



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

July 14, 2010

VIA HAND DELIVERY

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

**Re: Objections to Adoption of Urban and Rural Reserves in Metropolitan Portland
(Metro Ord. No. 10-1238A, Clackamas County Ord. No. ZDO-233, Multnomah
County Ord. No. 2010-1161, and Washington County Ord. No. 733-A)**

Dear Urban and Rural Reserves Specialist:

This office represents Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC, and LFGC, LLC ("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 adoption of urban and rural reserve designations in metropolitan Portland by the Metro Council ("Metro") and the Counties of Clackamas, Multnomah, and Washington (together, the "Counties") as referenced in the joint and concurrent submittal by these government agencies to DLCD dated June 23, 2010 ("Decision"). Please place this letter in the official record before both DLCD and, if assigned, the Land Conservation and Development Commission ("LCDC").

A. Executive Summary

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" designation, and to otherwise address the legal deficiencies identified herein. As set forth in greater detail below, the reasons for this request are the following:

- Substantial evidence in the record supports designating the Property as an "urban reserve" and conversely does not support the current designation as "rural reserve."

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- Metro and the Counties misconstrued applicable law and made a decision not supported by substantial evidence in designating the Property as a "rural reserve."
- The enforcement of the "safe harbor" provision of OAR 660-027-0060(4) by Metro and the Counties violates ORS 195.141(3) and (4).
- The Decision violates Statewide Planning Goal ("Goal") 2 because it relies upon an unacknowledged extraneous report to formulate 50-year land needs.
- The Decision further violates Goal 2 because there is no 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).
- There is no substantial evidence or related findings to meaningfully assure that the Decision, as it will be implemented by the Counties, is in compliance with Goal 9.
- The Decision violates Goal 12 because it does not include findings regarding the Oregon Transportation Planning Rule ("TPR").

B. Applicable Law

1. SB 1011

In 2007, the Oregon Legislative Assembly adopted, and the Governor signed, SB 1011, which authorized Metro and the Counties to jointly and concurrently designate urban and rural reserves in the Portland metropolitan area after consideration of specific review standards through a public process. SB 1011 is codified at ORS 195.137 through ORS 195.145. By its terms, SB 1011 was designed to facilitate long-range planning for population and employment growth, which would, in turn, provide greater certainty to agriculture, forest, and other industries; property owners; and public service providers. ORS 195.139. LCDC adopted administrative rules, now set forth in OAR Chapter 660 Division 27, to implement the new statutes. These rules, together with the provisions of ORS 195.137 *et seq.* and the Goals serve as the core legal standards at issue in this matter. These provisions authorize designation of two (2) types of reserves—urban and rural--which are each described below.

2. Urban Reserves

Urban reserves are lands located outside the Metropolitan Portland Urban Growth Boundary ("UGB") that are intended to provide for future UGB expansion over an extended period of time. ORS 195.137(2); OAR 660-027-0010(11). They are the highest priority for inclusion in any UGB expansion. OAR 660-027-0070(1).

OAR Chapter 660 Division 21 already provides Metro the authority to designate urban reserves. In lieu of exercising this authority, Metro may designate urban reserves in conjunction with designating rural reserves by entering an intergovernmental agreement with the Counties and by adopting corresponding amendments to the regional framework plan. OAR 660-027-0020(1). Metro and the Counties must designate urban reserves after determining whether the land under consideration, either on its own or in combination with land already inside the UGB:

"(a) Can be developed at urban densities in a way that makes efficient use of existing and future public infrastructure investments;

(b) Includes sufficient development capacity to support a healthy urban economy;

(c) Can be served by public schools and other urban-level public facilities and services efficiently and cost-effectively by appropriate and financially capable service providers;

(d) Can be designed to be walkable and served by a well-connected system of streets by appropriate service providers;

(e) Can be designed to preserve and enhance natural ecological systems; and

(f) Includes sufficient land suitable for a range of housing types."

ORS 195.145(5). OAR 660-027-0050 requires consideration of these same factors and also requires consideration of whether the land can be served with a well-connected system of bikeways, recreation trails, and public transit; whether it can be developed in a manner that preserves important natural landscape features included in urban reserves; and whether it can be designed to avoid or minimize adverse effects on farm and forest practices and important natural landscape features on nearby rural reserves. OAR 660-027-0050(4), (7), and (8).

