandy's first assignment of error is denied.[9]

SECOND ASSIGNMENT OF ERROR (SANDY)

As we noted earlier, Sandy, the Oregon Department of Transportation, Clackamas County and Metro entered into an IGA under which Metro designated certain areas as Rural Reserves. Sandy cites IGA provisions that it contends are inconsistent with Metro's decision to include the disputed 90 acres inside the UGB.[10] According to Sandy, the decision to include the 90 acres within the UGB and to apply the RSIA design type designation is inconsistent with the IGA, is inconsistent with Metro's earlier designation of the 90 acres as a Rural Reserve, and constitutes an improper *de facto* amendment of the IGA.

Sandy's second assignment of error is either an explicit or a *de facto* challenge of the 2002 Ordinance, which is not before LUBA in this appeal. LUBA cannot consider allegations of error that are directed at a decision that is not before us in this appeal. Sandy attempts to avoid this problem by claiming that the 2004 Ordinance adopts amendments to the UGB and to the Metro 2040 Concept, but as we explain below, we do not agree with Sandy's description of the amendments the 2004 Ordinance actually adopted.[11]

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[9] Although Metro moves to *dismiss* this assignment of error, we believe the proper disposition is to deny an assignment of error that relies on legal arguments that are not within LUBA's jurisdiction.

[10] Among other things, the IGA requires that amendments of Rural Reserve Boundaries must be adopted by all parties to the IGA.

[11] Sandy also argues that because it is not disputed that the 2004 Ordinance changes the Metro 2040 Design Type designation for the 90 acres, Sandy should be permitted to challenge the findings that Metro adopted in support of its 2002 Ordinance that included the 90 acres inside the UGB and applied the original Inner Neighborhood design type to the 90 acres. Although this argument is presented under the first assignment of error, which we have concluded we do not have jurisdiction to consider, we understand Sandy to rely on this argument in its second assignment of error as well. We reject the argument.

The 2004 Ordinance purports to amend the Metro UGB "to include all or portions of the Study Areas shown on Exhibit E," and the 90 acres are included in Exhibit E. Record 3, 103. However, as we have already noted, the 2002 Ordinance amended the UGB to include the 90 acres. Even if the quoted language in the 2004 Ordinance can be read to say that the 2004 Ordinance added the 90 acres to the UGB (presumably for a second time), that does not change the fact that the 90 acres were previously included in the UGB by the 2002 Ordinance. The 2004 Ordinance does not add 90 acres to the UGB that were already included in the UGB on the date the 2004 Ordinance took effect. Stated differently, even if LUBA were to reverse or remand the 2004 Ordinance, the 90 acres would still be inside the UGB and it would still carry a Metro 2040 *urban* design concept designation rather than the Rural Reserve designation that Sandy prefers.

To the extent that Sandy challenges the only pertinent amendment that the 2004 Ordinance actually adopts, *i.e.*, the change in Metro 2040 Design Concept designation from Inner Neighborhood to RSIA, Sandy advances no reason why that amendment is improper.[12] Both the Inner Neighborhood and RSIA designations are appropriate designations for properties that are located inside the UGB. Petitioner's objection to the RSIA designation is based on its erroneous premise that the 2004 Ordinance brings the 90 acres within the UGB. From that erroneous premise, Sandy argues the 2004 Ordinance must be supported by findings that justify bringing the 90 acres within the UGB. Because that premise is erroneous, Sandy's second assignment of error provides no basis for reversal or remand. If Metro's decision to include the 90 acres inside the UGB and to replace the prior rural Metro 2040 design concept designation for those 90 acres with an urban 2040 design concept designation constituted an improper unilateral modification of the IGA, that error was committed in the 2002 Ordinance, not the 2004 Ordinance.

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[12] Indeed Sandy contends that the Inner Neighborhood designation is improper because it is an urban designation. Sandy Petition for Review 5.

Sandy's second assignment of error is denied.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR (HILLSBORO)

Metro argues that Hillsboro's third, fifth and sixth assignments of error concern matters that are within LCDC's exclusive jurisdiction and moves to dismiss those assignments of error. For the reasons explained below, we conclude that we do have jurisdiction to consider Hillsboro's third assignment of error, but we agree with Metro that we do not have jurisdiction to consider Hillsboro's fifth and sixth assignments of error.

A. Hillsboro's Third Assignment of Error

In its third assignment of error, Hillsboro argues that Metro's decision to mandate adoption of geographically and textually specific amendments to the city's zoning ordinance and land division regulations violates the RFP. On its face, that assignment of error presents a Statewide Planning Goal 2 (Land Use Planning) consistency issue that would appear to be within LCDC's exclusive jurisdiction. *CAIG*, 179 Or App at 472. Hillsboro opposes Metro's motion to dismiss this assignment of error, pointing out that its argument under the third assignment of error is not that Metro's decision is merely inconsistent with the substantive planning policies in the RFP, but rather that Metro's decision exceeds Metro's "jurisdictional authority" to adopt and amend functional plans. Petitioner City of Hillsboro's Response to Metro's Motions to Dismiss 2.

