



1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
PHONE: 503.727.2000
FAX: 503.727.2222
www.perkinscoie.com

Steven L. Pfeiffer
PHONE: (503) 727-2261
FAX: (503) 346-2261
EMAIL: SPfeiffer@perkinscoie.com

August 8, 2011

VIA EMAIL AND U.S. MAIL

John H. VanLandingham, Chair
Land Conservation and Development Commission
635 Capitol Street NE, Suite 200
Salem, OR 97301

Re: Exceptions to the July 28, 2011 Staff Report for the Objections to Portland Metro Area Urban and Rural Reserve Designations

Dear Chair VanLandingham and Members of the Commission:

This office represents Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC, and LFGC, LLC (together, "Maletis"), the owners of property generally located south of the Willamette River, east of I-5, and west of Airport Road in Clackamas County ("Maletis Property"). The purpose of this letter is to submit written exceptions to the July 28, 2011 staff report ("Redesignation Staff Report") prepared by the Department of Land Conservation and Development ("DLCD") in response to the objections to the redesignation of urban and rural reserves in metropolitan Portland ("Redesignation") by the Metro Council ("Metro") and the Counties of Clackamas, Multnomah, and Washington (together, "Counties"). Please place this letter in the official record before the Land Conservation and Development Commission ("LCDC") and consider it prior to rendering a decision on the Redesignation.

A. Summary of Arguments

Maletis incorporates its six (6) prior exceptions dated October 8, 2010, by reference. Maletis further files the following five (5) exceptions to the Redesignation Staff Report:

- DLCD staff erred by failing to acknowledge that LCDC is subject to, but has not yet complied with, ORS 197.040 in this matter.
- DLCD staff erred in finding that Clackamas County's local process for the Redesignation was lawful. Further, DLCD staff erred in inconsistently defining LCDC's scope of

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review and in failing to recognize that to the extent LCDC validates an unlawful local decision, LCDC's decision itself becomes unlawful.

- The Redesignation violates the State and Federal Equal Protection Clauses, both facially and as applied, and DLCD staff erred in contending that LCDC should either not consider or deny this objection.
- Metro has no authority to designate reserves on land located outside the Metropolitan Service District boundary, and DLCD erred in concluding otherwise.
- The Redesignation does not properly address Maletis' objection to reliance on the "safe harbor" provision of OAR 660-027-0060(4).

B. Procedural History

The following actions and corresponding dates provide the relevant history of this matter:

6/28/2007	SB 1011 authorizing designation of urban and rural reserves becomes effective
9/8/2009	Maletis submits letter to Clackamas County Board of Commissioners
4/21/2010	Maletis submits letter to Clackamas County Board of Commissioners
5/20/2010	Maletis submits letter and exhibits to Metro Council
6/23/2010	Metro and the Counties submit reserves designation decision ("Designation") to DLCD
7/14/2010	Maletis timely submits letter with six (6) objections to Designation
9/3/2010	DLCD refers the matter to LCDC
9/28/2010	DLCD issues Designation Staff Report recommending denial of all six (6) Maletis objections
10/8/2010	Maletis files six (6) exceptions to Designation Staff Report
10/29/2010	LCDC issues oral decision to remand the Designation
4/21/2011	Maletis submits letter to Metro Council
5/12/2011	Metro and the Counties submit reserves redesignation decision ("Redesignation") to DLCD
6/2/2011	Maletis timely submits letter incorporating prior objections and making five (5) new objections to Redesignation
7/28/2011	DLCD issues Redesignation Staff Report recommending denial of all Maletis objections
8/8/2011	Maletis files these exceptions to Redesignation Staff Report

C. Description of the Maletis Property

The Maletis Property is located in the French Prairie area south and east of the City of Wilsonville in Clackamas County. The Maletis Property is generally located south of the Willamette River, east of I-5, and west of Airport Road in Clackamas County. It is within the immediate area of the Aurora State Airport and short and main line railways. The Maletis Property is generally flat, but it does not lie within any floodplains. Moreover, the Maletis Property does not include any important natural landscape features, such as plant or wildlife habitat or other features that define and distinguish the region. As a result, the Maletis Property is generally unconstrained and buildable.

