BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CLACKAMAS RIVER WATER,
*Petitioner,*

and

CLACKAMAS COUNTY,
*Intervenor-Petitioner,*

vs.

METRO,
*Respondent,*

and

CITY OF OREGON CITY and
SOUTH FORK WATER BOARD,
*Intervenor-Respondents.*

LUBA No. 2006-117

FINAL OPINION
AND ORDER

Appeal from Metro.

G. Frank Hammond, Portland, filed a joint petition for review and argued on behalf of petitioner. With him on the brief were Michael Judd, Clark I. Balfour, Chad M. Stokes, and Cable Huston Benedict Haagensen & Lloyd LLP.

Michael E. Judd, Clackamas County Counsel, Oregon City, filed a joint petition for review on behalf of intervenor-petitioner. With him on the brief were G. Frank Hammond, Clark I. Balfour, Chad M. Stokes and Cable Huston Benedict Haagensen & Lloyd LLP.

No appearance by Metro.

Christopher D. Crean, Portland, filed the response brief and argued on behalf of intervenor-respondents. With him on the brief were Pamela J. Beery and Beery Elsner & Hammond, LLP.

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

AFFIRMED 10/26/2006

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

Petitioner and intervenor-petitioner (petitioners) appeal a Metro Boundary Appeals Commission decision that denies a county order that establishes a water authority.

## MOTION TO INTERVENE

Clackamas County moves to intervene on the side of petitioner. The City of Oregon City and South Fork Water Board move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

## INTRODUCTION

### A. The Parties

The Clackamas River Water District (CRW) is the petitioner in this appeal. CRW is a domestic water supply district that was formed under ORS chapter 264. CRW came into existence in 1995, as a result of a consolidation of the Clackamas Water District and the Clairmont Water District. The part of CRW's service area south of the Clackamas River adjoins the City of Oregon City. The part of CRW's service area north of the Clackamas River is generally inside the Metro urban growth boundary (UGB); the part of CRW's service area south of the Clackamas River is generally outside the UGB. A map showing the CRW service areas appears at County Record 413.

Clackamas County is the intervenor-petitioner in this appeal. Clackamas County approved the boundary change that formed the Clackamas River Water Authority. With minor exceptions, the Clackamas River Water Authority service area is the same service area that is now served by CRW.[1]

[1] The record in this appeal is made up of two parts, a six-volume record of the proceeding before Clackamas County (County Record) and a one-volume record of the proceedings before the MBAC (Metro Record).

Metro is the respondent in this appeal. The Metro Boundary Appeals Commission (MBAC) is a three-person Metro commission that is appointed by the Metro Council and decides contested cases concerning boundary change decisions. Metro Code (MC) 3.09.060. Clackamas County's decision to approve formation of the Clackamas River Water Authority was appealed to the MBAC by Oregon City and the South Fork Water Board (SFWB). The MBAC decision that denied that county decision is the decision that is before LUBA in this appeal.[2] The challenged decision is in the form of a two-page MBAC final order that adopts a 65-page proposed final order that was prepared by a Metro hearings officer. Metro Record 3-4, 28-92.

The City of Oregon City and SFWB are the intervenor-respondents (intervenors) in this appeal. SFWB is an ORS chapter 190 intergovernmental entity that is jointly owned by the cities of Oregon City and West Linn. SFWB operates a large water treatment facility on the Clackamas River. SFWB provides treated water to the cities of Oregon City and West Linn. SFWB also provides treated water to CRW, which CRW uses to serve CRW customers in its service area south of the Clackamas River.

**B. CRW's Service Area**

The challenged decision includes the following description of the CRW's service areas:

> "The North Service Area, sometimes known as Area 1, is north of the Clackamas River and formerly was serviced by the Clackamas Water District. Area 1 in 2005 served a relatively stable retail customer population of about 33,000. This population is centered within an 11 square mile unincorporated area, mostly within the UGB. The Area 1 water system is a fairly dense urban type water system. The water comes from CRW's 30 mgd Clackamas River Water Treatment Plant. Area 1 already is developed to such an extent that it will not see significant additional development other than re-densification and redevelopment."

[2] The MBAC is not authorized to remand a boundary change decision; it must affirm or deny the decision. MC 3.09.090(g).

> "The South Service Area, sometimes known as Area 2, and the South End Service Area, sometimes known as Area 3, formerly were served by the Clairmont Water District. Areas 2 and 3 are south of the Clackamas River. Area 2 adjoins the easterly boundary of Oregon City and is approximately 27.6 square miles with a population of 11,740. Area 3 adjoins the southerly boundary of Oregon City and is approximately 3.0 square miles with a population of 5,435. These areas form a more sparsely-populated rural, residential area. They comprise potential growth areas, with a 17% population increase since 1998. Area 2 has the highest potential for growth not only from re-development resulting from densification, but also by being brought into the UGB in future expansions. Area 3, already within the UGB, is ready for annexation by Oregon City. CRW purchases water from SFWB to serve Area 2. CRW takes this water from Oregon City's distribution system and from a metered SFWB take-off point. CRW also purchases water from SFWB to serve Area 3. It takes this water from Oregon City's distribution system. * * *." Metro Record 55-56.

**C. The Disputed Area**

The disputed area is a portion of Area 2 that adjoins the Metro UGB, northeast of the City of Oregon City. Oregon City anticipates that the disputed area will be annexed and included inside the UGB. As discussed in more detail below, the disputed area was designated as an urban reserve by Metro in 1997 with the expectation that it would be included in the urban growth boundary at some point in the future.[3] The hearings officer's proposed order, which the MBAC adopted, includes a succinct explanation for why the Clackamas River Water Authority was formed and why Oregon City and SFWB oppose that action.