If the question of Metro's authority to amend the RFP and its component UGM Functional Plan to impose the disputed requirements were solely a question of whether the RFP and UGM Functional Plan prohibit Metro from adopting the disputed requirements, it seems likely to us that the question would be within LCDC's exclusive jurisdiction. However, the question of Metro's authority to adopt the amendments that Hillsboro disputes is not solely a question of interpreting the RFP. The question of Metro's authority, as Hillsboro frames the question, requires that LUBA consider the parties' very different reading of sections of the Oregon Constitution, certain state statutes that have no statewide planning

goal analog, and certain Metro Charter provisions that have no statewide planning goal analog. Metro does not dispute that we have jurisdiction to decide whether Metro's action in this matter violated or was inconsistent with those constitutional, statutory and charter authorities. Hillsboro's constitutional, statutory and Metro charter arguments are so intertwined with its RFP arguments that they cannot be separated. We therefore consider all of them together below, and we reject Metro's contention that Hillsboro's third assignment of error falls outside our jurisdiction.

B. Hillsboro's Fifth Assignment of Error

Hillsboro requested that Metro amend the UGB to include a site that it prefers (the Evergreen Site) instead of the site that Metro ultimately amended the UGB to include (the Helvetia Site). Hillsboro contends that the Evergreen Site is superior to the Helvetia site and that it meets the legal requirements for a UGB amendment. We understand Hillsboro to contend that because the Evergreen Site meets the legal requirements for a UGB amendment and because Hillsboro prefers that site to the Helvetia site, Metro's decision to include the Helvetia site violates Metro's coordination responsibility under ORS 197.025(1) and 268.385(1).[13] Hillsboro contends that this statutory coordination responsibility is different from the Goal 2 coordination obligation, which Hillsboro describes as "procedural

[13] ORS 195.025(1) provides:

> "In addition to the responsibilities stated in ORS 197.175, each county, through its governing body, shall be responsible for coordinating all planning activities affecting land uses within the county, including planning activities of the county, cities, special districts and state agencies, to assure an integrated comprehensive plan for the entire area of the county. In addition to being subject to the provisions of ORS chapters 195, 196 and 197 with respect to city or special district boundary changes, as defined by ORS 197.175 (1), the governing body of the Metropolitan Service District shall be considered the county review, advisory and coordinative body for Multnomah, Clackamas and Washington Counties for the areas within that district."

ORS 268.385(1) states that "[f]or the purposes of ORS 195.025, the district formed under this chapter shall exercise within the district the review, advisory and coordinative functions assigned under ORS 195.025(1) to each county and city that is within the district."

niceties."[14] According to Hillsboro, the statutory coordination responsibility goes beyond what coordination under Goal 2 requires and "the expressed needs of a city are relevant to Metro's decision, and *determinative* unless the city's desired outcome cannot be justified under the decisional standards." Hillsboro's Petition for Review 45 (emphasis added). Hillsboro also describes this additional obligation as "an *obligation of accommodation*." *Id* (emphasis in original). If Hillsboro is correct and Metro's coordination responsibility under ORS 197.025(1) and 268.385(1) is qualitatively different from its coordination obligation under Goal 2, LUBA has jurisdiction to consider Hillsboro's fifth assignment of error. If the coordination obligation under Goal 2 and the statutes is not different, LCDC has exclusive jurisdiction to consider whether Metro failed to perform its coordination obligation in selecting the Helvetia Site over the Evergreen Site.

We do not agree with Hillsboro's description of the Goal 2 coordination obligation as a procedural nicety. In *DLCD v. Douglas County*, 33 Or LUBA 216, 221 (1997) we described that obligation as follows:

> "Goal 2 requires, in part, that comprehensive plans be 'coordinated' with the plans of affected governmental units. Comprehensive plans are '"coordinated" when the needs of all levels of government have been considered and accommodated as much as possible.' ORS 197.015(5); *Brown v. Coos County*, 31 Or LUBA 142, 145 (1996). Comprehensive plan coordination is a two step process, which requires:
>
> "'1. The makers of the [comprehensive] plan engaged in an exchange of information between the planning jurisdiction and affected governmental units, or at least invited such an exchange.
>
> "'2. The jurisdiction used the information to balance the needs of all governmental units * * * in the plan formulation or revision.' *Brown*, 31 Or LUBA at 146, *quoting Rajneesh v. Wasco County*, 13 Or LUBA 202, 210 (1985).

[14] Goal 2 requires that "[e]ach plan and related implementing measure shall be coordinated with the plans of affected governmental units."

> "A local government is not required to 'accede to every request that may be made by a state agency.' *Brown*, 31 Or LUBA at 146. It must, however, 'adopt findings responding to legitimate concerns.' *Id.*, *quoting Waugh v. Coos County*, 26 Or LUBA 300, 314 (1993)."

We recognize that the Goal 2 coordination obligation is somewhat subjective and process driven, and, as a practical matter, somewhat reliant on the good faith efforts of the governing bodies involved.[15] But it is inaccurate to characterize the obligations to "balance the needs of all governmental units," to accommodate competing needs "as much as possible," and to explain how that balancing of needs was accomplished as nothing more than a procedural nicety. In any event, whatever the parameters of the coordination obligation under Goal 2, the question we must resolve in this case is whether that coordination obligation, however that obligation is characterized, differs from Metro's coordination obligation under ORS 197.025(1) and 268.385(1).