Once designated, urban reserves must be planned to accommodate estimated urban population and employment growth in the Metro area for between 20 and 30 years beyond 2029, as more specifically identified by Metro. ORS 195.145(4); OAR 660-027-0040(2). A county may not allow uses not allowed, or smaller lots than were allowed, at the time of designation as urban reserves until the land within the reserves are added to the UGB. OAR 660-027-0070(3).

3. Rural Reserves

Rural reserves are lands located outside the UGB that are designed to provide long-term protection for agriculture, forestry, or important natural landscape features. ORS 195.137(1); OAR 660-027-0010(9). Each county is charged with designating rural reserves within its boundaries by entering an intergovernmental agreement with Metro and by adopting corresponding amendments to comprehensive plan and zone maps. OAR 660-027-0020(2); OAR 660-027-0040(7). Metro and the Counties must designate rural reserves after determining whether the land under consideration:

- "(a) Is situated in an area that is otherwise potentially subject to urbanization during the period described in subsection (2)(b) of this section, as indicated by proximity to the urban growth boundary and to properties with fair market values that significantly exceed agricultural values;
- (b) Is capable of sustaining long-term agricultural operations;
- (c) Has suitable soils and available water where needed to sustain long-term agricultural operations; and
- (d) Is suitable to sustain long-term agricultural operations, taking into account:
 - (A) The existence of a large block of agricultural or other resource land with a concentration or cluster of farms;
 - (B) The adjacent land use pattern, including its location in relation to adjacent nonfarm uses and the existence of buffers between agricultural operations and nonfarm uses;
 - (C) The agricultural land use pattern, including parcelization, tenure and ownership patterns; and
 - (D) The sufficiency of agricultural infrastructure in the area."

ORS 195.141(3). OAR 660-027-0060(2) delineates the same factors for designation as rural reserves intended to provide long-term protection to the agricultural industry. Notwithstanding the requirement to apply these factors, a county may designate Foundation Agricultural Lands or Important Agricultural Lands within three (3) miles of an Urban Growth Boundary as rural reserve without additional explanation. OAR 660-027-0060(4).

OAR 660-027-0060(2) provides factors for consideration of lands for designation as rural reserves intended to provide long-term protection to the forestry industry. These factors are analogous to the factors applicable to lands under consideration for designation as rural reserves intended to provide long-term protection to the agriculture industry.

OAR 660-027-0060(3) provides additional factors for consideration of lands for designation as rural reserves intended to protect important natural landscape features as follows:

- "(a) Are situated in an area that is otherwise potentially subject to urbanization during the applicable period described OAR 660-027-0040(2) or (3);
- (b) Are subject to natural disasters or hazards, such as floodplains, steep slopes and areas subject to landslides;
- (c) Are important fish, plant or wildlife habitat;
- (d) Are necessary to protect water quality or water quantity, such as streams, wetlands and riparian areas;
- (e) Provide a sense of place for the region, such as buttes, bluffs, islands and extensive wetlands;
- (f) Can serve as a boundary or buffer, such as rivers, cliffs and floodplains, to reduce conflicts between urban uses and rural uses, or conflicts between urban uses and natural resource uses
- (g) Provide for separation between cities; and
- (h) Provide easy access to recreational opportunities in rural areas, such as rural trails and parks."

Once a rural reserve is designated, it cannot be redesignated as an urban reserve or annexed into an Urban Growth Boundary for a period for a period between 20 and 30 years after 2029, as more specifically identified by Metro. ORS 195.141(2); OAR 660-027-0040(4), (5). A county may not permit uses not allowed, or smaller lots than were allowed, at the time of designation as rural reserves unless the lands are designated as other than rural reserves. OAR 660-027-0070(3).

C. Facts Common to All Objections

1. Implementation of SB 1011 by Metro and the Counties

This is the first time that Metro and the Counties have adopted reserves designations under ORS 195.137 *et seq.* and OAR Chapter 660 Division 27. Thus, there has been no precedent to guide these agencies.

To implement the reserves designations process, each County formed its own reserves committee, which provided recommendations to a regional stakeholders group formed by Metro and the Counties, the Reserves Steering Committee ("RSC"). The RSC, in turn, provided a recommendation to the governing bodies regarding reserves designations. The RSC made its final recommendations on reserves designations in February 2010. By February 25, 2010, Metro and the Counties approved and executed their respective intergovernmental agreements ("IGA's") identifying preliminary reserves designations throughout the region. In many cases, the preliminary reserves designations were modified at the last minute without specific notice to affected property owners. Metro and the Counties received extensive testimony requesting changes to the preliminary reserves designations; however, Metro and the Counties made virtually no changes to these preliminary designations before finalizing them.

