

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

DEPT OF  
JUN 03 2011  
LAND CONSERVATION  
AND DEVELOPMENT

June 2, 2011

**VIA E-MAIL AND U.S. MAIL**

Urban and Rural Reserves Specialist  
Department of Land Conservation and Development  
635 Capitol Street NE, Suite 150  
Salem, OR 97301

**Re: Objections to Redesignation of Urban and Rural Reserves in Metropolitan Portland (Metro Ord. No. 11-1255, Multnomah County Ord. No. 1180, Washington County Ord. No. 740, and Clackamas County Approval of Findings)**

Dear Urban and Rural Reserves Specialist:

This office represents Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC, and LFGC, LLC (together, "Owners"), the owners of property generally located south of the Willamette River, east of I-5, and west of Airport Road in Clackamas County ("Property"). The purpose of this letter is to file written objections with the Department of Land Conservation and Development ("DLCD") to the redesignation of urban and rural reserves in metropolitan Portland by the Metro Council ("Metro") and the Counties of Clackamas, Multnomah, and Washington (together, "Counties") as referenced in the joint and concurrent submittal by these government agencies to DLCD dated May 12, 2011 ("Redesignation").

**A. Summary of Arguments.**

The Owners request that DLCD remand the reserves designations to Metro and the Counties to remove the "rural reserve" designation from the Property, replace it with an "urban reserve" or "undesignated" status, and to otherwise address the legal deficiencies identified herein and in the Owners' prior objections. As set forth in greater detail below, the reasons for this request are the following:

- The Redesignation fails to adequately address the Owners' written objections to DLCD dated July 14, 2010 ("Objections").

- Clackamas County failed to properly amend its earlier findings by not adopting a formal amendment to Ordinance No. ZDO-223 ("Ordinance") and by not explaining how the new findings relate to the findings adopted by the Ordinance.
- The Redesignation violates federal and state equal protection clauses both facially and as applied.
- Metro has no authority to designate reserves outside of the service district boundary.
- The Redesignation does not properly address the Owners' Objection to reliance on the "safe harbor" provision of OAR 660-027-0060(4).

**B. Description of the Property.**

The Property is located in the French Prairie area south and east of the City of Wilsonville in Clackamas County. The 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 Property is generally flat, but it does not lie within any floodplains. Moreover, the 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 Property is generally unconstrained and buildable.

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

Notwithstanding these ratings and additional evidence in support of an urban reserve designation offered by the Owners into the record, Clackamas County recommended that the Property be designated as a rural reserve. Metro and the Counties incorporated the rural reserve designation into the original reserves designation. The Redesignation does not modify or further justify the rural reserve designation.

**C. Review by DLCD/LCDC.**

**1. Requirements of All Objections.**

According to the Notice of Decision for the Redesignation, each written objection must satisfy the following minimum requirements to be considered by DLCD (and LCDC if assigned):

**"1. Show that you participated in the process leading to one of the decisions by speaking or submitting written testimony at a public hearing held by one of the four governments or**

**submitting written comment at one of the workshops or open houses held by one of the governments or sending written comments to one of the four governments."**

The Owners participated in the local process by submitting written testimony as follows:

- September 9, 2009 letter and exhibits to the Clackamas County Board of Commissioners ("BOC")
- April 21, 2010 letter and exhibits to the BOC
- May 20, 2010 letter and exhibits to Metro Council
- April 21, 2011 letter to Metro Council

Therefore, the Owners have standing to file these written objections with DLCD. This standard is satisfied.

**"2. Explain your objection to one of the decisions, being as specific as possible, including the statewide planning goal, the LCDC rule or the land use statute that you believe was violated by the decision."**

In Section D of this letter, the Owners explain the numerous Property-specific and general programmatic objections to the substance of the Redesignation and the procedure utilized by Metro and the Counties in adopting it. These objections are specific and identify the Goals, rules, and statutes that have been violated. This standard is satisfied.

**"3. Recommend a specific change that would resolve your objection."**

DLCD, or the LCDC if assigned, should remand this matter with direction to Metro and the Counties to remove the "rural reserve" designation from the Property, identify the Property as "urban reserve" or undesignated, and to otherwise address the legal deficiencies identified herein. This standard is satisfied.