After completing a comprehensive analysis of the Maletis Property and its suitability for urban or rural purposes, Clackamas County staff rated the Maletis Property as having "medium" or "high" suitability for an urban reserve designation on all factors, with the exception of three subfactors.

D. Exceptions Incorporated by Reference

On October 8, 2010, Maletis filed the following six (6) exceptions with LCDC to the Designation Staff Report:

- Exception #1: DLCD erred in deferring to Metro and the Counties' designation of the Maletis Property as a "rural reserve" when the decision to adopt such designation misconstrued applicable law and was not supported by substantial evidence.
- Exception #2: DLCD erred in recommending denial of Maletis' objection that substantial evidence supports designating the Maletis Property as an "urban reserve."
- Exception #3: DLCD erred in determining that Metro complied with state law when it relied upon a new unacknowledged report extraneous to its acknowledged functional plan for the purpose of identifying population and employment growth forecasts to determine land needs for reserve designations.
- Exception #4: DLCD erred in finding that there is an adequate factual base to support the conclusion that all lands within three (3) miles of the UGB are necessarily "subject to urbanization" for purposes of OAR 660-027-0060(2)(a).
- Exception #5: DLCD erred in finding that there is substantial evidence in the whole record to assure that the Decision, as it will be implemented by the Counties, is in compliance with Goal 9.

- Exception #6: DLCD erred in finding that Metro and the Counties were not required to apply the TPR when the Decision included amendments to each local government's comprehensive plan, and no provision of law exempted the reserve process from the TPR analysis.

Maletis supported these exceptions with detailed legal arguments and citations to facts in the record and provisions of statutes, administrative rules, and case law. DLCD staff recommended that LCDC deny each of these objections in the Designation Staff Report. LCDC did not issue a final written decision on the exceptions. On remand, Metro and the Counties did not properly address or correct any of the issues raised in the Exceptions. Therefore, Maletis raised them again as objections to the Redesignation. DLCD staff responded as follows:

"For the re-designation submittal, the objectors' first objection specifically maintains their prior objections on the same grounds and for the same reasons set forth in their objections filed July 14, 2010. [Footnote omitted.] The department addressed those objections in the department's September 28, 2010 report, including at pp. 30-32, 46-47, 49-50, 56-57, and 79-82. Nothing in the recent objection or the intervening period causes the department to reconsider its prior recommendation."

Redesignation Staff Report 53. As reflected in this passage, the Redesignation Staff Report does not address the substance of, correct, eliminate, or otherwise resolve the substantive legal basis for Maletis' exceptions in any way. Therefore, the Redesignation maintains the same deficiencies as the Designation, particularly as it relates to the Maletis Property. As such, Maletis takes exception to the Redesignation Staff Report on the same grounds and for the same reasons set forth in the October 8, 2010 letter filing the exceptions. For the sake of efficiency, Maletis does not restate the arguments and evidence in support of the exceptions in full in this letter but instead incorporates same by reference herein in response to the Redesignation. On the basis of this incorporated evidence and argument, LCDC should uphold the exceptions and remand the Redesignation.

E. Additional Exceptions

Maletis raises the following additional exceptions to the Redesignation Staff Report, which are numbered consecutively from the last exception incorporated by reference ("Exception #6):

Exception #7: DLCD staff erred by failing to acknowledge that LCDC is subject to but has not yet complied with ORS 197.040 in this matter.

Maletis takes exception to DLCD staff's interpretation of ORS 197.040. Maletis raised the issue of compliance with ORS 197.040 in its June 2011 objections letter, but it was not in the form of an objection. Nevertheless, DLCD staff responded to the issue in the Redesignation Staff Report by contending that ORS 197.040 does not impose any requirements on the Counties or Metro. Maletis agrees; however, this statute is nevertheless applicable to LCDC in its final exercise of its statutory duties, and there is no evidence that DLCD anticipates and addresses such required analysis nor has LCDC complied with same to date. Therefore, LCDC must comply with the statute prior to rendering its decision in this matter. Moreover, properly applied, this statute supports leaving the Maletis Property as "undesignated."

a. LCDC must apply ORS 197.040(1)(b) in this matter.