Instead, Metro and the Counties adopted ordinances in June 2010 to formalize the final reserves designations and to enact related local plan amendments. On June 10, 2010, the Metro Council adopted Ordinance No. 10-1238A, which designated 28,615 gross acres of urban reserves and approved related amendments to Metro's Urban Growth Management Functional Plan. On June 15, 2010, the Washington County Board of Commissioners adopted Ordinance No. 733, which designated 151,536 acres of rural reserves in Washington County and approved related amendments to Washington County's Functional Plan. On June 17, 2010, the Clackamas County Board of Commissioners adopted Ordinance No. ZDO-233, which designated 68,713 acres as rural reserves in Clackamas County and approved related amendments to the Clackamas County Comprehensive Plan. Also on June 17, 2010, the Multnomah County Board of Commissioners adopted Ordinance No. 2010-1161, which designated 46,706 acres as rural reserves in Multnomah County and approved related amendments to the Multnomah County Functional Plan.

2. The Owners' Property

The Property is approximately 616 acres in size and located in the French Prairie area south and east of the City of Wilsonville in Clackamas County. The Property is generally wedged between SW Miley Road on the north, NE Airport Road on the east, Interstate 5 on the west, and NE Arndt Road on the south. It is served by short and main line railways, and it is within the immediate area of the Aurora State Airport. The Property is generally unimproved, although it does include the Langdon Farms Golf Club. The Property is generally flat, although 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 substantial 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 respective IGA and the Decision. In response, the Owners offer the following objections.

D. Review by DLCDC/LCDC

1. Requirements of All Objections

According to the Notice of Decision, each written objection must satisfy the following minimum requirements to be considered by DLCDC (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."

As explained in Section E of this letter, the Owners participated in the local processes leading up to the Decision. 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 Sections F and G of this letter, the Owners explain the numerous Property-specific and general programmatic objections to the substance of the Decision 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."

In Section H of this letter, the Owners recommend that LCDC remand the Decision to Metro and the Counties to correct the identified errors and designate the Property as "urban reserve." This standard is satisfied.

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

Metro and the Counties mailed the Notice of Decision on June 23, 2010. The deadline for DLCDC to receive written objections is July 14, 2010. This letter will be hand-delivered to DLCDC on July 14, 2010. This standard is satisfied.

2. DLCD/LCDC Review Standards; Available Remedies

Pursuant to OAR 660-027-0080, DLCD (or LCDC if assigned) must review the joint submittal for: (1) compliance with the Goals; (2) compliance with the applicable administrative rules; and (3) consideration of the factors for designation of land as urban or rural reserves described above. For purposes of this review, "compliance with the 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 Decision to Metro and the Counties if it finds that these standards are not satisfied.

E. Owners' Standing to Object

The Owners participated in the local process as an adversely-affected party in the following ways:

- September 8, 2009 letter and exhibits to the Clackamas County Board of Commissioners, a copy of which is attached to a cover letter to DLCD and set forth in Exhibit A
- April 21, 2010 letter and exhibits to Clackamas County Board of Commissioners
- May 20, 2010 letter and exhibits to Metro Council

Therefore, the Owners have standing to file these written objections with DLCD.

F. Property-Specific Objections

1. Substantial evidence in the record supports designating the Property as an "urban reserve."

(1) Can be developed at urban densities in a way that makes efficient use of existing and future public and private infrastructure investments;

The Property is ideally located to make efficient use of existing and planned public and private infrastructure investments. It is located south and west of the UGB and the City of Wilsonville. Moreover, it is well-equipped with transportation facilities of various modes, including main and short line railways (Union Pacific, Portland and Western); an interstate freeway with operating capacity available to accommodate increases in traffic (Interstate 5); state highways (OR 51 and OR 99); major arterials bordering the Property (NE Arndt Road and NE Airport Road); and immediate access to the fifth-busiest airport in the state (Aurora Airport). As explained below,

the Property is large, generally flat, has no natural resource constraints, and can be served by public utilities. In sum, the Property is ideal for urban development, and this factor is satisfied.