> "In capsule form, the objective of the City [of Oregon City] and SFWB is for the City to be the retail provider of urban water service within the current Urban Growth Boundary (UGB) adjacent to the city and also within future UGB expansion areas. The proposed [Clackamas River Water Authority] would include within its territory areas adjacent to the current UGB that the City and SFWB believe are likely to be future UGB expansion areas. The City and SFWB oppose formation of [the Clackamas River Water Authority] because they believe that creation of a water authority, due to restrictions in

[3] A map showing these urban reserve areas appears at Metro Record 204.

ORS 450.987, will undermine their ability to achieve their objective as to these potential expansion areas.[4]

"Also in capsule form, the objective of Clackamas County and CRW is to create a mechanism so that the territory presently served by CRW outside the UGB adjacent to the City, including the area that the City and SFWB believe may be a future UGB expansion area, will not be subject to future withdrawals of territory by annexing cities. They fear that if there is not such a protecting mechanism, then following future annexations and withdrawals, the customers/ratepayers in CRW's remaining un-annexed, not-withdrawn areas will be subject to ultimately intolerably increased rates to support non-variable costs that will remain with the CRW system. They believe that creation of a water authority to replace CRW, due to restrictions in ORS 450.987, will allow the system to protect itself against such damaging future withdrawals following annexations.

"Thus this appeal to a great extent involves a dispute over who should have ultimate jurisdictional control over water service in the areas the City and SFWB believe are potential UGB expansion areas for the City." Metro Record 28-29.

**FIRST ASSIGNMENT OF ERROR**

Petitioners first argue that LUBA should reverse the MBAC's decision, because the MBAC did not have jurisdiction to review the county's formation of the Clackamas River Water Authority. The statute that Metro relied on for jurisdiction in this matter is ORS 268.347(1).[5] Under that statute, Metro has jurisdiction over "boundary changes" (1) "within the boundaries of the district" and (2) "within all territory designated as urban reserves by the district in an ordinance adopted by the district council prior to June 30, 1997." Because the

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[4] Apparently areas served by a domestic water district like CRW may be annexed by a city and withdrawn from the domestic water district. ORS 450.987 also allows annexation and withdrawal of territory from a water authority, but requires that the withdrawing city first make a number of findings, including a finding that "[w]ithdrawal of the territory or improvements from the water * * * authority will have no substantial adverse impact on the ability of the water * * * authority to provide service to the remaining territory." ORS 450.987(1).

[5] ORS 268.347(1) provides:

"Notwithstanding ORS chapters 198, 221 and 222, a metropolitan service district may exercise jurisdiction over boundary changes under ORS 268.351 and 268.354 within the boundaries of the district and within all territory designated as urban reserves by the district in an ordinance adopted by the district council prior to June 30, 1997."

area in dispute lies within territory that Metro designated as an urban reserve in 1997, the MBAC relied on the second category of boundary changes described in ORS 268.347(1).

**A. Boundary Changes Within the Boundaries of the District**

Intervenors first argue that the MBAC has jurisdiction under the first part of ORS 268.347(1), because much of the territory that is included within the Clackamas River Water Authority is included "within the boundaries of the district," *i.e.* within Metro's boundaries. Intervenors contend that it does not matter that some of the Clackamas River Water Authority's territory, including the disputed area that is the focus of the parties' arguments, is located outside the district.

ORS 268.347(1) is ambiguous regarding Metro's jurisdiction in a case where a boundary change concerns a territory that is partially inside the district and partially outside the district, which is the case here. It is not clear whether ORS 268.347(1) gives Metro jurisdiction over a boundary change only if *the entire territory* that is the subject of the boundary change is within the district or whether ORS 268.347(1) gives Metro jurisdiction over a boundary change if *any part of the territory* that is affected by the boundary change lies within the district. At oral argument, petitioners suggested a third possibility. That third possibility is that Metro and LUBA have shared jurisdiction over a boundary change that affects territory that is partially within the district—Metro having jurisdiction over issues concerning territory that is within the district, and LUBA having jurisdiction over issues concerning territory that is not within the district.

While all three of the above interpretations suggested above have some problems, petitioners' interpretation of ORS 268.347(1) is the most problematic. It would result in the possibility that Metro could deny a boundary change that LUBA had affirmed and vice versa. We also question whether the legal issues that might arise in an appeal of boundary change decision necessarily would always be territory-specific. The other possible interpretations we note above seem more or less reasonable depending on how much of the territory is

located within the district. In other words, it seems more likely to us that the legislature intended Metro to have jurisdiction over a boundary change that lies largely within the district and less likely that the legislature intended Metro to have jurisdiction over a boundary change that concerns territory that falls almost entirely outside the district. Perhaps the lack of an entirely satisfactory answer to this ambiguity in the first part of ORS 268.347(1) is what led Metro not to rely on the first part of ORS 268.347(1) in concluding that it has jurisdiction. Because Metro did not rely on the first part of ORS 268.347(1), we decline to determine whether Metro has jurisdiction under that part of ORS 268.347(1), and we turn to the part of ORS 268.347(1) that Metro did rely on.

### B. Boundary Changes Within All Territory Designated as Urban Reserves by the District in an Ordinance Adopted by the District Council Prior to June 30, 1997.