Goal 2 requires that when Metro is adopting or amending its plans it must ensure that its new or amended plans are "coordinated with the plans of affected governmental units." Metro's coordination obligation under the statutes is different only in the sense the statutes obligate Metro to coordinate the planning of others. While Hillsboro points out this difference, it is not entirely clear to us why Metro's statutory obligation to coordinate the planning of others is even implicated in this amendment of the RFP and UGB. However, even if Metro's statutory coordination obligation is implicated by the 2004 Ordinance, Hillsboro points to nothing in the text of the statutes that would support its contention that

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[15] As the Court of Appeals observed in *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 27 (2000):

> "[T]he essence of coordination must be a cooperative effort on the part of the governmental bodies involved. LUBA and the courts can require findings or other procedural devices to demonstrate that the necessary efforts have been undertaken. But in the last analysis, the participating bodies alone are responsible for undertaking the efforts. It is difficult to imagine a process that depends more for its success than this one on the participants' active desire and efforts to make it successful. The findings and other procedural trappings that LUBA and the courts may require can be nothing more than shadows if the parties are not committed to achieving any underlying substance for them to reflect."

when Metro is coordinating under the statutes it is obligated to do more than coordination under Goal 2 requires. In particular, Hillsboro points to nothing in the statutory language than can be read to require that Metro include a site within the UGB if (1) Hillsboro asks Metro to do so and (2) the proposed site meets the legal standards for a UGB amendment.[16] The statutes and Goal 2 both require coordination, and the statutory text provides no support for reading in a legislative intent that coordination under the statutes carries an "obligation of accommodation."

We agree with Metro that if LCDC is asked to determine whether Metro violated its obligation to coordinate the disputed amendments with Hillsboro under Goal 2 in its pending periodic review proceedings, LCDC will also effectively determine whether Metro violated any coordination obligations Metro had in this matter under ORS 195.025(1) and 268.385(1).

We do not consider Hillsboro's fifth assignment of error further.

C. Hillsboro's Sixth Assignment of Error

Hillsboro concedes that its sixth assignment of error is within LCDC's exclusive jurisdiction in its pending periodic review of the dispute decision. Accordingly, we do not consider that assignment of error.

FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR (HILLSBORO)

A. Introduction

Although the parties cite and rely on a number of sources of legal authority in advancing their respective legal positions in this appeal, the meaning and scope of ORS 268.390 is at the heart of Hillsboro's first four assignments of error.[17] Hillsboro describes its "core premise" under these assignments of error as follows:

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[16] Of course any site that Metro includes within the UGB must meet applicable legal standards, but Metro could have any number of reasons why it might favor one site that meets those standards over another site that also meets those standards.

[17] We set out the complete text of that statute later in this opinion.

> "The core premise of the City is that the functional planning authority of Metro does not include the power to dictate the zoning of particular property, the allowed land uses for that property, and the land division policies to be applied to the geographic area. This goes beyond the functional planning authority conferred on Metro by ORS 268.390. ORS 268.380 and ORS 268.390, conferring planning authority on Metro, should be construed in light of the plain language of the statutes." Petition for Review 13.

In its first assignment of error, Hillsboro contends that if Metro's planning authority under ORS 268.380 and 268.390 is viewed in context with authority that is extended to Metro and limitations that are placed on Metro by other related laws, it is clear that ORS 268.380 and 268.390 do not authorize the disputed UGM Functional Plan amendments. In its third assignment of error, Hillsboro contends that even if ORS 268.380 and 268.390 can be read to authorize the disputed UGM Functional Plan Amendments, those amendments are inconsistent with and precluded by some of those same contextual laws. In its fourth assignment of error, Hillsboro argues that if ORS 268.380 and 268.390 and certain contextual laws authorize the UGM Functional Plan amendments, those UGM Functional Plan amendments nevertheless are unlawful, because they violate Hillsboro's home rule autonomy under Oregon Constitution, Article IV, section 1(5) and Article XI, section 2.

We view Hillsboro's second assignment of error as precautionary. Metro has specific authority "to provide a local aspect of a public service" (ORS 268.330(1)) and to adopt an ordinance that authorizes "provision or regulation by Metro of a local government service" (Metro Charter, Section 7(2)). Hillsboro argues in its second assignment of error that if Metro is relying on either of these authorities, Metro failed to follow the statutory and Metro Charter prerequisites for Metro to assume responsibility for local services.

Metro does not contend that the steps required under ORS 268.330 or Metro Charter, Section 7(2) to assume a local service were taken and responds that it does not rely on either ORS 268.330 or Metro Charter, Section 7(2) as authority for the disputed UGM Function Plan amendments. Accordingly, the second assignment of error provides no independent basis for reversal or remand and we do not consider the second assignment further.

Because the meaning and scope of ORS 268.390 is at the center of Hillsboro's argument, we turn first to the text of that statute before considering the contextual laws that Hillsboro and Metro rely on to support their interpretations of that statute.

B. ORS 268.390

ORS 268.390 authorizes Metro to identify areas and activities that have a significant impact on the metropolitan area and plan for those areas and activities:

> "(1) A district may define and apply a planning procedure which identifies and designates areas and activities having significant impact upon the orderly and responsible development of the metropolitan area, including, but not limited to, impact on:
>
> (a) Air quality;
>
> (b) Water quality; and
>
> (c) Transportation.
>
> "(2) A district may prepare and adopt functional plans for those areas designated under subsection (1) of this section to control metropolitan area impact on air and water quality, transportation and other aspects of metropolitan area development the district may identify.
>
> "(3) A district shall adopt an urban growth boundary for the district in compliance with applicable goals adopted under ORS chapters 195, 196 and 197.
>
> (4) A district may review the *comprehensive plans* in effect on January 1, 1979, or subsequently adopted by the cities and counties within the district which affect areas designated by the district under subsection (1) of this section or the urban growth boundary adopted under subsection (3) of this section and *recommend or require cities and counties, as it considers necessary, to make changes in any [comprehensive] plan to assure that the [comprehensive] plan and any actions taken under it conform to the district's functional plans* adopted under subsection (2) of this section and its urban growth boundary adopted under subsection (3) of this section.
>
> (5) Pursuant to a [RFP], a district may adopt implementing ordinances that:

> "(a) Require *local comprehensive plans and implementing regulations* to comply with the [RFP] within two years after compliance acknowledgment.
>
> "(b) Require adjudication and determination by the district of the consistency of local comprehensive plans with the [RFP].
>
> "(c) Require each city and county within the jurisdiction of the district and making land use decisions concerning lands within the land use jurisdiction of the district to make those decisions consistent with the [RFP]. * * *.
>
> "(d) Require changes in local land use standards and procedures if the district determines that changes are necessary to remedy a pattern or practice of decision-making inconsistent with the [RFP].
>
> "(6) The [RFP], ordinances that implement the [RFP] and any determination by the district of consistency with the [RFP] are subject to review under ORS 197.274." (Emphases added).

There is no dispute that the UGM Functional Plan, of which Title 4 is a part, was adopted by Metro under the authority provided above under ORS 268.390(1) and (2) to identify areas of metropolitan concern and adopt functional plans to address those areas of metropolitan concern.[18] ORS 268.390(4), quoted above, is the key statute in Hillsboro's argument. Hillsboro emphasizes that under ORS 268.390(4) Metro is directed to review "comprehensive plans," and while ORS 268.390(4) expressly authorizes Metro to dictate changes in local land use legislation to "conform to * * * functional plans," it only authorizes Metro to require cities "to make changes in any [comprehensive] plan." According to Hillsboro, because ORS 268.390(4) expressly authorizes Metro to dictate specific changes in "plans," but does not expressly authorize Metro to dictate specific changes in "implementing regulations," such as zoning ordinances and land division ordinances, Metro lacks authority to dictate such changes, as it has done in the Title 4 amendments.

[18] It appears that Metro has multiple sources of authority for many of its planning activities, and frequently those authorities are similarly or identically worded.

Hillsboro's argument requires that an important distinction be drawn between "comprehensive plans" and "land use regulations" such as zoning ordinances and land division regulations, which implement comprehensive plans and generally are more detailed and property specific.[19] If we understand Hillsboro correctly, in adopting or amending its UGM Functional Plan, Hillsboro contends that Metro is only authorized to plan, and to impose planning requirements on the city, at a level of detail that matches comprehensive plans. Hillsboro offers an extensive contextual argument, which we summarize later in this opinion, in support of its construction of ORS 268.390(4).

Metro first points out that the operative language in ORS 268.390(4) is not altogether limited to the comprehensive "plan." The directive to Metro in ORS 268.390(4) is to "recommend or require cities and counties, as it considers necessary, to make changes in any plan to assure that the plan *and any actions taken under it* conform to the district's functional plans." Metro also focuses on the next subsection of ORS 268.390. As we have already noted, the UGM Functional Plan is also a component of the RFP. ORS 268.390(5) expressly

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[19] ORS 197.010 defines "comprehensive plan" and "land use regulation" as follows:

"* * * * *

"(5) 'Comprehensive plan' means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. 'Comprehensive' means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. 'General nature' means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is 'coordinated' when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. 'Land' includes water, both surface and subsurface, and the air.

"* * * * *

"(11) 'Land use regulation' means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

authorizes Metro to "[r]equire local comprehensive plans *and implementing regulations* to comply with the [RFP]." Metro relies on this express reference to "implementing regulations" in ORS 268.390(5) to support its contention that Metro has authority to require the zoning ordinance and land division ordinance amendments that are mandated by the Title 4 amendments. Like Hillsboro, Metro cites a number of contextual laws to support its interpretation of ORS 268.390(4) and (5).

B. Context for ORS 268.390(4) and (5).

1. Directives That Metro Work Cooperatively With Cities and Counties and Employ Non-Mandatory Approaches

There are a number of Metro Charter provisions that direct Metro to work cooperatively with member cities and counties and to employ model ordinances and other approaches that allow cities and counties choice in deciding precisely how to go about responding to identified metropolitan concerns.[20] The UGM Functional Plan frequently employs this non-mandatory approach and allows cities and counties some flexibility in deciding how to respond to generally worded planning mandates. Hillsboro's Petition for Review 14 n 7. The UGM Functional Plan includes the following discussion of the principle:

> "The Urban Growth Management Functional Plan is a regional functional plan which contains 'requirements' that are binding on cities and counties of the region as well as recommendations that are not binding. 'Shall' or other directive words are used with requirements. The words 'should' or 'may' are

[20] Examples are set out below:

> "We, the people of the Portland area metropolitan service district, in order to establish an elected, visible and accountable regional government that is responsive to the citizens of the region and works cooperatively with our local governments; * * * do ordain this charter for the Portland area metropolitan service district, to be known as Metro." Metro Charter Preamble.

> "* * * The regional framework plan shall also address other growth management and land use planning matters which the council, with the consultation and advice of the MPAC, determines are of metropolitan concern and will benefit from regional planning. To encourage regional uniformity, the regional framework plan shall also contain model terminology, standards and procedures for local land use decision making that may be adopted by local governments. * * *." Metro Charter Section 5(2)(b).