**"The Department must receive your objection no later than 21 days from the date this notice was mailed (see postmark on envelope or date of e-mail)." (Emphasis in original.)**

Metro and the Counties mailed the Notice of Decision for the Redesignation on May 12, 2011. The deadline for DLCD to receive written objections is June 2, 2011. This letter will be sent via e-mail to DLCD on June 2, 2011. This standard is satisfied.

**2. DLCD/LCDC Review Standards; Available Remedies.**

**a. For Reserves Designations.**

Pursuant to OAR 660-027-0080, DLCD (or LCDC if assigned) must review the joint submittal for: (1) compliance with the Statewide Planning Goals; (2) compliance with the applicable administrative rules; and (3) consideration of the factors for designation of land as urban or rural reserves. For purposes of this review, "compliance with the [Statewide Planning] Goals" means that the submittal must conform with the purposes of the Goals and that not satisfying individual Goal requirements must only be technical in nature. In order to satisfy Goal 2's requirement for an adequate factual base, each finding of fact of the submittal must be supported by substantial evidence. "[S]ubstantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." OAR 660-027-0080(4)(a). DLCD (or LCDC) must remand the Redesignation to Metro and the Counties if it finds that these standards are not satisfied.

**b. For all General Policies and Programs.**

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

**"(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, Metro must consider all alternatives, including whether leaving property as "undesigned" serves the same state interest as a "rural reserve" designation while imposing fewer burdens on identified economic interests, including the State. In the instant case, leaving the Property as "undesigned" serves the same state interest as a "rural reserve" designation would, 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. Moreover, classifying the Property as "undesigned" would also impose less substantial economic impacts than the "rural reserve"

designation as it would not adopt regulations that would effectively preclude development of the 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.

**D. Objections.**

**1. Objections Incorporated by Reference.**

On July 14, 2010, the Owners filed the Objections with DLCD to the initial designation of reserves by Metro and the Counties. The Objections addressed both programmatic and Property-specific concerns. The Redesignation only attempts to address one of the Objections, and as explained in Section D.5 below, the Redesignation fails to properly address it. As such, the Redesignation does not eliminate the need for the Objections in any way. In fact, the Redesignation maintains the same deficiencies as the initial reserves designation. As such, the Owners object to the Redesignation on the same grounds and for the same reasons set forth in the Objections. For the sake of efficiency, the Owners do not restate the Objections in full in this letter but instead incorporate the Objections by reference herein, including the statement of standing and the recommended changes to resolve the Objections. The Owners also object to the Redesignation for the reasons explained below.

**2. Clackamas County Failed To Properly Amend Its Earlier Findings By Not Adopting A Formal Amendment To The Ordinance And By Not Explaining How The New Findings Relate To The Findings Adopted By The Ordinance.**

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 the 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 ("2010 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, "New 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 New Findings. In addition, the New Findings do not state that they replace or supersede the 2010 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 2010 Findings. In fact, because the New Findings do not indicate that they replace or supersede the 2010 Findings, the BOC's action actually creates conflicting findings relating to reserves. Under these circumstances, DLCD, or LCDC if assigned, must remand the BOC's action to correct these procedural and substantive errors.

### **3. The Redesignation Violates the Federal and State Equal Protection Clauses Both Facially and as Applied.**

Under the Equal Protection Clause of the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Oregon Constitution also provides that "[n]o law shall be passed granting to any citizen or class of citizens, privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Or. Const. Art. 1, § 20. 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 violates the Federal and State Equal Protection Clauses both facially and as applied. First, the decision 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. 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 Property for two primary reasons, which are discussed on pages 11 to 12 of the Objections from the undersigned to DLCDC. As shown there, neither of these reasons is valid, and each is contradicted by the evidence before LCDC. These pretextual justifications cannot be used as a rational basis for the disparate treatment of the Property. For these reasons, the Redesignation is unconstitutional and must be remanded.