There is no dispute that the formation of the Clackamas River Water Authority qualifies as a "boundary change," within the meaning of ORS 268.351(1) and 199.415(4), (11) and (12). The area that CRW wants to protect from withdrawal by Oregon City in the future, and the area that Oregon City wants to ensure it can annex to the city and withdraw from CRW (the disputed area), lies northeast of the current UGB. The parties apparently agree that the disputed area was designated as an urban reserve by Metro Ordinance No. 96-665(e), which was adopted March 6, 1997. Since that ordinance predates June 30, 1997, the MBAC concluded that it had jurisdiction to review the county's decision in this matter. However, Ordinance 96-665(e) was appealed to LUBA and was remanded in 1999. *D.S. Parklane v. Metro*, 35 Or LUBA 516 (1999), *aff'd* 165 Or App 1, 994 P2d 1205 (2000). Petitioners argue that as a consequence of *D.S. Parklane*, Metro does not have jurisdiction in this matter under the second part of ORS 268.347(1); intervenors argue that LUBA's remand in *D.S. Parklane* is irrelevant.[6]

[6] As the jurisdictional question under the second part of ORS 268.347(1) is framed by the parties, the question before LUBA is whether the *disputed area* is "territory designated as urban reserves by the district in

According to petitioners, LUBA's decision "voided" Metro Ordinance No. 96-665(e) and "the urban reserve designations of March 6, 1997 no longer exist, and they cannot, therefore, form a jurisdictional basis for the MBAC." Petition for Review 7-8. The MBAC reached the opposite conclusion:

> "At the time the legislature adopted ORS 268.347, Metro already had adopted its ordinance designating urban reserves. This meant that the Legislature knew, at the time it adopted ORS 268.347, the boundaries of the area over which it was giving Metro jurisdiction. In other words, this was not a situation in which the Legislature delegated to Metro the authority to designate urban reserves in the future and thus to determine the extent of Metro's boundary change jurisdiction. Rather, the Legislature gave Metro boundary change jurisdiction over a specific already defined geographic area, which the Legislature apparently recognized as being appropriately within Metro's sphere of influence. That being the case, it is the [MBAC's] conclusion that the subsequent remand of the urban reserve designations is irrelevant. The potential Oregon City UGB expansion area, as well as other areas designated as urban reserves, still were 'territory designated as urban reserves by the district in an ordnance adopted by the district council prior to June 30, 1997' and therefore are part of the area over which Metro has boundary change jurisdiction. This conclusion is reinforced by the fact that the Legislature has amended ORS 268.347 twice in recent years and has not changed this description of Metro's boundary change jurisdiction." Metro Record 32-33.

We set out the text of ORS 268.347(1) earlier at n 5. Relying solely on the text of ORS 268.347(1), it might be possible to read that text impliedly to require that the urban reserves that were designated prior to June 30, 1997 still exist, or still exist exactly as they were adopted prior to June 30, 1997. However, the statute does not expressly or clearly impose either requirement. Petitioners' interpretation of the second part of ORS 268.347(1) would be much stronger if the statute gave Metro jurisdiction "within urban reserves

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an ordinance adopted by the district council prior to June 30, 1997." If the disputed area is such territory, we do not understand petitioners to argue that Metro lacked jurisdiction to review the county's decision. Because petitioners so limit their challenge to Metro's jurisdiction, and because the disputed area is in fact the focus of the parties' dispute, we do not explore the jurisdictional question any further on our own. We note, however, that the second part of ORS 268.347 potentially presents the same ambiguity that is present in the first part. Specifically, while we conclude below that the *disputed area* is "territory designated as urban reserves by the district in an ordinance adopted by the district council prior to June 30, 1997," most of the territory included in the Clackamas River Water Authority by the boundary change is not "territory designated as urban reserves by the district in an ordinance adopted by the district council prior to June 30, 1997."

designated by the district in an ordinance adopted by the district council prior to June 30, 1997" or "within the boundaries of urban reserves designated by the district in an ordinance adopted by the district council prior to June 30, 1997." However, the text of the statute is not worded in that way, and the subject of the statute is specific "territory" that had previously been identified as Metro as a potential UGB expansion area.

Based on the text and context of ORS 268.347(1), we are persuaded by intervenors' argument that "[i]ndeed, by specifically identifying the urban reserves as they existed prior to June 30, 1997, the statute contemplates that they may later expand, contract or, as in this case, cease to exist all together." Intervenor-Respondents' Brief 5. While that reading of ORS 268.347(1) admittedly is not required by the words of the statute, it is the more straightforward reading of the statute.

We understand intervenors to contend that if Metro Ordinance No. 96-665(e) had been affirmed in *D.S. Parklane* and Metro had later expanded or reduced those urban reserve areas, the "territory" over which Metro would have boundary change jurisdiction under the second part of ORS 268.347(1) would have remained coextensive with the "territory" included in the urban reserves as they were originally approved in Metro Ordinance No. 96-665(e). In other words, that "territory" over which Metro had boundary change review jurisdiction would not expand or contract by virtue of subsequent decisions to enlarge or reduce those urban reserve territories. Similarly, we understand intervenors to argue that the "territory" described in Metro Ordinance No. 96-665(e), for purposes of ORS 268.347(1), is unaffected by LUBA's decision in *D.S.* Parklane. While the text of ORS 268.347(1) could be clearer, we agree with Metro's and intervenors' interpretation of ORS 268.347(1).

No party has provided any legislative history of ORS 268.347(1) that might have some bearing on the legislature's intent in giving Metro jurisdiction over boundary changes regarding "all territory designated as urban reserves by the district in an ordinance adopted by the district council prior to June 30, 1997." We have not independently sought out that