> used with recommendations. In general, the plan is structured so that local jurisdictions may choose either performance standard requirements or prescriptive requirements. The intent of the requirements is to assure that cities and counties have a significant amount of flexibility as to how they meet requirements. Performance standards are included in most titles. If local jurisdictions demonstrate to Metro that they meet the performance standard, they have met that requirement of the title. Standard methods of compliance are also included in the plan to establish one very specific way that jurisdictions may meet a title requirement, but these standard methods are not the only way a city or county may show compliance. In addition, certain mandatory requirements that apply to all cities and counties are established by this functional plan." MC 3.078.030.

While there are references to working cooperatively and references to performance standards, model ordinances and non-mandatory approaches, the above-quoted UGM Functional Plan language also states there are some "mandatory requirements." These Charter and UGM Functional Plan provisions do not provide much assistance in understanding whether Metro has authority under ORS 268.390(4) and (5) to adopt the Title 4 amendments.

2. Specific But Limited Grants of Authority to Require Amendments of Land Use Regulations

Hillsboro identifies a number of instances where Metro is granted specific authority to require that cities and counties amend their land use regulations. One of those instances is in ORS 268.390(5) itself. ORS 268.390(5)(d) specifically authorizes Metro to require changes in "local land use measures and procedures" if Metro determines those "changes are necessary to remedy a pattern or practice of decision-making inconsistent with the [RFP]."[21] ORS 268.330(1) expressly authorizes Metro "to provide a local aspect of a public service," but requires that the affected local public corporation must agree.[22] And finally, ORS

[21] The UGM Functional Plan and the Metro Charter also specifically authorize Metro to require changes in land use regulations in that circumstance. MC 3.07.870(D); Metro Charter Section 5(2)(e)(4).

[22] Metro Charter Section 7(2) similarly authorizes Metro to take over provision of a local service, but requires approval by the voters of Metro or a majority of [Metro Policy Advisory Committee] members.

197.296(6)(b) specifically authorizes Metro to require changes in land use regulations if they are needed to meet identified housing needs. Hillsboro contends that if Metro has general authority under ORS 268.390(4) and (5) to mandate changes in land use regulations, none of these statutes would be necessary.

Like Metro we do not see that express legislative authority to mandate changes in land use regulations to correct patterns or practices of decision making in contravention of the RFP, or authority to take over local services or a legislative direction to take particular steps to ensure that housing needs are met, necessarily means that Metro does not also have authority under ORS 268.390(4) and (5) to require changes in other contexts to ensure that local decision making is consistent with its UGM Functional Plan and RFP. As Metro notes, it is at least as likely that the legislature is simply directing that Metro exercise authority that it already had from other sources to dictate changes in city and county land use regulations to address the specific concerns identified in these statutes.

3. The RFP

Hillsboro next points to language in RFP Policies 7.3 and 7.5, which discuss the roles of RFP Policies and Functional Plans. We set those policies out below:

"7.3 Applicability of [RFP] Policies

> "The policies included in [RFP] Policies in Chapters 1-6 of this Plan are regional goals and objectives consistent with ORS 268.380(1). Many of these policies were previously adopted and acknowledged as the Regional Urban Growth Goals and Objectives. The specific policies included in this [RFP] are neither a comprehensive plan under ORS 197.015(5), nor a functional plan under ORS 268.390(2). All functional plans adopted by the Metro Council shall be consistent with these goals and objectives. Metro's management of the UGB shall be guided by standards and procedures which must be consistent with these goals and objectives. These goals and objectives shall not apply directly to sitespecific land use actions, including amendments of the UGB.
>
> "[RFP] Policies in Chapters 1-6 of this Plan shall apply to adopted and acknowledged comprehensive land use plans as follows:

"• components of the [RFP] that are adopted as functional plans, or other functional plans, shall be consistent with these Policies,

"• the management and periodic review of Metro's acknowledged UGB Plan, shall be consistent with these Policies, and

"• *Metro may after consultation with MPAC identify and propose issues of regional concern, related to or derived from these Policies as recommendations but not requirements, for consideration by cities and counties at the time of periodic review of their adopted and acknowledged comprehensive plans.*

"* * * * *." (Emphasis added).

"**7.5 Functional Plans**

"Functional plans are limited purpose plans, consistent with this [RFP], which address designated areas and activities of metropolitan concern. Functional plans are established in state law as a way Metro may recommend or require changes in local *plans*. This [RFP] uses functional plans as the identified vehicle for requiring changes in local plans in order to achieve consistence and compliance with this Framework Plan.

"Those functional plans or functional plan provisions containing recommendations for *comprehensive planning* by cities and counties may not be final land use decisions. If a provision in a functional plan, or an action implementing a functional plan require changes in an adopted and acknowledged *comprehensive plan*, then the adoption of a provision or action will be a final land use decision. If a provision in a functional plan, or Metro action implementing a functional plan require changes in an adopted and acknowledged *comprehensive plan*, then that provision or action will be adopted by Metro as a final land use action required to be consistent with statewide planning goals. In addition, [RFP] components will be adopted as functional plans if they contain recommendations or requirements for changes in comprehensive plans. These functional plans, which are adopted as part of the [RFP], will be submitted along with other parts of the [RFP] to LCDC for acknowledgment of their compliance with the statewide planning goals. Because functional plans are the way Metro recommends or requires local plan changes, most [RFP] components will probably be functional plans. * * *" (Emphases added).

