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October 8, 2010

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LAND CONSERVATION
AND DEVELOPMENT

John VanLandingham, Chair
Land Conservation and Development Commission
635 Capitol Street NE
Suite 150
Salem, OR 97301-2540

Re: Exceptions to DLCD staff report – Metro Urban and Rural Reserves

Dear Chairman VanLandingham and Commissioners:

Please accept these exceptions to the staff report of September 28, 2010, on behalf of the City of Wilsonville. As we have noted before, Wilsonville is located in both Washington and Clackamas Counties and has been directly involved in decisions made by Metro and both counties relative to the reserves. Wilsonville now has large areas of both urban and rural reserves adjacent to our city limits.

The City of Wilsonville hereby presents two exceptions for your Commission's consideration:

1. That DLCD correctly determined that Area 4J has been properly designated a rural reserve, but did not go far enough in supporting that decision; and
2. That DLCD erred in concluding that all of Area 5F has been properly designated an urban reserve.

I. Designation of Area 4J as Rural Reserve

The City's July 14, 2010, Objection letter specifically called out the French Prairie area and its designation as a rural reserve under the "safe harbor" rule in OAR 660-027-0060(4)[1] in order to preserve the ability to make argument before LCDC.

In response to the Maletis Family Objection claiming that, as applied, the use of the "safe harbor" provision of the rule violates ORS 195.141(3) and (4), the Department noted as follows:



“This section permits a county to assign a rural reserve designation to a property classified as a Foundation or Important Agricultural Land by the Oregon Department of Agriculture without making findings addressing the factors. The “safe harbor” provision in OAR 660-027-0060 (4) does not replace the factors from statute and rule, but rather identifies a circumstance where, in the Commission’s judgment, the factors are already adequately considered based on prior analysis that the Oregon Department of Agriculture (ODA) carried out that evaluated lands in the region based on the same considerations. Counties are not required to utilize the safe harbor (and Washington County did not), but the Commission’s rule authorizes them to do so. There is no legal error in determining that the county may rely on a preexisting analysis that the Commission determines adequately considers the statutory factors for designating land as rural reserve under ORS 195.141(3).”

The Department’s analysis is good as far as it goes. However, it does not go far enough.

The City submits that there is an even stronger, more direct response available.

The Maletis Family objection is that the use of the safe harbor rule violates ORS 195.141(3) and (4) by allowing the designation of a rural reserve without applying the statute’s factors. This position misreads subsection (4) of the statute. ORS 195.141(4) provides as follows:

*“The Land Conservation and Development Commission shall, after consultation with the State Department of Agriculture, adopt by goal or by rule a *process and criteria* for designating rural reserves pursuant to this section.” (Emphasis supplied.)*

“This section” is ORS 195.141, which, as we know, provides the legislature’s stated requirements for rural reserve designations. The section contains criteria that must be met,^[2] and factors that form the basis of a designation.^[3] In administrative law parlance, “criteria,” as mandatory standards, have primacy over “factors” that are to be taken into account.¹ So viewed, ORS 195.141(4) is understood to authorize and require LCDC, in consultation with the Department of Agriculture, to adopt a rule that provides a “process and criteria” for rural reserve designation that may add to, incorporate, or replace the consideration of the enumerated factors. In promulgating the safe harbor rule, the Commission has done exactly that, by providing a qualifying standard that displaces the factors and raises the bar for rural land designation. Actions by a county pursuant to this rule, designating rural reserves for certain Foundation Agricultural Lands described by the rule, are therefore inherently consistent with ORS 195.141.

This is a fair textual reading of ORS 195.141(4). Construing the authority of the Commission to go beyond adopting implementing rules -- to adopt "criteria" for a reserve designation—is also borne out by the statutory context.

Contrary to the Maletis objection, ORS 195.141(4) is not merely an authorization for LCDC to implement the reserves statute through rules. The general authority to promulgate rules to carry out ORS chapter 195 is already contained in ORS 197.040(1) (b).^[4] In requiring the Commission to adopt "criteria" for rural reserve designation, the state legislature delegated the authority to promulgate mandatory standards that, as we have seen, may supersede the consideration of "factors." Statutory construction maxims in the law support this view.^[5]

The correct interpretation of ORS 195.141(4) and resultant validity of the safe harbor rule is also supported by legislative history leading up to the adoption of the rule. In the report of DLCDC to the Commission for its November 15, 2007, rulemaking, the Department describes the Oregon Department of Agriculture, whose coordination the statute requires, along with other workgroup members, as urging the Commission to "raise the bar" with regard to qualification of lands mapped as Foundation Agricultural Land, without the required findings regarding application of the factors. (Staff report, page 15.)

Beyond the staff's findings and recommendations, it appears that the text, context and legislative history surrounding the authorization of the safe harbor rule offer further reasons why the Maletis objection should be denied. In light of the foregoing, and for the reasons stated herein, the City urges the Commission to find that in the rural reserve designation of Area 4J, Metro and Clackamas County properly construed and applied the applicable law.

II. Designation of Area 5F as Urban Reserve

The City of Wilsonville supports the inclusion of the portion of Area 5F within the Southwest Tualatin Concept Planning Area as an urban reserve, but maintains its objection to the urban reserve designation for the remainder of 5F, faulting Metro's application of the statutory factors as not supported by substantial evidence. Specifically, the City of Wilsonville noted that the area is within the "Tonquin Geologic Corridor," and is mapped in Metro's February 2007 "Natural Landscape Features Inventory." We maintain that the decision to designate the entire area as an urban reserve did not adequately address the required factors for such an area.