legislative history. While we have not been provided the legislative history that preceded adoption of ORS 268.347(1), as the MBAC noted, the legislature has amended ORS 268.347 twice since LUBA's decision in *D.S. Parklane*. One of those amendments, which was adopted in 2005, is consistent with Metro's, intervenors' and our interpretation of ORS 268.347(1). As it was originally enacted, ORS 268.347 included a cross reference to a provision to automatically transfer to Metro any boundary change preceding that remained pending before the Portland Metropolitan Area Local Government Boundary Commission on December 31, 1998. Or Laws 1997, ch 516 §13 (cross referencing Or Laws 1997, ch 516 §11). After December 31, 1998, that cross reference was no longer needed. In 2005, Or Laws 2005 ch 22 § 193 eliminated the Or Laws 1997, ch 516 §13 reference to Or Laws 1997, ch 516 §11, so that the statute reads as it does today. If petitioners' view of the reference in ORS 268.347(1) to "all territory designated as urban reserves by the district in an ordinance adopted by the district council prior to June 30, 1997" and the legal effect of LUBA's decision in *D.S. Parklane* is correct, that language in ORS 268.347(1) was also unnecessary by 2005 when the legislature amended ORS 268.347(1) to eliminate the unnecessary cross reference to Or Laws 1997, ch 516 §11. But while the legislature took action to eliminate the unnecessary cross-reference to Or Laws 1997, ch 516 §11, it did not remove the language that gives Metro jurisdiction over "boundary changes within all territory designated as urban reserves by the district in an ordinance adopted by the district council prior to June 30, 1997." That the legislature may have believed the second part of ORS 268.347(1) remained operative after *D.S. Parklane* when it left that language in the statute in 2005 and repealed other unnecessary language is of little or no value in determining the legislature's intent when it originally enacted a statute. *Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457 (1995). Nevertheless, the legislature's action in 2005 to keep the second part of ORS 268.347(1) while it was repealing unnecessary statutes is consistent with Metro's and

intervenors' interpretation the second part of ORS 268.347(1) and inconsistent with petitioners' interpretation.

Because the disputed part of the boundary change that is located outside the Oregon City UGB and the district is nevertheless "territory designated as urban reserves by the district in an ordinance adopted by the district council prior to June 30, 1997," the MBAC correctly determined that it has jurisdiction over the county's decision.

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

Under Metro Code (MC) 3.09.070(a) one must be a "necessary party" to appeal a boundary change decision to the MBAC.[7] As intervenors point out, the MC 3.09.020(j) definition of "necessary party" sets out three independent tests for determining if a party is a "necessary party:"

> "First, a local government whose jurisdictional boundary includes any part of the area affected by the boundary change petition is a 'necessary party.' Second, a local government that provides urban services to the affected area is a necessary party. Third, a local government that is a party to an agreement to provide urban services to the affected area is a necessary party. * * *"[8] Intervenor-Respondents' Brief 7.

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[7] As relevant, MC 3.09.070(a) provides:

> "A necessary party to a final decision that has appeared in person or in writing as a party in the hearing before the approving entity decision may contest the decision before the Metro Boundary Appeals Commission. * * *"

We do not understand petitioners to argue that Oregon City and SFWB did not appear as a party in the hearing before the county. The dispute is whether Oregon City and SFWB satisfy the other MC requirements for becoming a necessary party.

[8] MC 3.09.020(j) provides:

> "'Necessary party' means: any county, city or district whose jurisdictional boundary or adopted urban service area includes any part of the affected territory or who provides any urban service to any portion of the affected territory, Metro, and any other unit of local government, as defined in ORS 190.003, that is a party to any agreement for provision of an urban service to the affected territory."

For all three tests under the MC 3.09.020(j) definition, the scope of the "affected area" is relevant. Pursuant to MC 3.09.020(b) the "affected area" is the area described in the "petition."[9] Pursuant to MC 3.09.020(k), the petition is the "initiatory action for a boundary change."[10]

Petitioners argue that intervenors are not a necessary party and that Metro therefore should have dismissed their appeal. Intervenors contend that they separately qualify as a "necessary party" under all three tests. For the reasons explained below, we conclude that Metro did not err in finding that intervenors qualify as necessary parties under two of the three MC 3.09.020(j) tests.[11]

### A. A Local Government Whose Jurisdictional Boundary Includes Any Part of the Area Affected by the Boundary Change

The county initiated the disputed boundary change by adopting Order 2005-033, on February 17, 2005. As described in Order 2005-033, the boundary change did not include any part of Oregon City.[12] County Record 3394-96. Order 2005-033 was later amended by Order 2005-072 on April 7, 2005. County Record 3362-63. Part of Oregon City was included in the proposed boundary change, as amended by Order 2005-072. When Oregon City later refused to give its consent to the proposed boundary change, the county adopted Order 2005-139, on June 9, 2005. County Record 7-132. In Order 2005-139 the county

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[9] MC 3.09.020(b) provides:

> "'Affected territory' means territory described in a petition."

[10] MC 3.09.020(k) provides:

> "'Petition' means a petition, resolution or other form of initiatory action for a boundary change."

[11] The parties make no distinction between Oregon City and SFWB in presenting their "necessary party" arguments, and we likewise make no distinction.

[12] As we explained earlier, the disputed area, which is the focus of the parties' arguments, lies outside the UGB and outside the city's current municipal limits.

amended the proposed boundary change to exclude Oregon City and approved the proposed boundary change, subject to a second hearing to determine if an election would be necessary. *Id*. On June 30, 2005, the county adopted Order 2005-180, which approved the disputed boundary change after finding that an election would not be necessary. County Record 1. As approved by Order 2005-180, no part of Oregon City was included in the boundary change.

If the first test under the MC 3.09.020(j) definition of "necessary party," the MC 3.09.020(b) definition of "affected territory" and the MC 3.09.020(k) definition of "petition" are read literally, the "initiatory action" is Order 2005-033. Order 2005-033 did not include any part of the city in the proposed boundary change and, therefore, under a literal reading of those MC provisions, Oregon City is not a necessary party. Such a literal reading would have the almost certainly unintended effect of denying "necessary party" status to any city that might be included in subsequent amendments of the initiatory action to include the territory of additional cities, even though they would have been necessary parties if they had been included under the original initiatory action.

Departing from the literal language of the MC also presents its own set of issues. And the county's decision in this case to exclude Oregon City, then include Oregon City, and finally to again exclude Oregon City raises additional issues. We need not address and resolve those issues here, however, because we conclude below that there are two other bases under which Oregon City qualifies as a "necessary party." We do not consider the first test further.