We are not sure what to make of the third bulleted provision of RFP Policy 7.3. However, whatever it means, we do not agree with Hillsboro that it must be read to prohibit Metro Functional Plans from requiring changes in land use regulations. Metro is not

attempting to mandate the desired Title 4 amendments via RFP Policies generally or as an "issue[] of regional concern" under RFP Policy 7.3 specifically. It is mandating those changes via a UGM Functional Plan amendment. Hillsboro's stronger argument is that RFP Policy 7.5, like ORS 268.390(4), states that Metro may require changes in comprehensive plans and does not specifically reference land use regulations. However, as Metro notes, other language in the RFP recognizes that the Functional Plans that are adopted as part of the RFP may require changes in both comprehensive plans and land use regulations:

> "Section 5 of the Charter requires that Metro implement the Regional Framework Plan by requiring cities and counties to comply with the Plan. In addition to authorizing Metro to adopt land use planning goals and objectives, the state legislation creating Metro authorized Metro to adopt 'Functional Plans' that could contain specific recommendations and requirements for the cities and counties within Metro's boundaries to amend their comprehensive plans *and implementing zoning ordinances*." RFP Introduction; Hillsboro's Petition for Review Appendix 353.[23]

The RFP Introduction language is consistent with ORS 268.390(5), which specifically provides that Metro may require that "implementing regulations" comply with the RFP. In light of those references, we believe it is unlikely that the legislature and Metro Council intended the references to "comprehensive plan" and "plans" in ORS 268.390(4) and RFP 7.5 to express a legislative intent to (1) *require* that functional plans operate at a textual and geographic level of abstraction and generality that matches comprehensive plans and (2) *prohibit* functional plans that mandate specific changes in land use regulations.

We reject Hillsboro's contention that the RFP either prohibits functional plans from including specific directives that land use regulations be amended or provides contextual support for reading such a limitation into ORS 268.390(4) and (5).[24]

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[23] Neither the on-line version of the RFP nor the copy of the RFP that is attached to Hillsboro's petition for review has page numbers.

[24] Hillsboro also cites RFP Policy 7.7, which sets out a number of specific responsibilities for Metro and cities. We do not see that RFP Policy 7.7 adds anything to Hillsboro's arguments under RFP Policies 7.3 and 7.5.

4. City Authority

The home rule amendments to the Oregon Constitution authorize Hillsboro to legislate directly under its charter and protect Hillsboro's autonomy to choose its political form and governmental structure.[25] Pursuant to these authorities, Hillsboro has adopted a charter, which vests city legislative authority with the city council. Under ORS 227.215 Hillsboro is expressly authorized to adopt development ordinances. Under ORS 92.044(1), 92.046 and 92.048, Hillsboro is expressly authorized to adopt land division regulations. Under ORS 197.175(2), Hillsboro is required to adopt a comprehensive plan and land use regulations that comply with the statewide planning goals. Pursuant to its charter and these statutory authorities, the City of Hillsboro City Council has adopted a zoning ordinance and land division regulations. One of the many planning obligations that LCDC has placed upon cities is a detailed duty to plan and zone lands to ensure that sites are available for commercial and industrial uses. OAR 660-009-0015(2). Under OAR 660-009-0020, the city is required to adopt industrial and commercial policies. Under OAR 660-009-0025, the city is directed to plan for both a long-term and short-term supply of land and sites for industrial and commercial development. Hillsboro contends that the disputed Title 4 amendments will require that Hillsboro amend its zoning ordinance and land division regulations in specific ways that Hillsboro believes will harm its ability to attract and plan for development of its

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[25] Oregon Constitution, Article IV, section 1(5) provides in part:

> "The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. * * *"

Oregon Constitution Article XI, section 2 provides, in part:

> "* * * The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon[.]"

industrially planned and zoned lands. In adopting the disputed Title 4 amendments, Hillsboro contends Metro has usurped Hillsboro's legislative power, prevented Hillsboro from performing its Goal 1 and Goal 2 obligations and precluded Hillsboro from fulfilling its statutory planning mandate. Hillsboro argues that if these authorities do not provide context that convinces LUBA to construe ORS 268.390 narrowly to deny Metro the authority to demand specific land use regulation amendments such as the Title 4 amendments, ORS 268.390 improperly intrudes on Hillsboro's home rule authority and for that reason is preempted.

The broad preclusive effect Hillsboro argues for its statutory planning authority and home rule authority is untenable. Although it causes tension, there is nothing unusual about shared planning authority and overlapping local government interests that must be balanced, in an attempt to accommodate both local and regional interests as much as possible. That cities and counties and Metro must balance their respective interests in planning for the region is recognized and assumed by the relevant statutes. Metro's role in coordinating those potentially competing interests under Goal 2 and ORS 195.025 and ORS 268.385 was noted earlier. ORS 268.380(1)(c) also specifically directs Metro to "[c]oordinate the land-use planning activities of that portion of the cities and counties within the district[.]"

We reject Hillsboro's contention that Metro's Title 4 amendments impermissibly intrude on its charter and constitutional home rule authority. The Oregon Supreme Court described the operation of the city's constitutional home rule authority as follows:

> "When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.
>
> "Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's

> freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization." *La Grande/Astoria v. PERB*, 281 Or 137, 156 576 P2d 1204, *aff'd on rehearing* 284 Or 173, 586 P2d 765 (1978) (footnote omitted).