(2) Includes sufficient development capacity to support a healthy economy;

Together with other designated urban reserves, the Property includes sufficient development capacity to support a healthy economy. There are no floodplains, steep slopes, sensitive environmental areas, or other natural constraints to developing the Property. As explained above, the Property is a veritable multi-modal transportation hub. Moreover, as substantiated on the record below by Group Mackenzie, project development consultant, development of the Property and surrounding areas with industrial uses could generate ad valorem tax revenues of \$16,443,692; annual payrolls of \$1,167,302,373; and a market value of \$1,649,357,299. No one offered substantial evidence, such as an alternative economic development analysis yielding different results, to rebut this conclusion. Clackamas County staff also rated the Property as highly suitable for employment land. This factor is satisfied.

(3) Can be efficiently and cost-effectively served with public schools and other urban-level public facilities and services by appropriate and financially capable service providers;

Public facilities and services are or can be made available to serve the Property. According to the analysis prepared by Group Mackenzie, the City of Wilsonville has current and planned expansion capacity sufficient to serve significant industrial development similar in size to the developable area of the Property and surrounding parcels. For example, the City of Wilsonville's water treatment plant has rights to 150 million gallons per day from the Willamette River, and the I-5 Boone Bridge crossing currently carries the water main across the river to serve properties such as the Property to the south. Furthermore, the City's wastewater treatment plant also has existing capacity, or in the alternative, a site-specific facility would be feasible. Clackamas County staff rated the Property as highly suitable for serviceability by storm water facilities. It should also be noted that most development approvals contain exactions requiring expansions, improvements, or upgrades to public infrastructure. Thus, it is reasonable to conclude that site-specific infrastructure and services such as fire, police, stormwater, and local roadway improvements will accompany, and largely be financed and constructed, as conditions of approval to operating any urban development on the Property. Finally, development of the Property will raise additional SDC revenues to support extension of public services, which will make them more efficient and cost-effective. In sum, this factor is satisfied.

(4) Can be designed to be walkable and served with a well-connected system of streets, bikeways, recreation trails and public transit by appropriate service providers;

By connecting to the various existing major transportation facilities in the area, the Property can be readily served by a comprehensive transportation network, including streets, sidewalks,

bikeways, trails, and public transit. As explained above, the Property is bordered by major arterials on two sides, and it is proximate to WES commuter rail, Canby Area Transit, and SMART bus service. This factor is satisfied.

(5) Can be designed to preserve and enhance natural ecological systems;

There are no floodplains, sensitive environmental areas, significant wildlife habitat, or other important natural resources on the Property. Nevertheless, the Property is large enough that it can preserve natural elements in open space tracts or buffers along Property lines. Clackamas County staff also rated the Property as highly suitable for urban reserve designation under this factor. Therefore, there is substantial evidence that this factor is satisfied.

(6) Includes sufficient land suitable for a range of housing types;

Although the highest and best use of the Property is likely industrial in nature, the Property can also accommodate local and regional housing needs. The Property generally consists of flat, buildable land with no known development constraints. It is also proximate to major employment centers in Wilsonville and Salem. For these reasons, the Property includes sufficient land suitable for a range of needed housing types. Again, Clackamas County staff rated the Property as highly suitable for urban reserve designation under this factor. Thus, this factor is satisfied.

(7) Can be developed in a way that preserves important natural landscape features included in urban reserves; and

There are no floodplains, steep slopes, sensitive environmental areas, significant wildlife habitat, or other important natural landscape features that limit urban development or help define appropriate natural boundaries for urbanization located on the Property or nearby urban reserves. Nevertheless, the Property is large enough that it can preserve natural elements in open space tracts or buffers along Property lines. Clackamas County staff also rated the Property as highly suitable for urban reserve designation under this factor. Therefore, there is substantial evidence that this factor is satisfied.

(8) Can be designed to avoid or minimize adverse effects on farm and forest practices, and adverse effects on important natural landscape features, on nearby land including land designated as rural reserves.