**B. A Local Government That Provides Urban Services to the Affected Area**

Under the second test provided in MC 3.09.020(j), a local government that provides urban services to the affected area qualifies as a necessary party. Petitioners offer four reasons why they believe intervenors do not provide an urban service to the affected area.

The first two reasons and the last two reasons are closely related and we address them together.

### 1. Intervenors Provide No Water Service to the Affected Area and Any Water Service They Provide is not Urban (Reasons 1 and 2)

If we understand the parties' arguments, it is undisputed that SFWB provides the water that CRW delivers through CRW's water distribution pipes in Areas 2 and 3 south of the Clackamas River. That "wholesale" water transfer to CRW is accomplished at several discrete points in the SFWB-owned and city-owned water distribution facilities. According to petitioners, SFWB's transfer of "wholesale" water to CRW who in turn provides "retail" service does not constitute provision of water service in Areas 2 and 3.

We agree with intervenors that the significance that petitioners assign to artificial "wholesale" and "retail" distinction is unwarranted and is not based on any cited authority. That SFWB and the city are not the sole providers of water service to Areas 2 and 3 does not change the fact that SFWB and Oregon City, in concert with CRW, provide water service to Areas 2 and 3.

Next, citing *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 498-99, 724 P2d 268 (1986), petitioners argue that even if intervenors' provision of "wholesale" water to Areas 2 and 3 can be viewed as providing water service to those areas, it is not an *urban* service, because Areas 2 and 3 generally fall outside the UGB.[13] Under the Oregon Supreme Court's decision in *Curry County*, Statewide Planning Goal 14 (Urbanization), and the Statewide Planning Goal definitions of "Rural Land," Urban Land," and "Urbanizable Land," the state is made up of three general categories of land.[14] Inside an acknowledged

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[13] Apparently there are small areas that have been annexed by the city and included in the UGB that still receive water from CRW. No party argues that these areas are of legal significance in this appeal.

[14] The Statewide Planning Goals include the following definitions:

> **"RURAL LAND**. Land outside urban growth boundaries that is:

UGB there are urban and urbanizable lands; outside acknowledged UGBs there are rural lands. We understand petitioners to argue that SFWB's and the city's provision of the water that CRW then delivers to its customers in Areas 2 and 3 is necessarily a "rural" service rather than an "urban" service, as required by MC 3.09.020(j), because those areas are almost entirely outside the UGB.

We do not see any reason to suspect that in adopting the MC 3.09.020(j) definition of "necessary party" and using the term "urban service" Metro intended to incorporate the "urban," "urbanizable," and "rural" distinctions articulated in *Curry County*. MC 3.09.020(m) provides a definition of "urban services." [15] While no party in this appeal cites or relies on that definition, MC 3.09.020(m) neither makes reference to *Curry County* nor limits its definition of urban services to services provided within a UGB. It simply lists several types of services that are commonly provided in densely populated areas. SFWB's and Oregon City's provision of water service to Areas 2 and 3 is provision of an urban service, as MC 3.09.020(j) uses, and MC 3.09.020(m) defines, that term. If Metro had

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> "(a) Non-urban agricultural, forest or open space,
>
> "(b) Suitable for sparse settlement, small farms or acreage homesites with no or minimal public services, and not suitable, necessary or intended for urban use, or
>
> "(c) In an unincorporated community."
>
> "**URBAN LAND**. Land inside an urban growth boundary."
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> "**URBANIZABLE LAND.** Urban land that, due to the present unavailability of urban facilities and services, or for other reasons, either:
>
> "(a) Retains the zone designations assigned prior to inclusion in the boundary, or
>
> "(b) Is subject to interim zone designations intended to maintain the land's potential for planned urban development until appropriate public facilities and services are available or planned."

[15] MC 3.09.020(m) provides:

> "'Urban services' means sanitary sewers, water, fire protection, parks, open space, recreation and streets, roads and mass transit."

intended to limit the scope of its MC 3.09.020(m) definition of "urban services" to services that are provided within an acknowledged UGB, it could easily specified that limitation.

Because intervenors provide an "urban service," to the "affected territory," as those concepts are defined by MC 3.09.020(m) and (b), they are a "necessary party," under the second test set out in MC 3.09.020(j).

**2. There is no Urban Service Agreement under ORS 195.065 to Provide Water Service to Areas 2 and 3 Because There is no Cooperative Agreement Pursuant to ORS 195.020(2).**

Under the third test set out in MC 3.09.020(j), "any other unit of local government * * * that is a party to any agreement for provision of an urban service to the affected territory" is a necessary party. Petitioners argue that ORS 195.020(2) mandates that before parties may enter into "urban service agreements" under ORS 195.065, they must first enter into a cooperative agreement under ORS 195.020(2). See ns 20 and 23.

We address and reject petitioners' interpretation of ORS 195.020(2) and ORS 195.065 in our discussion of the third assignment of error below. However, for purposes of resolving petitioners' argument regarding the third test set out under MC 3.09.020(j), it is sufficient to point out that there is no dispute that Oregon City and CRW have entered into two intergovernmental agreements concerning provision of water service to part of Areas 2 and Area 3. The Holcomb-Outlook-Park Place Intergovernmental Cooperation Agreement (the HOPP ICA) covers a portion of Area 2, and the South End Road Intergovernmental Cooperative Agreement (South End Road ICA) covers most or all of Area 3.[16] MC 3.09.020(j) does not mandate that the referenced "agreement for provision of an urban service to the affected territory," must have been entered into pursuant to ORS 195.065. Just as MC 3.09.020(j) does not mandate that those agreements for provision of urban service be

[16] The HOPP ICA area appears to be the same as, or approximately the same as, the disputed area.

ORS 197.065 agreements, MC 3.09.020(j) does not mandate that such urban service agreements be preceded by an intergovernmental agreement under ORS 195.020(2).