ORS 197.040 establishes the duties of LCDC. Pursuant to ORS 197.040(1)(b), when "designing its administrative requirements," LCDC is obligated to, among other things:

"(C) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;

(D) Assess the likely degree of economic impact on identified property and economic interests; and

(E) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact."

As such, when considering reserves designations, LCDC must consider all alternatives, including whether leaving property as "undesignated" serves the same state interest as a "rural reserve" designation while imposing fewer burdens on identified economic interests, including the State. Again, there is no evidence that DLCD or LCDC has engaged in this analysis. DLCD staff also appear to contend that this statute is only applicable when LCDC conducts rule-making, not when it applies existing rules. However, the express language of this statute does not so limit its scope and application. Therefore, LCDC must conduct the alternatives analysis of ORS 197.040(1)(b) prior to rendering its decision.

b. Properly applied, ORS 197.040(1)(b) supports leaving the Maletis Property "undesignated."

Pursuant to ORS 197.040(1)(b), LCDC should leave the Maletis Property "undesignated" for two reasons. First, leaving the Property as "undesignated" serves the same state interest as a "rural reserve" designation, because the existing regulatory scheme (Statewide Planning Goals 3 and 14 and related implementing rules and ordinances) prevents urban development of the Property until

such time as need is demonstrated through an established public process. This mandatory review process will consider and address any off-site impacts and service delivery issues.

Second, classifying the Maletis Property as "undesignated" would also impose less substantial economic impacts than the "rural reserve" designation. A "rural reserve" designation would effectively preclude development of the Maletis Property over a 50-year time period, which would be detrimental to the economic well-being of the entire region based upon testimony in the record from the Port of Portland and Clackamas County Business Alliance. By contrast, if the Maletis Property remains "undesignated," there is some potential that it could develop with urban uses if the balance of Metro-area urban reserves develop or if state officials deem in the future that there is a need to designate industrial areas (e.g., SB 766). Such development would generate various economic benefits to the region, including much-needed growth in employment and ad valorem tax revenues. An "urban reserve" designation offers similar development potential but, again, only upon demonstrated compliance with applicable criteria.

LCDC should grant this exception, properly apply ORS 197.040(1)(b), and remand with direction to leave the Maletis Property as "undesignated" or designate it "urban reserve."

Exception #8: DLCD staff erred in finding that Clackamas County's local process for the Redesignation was lawful. Further, DLCD staff erred in inconsistently defining LCDC's scope of review and in failing to recognize that to the extent LCDC validates an unlawful local decision, LCDC's decision itself becomes unlawful.

Maletis takes further exception to DLCD's recommendation that LCDC deny Maletis' objection that Clackamas County committed both procedural and substantive errors in its consideration of the Redesignation. DLCD's recommendation both misconstrues the requirements of Clackamas County's process and improperly defines LCDC's scope of review. Therefore, LCDC should grant this exception.

a. DLCD misconstrued the requirements for Clackamas County's process.

First, DLCD erred in its characterization of the process Clackamas County was required to conduct on remand. County zoning and land use planning regulations are generally adopted and amended by ordinance. ORS 215.050(1) (county shall adopt a comprehensive plan "and other ordinances"); ORS 215.503(2) (all legislative acts relating to comprehensive plans, land use planning, or zoning adopted by county governing body "shall be by ordinance"). Furthermore, subject to limited exceptions, legislative ordinances must typically be read at two different meetings on two separate dates. ORS 203.045(3). A county governing body must provide a public hearing in conjunction with the adoption of an ordinance amending a comprehensive plan. ORS 215.503(3).

