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 Metropolitan Land Group ("MLG"), the owner of approximately 38 acres of property located in the 607-acre study area known as East Bethany in Multnomah County, commonly known as the "L" within Study Area 9B ("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, the "Counties"). Please place this letter in the official record before the Land Conservation and Development Commission ("LCDC") in this matter and consider it prior to rendering a decision on the Redesignation.

The Redesignation does not modify the 2010 decision by Metro and the Counties ("Designation") to designate the Property as a "rural reserve." Like the Designation, the Redesignation is not supported by substantial evidence; is rebutted by substantial evidence to the contrary; misconstrues applicable law; and is inconsistent with the Statewide Planning Goals, applicable administrative rules, and binding case law. Accordingly, MLG takes exception to the Redesignation.
1. **Exceptions Incorporated by Reference.**

On October 8, 2010, MLG filed the following six exceptions ("Exceptions") with LCDC to DLCD's September 28, 2010 staff report ("Designation Staff Report") for the Designation:

- **Exception #1:** DLCD erred in deferring to Metro and the Counties' designation of the 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 MLG's objection that substantial evidence supports designating the 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 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.

- **Exception #6:** DLCD erred in finding that MLG's Objection #6 was invalid for lack of a remedy, when MLG suggested a remedy when it filed the objection. Further, DLCD erred in failing to consider and grant the objection on the merits when the enforcement of OAR 660-027-0060(4) ("safe harbor" rule) by Metro and the Counties violates ORS 195.141(3) and (4).

MLG supported the 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, MLG raised them again as objections to the Redesignation ("Redesignation Objections"). DLCD staff responded as follows:
"[T]he department recommends that the Commission not reconsider the department recommendation to reject these previously presented objections and exceptions."

Redesignation Staff Report 57. 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 MLG's Exceptions in any way. Therefore, the Redesignation maintains the same deficiencies as the Designation, particularly as it relates to the Property. As such, MLG takes exception to the Redesignation Staff Report on the same grounds and for the same reasons set forth in the Exceptions. For the sake of efficiency, MLG 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.

2. LCDC Should Deny Multnomah County's Contentions that LCDC Should Not Review the Objections.

On July 26, 2011, Multnomah County filed a letter through its counsel, asserting that LCDC should not review MLG's objections to the Redesignation ("Redesignation Objections"). LCDC should deny these contentions because they misconstrue the law and facts at hand.

A. MLG's Redesignation Objections Do Not Exceed the Scope of LCDC's Remand.

First, Multnomah County contends that the Redesignation Objections exceed the scope of LCDC's remand because LCDC did not remand any reserves designations in Multnomah County. As such, Multnomah County contends its action on remand was limited to adopting revised overall findings which did not reach new conclusions or designations for any properties in Multnomah County. While MLG does not disagree with Multnomah County's general description of the procedural posture of the remand, these facts do not preclude MLG from filing, and LCDC from considering, the Redesignation Objections for two reasons. First, the designation of reserves is to be made on a regional scale based upon the projected 50-year population and employment growth required to sustain the entire metropolitan area. For example, OAR 660-027-0040(2) states in relevant part as follows:

"Urban reserves designated under this division shall be planned to accommodate estimated urban population and employment growth in the Metro area for at least 20 years, and not more than 30 years, beyond the 20-year period for which Metro has demonstrated a buildable land supply inside the UGB in the most recent inventory, determination and analysis performed under ORS 197.296. Metro shall specify the particular number of years for which the urban reserves are
intended to provide a supply of land, based on the estimated land supply necessary for urban population and employment growth in the Metro area for that number of years. * * *" (Emphasis added).

As such, the elimination of urban reserves land by Washington County necessarily affects the entire region by reducing the amount of land available to accommodate the expected growth of the Portland area for the next 50 years. One obvious remedy would be for other jurisdictions, such as Multnomah County, to adopt a corresponding increase in the amount of urban reserves land to offset the deficit created by Washington County. In this way, the individual reserves decisions of each of the Counties are not isolated in nature but have implications for the other Counties and Metro. As a result, even a "remand that is limited in scope" to Washington County lands has implications for Multnomah County. Therefore, MLG's Redesignation Objections are both allowed and appropriate.

Second, Multnomah County has not—and cannot—cite to any statute or rule that precludes MLG from raising the Redesignation Objections, particularly in light of the fact that the Redesignation is not limited to Washington County but specifically redesignates all reserves, including the "rural reserve" affecting the Property. Finally, MLG wonders if it did not file the Redesignation Objections and Exceptions to the Redesignation whether Multnomah County would contend that MLG was waiving its concerns by not raising them anew. For these reasons, LCDC should deny this contention and consider the Redesignation Objections.

B. MLG Has Not Waived the Redesignation Objections Because MLG Timely Raised All of Them in 2010.

Second, Multnomah County contends that LCDC should not review MLG's Redesignation Objections because they should have been raised by October 2010, the date of LCDC's prior action on the reserves appeal. In fact, MLG did raise the Redesignation Objections prior to LCDC's action, in a letter to DLCD dated July 14, 2010. Furthermore, the Redesignation Objections simply restate these earlier objections, as noted in MLG's May 31, 2011, letter to DLCD:

"** * *MLG objects to the Redesignation on the same grounds and for the same reasons set forth in the Objections. For the sake of efficiency, MLG does not restate the Objections in full in this letter but instead incorporates the Objections by reference herein, including the statement of standing and the recommended changes to resolve the Objections, in response to the Redesignation."

In short, MLG has not raised any new objections in 2011. As such, MLG simply reasserted its prior objections to DLCD/LCDC in order to underscore that the Redesignation did nothing to remedy the shortcomings of DLCD's analysis and conclusions for the Designation. Therefore,
MLG did not waive any objections by failing to raise them in 2010, because MLG raised all of its objections in 2010. LCDC should deny Multnomah County's contentions to the contrary.

3. Conclusion.

For the reasons set forth above and as further elaborated in the record, LCDC should: (1) grant MLG's Exceptions; and (2) remand the Redesignation to Metro and the Counties to remove the "rural reserve" designation from the Property, to redesignate the Property as an "urban reserve," and to otherwise address the legal deficiencies identified in the Exceptions.

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: John O'Neil, Metropolitan Land Group, LLC  
    Matt Wellner, Metropolitan Land Group, LLC  
    Seth King, Perkins Coie