Although Hillsboro attempts to characterize the Title 4 amendments as intruding on the city's governmental structure, they do not. The Title 4 amendments advance regional substantive economic objectives. While Hillsboro is certainly free to disagree with the wisdom of the amendments and to challenge those amendments against all relevant planning standards, the Title 4 amendments do not intrude on Hillsboro's "freedom to choose its own political form."[26]

5. Conclusion

Petitioner Hillsboro takes the position under its first four assignments of error that Metro lacks jurisdiction or authority to require changes in city land use regulations. We have addressed that contention as it was presented, and we have concluded that Metro has authority under ORS 268.390(4) and (5) to amend its UGM Functional Plan, which is part of the RFP, to require that Hillsboro amend its land use regulations to conform to the RFP and UGM Functional Plan. That authority is expressly granted by ORS 268.390(5). Nothing in the contextual laws that Hillsboro cites overcomes that express language. And neither the RFP nor the Oregon Constitution's grant of home rule authority to the city precludes Metro from exercising that authority.

We finally note that it is possible to read some of Hillsboro's arguments to pose a slightly different question. Even if Metro has authority to direct cities to amend their zoning ordinances to respond to legitimate metropolitan concerns, or if Metro had adopted the same

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[26] As Metro points out, under the statewide planning program, there is nothing novel about local governments being required to adopt specific zoning requirements. Goal 3 (Agricultural Lands) imposes a far more intrusive and geographically and textually specific displacement of local planning prerogatives on home rule counties. Goal 3 requires that counties adopt the detailed Exclusive Farm Use zoning that is set out in 27 pages of the Oregon Revised Statutes and supplemented in 31 pages of Oregon Administrative Rules, for county lands that fall within the Goal 3 definition of "agricultural land."

Title 4 amendments more indirectly by requiring that city comprehensive plans be amended to require the same limitations, are the Title 4 amendments a legitimate exercise of Metro's authority to address matters of *metropolitan* concern?[27] We therefore briefly address that question.

As Hillsboro points out in several places in its brief, the constitutional, statutory, charter and code authorities that frame Metro's planning authority consistently state that Metro's planning jurisdiction extends to matters of *metropolitan* concern.[28] That is admittedly a subjective limitation on Metro's authority, but we believe it is a limitation. For example, we have little doubt that if Metro were to decide to (1) prepare complete comprehensive plans and land use regulations for each city and county in the region, and (2) amend the UGM Functional plan to mandate that each city adopt the comprehensive plan and land use regulations that Metro had prepared for it without change, such action would exceed Metro's legal mandate to engage in planning regarding areas and activities of *metropolitan* concern. Obviously there are political and practical limitations that make it unlikely that Metro would ever attempt anything close to this extreme where local planning interests would be totally preempted, so the question becomes whether there are limits on Metro's

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[27] Phrasing the question in this way also makes more obvious a problem in Hillsboro's more forcefully stated position that the parties do not really address. If Hillsboro believes the ultimate limit on Metro's authority is a requirement that Metro not exceed the textual and geographic specificity that is appropriate in comprehensive plans, that is an exceedingly ambiguous and uncertain limit. It is true, as a general proposition, that most comprehensive plans are more general than most land use regulations. However, there is a great deal of variation in the specificity of comprehensive plans, and some comprehensive plans include provisions that are quite specific. While the ORS 197.015(10) definition of comprehensive plan does state that comprehensive plans are "generalized," the statutory definition does not prohibit specificity. *See* n 19.

[28] Oregon Constitution Article XI, section 14(4) provides that Metro "shall have jurisdiction over matters of metropolitan concern as set forth in the charter of the district." As noted earlier ORS 268.030(3) provides that Metro "shall provide for those aspects of land use planning having metropolitan significance." Metro Charter Section 4 elaborates on the scope of matters of metropolitan concern:

> "Metro has jurisdiction over matters of metropolitan concern. Matters of metropolitan concern include the powers granted to and duties imposed on Metro by current and future state law and those matters the council by ordinance determines to be of metropolitan concern. The council shall specify by ordinance the extent to which Metro exercises jurisdiction over matters of metropolitan concern."

planning authority to impose specific and precise solutions that Metro believes are necessary to respond to metropolitan problems.

The specific amendments that Metro is requiring through the Title 4 amendments, while clearly offensive to Hillsboro, are far removed from the complete takeover of local planning and zoning that we hypothesize above. Metro's concern about the potential for significant conversion of industrially planned and zoned land to other uses, as an abstract concern, is clearly a legitimate matter of metropolitan concern.[29] However, a closer question is presented if the question is rephrased to ask whether Metro's decision to impose the particular Title 4 amendment solution to that legitimate metropolitan concern is also properly viewed as within Metro's jurisdiction and authority to plan for activities that have a significant impact on the metropolitan area. As Hillsboro points out, such highly specific mandates have the potential to intrude unnecessarily on the city's legitimate interest in ensuring that legitimate local interests are not unnecessarily compromised when they overlap with matters of metropolitan concern. Whatever parameters there may be on Metro's authority to balance metropolitan concerns and local concerns and opt for a specific solution to address the metropolitan concern, Hillsboro has not demonstrated that Metro exceeded its authority in adopting the Title 4 amendments in this case.

Hillsboro's first, second, third and fourth assignments of error are denied.

Metro's decision is affirmed.

Davies, Board Member, dissenting.

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[29] Citing ORS 197.712(1), Hillsboro contends that "responsible development of industrial and employment sites is a matter of statewide, not metropolitan concern." Just because the availability of adequate industrial and employment sites is a matter of state concern does not mean that it is not also a matter of metropolitan concern. Hillsboro's arguments make it clear that Hillsboro also believes the availability of adequate industrial and employment sites is a matter of *local* concern as well.

