

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

IN THE MATTER OF THE REVIEW OF)	
THE DESIGNATION OF URBAN)	
RESERVES BY METRO AND RURAL)	METRO’S RESPONSE BRIEF
RESERVES BY CLACKAMAS COUNTY,)	
MULTNOMAH COUNTY, AND)	
WASHINGTON COUNTY)	

I. SUMMARY OF ARGUMENTS

There is no need for LCDC to remand this matter for further evidentiary hearings because no additional evidence is required. Instead, LCDC may adopt findings that affirm Metro’s decision to designate Stafford as urban reserve by addressing the deficiency identified by the court of appeals – which is a purely *legal* deficiency arising out of LCDC’s failure to respond to the cities’ evidence concerning traffic in the 2035 Regional Transportation Plan (RTP). Based on the legal argument provided in Metro’s opening brief, LCDC may adopt findings that provide the “meaningful explanation” requested by the court of appeals explaining why the 2035 RTP does not constitute evidence that Stafford cannot be served with transportation facilities under the urban reserve factors. Alternatively, if LCDC decides that additional evidence is required, LCDC may also rely on the recently updated mobility policy maps in the 2014 RTP as evidence that clearly supports the designation of Stafford as an urban reserve area.

Regarding the administrative rules creating the “best achieves” and “amount of land” requirements, the Oregon legislature’s enactment of HB 4078 established – by statute – a new map of the UGB and urban and rural reserve areas. That statute necessarily governs over the administrative rules and negates any need for application of those rules if no changes are made to the reserve maps. For the reasons explained in Metro’s opening brief, if LCDC retains jurisdiction over the court’s remand and no changes are made in the reserve designations for

Stafford and Multnomah County, there is no reason for LCDC to reconsider the “best achieves” or “amount of land” standards in light of the statutory map changes made by the legislature in HB 4078.

II. ARGUMENT

A. LCDC may adopt new approval findings without considering evidence

The cities and Clackamas County devote significant portions of their briefs to analyzing LUBA cases regarding whether there is evidence that “clearly supports” a decision. As explained by Metro and Multnomah County in their opening briefs, there are fundamental differences between LCDC’s review of the discretionary “consideration of factors” for purposes of reserves and LUBA’s review of local land use decisions. Those differences support a conclusion by LCDC that LUBA cases prohibiting the “weighing” of conflicting evidence under ORS 197.835(11)(b) do not apply in the context of the specific one-time authority granted to LCDC for review of this decision on remand.

More importantly, LCDC need not even reach this question. Instead LCDC may adopt findings that directly address the *legal* issue identified by the court of appeals by providing a “meaningful explanation” that responds to the conflicting evidence relied upon by the cities from the 2035 RTP. As the court explained: “it was incumbent on LCDC to provide a ‘meaningful explanation’ as to why—even in light of that conflicting evidence—the designation of Stafford as urban reserve is supported by substantial evidence.” *Barkers Five*, 261 Or App at 360. LCDC may provide this “meaningful explanation” without relying on evidence. The explanation is provided by Metro in its opening brief, which explains why the mobility policy maps in the 2035 RTP are irrelevant for purposes of applying the urban reserve factors and why the court was therefore incorrect that those maps amount to “weighty countervailing evidence” regarding

whether adequate transportation services can be provided to the Stafford area. This is not an evidentiary issue. Metro’s opening brief at Section III.C (page 9) provides *argument* that challenges the cities’ reliance on the 2035 RTP as evidence and refutes the court’s conclusion that the cities’ claims were supported by substantial evidence. Metro’s opening brief responds to the cities’ claims by correctly describing the role of the RTP and its mobility policy maps and explaining why there is no logical connection between the 2035 RTP traffic forecasts, which are based on already outdated project lists from 2010, and the relevant question under the urban reserve factors, which is whether future improvements can be built to serve Stafford.