The Property can be designed to avoid or minimize adverse effects on resource uses and features on nearby lands for four (4) reasons. First, the Property is surrounded on all four (4) sides by major existing streets—I-5, an interstate highway, to the west; NE Arndt Road, a major arterial road, to the south; NE Airport Road, a major arterial road to the east; and SW Miley Road to the

north. These existing facilities will help buffer surrounding farm and forest practices and important natural landscape features from the adverse effects of any urban land uses on the Property. In addition, the Property is large enough to accommodate urban development and associated buffers to mitigate noise, visual, or other adverse impacts. Clackamas County can apply these buffers through concept and community level planning in conformance with established Clackamas County Plan and Code provisions.

For these reasons, the Property satisfies each of the factors for designation as an urban reserve. Metro and the Counties erred when they reached a contrary conclusion in the Decision.

2. Metro and the Counties misconstrued applicable law and made a decision not supported by substantial evidence in designating the Property as "rural reserve."

According to the Findings, Metro and the Counties designated the Property as a "rural reserve" for two primary reasons. Substantial evidence in the record does not support such findings and conclusions, and in fact, serves to undermine same.

a. As applied, the enforcement of the "safe harbor" provision of OAR 660-027-00060(4) by Metro and the Counties violates ORS 195.141(3) and (4).

ORS 195.141(3) requires that, when considering a rural reserve designation to provide long-term protection to the agricultural industry, Metro and each County "*shall* base the designation on consideration of factors including, but not limited to..." (emphasis added). The statute continues by enumerating review factors. The statute does not provide any exceptions when Metro and the Counties are exempt from applying these review factors. Thus, based upon the plain language of the statute, Metro and the Counties must apply the enumerated factors to determine whether each property qualifies for a rural reserve designation. ORS 195.141(4) authorizes LCDC to adopt rules establishing a process and criteria for designating reserves pursuant to ORS 195.141. This grant of authority does not explicitly authorize LCDC to disregard or modify any portion of the statute when drafting the rules.

LCDC adopted such rules in 2008, and they are codified at OAR 660-027-0060(2). These rules require consideration of enumerated factors, which mirror those set forth in ORS 195.141(3), prior to designating a rural reserve to provide long-term protection to the agricultural industry. However, LCDC also adopted another provision, OAR 660-027-0060(4), which reads as follows:

"(4) 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."

This rule is known as the "safe harbor" provision. It permits a County to ignore the enumerated factors of OAR 660-027-0060(2) and simply assign a rural reserve designation to a property classified as a Foundation or Important Agricultural Land by the Oregon Department of Agriculture. This explicitly violates ORS 195.141. LCDC clearly exceeded its statutory authority in enacting this provision.

Of greater concern than the mere enactment of this provision is its enforcement by Metro and the Counties. In the instant case, Metro's findings in support of Ordinance No. 10-1238A read as follows on page 27, under a heading entitled "Conclusions and Analysis" for Rural Reserve 4J commonly known as French Prairie:

"Designation of Area 4J as a Rural Reserve is consistent with OAR 660, Division 27. This entire area is comprised of Foundation Agricultural Land located within three miles of an urban growth boundary. Pursuant to OAR 660-027-0060(4), no further explanation is necessary to justify designation of this area as a Rural Reserve."

Area 4J includes the Property. Thus, Metro and the Counties have specifically relied upon the "safe harbor" provision as the sole basis to justify designating the Property as a "rural reserve." There are no other findings explaining whether the Property is suitable under any of the enumerated factors for consideration of rural reserves under ORS 195.141. This action clearly misconstrues the applicable law as applied to the Property. Accordingly, Metro and the Counties have erred.

b. The "rural reserve" designation improperly elevates form over substance.

Second, to the extent that the RSC chose to designate the Property as a "rural reserve" 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 substantial compliance with applicable criteria. Further, there are many other instances where the RSC chose to ignore natural boundaries when designating urban reserves, including on the Peterkort Property in Washington County, which is located on the "rural" side of Rock Creek. Accordingly, the Property's location relative to a natural boundary alone should not affect its reserves designation.

G. General Objections

1. The Decision violates Goal 2 and Goal 14 because Metro and the Counties based projected population growth, employment growth, densities of development, and

land needs on a new unacknowledged report rather than on Metro's acknowledged functional plan and the acknowledged comprehensive plans of the Counties.