In order to amend an ordinance that has already been adopted, a county must follow an amendment process that is substantially similar to that used to adopt the ordinance. *See Fifth Avenue Corp. v. Washington County*, 282 Or 591, 581 P2d 50 (1978) (resolution amending local comprehensive plan was effective, because the county process to adopt the resolution was substantially similar to that used to adopt an ordinance, including that it provided a meaningful opportunity for public input after adequate notice); *Gearhard v. Klamath County*, 7 Or LUBA 27 (1982) (a county order not adopted with the formalities of an ordinance cannot amend an ordinance or otherwise control application of an ordinance). In a challenge to Clackamas County amendment procedures, LUBA held that if Clackamas County believes that ordinance provisions are unnecessary or require modification, it must amend the ordinance to delete the provisions in question; it may not by order choose to disregard them. *Palaske v. Clackamas County*, 43 Or LUBA 202 (2002).

On May 27, 2010, the Clackamas County Board of Commissioners ("BOC") adopted Ordinance No. ZDO-223 ("Ordinance") which amended the County's adopted comprehensive plan to adopt urban and rural reserves. Section 2 of the Ordinance adopted findings in support of the County's decision ("Designation Findings"). On April 21, 2011, the BOC adopted "Overall Findings for Designation of Urban and Rural Reserves" and "Revised Findings for Clackamas County Urban and Rural Reserves" (together, "Redesignation Findings"). These documents were free-standing and not included as part of an ordinance, resolution, or order. The BOC considered them as a consent agenda item and did not accept public testimony at the meeting before adopting the Redesignation Findings. In addition, the Redesignation Findings do not state that they replace or supersede the Designation Findings.

Thus, the procedures followed by the BOC lacked adequate notice and a meaningful opportunity to be heard. As a result, the BOC's procedures were not substantially similar to the procedures followed by the County when adopting the Ordinance in 2010. Therefore, consistent with *Gearhard* and *Palaske*, the BOC's action is unlawful and is not an effective amendment to the Ordinance and the Designation Findings. In fact, because the Redesignation Findings do not indicate that they replace or supersede the Designation Findings, the BOC's action actually creates conflicting findings relating to reserves. Under these circumstances, the BOC's improper process creates both procedural and substantive errors.

In the Redesignation Staff Report, DLCDC contends that Clackamas County was not required under Oregon law to utilize its ordinance adoption process to adopt findings. LCDC should deny this contention for two reasons. First, it fails to cite to any authority for its position and further fails to respond to any of the LUBA cases referenced by Maletis above that state to the contrary. Second, even assuming *arguendo* that DLCDC staff's general point is correct, it fails to recognize that the instant case does not simply involve adoption of findings but rather adoption of findings that purport to amend earlier findings incorporated by reference within an adopted ordinance.

Therefore, LCDC should find that Clackamas County has erred, and DLCD has erred in not finding error in this instance.

b. DLCD has improperly defined the scope of review on appeal to LCDC.

Second, DLCD contends that LCDC does not have the authority to remand Clackamas County's decision due to the limited scope of review set forth in OAR 660-027-0080(4). Specifically, DLCD states:

"Because this objection fails to establish that the re-designation submittal is non-compliant with the goals or applicable administrative rules, or that the county failed to consider the factors for designation of lands as rural reserves under OAR 660-027-0060, it provides no basis for the Commission to remand the re-designation submittal."

Redesignation Staff Report 54. Maletis understands DLCD in this passage to say that LCDC has the authority to authorize and validate local actions that do not comply with state law and further, that such local actions are immune from LCDC's review unless they happen to relate to compliance with a Statewide Planning Goal or administrative rule. However, on page 12 of the Redesignation Staff Report, DLCD staff has already stated otherwise:

"* * * [R]eview is of the written record, and is limited to whether the decisions are: (a) unlawful in substance or procedure (however, error in procedure is not cause for reversal or remand unless the substantial rights of a person who filed a valid objection were prejudiced); (b) unconstitutional; or (c) not supported by substantial evidence in the whole record. SB [1011], section 9."¹

¹ This passage correctly identifies the standard of review that the Court of Appeals is required to apply to any appeal of LCDC's order on Portland Metro reserves. *See, e.g.*, ORS 197.651(10) ("The Court of Appeals shall reverse or remand [LCDC's] order only if the court finds the order is:

- (a) Unlawful in substance or procedure. However, error in procedure is not cause for reversal or remand unless the Court of Appeals determines that substantial rights of the petitioner were prejudiced.
- (b) Unconstitutional.
- (c) Not supported by substantial evidence in the whole record as to facts found by [LCDC].")