The Department's recommended denial of the objection is facile. It does so by noting that: 1) part of the area is included as potential industrial land in a concept plan prepared by the City of Tualatin; 2) the area has long been included in the study area as an urban reserve; and 3) the record supports that there is a capacity for natural feature protection, because the area "can be protected and

enhanced under the existing regulatory framework in Washington County, Sherwood and Tualatin.” (Staff report, page 83.)

The Department’s recommendation for denial followed its response to like objections wherein it states that no provision of the applicable statutes or rules requires a parcel-specific analysis for reserve-boundary location decisions.

The City acknowledges that Metro is not generally required to designate urban reserves by findings that explain the details of each segment of the boundary selected by Metro. But the Department is wrong when it states that no law requires a sub-area analysis under the factors.

Where, as here, land has been identified by Metro as “important natural landscape features that limit urban development,” the statutory scheme requires that these areas be analyzed as a rural reserve, independent of their inclusion in an area that, for study purposes, has been considered as a possible urban reserve. The reserves statute specifically provides that “important natural landscape features” be an essential and defining part of a rural reserve. See, ORS 195.137(1). Commission rules carry this defining characteristic forward. (See OAR 660-027-0010(9).)

To further carry out the intent of the legislature, the Commission has provided in OAR 660-027-0005(2) that reserve designations are to “best achieve” among other things, the “protection of the important natural landscape features that define the region for its residents.” Lastly, OAR 660-027-0060(3) provides that “when *identifying* and selecting land for designation as rural reserves intended to protect important natural landscape features, a county must consider *those areas* identified in Metro’s February, 2007, “Natural Landscape Features Inventory” and other pertinent information, and shall base its decision on consideration [of the factors] (Emphasis added.)

Question: how is it that Metro and the counties can avoid manifest legislative intent that certain natural areas – especially those everyone agrees are regionally “important”— be considered for rural designation? How can these lands be ignored simply because they happen to be included in an area recently thought to be urban, or subject to local regulations thought to be sufficiently protective?

The answer is, “they can’t”. Metro and Washington County have erred by not applying the rural reserve criteria and factors to the Tonquin Geologic Area, as mapped and identified by Metro, and DLCD staff have erred by recommending that your Commission accept the determinations of Metro and Washington County without further review.

The City of Wilsonville asks that your Commission partially remand the decision on Area 5F to Metro and Washington County. That partial remand should

logically apply to those portions of 5F that are outside of the Southwest Tualatin Concept Planning Area. At a minimum, that remand should apply to lands specifically approved for federal acquisition as part of the Tualatin River National Wildlife Refuge (map on record from January 21, 2010, Metro Council Hearing and attached here).

[1] OAR 660-027-0060(4) provides: Notwithstanding requirements for applying factors in OAR 660-027-0040 (9) and section (2) of this rule, a county may deem that Foundation Agricultural Lands or Important Agricultural Lands within three miles of a UGB qualify for designation as rural reserves under section (2) without further explanation under OAR 660-027-0040 (10).

[2] E.g.; land must be outside a UGB. 195.1412(a)

[3] E.g.; is suitable to sustain long-term agricultural operations. ORS 195.141 (3) (d)

[4] (1) The Land Conservation and Development Commission shall: (b) In accordance with the provision of [the administrative procedures act] adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197.

[5] ORS 174.020, PGE v. BOLI 317 Or 606 (1993). The more specific authorization controls the general, and the use of specific terms not appearing in the general statute mean something.

In conclusion, the two exceptions articulated herein by the City of Wilsonville request that your Commission:

1. Find that DLCD correctly determined that Area 4J has been properly designated a rural reserve, but add to the findings in support of that decision; and
2. Remand that portion of Area 5F that is outside of the Southwest Tualatin Concept Planning Area that has been designated an urban reserve; and

Thank you for your consideration of these comments and for all of your hard work on these important issues.

Sincerely,



Tim Knapp
Mayor

Copies: Richard Whitman, Director, DLCD
Bob Rindy, DLCD Senior Policy Analyst
Wilsonville Planning Commission and City Council

Attachment: Map of Area 5F

Area 5F Exception

-  Southwest Tualatin Concept Plan Sub-Area
-  FEMA Floodplains
-  County Boundary Lines
-  Area 5F
-  Rural Reserve
-  Approved Refuge Acquisition Areas
-  Cities



October 2010

0 500 Feet

5F Urban

BPA Easement

Southwest Tualatin
Concept Plan
Sub-Area
117 Acres

Coffee Creek
Correctional
Facility

French, Larry

From: Donnelly, Jennifer [jennifer.donnelly@state.or.us]
Sent: Friday, October 08, 2010 4:33 PM
To: larry.french@state.or.us
Cc: Whitman, Richard
Subject: FW: Scanned from a Xerox multifunction device

Attachments: Scanned from a Xerox multifunction device001.pdf



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Xerox multifunc...

-----Original Message-----

From: Lashbrook, Stephan [mailto:lashbrook@ci.wilsonville.or.us]
Sent: Friday, October 08, 2010 4:30 PM
To: 'Jennifer Donnelly (jennifer.donnelly@state.or.us)'
Subject: FW: Scanned from a Xerox multifunction device

-----Original Message-----

From: xeroxcopier@ci.wilsonville.or.us [mailto:xeroxcopier@ci.wilsonville.or.us]
Sent: Friday, October 08, 2010 4:27 PM
To: Schur, Starla
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