Because Oregon City is "a party to an agreement for provision of an urban service to the affected territory," intervenors also qualify as necessary parties under the third of the three tests set out in MC 3.09.020(j).[17]

Petitioners' second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

MC 3.09.050(d) sets out a number of criteria that the county was required to address in its findings. MC 3.09.050(d)(1) requires that the county find that the proposed boundary change is consistent "with directly applicable provisions in an urban service provider agreement or annexation plan adopted pursuant to ORS 195.065."[18] Under MC 3.09.090(f), the MBAC was also required to adopt findings addressing the MC 3.09.050(d) criteria.[19] The MBAC found that the HOPP ICA and South End ICA were ORS 195.065 urban service provider agreements. The county did not adopt findings addressing those agreements, and the MBAC ultimately found that the county had not established that the boundary change

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[17] For the reasons explained in our discussion of the third assignment of error below, we conclude that the HOPP ICA is an ORS 195.065 urban services agreement and that ORS 195.065 does not mandate a prior ORS 195.020 intergovernmental cooperation agreement. Those conclusions provide a separate basis for denying the second assignment of error.

[18] As relevant, MC 3.09.050(d) provides:

> "An approving entity's final decision on a boundary change shall include findings and conclusions addressing the following criteria:
>
> "(1) Consistency with directly applicable provisions in an urban service provider agreement or annexation plan adopted pursuant to ORS 195.065[.]"

[19] MC 3.09.090(f) provides in relevant part:

> "No later than 30 days following the close of a hearing before the [MBAC] on a contested case, the [MBAC] shall consider its proposed written final order and shall adopt the order by majority vote. The order shall include findings and conclusions on the criteria for decision listed in Section 3.09.050(d) and (g). * * *"

would be consistent with the HOPP ICA. Metro Record 81. Petitioners assign error to that finding, arguing that the HOPP ICA is not an ORS 195.065 urban service agreement.

### A. ORS 195.020, 195.065, the HOPP ICA and the South End ICA

The requirements of ORS 195.020 and 195.065 are less than clear. How those statutes relate to each other is also unclear. Those statutes include numerous ambiguities. We attempt to limit our discussion to the ambiguities that the parties address in their briefs. We begin with ORS 195.020(2), (3) and (4). ORS 195.020(2) requires that counties and Metro enter into "a cooperative agreement with each special district that provides an urban service within the boundaries of the county or the metropolitan [service] district."[20] ORS 195.020(3) imposes a similar requirement on cities, counties and Metro to "enter into a cooperative agreement with each special district that provides an urban service within an urban growth boundary."[21] ORS 195.020(4) then sets out detailed requirements for the content of the cooperative agreements that are required by ORS 195.020(2) and (3).[22] The

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[20] ORS 195.020(2) provides:

> "A county assigned coordinative functions under ORS 195.025 (1), or the Metropolitan Service District, which is assigned coordinative functions for Multnomah, Washington and Clackamas counties by ORS 195.025 (1), shall enter into a cooperative agreement with each special district that provides an urban service within the boundaries of the county or the metropolitan district. A county or the Metropolitan Service District may enter into a cooperative agreement with any other special district operating within the boundaries of the county or the metropolitan district."

[21] ORS 195.020(3) provides:

> "The appropriate city and county and, if within the boundaries of the Metropolitan Service District, the Metropolitan Service District, shall enter into a cooperative agreement with each special district that provides an urban service within an urban growth boundary. The appropriate city and county, and the Metropolitan Service District, may enter into a cooperative agreement with any other special district operating within an urban growth boundary."

[22] With one exception, the requirements set out in ORS 195.020(4) for the cooperative agreements required by ORS 195.020(2) and (3) are identical. The exception is ORS 195.020(4)(e), which requires that the intergovernmental agreements required by ORS 195.020(3) must "[s]pecify the units of local government which shall be parties to an urban service agreement under ORS 195.065." We have no idea why that requirement is not also imposed on the cooperative agreements required by ORS 195.020(2).

cooperative agreement required by ORS 195.020(2) and (3) are generally *planning* agreements, as opposed to *urban service* agreements.

ORS 195.065 is one of a series of statutes that require urban service agreements.[23] ORS 195.070 sets out a number of "factors that shall be considered in establishing urban service agreements under ORS 195.065." Although it is apparently undisputed that CRW and Oregon City have not entered into a cooperative planning agreement under ORS

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Both types of cooperative agreements must describe special districts' role in city and county comprehensive planning, Metro regional planning, and development review, as well as city or county responsibilities with regard to special district facilities and property, and any other provisions required by the Land Conservation and Development Commission by rule. ORS 195.020(4)(a) through (d), (f) and (g).

[23] ORS 195.065 provides in relevant part:

> "(1) Under ORS 190.003 to 190.130, units of local government and special districts that provide an urban service to an area within an urban growth boundary that has a population greater than 2,500 persons, and that are identified as appropriate parties by a cooperative agreement under ORS 195.020, shall enter into urban service agreements that:
>
> "(a) Specify whether the urban service will be provided in the future by a city, county, district, authority or a combination of one or more cities, counties, districts or authorities.
>
> "(b) Set forth the functional role of each service provider in the future provision of the urban service.
>
> "(c) Determine the future service area for each provider of the urban service.
>
> "(d) Assign responsibilities for:
>
> "(A) Planning and coordinating provision of the urban service with other urban services;
>
> "(B) Planning, constructing and maintaining service facilities; and
>
> "(C) Managing and administering provision of services to urban users.
>
> "(e) Define the terms of necessary transitions in provision of urban services, ownership of facilities, annexation of service territory, transfer of moneys or project responsibility for projects proposed on a plan of the city or district prepared pursuant to ORS 223.309 and merger of service providers or other measures for enhancing the cost efficiency of providing urban services.
>
> "(f) Establish a process for review and modification of the urban service agreement."