Thus, at a minimum, DLCD has erred because the Redesignation Staff Report is internally inconsistent in defining the applicable scope of review. Further, however, by referencing the Court of Appeals' standard of review on appeal from LCDC, the Redesignation Staff Report acknowledges and underscores that, to the extent LCDC authorizes local decisions that are unlawful, LCDC's action itself becomes unlawful and will be reversed or remanded on appeal to the Court of Appeals.

For these reasons, LCDC should grant this exception.

Exception #9: The Redesignation violates the State and Federal Equal Protection Clauses, both facially and as applied, and DLCD staff erred in contending that LCDC should either not consider or deny this objection.

Maletis takes further exception to DLCD's contention that LCDC should either not consider or deny Maletis' objection that the Redesignation violates the State and Federal Equal Protection Clauses, both facially and as applied. DLCD's contention misconstrues applicable law in two ways. Therefore, LCDC should grant this exception.

a. DLCD erred in recommending that LCDC not reach the merits of this issue.

First, DLCD staff contend that LCDC should deny this objection because it "fails to establish that the re-designation is non-compliant with the goals or applicable administrative rules, or that the county failed to consider the factors for designation of lands as rural reserves under OAR 660-027-0060." Redesignation Staff Report 55. In short, DLCD contends in the Redesignation Staff Report that this issue is outside the scope of LCDC's review. Maletis understands DLCD to say, effectively, that LCDC has the authority to authorize and validate local actions that do not comply with state and federal law, and further, that such local actions are immune from LCDC's review unless they relate to compliance with a Statewide Planning Goal or administrative rule. LCDC should deny DLCD's contentions for the reasons explained above in Exception #8: The Court of Appeals will be reviewing LCDC's decision under ORS 197.651(10) to determine whether or not it is constitutional. Therefore, LCDC must ensure that its decision is not unconstitutional by virtue of affirming an unconstitutional decision made by Metro and the Counties. This will require that LCDC consider the merits of this Exception.

b. DLCD erred in its analysis of the merits of this issue.

Second, DLCD staff contend that, if LCDC reaches the merits of this issue, LCDC should deny Maletis' objection because Maletis has not demonstrated that: (1) it is part of a "true class," or (2) even if so, that distinguishing between farmland and non-farmland does not have a legitimate legislative end. DLCD's analysis misconstrues the law and facts at issue.

First, Maletis is part of a "true class" for purposes of the Federal and State Equal Protection Clauses. The Court of Appeals of Oregon held that a "true class" is one that is defined in terms of characteristics independent of the challenged statute. *Tanner v. OHSU*, 157 Or App 502, 520, 971 P2d 435 (1998). Maletis belongs to the group of owners of farmland outside urban growth boundaries in Oregon. The reserves statutes and rules do not create this class; rather, the class exists independent of these provisions. Therefore, Maletis belongs to a "true class." LCDC should deny DLCDC's contention to the contrary.