Goal 2 requires that land use actions be consistent with comprehensive and regional plans; moreover, the Goal requires that these plans "be the basis for all decisions and actions related to use of land." The Court of Appeals had held that Metro violated Goal 2 when, in a previous exercise similar to the instant case, Metro based its estimate for needed land for urban reserves on an informal study that was not a part of the acknowledged Urban Growth Management Functional Plan ("UGMFP"). *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 994 P2d 1205 (2000). In affirming LUBA's remand of Metro's decision to designate urban reserves, the Court stated that "computation of need [for urban reserves] must be based upon the functional plan and/or Metro's other applicable planning documents." *Id.* at _____. Later, the Court of Appeals of Oregon held that the City of Dundee could not rely on a study contemplated by, but not incorporated within, a comprehensive plan when rendering a land use decision. *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 124 P3d 1249 (2005). For the same reasons expressed in *Parklane*, the Court reasoned that the City's action violated Goal 2. The Court explained its decision as follows:

"[This] is not a matter of mere abstract concern. Rather, it goes to the heart of the practical application of the land use laws: The comprehensive plan is the fundamental document that governs land use planning. Citizens must be able to rely on the fact that the acknowledged comprehensive plan and information in that plan will serve as the basis for land use decisions, rather than running the risk of being 'sandbagged' by government's reliance on new data."

Id. at _____. *Parklane* and *1000 Friends of Oregon* are directly applicable to the instant case, yet Metro has not complied with this precedent when estimating the region's 50-year land needs. Metro calculated estimated land needs through the year 2060 based upon assumptions regarding demand for housing and jobs in the UGB as well as on assumptions regarding development densities over time. In making these estimates, Metro apparently relied to some degree upon the growth projections set forth in the *Urban Growth Report 2009-2030*; however, it is undisputed that the Metro Council has not formally adopted this report or incorporated it within the UGMFP. Instead, on December 10, 2009, the Metro Council simply "accepted" the population and employment projections from the "draft" report when it approved Resolution No. 09-4094. Even at that, according to the text of that Resolution, the Metro Council did not accept these projections for purposes of designating urban reserves.

Moreover, Washington County's findings note that Metro modified the assumptions and trends underlying the 20-year estimate "where appropriate," yet the record does not explain when or

why Metro determined that it was appropriate to do so. These modified assumptions are then set forth in Metro's "COO Recommendation, Urban Rural Reserves" in Appendix 3E-C of Metro's record. Importantly, the assumptions set forth in Appendix 3E-C are, in many cases, departures from existing policies and trends relating to development patterns, yet Metro cites to no substantial evidence or provision of the UGMFP to substantiate these assumptions. Metro has also not incorporated the "COO Recommendation, Urban Rural Reserves" into the UGMFP. Thus, in clear contravention of *Parklane* and *1000 Friends of Oregon*, Metro has relied upon unacknowledged documents extraneous to the UGMFP as a basis for ensuring compliance with its obligation to establish, in a manner supported by substantial evidence, when estimating the region's 50-year land needs for purposes of designating urban reserves pursuant to Goals 2 and 14. Therefore, Metro and the Counties have erred, and the Decision should be remanded.

2. The Decision further violates Goal 2 because there is no 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).

In deciding whether to designate lands as a "rural reserve," a County must consider whether the lands are "subject to urbanization" through 2060, the agreed horizon date for reserves planning. ORS 195.141(3)(a); OAR 660-027-0060(2)(a). The applicable statutes and rules do not define the term "subject to urbanization," although they do note that the term should be measured based upon proximity to a UGB or proximity to properties with fair market values that significantly exceed agricultural values for farmland, or forestry values for forest land. The term "proximity" is not defined, and there are no other criteria that explain how to apply or interpret this factor. Clackamas County determined that all lands located within three (3) miles of the Portland Metropolitan UGB and within one-half mile of an outlying city UGB are necessarily "subject to urbanization." *See generally* Clackamas County staff report presented to that County's Planning Commission (March 2, 2010).

This appears to be a bright-line, "one size fits all" conclusion. There is no evidence in the record to support the selected distances or to explain why properties within 3 miles of a UGB, as opposed to those within 2.75 miles or 13 miles, are found to uniformly be subject to the varied factors that influence urbanization, such as location, surrounding development patterns, demographic trends, proximity to employment centers or transportation facilities, parcel sizes, or quality of schools. This conclusion is further challenged by the fact that urbanization of such lands can occur only through inclusion within an acknowledged urban growth boundary or pursuant to a Goal exception. Clearly the record is devoid of such evidentiary support. In the absence of any evidence at all to support Clackamas County's characterization of this factor, there is no adequate factual base for purposes of Goal 2 to support Clackamas County's application of this factor in the rural reserves analysis. LCDC should strike this "one size fits all" conclusion and remand these proceedings with direction that Clackamas County develop an adequate factual base for determining when lands are "subject to urbanization."