195.020, it is also undisputed that CRW and Oregon City have entered into two cooperative agreements regarding the provision of water service. County Record 2677-84 (South End ICA), 2685-92 (HOPP ICA). The HOPP ICA includes the following recitals:

> "WHEREAS, the parties intend to designate service providers in the HOPP Area, provide for orderly service delivery and annexation to the City and assure that CRW will be able to amortize and recover the costs of its system investment in urban level water improvements it makes in the HOPP Area during the term of this Agreement;
>
> "WHEREAS, based on the foregoing, the parties sharing common boundary or other service areas, and the parties intend this Agreement to fix present and future water service delivery boundaries and designate providers of water service and [sic, should be in] conformance with ORS 195.060 through 195.085, and that this Agreement shall be adopted and submitted for acknowledgment as part of the City's periodic review of its Comprehensive Plan and Land Use Regulations; and
>
> WHEREAS, in negotiating this Agreement, the parties have considered the factors of ORS 195.070, and that this Agreement will assure continuance of and appropriate and adequate levels of water service; and
>
> WHEREAS, the parties have the authority to enter into this Agreement pursuant to their respective Charter or principal acts and ORS 190.003 through 190.030,
>
> NOW THEREFORE, the premises being generally stated in the foregoing Recitals, the parties Agree as follows[.]" County Record 2685-86.

The South End ICA includes nearly identical recitals. County Record 2677.

**B. Petitioners' Arguments**

Petitioners advance three separate arguments that the HOPP ICA is not an ORS 195.065 urban service agreement and an alternative argument that the boundary change should be found consistent with the HOPP ICA.

**1. The HOPP ICA Includes Areas Outside the UGB**

Petitioners first argue that

> "[t]he HOPP ICA includes areas outside the UGB and thus ORS 195.065, the statute mandating an urban service provider agreement, is not applicable. * * * Because urban service agreements under ORS 195.065 only apply to entities that provide an urban service within the UGB, and the HOPP ICA

concerns, in part, an area outside the UGB, MC 3.09.050(d)(1) does not apply." Petition for Review 14.

While we tend to agree with petitioners that that ORS 195.065 envisions that the focus of the required urban service agreements will be on providing urban services inside UGBs, we see nothing in that statute that would preclude including provisions in the agreement for providing urban services to lands lying just beyond the UGB. More importantly, the HOPP ICA explicitly provides that it is adopted to comply with ORS 195.065 and it includes areas outside the UGB. If that is inconsistent with ORS 195.065, that inconsistency might provide a basis for amending or invalidating the HOPP ICA. But that alleged inconsistency provides no basis for concluding that the HOPP ICA is something other than what it expressly says it is.

**2. The Water Service Anticipated in the HOPP ICA is Rural Water Service**

We understand petitioners to argue next that the water service provided for in the HOPP ICA is necessarily *rural* water service and therefore the HOPP ICA cannot be an ORS 195.065 *urban* water service agreement.

We reject petitioners' central premise that an ORS 197.065 urban water service agreement could not include provisions for providing water service to rural lands located near the UGB along with provisions for ultimately bringing such lands into the UGB and transferring service responsibility to a city. Just as importantly, as we have already pointed out above, even if the HOPP ICA includes provisions that it should not include under ORS 195.065, that is not a basis for concluding the HOPP ICA is not the ORS 195.065 urban service agreement that it explicitly says it is.

**3. There is no ORS 195.020(2) Cooperative Planning Agreement**

Petitioners next argue:

"* * * ORS 195.020(2) requires that the County enter into a cooperative agreement with each special district that provides an urban service within the boundary of the County or metro and ORS 195.020(3) requires the County to

> enter into such agreements with Cities. This cooperative agreement was never executed by Oregon City, SFWB, Clackamas County, CRW and Metro. Failure to follow the statutory prerequisites for an urban service agreement means that the HOPP ICA cannot be construed as an urban service agreement under ORS 195.065 and therefore the requirements in MC 3.09.050(d)(1) are not applicable. * * *" Petition for Review 15.

Although we tend to agree with petitioners that reading ORS 195.020 and 195.065 together the legislature probably intended that the cooperative planning agreements envisioned by ORS 195.020 would predate the urban service agreements required by ORS 195.065, we do not agree that either ORS 195.020 or 195.065 mandate that they be adopted in that order. We are not sure what to make of the awkwardly stated cross reference to ORS 195.020 that is included in ORS 195.065(1). *See* n 23. But even if it can be construed to require that a cooperative planning agreement be adopted before an ORS 195.065 urban services agreement is adopted, that does not change the fact that Oregon City and CRW have entered into an ORS 195.065 urban service agreement. As we have already explained, construing the statutes in that way might provide a basis for amending or invalidating the HOPP ICA, but it does not provide a basis for concluding that the HOPP ICA is not the ORS 195.065 urban service agreement that it expressly says it is.

**4. CRW's Stipulation**

Finally, CRW argues that because it stipulated that it would honor the HOPP ICA, a county finding that the boundary change is consistent with the HOPP ICA is implicit.

The hearings officer found that the Clackamas River Water Authority would not necessarily be bound to assume all of CRW's rights and obligations and found that in view of the statutory requirements set out in ORS 450.987, see n 4, it might be that Clackamas River Water Authority could not legally do so. Those findings are unchallenged. The MBAC denied the county's decision in part, based on the county's failure to consider whether the disputed boundary change is consistent with "directly applicable provisions" in the HOPP ICA. CRW's stipulation provides no basis for reversing or remanding the MBAC's decision.