Second, the state's favoring of farmland over non-farmland (including forestland) is not rationally related to a legitimate state interest. The purpose of the Equal Protection Clause "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Where a person "has been intentionally treated differently from others similarly situated and [] there is no rational basis for the difference in the treatment," that action would support an equal protection claim. *Id.* "Disparate government treatment will survive rational basis scrutiny as long as it bears a rational relation to a legitimate state interest." *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004). "[T]here is no rational basis for state action that is malicious, irrational or plainly arbitrary." *Id.*

The Redesignation is facially invalid because it does not treat similarly-situated properties/owners in a similar manner. The land use statutes governing designation of reserves unlawfully protect farmland owners at the expense of non-farmland owners. In order to designate farmland as an urban reserve, there must be "a demonstration that there are no reasonable alternatives that will require less, or have less effect upon, resource land." There is no similar protection with respect to the designation of any land as a rural reserve. Moreover, there is no similar demonstration required for designating forestland as an urban reserve. This stark difference in process has no relationship to any legitimate state interest, and thus, violates the Federal and State Equal Protection Clauses.

Second, the evidence in the record shows that Metro and the Counties applied the reserve designation rules to similarly situated properties in a disparate manner based on improper political distinctions. Instead of applying the reserve factors in a fair and equitable manner, Metro and the Counties created pretextual "justifications" for its actions. For example, Clackamas County justified its "rural reserve" designation of the Maletis Property primarily because it is located south of the Willamette River. This conclusion greatly oversimplifies the analysis and improperly elevates form over substance in the reserve designation process.

Whether a boundary presents well on a map does not provide a basis for a conclusion of substantive compliance with applicable criteria. In short, a pretextual justification cannot be

used as a rational basis for the disparate treatment of the Maletis Property. This is especially true when there are several instances where Metro and the Counties chose to ignore natural boundaries when designating urban reserves, including on the Peterkort property in Washington County, which is designated as an urban reserve but is located on the "rural" side of Rock Creek. For these reasons, the Redesignation is unconstitutional and must be remanded.

LCDC should grant this exception.

Exception #10: Metro has no authority to designate reserves on land located outside the Metropolitan Service District boundary, and DLCD erred in concluding otherwise.

Maletis takes further exception to DLCD's recommendation that LCDC deny Maletis' objection that Metro has no authority to designate reserves outside of the boundary of the Metropolitan Service District. DLCD's contention does not identify an express grant of authority for Metro to act outside its boundaries. Moreover, DLCD's resort to maxims of statutory construction to support its contention is inappropriate because there is no identified ambiguity to resolve. For these reasons, LCDC should deny DLCD's contention and grant this exception.

a. Maletis' objection.

Metro has broad authority to exercise jurisdiction over matters of metropolitan concern but only "as authorized by a district charter." ORS 268.310(6). Pursuant to the Metro Charter, Metro's jurisdiction is coterminous with the boundaries of the metropolitan service district. *See, e.g.,* Metro Charter, Chapter I, Section 3 ("The Metro Area of governance includes all territory within the boundaries of the Metropolitan Service District...and any territory later annexed or subjected to Metro governance under state law.") Likewise, state law authorizing Metro to engage in land use planning activities is limited to areas inside the designated metropolitan service district. *See, e.g.,* ORS 268.380(1)(a) (Metro has the authority to adopt land use goals and objectives "for the district"); ORS 268.380(1)(c) (Metro may coordinate land use planning activities with cities and counties, but only those "within the district").

Although ORS 195.137 through 195.145 purport to allow Metro, in tandem with area counties, to designate urban reserves, these provisions do not explicitly extend the geographic scope of Metro's governing authority outside of the boundaries of the metropolitan service district. Rather, the Legislature's grant of authority in ORS Chapter 195 must be read consistent with the statutory and charter provisions cited above, which clearly confine Metro's jurisdiction to a limited geographic area. Therefore, to the extent that the Redesignation purports to designate urban reserves outside of the boundaries of the metropolitan service district—and it appears that it does in, at least, areas of Washington County--the Redesignation exceeds the scope of Metro's authority and is void *ab initio*.

b. DLCD's response.

DLCD offers two contentions in response. First, DLCD staff contend that Metro's actions are authorized by ORS 195.145(1)(b) (allowing Metro to enter an intergovernmental agreement with a county to designate reserves) and by ORS 268.380 (allowing Metro to coordinate land use planning with cities and counties). However, neither of these statutes expressly authorize Metro to designate reserves outside of the metropolitan service district boundary. In fact, as explained above, ORS 268.380 appears to limit such coordinating authority to the geographic limits of the metropolitan service district. Thus, DLCD's argument based upon the plain text of the statutes is not persuasive.