LCDC may rely on Metro’s *legal* argument to adopt new findings rejecting the cities’ claim that the 2035 RTP constitutes evidence that transportation services cannot be efficiently and cost-effectively provided to Stafford under the urban reserve factors. Because such findings would not require reliance on evidence in the record, or new evidence from the 2014 RTP, there is no need for LCDC to engage in the analysis regarding whether there is evidence to “clearly support” Metro’s designation of Stafford as an urban reserve.

B. LCDC may also rely on evidence in the 2014 RTP

In addition to the findings described above, LCDC may also adopt findings based on evidence submitted from the 2014 RTP in Metro’s opening brief, which shows that the 2035 RTP mobility policy maps relied upon by the cities are already outdated and do not constitute substantial evidence to support a conclusion that it is not possible for Stafford to be served by roads on a 50-year planning horizon. The mobility policy maps in the 2014 RTP show significant improvement in forecasted traffic congestion on principal roads in the Stafford area for the new RTP planning horizon that ends in 2040, as compared to the mobility policy maps relied upon by the cities from the 2035 RTP. The significant improvements in projected traffic

congestion in the Stafford area in just four years between Metro's adoption of the 2035 RTP and the 2014 RTP is evidence that refutes the cities' arguments and "clearly supports" a conclusion that Stafford may be efficiently and cost-effectively served by transportation facilities under the relevant urban reserve factors. This evidence, together with the legal argument described above in section A, may be relied upon by LCDC to provide the "meaningful response" to the evidence cited by the cities from the 2035 RTP that the court of appeals found was lacking. At the same time, the changes in the RTP mobility policy maps between 2010 and 2014 illustrate the fundamental problem with the cities' arguments that were based on the 2035 RTP mobility policy maps.

C. Metro's decision did not involve an error of law

In their opening brief the cities argue that Metro's decision involved an error of law. Cities' brief at 10. This is entirely incorrect. The court of appeals held that *LCDC's* decision involved an error of law because it did not properly apply the legal standard of review for substantial evidence regarding Stafford. The fact that LCDC made an error of law does not mean that Metro made an error of law. The court of appeals did not review Metro's decision and did not reach any conclusions about whether Metro made any legal errors. In fact, the nature of the legal error identified by the court suggests that, if anything, Metro's decision was not supported by substantial evidence in the record; there is nothing in the court's decision to suggest that Metro's decision involved the misapplication of law regarding the Stafford designation.

D. The cities' argument regarding application of the factors "as a whole" does not establish any basis for remand

As the "second issue" presented in their opening brief the cities argue that changes made by HB 4078 to the reserve maps in Washington County require remand to Metro and the county to reapply all of the factors, due to a finding that the cities contend was made by Metro and

LCDC regarding consideration of the factors “as a whole.” Cities’ brief at 11. The cities assert that “the only articulated basis for this conclusion” by Metro and LCDC was a finding that one result of the Stafford urban reserve designation is that it avoids an urban designation for other areas that include foundation agricultural land. *Id.*

The cities again mischaracterize the decisions on review. First, LCDC’s final order, which is the relevant decision that was reviewed and remanded by the court, does not include or make any specific reference to the findings cited by the cities. Rather, solely in response to arguments raised by the cities regarding Metro’s alleged failure to consider the factors “as a whole” (which is not an express requirement under the reserve rules), LCDC’s final order includes a section that rejects the cities’ arguments while saying nothing about avoiding urban designation of foundation agricultural land:

“Metro adequately considered the urban reserve factors in OAR 660-027-0050, and documented that consideration with sufficient evidence and findings. Metro and Clackamas County have made findings relative to each of the factors, alone and in relation to the others, explaining the designation of Stafford as urban reserves. * * * While the cities disagree with the findings and decision, the findings reflect that Metro weighed and evaluated the factors in making the reserves decision, and the findings and conclusions adopted by Clackamas County and Metro adequately explain how all factors were balanced in reaching the decision.”

