

ATTORNEYS:

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VIA ELECTRONIC MAIL

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Re: Written Objection to Department of Land Conservation and
Development's Staff Report of July 28, 2011

Dear Commissioners and Specialist:

This letter is in response to the staff report issued by the Department of Land Conservation and Development on July 28, 2011 in anticipation of the commission hearing on the urban and rural reserve designations. This is to follow up on the objections submitted by this office on May 27, 2011 on behalf of Robert Burnham, Vicki Burnham, Janet Burnham, John Burnham, Hank Skade, Dorothy Partlow, and Robert Zahler ("East Bethany Owners"), taking exception to the reserve designation process and the decisions made by LCDC, Multnomah County and Metro Council with regard to the initial urban and rural reserve findings, as well as the subsequent revision of those findings.

We respectfully submit that the Department staff has missed the point of the objections submitted and the consequent risk to the entire reserve designation process that now exists, arising from this simple construct: the Commission has a clear duty to consider and apply three legal requirements that obligate the Commission. The State and

Federal Constitutions and the Oregon Revised Statutes 197.040 then require that the Commission look at certain issues independently and fairly, and with due regard for the requirements of statutory and constitutional law. Any process that fails to apply these standards will be judicially impeached. Yet, the staff is suggesting the Commission to follow that exact path.

If these standards are applied, they fail obvious statutory and constitutional standards. First is a gaping defect in “equal protection” requirements of the Constitution that similarly situated parties cannot receive disparate treatment (note exception does not apply). Second, the duty of ORS 197.040(b)(E) was never addressed. The goals and factors set forth in the OAR were applied in a patently unfair and/or intentionally biased manner, which cannot meet even the most lenient “rational basis” constitutional scrutiny.

The factual merits of the Owners’ request for an urban reserve designation are compelling. The findings relied upon by the governmental entities and the Department are unsupported by the facts. As set forth in the Owners’ previous submissions, even a cursory review demonstrates that no facts whatsoever support a designation of rural reserve for the “L” contained in Area 9B. Larger riparian streams and larger slopes exist on other, more remote, land that was designated urban reserve. There are no significant natural landscape features contained in the “L” that require any particular protection, and there has been no suggestion that the safeguards afforded by an urban reserve designation are not adequate to protect any landscape that may be argued to exist. That the area can be simultaneously urbanized and protected is apparent, since the area directly across the street from the “L” is within the already highly commercialized North Bethany city.

We will not restate all of the arguments made in our previous letters; however, we reiterate the arguments made in our previous submissions, which are codified in the attached appendix and which are incorporated herein by reference. Additionally, we hereby incorporate by reference the arguments advanced by and on behalf of MLG, whose submissions are also codified in the attached appendix.

The only apparent rebuttal to the Owners’ submission is contained on page 9 of the staff report, wherein they suggest that the clear duties of ORS 197.040 are obviated by a statutory section from ORS 197.010, providing that the overarching principles are not legal requirements for the Legislative Assembly and are not judicially enforceable. An argument that this disclaimer of enforceability relieves the Commission of any duty to comply with any of ORS 197’s provisions is not even of colorable legal validity. They would render all LCDC duties “discretionary.” However, the duties of ORS 197.040 are mandatory, and they include the duties at issue here: to “[a]ssess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact” (and “[p]erform other duties required by law.”) ORS 197.040(b)(E) and (j). To amplify that conclusion, if there was any confusion, ORS 197.040(3) provides that “[t]he requirements of subsection (1)(b) of this section shall not be interpreted as requiring an assessment for each lot or parcel that could be affected by the proposed rule.” Of course, this section would be unnecessary if the meaning given ORS 197.010 by staff was applicable.

We implore the Commission to consider these points and exercise its own judgment on its duties in these regards. It will not only avoid gross injury to these Owners, it alone will preserve the reserve legislation.

Respectfully submitted,

THE JAMES LAW GROUP, LLC



Christopher James

Enclosure

Appendix of Submissions by and on Behalf of the East Bethany Owners

Letter from James Law Group to LCDC dated October 8, 2010
Letter from James Law Group to LCDC dated October 20, 2010
Letter from James Law Group to Metro Council and Washington County Board of Commissioners dated March 11, 2011
Letter from James Law Group to Multnomah County Commissioners dated May 16, 2011
Letter from James Law Group to DLCD dated May 27, 2011

Letter from John Burnham to LCDC (with photographs) dated October 8, 2010
Written Objections to the Staff Report Re: Area 9B from Tom VanderZanden to LCDC undated, but submitted October 8, 2010
Letter from Hank Skade and Dorothy Partlow to LCDC dated October 6, 2010
Letter from Kathy Blumenkron to LCDC dated October 6, 2010
Letter from John Burnham to LCDC dated July 9, 2010

Letter from Perkins Coie to DLCD on behalf of Metropolitan Land Group dated June 2, 2011
Letter from Perkins Coie on behalf of Metropolitan Land Group dated May 31, 2011
Letter from Perkins Coie on behalf of Metropolitan Land Group dated October 8, 2010
Submission on behalf of Metropolitan Land Group dated July 14, 2010

Letter from the East Bethany Owners Collaboration dated August 14, 2007