3. There is no substantial evidence or related findings to meaningfully assure that the Decision, as it will be implemented by the Counties, is in compliance with Goal 9.

Based upon the adopted Decision, Metro and the Counties concede that the Decision is subject to compliance with Goal 9, which requires the following: "[P]rovide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens." OAR 660-015-0000(9). As applied to the reserves context, the Decision includes short findings offered by each of the Counties that the designation of reserves complies with Goal 9. *See generally* Metro findings, pp. 32, 44, 100-101; however, the Decision and the record are utterly devoid of facts to support these conclusions. Further, it does not appear that Metro has made any effort to acknowledge and coordinate the Counties' findings and substantive mapping decisions as to Goal 9 into its own analysis to ensure that regional Goal objectives and obligations are met. Further, there are no independent findings by Metro that demonstrate, based upon substantial evidence in the whole record, that the Decision complies with Goal 9 on a regional basis.

These deficiencies in analysis and findings leave many open questions for implementing the Decision over time. For example, although Metro identifies a 50-year land need for approximately 3,000 acres of large-lot employment lands, there is no mechanism or guarantee that the lands designated by the Decision as urban reserves can actually fulfill this need as compared to other candidate lands. In the alternative, to the extent the designated lands can fulfill the identified need, there is no mechanism or guarantee that individual land use decisions made by the Counties will provide a realistic opportunity for these lands to develop in the needed manner. That is, it is entirely possible that one or more of the Counties could allow its limited urban reserves to develop for residential purposes because that serves immediate and local needs, while the region as a whole suffers because no County properly entitles sufficiently-sized and located employment land sufficient to serve the identified regional need over the planning period. Under these circumstances, DLCD, or LCDC if assigned, cannot make the requisite finding that the Decision complies with Goal 9. Metro and the Counties have erred.

4. The Decision violates Goal 12 because Metro and the Counties have not included findings whether the respective plan amendments "significantly affect" any existing or planned transportation facilities.

The Oregon Transportation Planning Rule ("TPR"), set forth at OAR 660-012-0060, requires that "where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation" will "significantly affect" any existing or planned transportation facility, the government agency adopting the amendment must preserve the "identified function, capacity, and performance standards" of the facility by taking one of the mitigatory actions in OAR 660-012-0060(2). OAR 660-012-0060(1), (2). The Court of Appeals of Oregon has held that a government agency must determine whether or not there is a significant effect under the TPR

prior to adopting the amendment in questions even if no development is proposed at all. *Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29, 220 P3d 445 (2009). This is because the TPR is, by its terms, a "planning requirement." *Just v. City of Lebanon*, 49 Or LUBA 180 (2005) (emphasis in original). As a result, Metro and the Counties may not avoid such compliance merely because the adoption of urban reserves does not authorize immediate development.

In the instant case, Metro has adopted amendments to the UGMFP, and the Counties have each adopted amendments to their respective acknowledged comprehensive plans. Although the TPR is applicable to each of these amendments, none of these agencies determined whether the proposed amendments would "significantly affect" any existing or proposed transportation facilities. It does not appear that Metro or Clackamas County made any independent findings regarding Goal 12 or the TPR at all; moreover, while Multnomah and Washington Counties did adopt findings regarding Goal 12, they, too, failed to address the TPR. As a result, it is entirely unclear whether any of the adopted reserves policies or designations significantly affect any existing or planned transportation facilities. Metro and the Counties are not permitted to avoid this analysis under the excuse that no development is currently proposed. Furthermore, Metro and the Counties cannot defer this analysis to a later stage of development. Accordingly, DLCD should find that Metro and the Counties erred.

H. Recommended Action and Conclusion

For the reasons set forth herein, 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, and to otherwise address the legal deficiencies identified herein. Thank you for your attention to these objections.

Very truly yours,



Steven L. Pfeiffer

Enclosures

cc: Laura Dawson-Bodner, Metro
Maggie Dickerson, Clackamas County
Chuck Beasley, Multnomah County
Steve Kelley, Washington County
Clients
Seth King, Perkins Coie