The relevant portion of Metro’s decision regarding Stafford consists of six pages of single-spaced findings. Metro Exhibit B to Ordinance No. 11-1255 at 26-31. Embedded in those findings are the two sentences that the cities quote in their brief as being the “only articulated basis” for a conclusion that the factors as a whole support the designation of Stafford as an urban reserve. The paragraph including those two sentences does not include any discussion or mention of the “as a whole” or “on balance” language that the cities are now attempting to assign error to, and it is difficult to understand why the cities believe that those are the only two

sentences out of six pages of findings that support LCDC's conclusion that Metro correctly weighed and balanced all of the factors, which is what is required under the reserve rules. Neither do the LCDC findings include any express reference to the "as a whole" language that the cities are apparently claiming to be a standard that must be addressed. In fact, it appears that the only reason LCDC included findings on this subject is because the cities raised a specific argument claiming that Metro's findings failed to demonstrate that the factors "as a whole" support designating Stafford as an urban reserve.

There is no basis for the cities' claim that the two sentences they quote in their brief are the "only articulated basis" for LCDC's conclusion that Metro's six pages of single-spaced findings correctly weighed and balanced the urban reserve factors. The argument presented as the second issue in the cities' brief does not create a basis for LCDC to require remand for re-application of the factors.

E. The "best achieves" and "amount of land" standards do not apply in the absence of further revisions to the reserves maps

Clackamas County argues that remand is required to Metro and the counties in order to consider not just the "best achieves" standard in OAR 660-027-0005(2) but also the "amount of land" standard in OAR 660-027-0040(2). In its opinion the court of appeals specifically remanded to Metro and the counties to address the "best achieves" standard, but only in the event that re-application of the reserve factors in Washington County on remand resulted in changes to the reserve designations. *Barkers Five* at 333. However, the court did not similarly require re-application of the "amount of land" standard as part of the remand. In the absence of a specific directive by the court to address this administrative rule on remand, there is no legal basis on which Clackamas County may claim that a full remand to Metro and the counties is required to

address the standard. If the court intended to require re-application of the standard on remand, it would have said so.

Turning to the merits, the analysis presented by Metro in its opening brief regarding the non-applicability of the “best achieves” standard on remand applies equally to the “amount of land” standard, which is also a standard created by administrative rule. In enacting HB 4078 the legislature enacted a new statutory map of the locations of the UGB and urban and rural reserves in Washington County. This legislative action negated the court’s directive requiring remand to Metro and Washington County for reconsideration of the reserve designations, and also negated any need to reconsider or apply the “best achieves” or “amount of land” standards, which are administrative rule requirements that are necessarily preempted by the new statutory map. Statutes necessarily control over administrative rules. *Avis Rent A Car System, Inc. v. Dept. of Rev.*, 330 Or 35, 41 (2000). If LCDC retains jurisdiction over the court’s remand and there are no changes in the reserve designations for Stafford and Multnomah County, there is no need for LCDC to reconsider the amount of land standard to account for the legislative changes made by HB 4078 in Washington County.

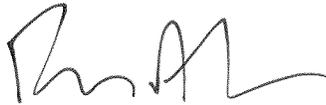
As explained in Metro’s opening brief, the new reserve designations created by HB 4078 do not create a need for LCDC, Metro or the counties to reconsider compliance with these administrative rule requirements in order to account for statutory changes to the Washington County reserves map.

F. Adoption of Multnomah County arguments

Evidence in the record clearly supports the designation of all of Area 9D as a rural reserve for the reasons explained by Multnomah County in its briefs. Metro adopts and incorporates by reference all of the arguments presented by Multnomah County in its opening and response briefs.

Dated this 9th day of October 2014

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CERTIFICATE OF FILING

I certify that on October 9, 2014 I filed the foregoing **Metro's Response Brief** with the Oregon Land Conservation and Development Commission via e-mail to Casaria Taylor at casaria.taylor@state.or.us.

DATED this 9th day of October 2014

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