**FOURTH ASSIGNMENT OF ERROR**

After finding that the HOPP ICA was an ORS 195.065 urban service agreement and that the county erred by failing to demonstrate that the disputed boundary change was consistent with directly applicable provisions in that agreement, the MBAC found:

> "Alternatively, if the HOPP ICA is not an urban service agreement subject to MC 3.09.050(d)(1)'s protection, as urged by the County and CRW, then MC 3.09.050(e) was applicable to the water authority formation process and the County failed to comply with its requirements[.]" Metro Record 92.[24]

Petitioners challenge the above finding. We have already found that the HOPP ICA is an ORS 195.065 urban service agreement and that MC 3.09.050(d)(1) applies to the disputed boundary adjustment. It follows that MC 3.09.050(e) does not apply in this case. Therefore, petitioners' challenge to the MBAC's alternative finding addressing MC 3.09.050(e) would provide no basis for reversal or remand of the MBAC decision even if we were to sustain the fourth assignment of error. We therefore do not consider the fourth assignment of error.

**FIFTH ASSIGNMENT OF ERROR**

MC 3.09.050(d)(7) requires that an approving entity's decision on a boundary change must include a finding that the boundary change is consistent "with other applicable criteria for the boundary change in question under state and local law." ORS 198.805(1) provides, in part, that "the county board shall * * * determine, in accordance with the criteria prescribed by ORS 199.462, whether the area could be benefited by the formation of the district." ORS 199.462(1) provides as follows:

> "In order to carry out the purposes described by ORS 199.410 when reviewing a petition for a boundary change or application under ORS 199.464, a boundary commission shall consider local comprehensive planning for the area, economic, demographic and sociological trends and projections pertinent to the proposal, past and prospective physical development of land that would

[24] MC 3.09.050(e) sets out criteria that the MBAC must apply when "there is no urban service agreement."

> directly or indirectly be affected by the proposed boundary change or application under ORS 199.464 and the goals adopted under ORS 197.225."

The MBAC found that a separate basis for denying the county's decision was its failure to adequately address the ORS 199.462 factors:

> "The County did not properly apply the ORS 199.462 factors during its decision-making process, and because proper application of those factors is required by state law in order for the County to determine that the proposed [Clackamas River Water Authority] formation will be consistent [with] the criterion established by ORS 198.805(1), there is not substantial evidence in the record to support the County conclusion that the proposed water authority formation complies with MC 3.09.050(d)(7), which requires consistency with all applicable criteria under State law." County Record 92.

The MBAC's specific reason for finding that the county failed to adequately address MC 3.09.050(d)(7), ORS 198.805(1) and 199.462 was the county's failure to consider whether the Clackamas River Water Authority or the City and SFWB should serve the disputed area.

Petitioners assign error to the above finding, arguing that the MBAC improperly read a specific requirement into ORS 198.805(1) and 199.462 that the county consider who should be the water provider in the disputed area, because the statutes do not require such a comparison. We agree with petitioners.

As we have already concluded, MC 3.09.050(d)(1) requires that specific applicable provisions of urban service agreements, including the HOPP ICA, be considered. The general charge in ORS 199.462 that the county also consider "local comprehensive planning for the area, economic, demographic and sociological trends and projections pertinent to the proposal, [and] past and prospective physical development of land" very well could provide a second route to require that the HOPP ICA be considered. That charge could also lead to other planning documents that would require that the county consider whether the Clackamas River Water Authority or some other potential provider of water service to the disputed area is preferable. However, the statute itself does not require that comparison. The best argument for implying that requirement into ORS 199.462(1) is the cross reference in that

section of the statute to the "purposes described in ORS 199.410."[25] However, we conclude the general concerns expressed in ORS 199.410(1) with fragmented government, lack of coordination, duplication of services and the lack of provisions in some comprehensive plans that determine who should provide services in specified service areas are not a sufficient basis for reading the very specific comparison that the MBAC found in ORS 199.462(1). It may very well be that such a comparison is required by other applicable state, regional or local law, but ORS 199.462(1) does not impose such a requirement.

The fifth assignment of error is sustained.

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[25] ORS 199.410(1) provides as follows:

"The Legislative Assembly finds that:

"(a) A fragmented approach has developed to public services provided by local government. Fragmentation results in duplications in services and resistance to cooperation and is a barrier to planning implementation. Such an approach has limited the orderly development and growth of Oregon's urban areas to the detriment of the citizens of this state.

"(b) The programs and growth of each unit of local government affect not only that particular unit but also the activities and programs of a variety of other units within each urban area.

"(c) As local programs become increasingly intergovernmental, the state has a responsibility to insure orderly determination and adjustment of local government boundaries to best meet the needs of the people.

"(d) Local comprehensive plans define local land uses but may not specify which units of local government are to provide public services when those services are required.

"(e) Urban population densities and intensive development require a broad spectrum and high level of community services and controls. When areas become urbanized and require the full range of community services, priorities are required regarding the type and levels of services that the residents need and desire. Community service priorities need to be established by weighing the total service needs against the total financial resources available for securing services. Those service priorities are required to reflect local circumstances, conditions and limited financial resources. A single governmental agency, rather than several governmental agencies is in most cases better able to assess the financial resources and therefore is the best mechanism for establishing community service priorities."

## CONCLUSION

In rejecting petitioners' first assignment of error, we conclude that the MBAC had jurisdiction to consider intervenors' appeal of the county's boundary change decision. In rejecting petitioners' second assignment of error, we conclude that Metro correctly determined that Oregon City and SFWB are "necessary parties," as MC 3.09.020(j) defines that term. In rejecting petitioners' third assignment of error, we reject petitioners' challenge to the MBAC's finding that the county's decision must be denied because the county did not demonstrate that the disputed boundary change is consistent with the HOPP ICA, as required by MC 3.09.050(d)(1). We do not consider petitioners' fourth assignment of error. Although we sustain petitioners' fifth assignment of error concerning the MBAC's finding regarding ORS 199.462(1), that error provides no basis for remand because the finding we sustain under the third assignment of error requires that the MBAC's decision be affirmed.

The MBAC's decision is affirmed.