#### **4. Metro Has No Authority to Designate Reserves Outside of the Service District Boundary.**

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 Ordinance purports to designate urban reserves outside of the boundaries of the metropolitan service district, the Ordinance exceeds the scope of Metro's authority and is void *ab initio*.

**5. The Redesignation Does Not Properly Address the Owners' Objection to the Reliance on the "Safe Harbor" Provision.**

Finally, the Owners would like to supplement their earlier Objection pertaining to the application of the "safe harbor" provision of OAR 660-027-0060(4) by Metro and the Counties. In that earlier objection (set forth in Section F.2.a. of the Objections), the Owners 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. The Owners reiterate that objection at this time and further extend that Objection to properties other than the Property.

Although the BOC's New Findings modify the 2010 Findings for the Property by including additional findings in response to each of the applicable rural reserve criteria, these New Findings are deficient for two reasons. First, the New Findings are deficient because they are too generalized as to Area 4J and overlook the fact that the Property is well-suited for urban development as explained in the Objections. The Port of Portland and the Clackamas County Business Alliance have recognized that the 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 Property from the remainder of Area 4J, and the New Findings should as well. Second, the County failed to adopt similar findings addressing all "rural reserve" factors for other properties. For example, for the East Clackamas Rural Reserve at page 26, the New Findings appear to rely solely upon the "safe harbor" designation to justify the "rural reserve" designation for this rural reserve (except a small area with steep slopes).

The Owners further contend that Metro and the Counties cannot rely upon the "safe harbor" provision, because it is based upon a 2007 report prepared by the ODA that cannot constitute substantial evidence because it is so generalized and was completed at such a regional level that it fails to recognize and identify significant subregional distinctions. For example, all areas, including those within cities, south of the Willamette River are designated as Foundation lands. Furthermore, the data was set out in an inter-agency report that was not vetted through a noticed

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public process prior to being finalized. As such, the ODA report is inherently unreliable and fails to provide an adequate factual base sufficient to constitute substantial evidence in support of a rural reserve designation.

**E. Recommended Action and Conclusion.**

For the reasons set forth herein and in the Objections, DLCD, or the LCDC should remand this matter with direction to Metro and the Counties to remove the "rural reserve" designation from the Property, to identify the Property as "urban reserve" or undesignated, and to otherwise address the legal deficiencies identified herein and in the Objections.

Thank you for your attention to this letter and to the Owners' Objections.

Very truly yours,



Steven L. Pfeiffer

SLP:crl

cc: Laura Dawson Bodner, Metro (via U.S. mail)  
Mike McCallister, Clackamas County (via U.S. mail)  
Chuck Beasley, Multnomah County (via U.S. mail)  
Aisha Willits, Washington County (via U.S. mail)  
Clients (via e-mail)  
Seth King, Perkins Coie (via e-mail)



1120 N.W. Couch Street, Tenth Floor  
Portland, OR 97209-4128

Urban and Rural Reserves Specialist  
Department of Land Conservation  
and Development  
635 Capitol Street NE, Suite 150  
Salem, OR 97301

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**French, Larry**

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**From:** Lundgren, Christina (Perkins Coie) [CLundgren@perkinscoie.com] on behalf of Pfeiffer, Steven L. (Perkins Coie) [SPfeiffer@perkinscoie.com]  
**Sent:** Thursday, June 02, 2011 4:49 PM  
**To:** 'Jennifer.Donnely@state.or.us'; 'Larry.French@state.or.us'  
**Cc:** King, Seth J. (Perkins Coie)  
**Subject:** Supplemental Objections  
**Importance:** High  
**Attachments:** LETTER.PDF

Attached please find written objections submitted on behalf of Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC and LFGC, LLC to the redesignation of urban and rural reserves in metropolitan Portland. Please confirm receipt. Please also place a copy of these written objections into the official record and place them before the Land Conservation and Development Commission prior to its consideration of this matter.

Thank you for your assistance.

**Steven L. Pfeiffer | Perkins Coie LLP**

1120 N.W. Couch Street  
Tenth Floor  
Portland, OR 97209-4128  
PHONE: 503.727.2261  
FAX: 503.346.2261  
E-MAIL: spfeiffer@perkinscoie.com

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