Hillsboro argues that the constitutional home rule amendments play a role in interpreting the Metro statutes and preclude an interpretation that Metro has authority to essentially dictate what Hillsboro must put in its land use code.

The majority discusses at length the statutory provisions setting out Metro's authority. ORS chapter 268. I do not disagree with that discussion, or even with the majority's conclusion that, absent consideration of Hillsboro's charter or the constitution's home rule provisions, the statutes can be interpreted to authorize Metro to adopt the Title 4 amendments it adopted. However, the home rule provisions and Hillsboro's charter must be considered as context when interpreting Metro's statutes.

Metro and the majority cite to *La Grande/Astoria v. PERB*, arguing that the Title 4 amendments do not intrude on the city's governmental structure and therefore do not violate the constitution's home rule provisions. The Supreme Court in *La Grande/Astoria* addressed "the relationship between the authority of the legislature and that of local governments" and made clear that the state can legislate on matters of local concern, "unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form." *Id*. at 141, 156. Unlike the issue presented in *La Grande/Astoria*, which dealt with a potential or actual conflict between state law and local legislation, the issue raised here involves two local governments.[30] Metro and Hillsboro have overlapping geographic jurisdictions and, to the extent local land use matters and matters of metropolitan concern collide, they potentially have overlapping subject matter jurisdiction. In such a situation, must the city's authority to legislate on local land use matters, given to the city council through Hillsboro's charter, cede to Metro's authority to legislate on matters of

[30] ORS 197.015(13) provides, in part:

> "'Local government' means any city, county or metropolitan service district formed under ORS chapter 268 * * *."

metropolitan concern? In this respect, is Metro more like the legislative assembly, or is it more like another city or county?

In *La Grande/Astoria*, the Supreme Court explained that the legislature has plenary power, subject to limitations found in federal law or the constitution, including the limitations imposed by Article XI, section 2. *Id*. at 142. The validity of local action, however, depends on whether it is authorized by local charter or statute. Metro, unlike the legislature, does not have plenary power; it relies, just as Hillsboro does, upon its charter and state statute.

As I see it, and I believe as Hillsboro sees it, the key factor in this case is that Metro, through the Title 4 amendments, is proposing to require Hillsboro to adopt a particular code provision. *See* n 6 in majority opinion. This is not even a situation, as was the case in *La Grande/Astoria*, where two provisions from two governmental entities conflict, and it is left to the judiciary to determine which controls. That circumstance is not presented to us in this case: Metro has not proposed to adopt its own ordinance, as Hillsboro suggests Metro might be authorized to do. *See* Petition for Review 40.[31] Rather, it has, in essence, ordered Hillsboro to adopt specific language as part of its code.

I concede that this issue is not a simple one, and the statutes governing Metro's authority are anything but clear regarding the scope of Metro's authority. However, Hillsboro, through its charter, has the general power "[t]o make bylaws and ordinances not inconsistent with the laws of the United States, and the State of Oregon[.]" Petition for Review App 476. While Metro's alleged interference of that general power may not technically present a "home rule" issue, the scope of Metro's authority should not be interpreted in a manner that invades Hillsboro's charter authority to adopt ordinances not

[31] Even if that were the case, the legislature's and citizens' intent that Metro can "preempt" Hillsboro's authority must be clear. Arguably, where two local governments are involved, that intent must be made even clearer.

inconsistent with state or federal laws, at least not absent clear language specifying that intent. I tend to agree with Hillsboro that a statute that purports to confer "this authority upon another governmental entity, not subject to elections by Hillsboro citizens, is inconsistent with the constitutional authority of Hillsboro citizens to make these constitutive choices through their municipal charter." Petition for Review 40.[32] Given the language quoted above in Hillsboro's charter and the ambiguity in the Metro statutes, it is my opinion that an interpretation of Metro's statutes that allows it to direct Hillsboro to adopt specific legislation, even where that legislation addresses matters of metropolitan concern, either invades Hillsboro's "autonomy function" or cannot be sustained because it conflicts with powers granted to Hillsboro through its charter.

[32] Metro and the majority opinion note that there is nothing novel about local governments being required to adopt specific zoning requirements. *See* n 26 of the majority opinion. They point out that under Goal 3, counties are required to adopt "exclusive farm use" zoning for "agricultural lands." That comparison is inapposite for several reasons.

First, LCDC is a state agency, not a local government. Its rulemaking authority comes from its authorizing legislation, which is in turn adopted by the legislature, which has plenary power. In addition, the legislature has given LCDC extremely broad policymaking and regulatory authority, especially with regard to protecting the state's agricultural lands. *Lane County v. LCDC*, 325 Or 569, 581, 942 P2d 278 (1997). Second, Goal 3 and the Goal 3 rule do not direct counties to adopt specific regulations. They provide guidelines and, in some instances, a template or the equivalent of model rules. However, they do not even go as far Metro in providing that a particular county must adopt specific language. Goal 3 provides: "Counties may authorize farm uses and those nonfarm uses defined by commission rule that will not have significant adverse effects on accepted farm or forest practices." Counties then may choose among the uses listed in the rule. Counties may be more restrictive, but not less restrictive. OAR 660-033-0130, with regard to uses allowed on agricultural lands provides: "Counties may include procedures and conditions in addition to those listed in the chart as authorized by law[.]" What Metro is proposing in its amendments to Title 4 actually goes even further than LCDC has gone.