Second, DLCD offers two maxims of statutory construction to support its contention. However, it is well-settled under Oregon law that resort to maxims of statutory construction only occurs in the last step of the analysis of legislative intent, after analysis under the first two steps has failed to resolve the identified ambiguity. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 612, 859 P2d 1143 (1993). DLCD has not identified any ambiguity in the statute. Therefore, it is premature to resort to maxims of statutory construction at this time, and DLCD has erred in so doing.

For these reasons, LCDC should grant this exception.

Exception #11: The Redesignation does not properly address Maletis' objection to reliance on the "safe harbor" provision of OAR 660-027-0060(4).

Maletis takes further exception to DLCD's recommendation that LCDC should deny Maletis' contention that the Redesignation improperly applies the "safe harbor" provision of OAR 660-027-0060(4). DLCD's contention is rebutted by substantial evidence to the contrary in the record. Therefore, LCDC should grant this exception.

Maletis originally contended that Metro and the Counties could not permissibly apply the "safe harbor" provision as the sole basis to designate properties as rural reserves when ORS 195.141(3) and (4) requires that Metro and the Counties apply all rural reserve factors to a reserve designation decision. Although Clackamas County's findings for the Redesignation modify the findings for the Designation by including additional findings in response to each of the applicable rural reserve criteria for the Maletis Property, the Redesignation findings are deficient for two reasons. First, they are deficient because they are too generalized as to Area 4J as a whole and overlook the fact that the Maletis Property is uniquely suited for urban development in ways that the remainder of Area 4J is not.

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In the Redesignation Staff Report, DLCD staff contend that Maletis at best establishes conflicting evidence on the issue and therefore there are no grounds to reverse or remand the Redesignation. DLCD is incorrect. Maletis has not simply identified conflicting evidence but evidence that undermines the evidence relied upon in support of the Redesignation. For example, the Port of Portland and the Clackamas County Business Alliance have testified on the record that the Maletis Property is of unique and significant economic importance and has high potential for employment growth with comparatively low infrastructure and service delivery costs. These characteristics distinguish the Maletis Property from the remainder of Area 4J, and the Redesignation analysis and findings should as well. DLCD does not rebut this specific allegation, presumably because the Redesignation decision does not address it in sufficient detail to allow such a response.

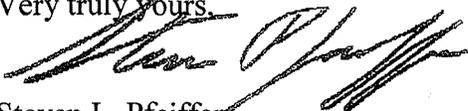
The Redesignation findings on this issue are deficient for a second reason. As explained above in Exception #8, Clackamas County improperly amended its earlier Designation ordinance and findings by failing to utilize the same process followed at the time of the original adoption of the Designation. Therefore, the Redesignation findings are invalid and do not address Maletis' original objection that Clackamas County could not permissibly apply the "safe harbor" provision as the sole basis to designate the Maletis Property as a rural reserve when ORS 195.141(3) and (4) requires that Metro and the Counties apply all rural reserve factors to a reserve designation decision. LCDC should grant this exception.

F. Recommended Actions and Conclusion

For the reasons set forth herein, LCDC should: (1) grant Maletis' 11 exceptions, including those incorporated by reference herein; and (2) remand the matter with direction to Metro and the Counties to remove the "rural reserve" designation from the Maletis Property, to redesignate the Maletis Property as "urban reserve," and to otherwise address the legal deficiencies identified herein. This matter is scheduled to come before LCDC at its meeting of August 17-19, 2011. Maletis requests the opportunity to present oral argument relating to these exceptions at that meeting and prior to LCDC's decision in this matter. Maletis is happy to answer any questions at that time.

Thank you for your attention to these exceptions and for your time in considering this complex and important matter.

Very truly yours,



Steven L. Pfeiffer

cc: Clients