



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) 346-2094
EMAIL: SPfeiffer@perkinscoie.com

August 27, 2010

VIA EMAIL

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

Re: Proposed Urban & Rural Reserve Rule Amendments

Dear Chair VanLandingham and Members of the Commission:

This office represents the Homebuilders Association of Metro Portland (HBA) regarding the proposed amendments to the Division 27 rules regarding urban and rural reserve areas in the Portland Metropolitan area. We participated in the Advisory Work Group meetings on behalf of the HBA and submit these comments in support of the amendments regarding transportation system improvements that were identified as "Option B" in our work group meeting on August 12, 2010.

The issue of primary concern to the HBA is the need for amendments to Division 27 that would allow transportation improvements in reserve areas, even where such improvements would require a goal exception. The current rules generally prohibit code or plan amendments that would allow new uses in reserve areas if such amendments would require a goal exception. Thus, the existing rules essentially create a 50-year prohibition on transportation system improvements if a goal exception would be required.

As noted by the HBA and other members of the Work Group during our meetings, 50 years is a very long time, and it is nearly impossible to forecast what the region's needs for transportation system improvements might be within that time horizon. The proposed "Option B" amendments would allow, in very prescribed circumstances, local governments the ability to amend their plan or code to allow new transportation facilities or road improvements through a goal exception, so long as there is an identified regional transportation need for such a facility, and such need cannot be reasonably accommodated through improvements to public transit or improvements that do not require an exception.

91004-2500/LEGAL19047544.1

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · LOS ANGELES · MADISON
MENLO PARK · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · SHANGHAI · WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

Chair John VanLandingham and Members of the
Land Conservation and Development Commission
August 27, 2010
Page 2

The proposed "Option B" language requires that, in order to allow such improvements, local governments must make findings regarding need and will be required to identify such need as part of an acknowledged transportation system plan. By requiring such facilities to be identified on a transportation system plan, the proposed rule ensures that appropriate planning has taken place and that there is an identified need for the facility.

This is an important amendment for the Commission to approve in order to allow some level of flexibility regarding transportation planning over a 50-year horizon, while not compromising the overall purpose of the reserve rules. Thank you for your consideration of these comments.

Very truly yours,



Steven L. Pfeiffer

SLP:crl

cc: Dave Nielsen, HBA (via email)

Title: Input to LCDC Re: September, 2010 Hearing - Item 9 Proposal to Amend Reserves Rules

From: Joseph C Rayhawk
15248 NW Germantown Road
Portland, OR 97231

Date: August 27, 2010, Updated August 28, 2010 wrt: Septic Field Replacement

Quick Summary: I recommend that the Rules not be modified until we have some experience that suggests they need adjusting. In my discussion below I review some hypothetical cases about undesirable changes that would be more likely with weakened rules. The examples actually suggest we may want to strengthen the rules later.

My wife and I own and live on a 34-acre farm in Multnomah County immediately north of North Bethany and the UGB. We operate Abbey Creek Stables with 30 horses and with an annual gross income of \$100,000.

Abbey Creek passes through my property for a distance of about 1300 feet. It is a headwater of Rock Creek. These and associated streams are facing serious ecological problems. As a result, they are part of a Tier 1 goal for acquisitions under the Metro Natural Areas Bond Measure. In 2007, we gave up use of the land along most of the creek as part of what is called an ECREP project. The West Multnomah Soil and Water District chose us as the 2007 Cooperators of the Year

We became aware in 2004 that North Bethany was being optioned by developers at \$500,000 per acre. I believed up until last year that there were at least 20 developable acres on my property. If the UGB was moved over us, this might have gotten us \$10,000,000. After considerable thought, I decided that it would be better for my community if my area was designated as Rural Reserves even though it would mean foregoing that huge windfall profit.

I attended and contributed to the last 10 meetings of the Multnomah County CAC on Reserves. I also testified at multiple Multnomah County, Washington County and Metro public hearings.

In 2009, Multnomah County rewrote, and indeed strengthened, its rules for protecting streams and habitat in unincorporated parts of the county. I participated in hearings of the Planning Commission, the Board of Commissioners and exchanged numerous emails with Planning Staff. Several of my suggestions for protecting streams and habitat AND nearby agricultural activity got into the final language of Chapters 33 and 35 of the County Code. These updates were approved in December, 2009. I was very pleased because I believed at that time that Rural Reserves Rules meant that those protections would therefore apply for the 50 years..

I am chagrined that LCDC is considering weakening the protection before we have any experience to see if such weakening is needed.

Washington County, in requesting these changes several months ago, suggested that there is an issue with rebuilding a failed septic system.

Under Chapters 33 and 35, Multnomah County cannot block rebuilding of failed septic systems. I am not familiar with Washington County code, but it seems pretty clear that in a court case, the county could not block such a rebuilding since it would be tantamount to making any associated home uninhabitable. I thought at the time that this was a weird topic from Washington County and might have had something to do with the large sewer line they want to run for 1000+ feet along the west side of Rock Creek in the Rural Reserves for sewage from North Bethany.

Additional Note: In most cases, when a septic field fails, it can be repaired in place in a variety of ways. Actually, the location of the septic field is often quite constrained. First, it must be downhill from the house. Second, it usually has to be protected from anything 'heavy' going over it. This includes tractors and, in our case, horses. It is often fenced off. Finally, there are often other structures built around it such as barns and equipment sheds. The result is that in the worst case, it is more cost-effective to scrape off any failing soil and recover it with new soil. Most of the septic processing occurs relatively near the surface. I am not sure that this change to the rules is really necessary. If the commissioners think this may be required, I would recommend the same kind of language proposed elsewhere, that building either a new septic field, or running a sewer line, through the Rural Reserves should be done only if no other solution is practical.

For example, the sewer line for North Bethany is expected to be run into the riparian area of Rock Creek which is 303(d) listed for water quality (Clean Water Act) and salmonids (Endangered Species Act). It has to cross the creek. Alternatives are available that actually stay within the UGB. They will cost more.

My property is in what Metro Reserves Maps refer to as Area 9C. It and most of Area 9C are covered by a Significant Environment Concern - Habitat (SEC-H) overlay. This significantly limits development rights beyond even what EFU, CFU, etc entail. Much of my property is also covered by a Significant Environmental Concern - Stream (SEC-S) overlay. I mentioned above that when I made the decision to advocate for Rural Reserves that I thought I had 20 developable acres. Under SEC-S, that is reduced to at most 10. Under the severest interpretation of SEC-H, I might have only 4 acres. I am hoping that designation of Rural Reserves does occur (next month?) will make it difficult for Multnomah County to change the rules in ways that will allow 'more development' and weaken the protections now in place. Umm, to be clear: The loss I suffer is more than offset by my land being protected from negative effects of changes on others' property, especially upstream.

I believe that there are two key issues that justify or allow designating land as Rural Reserves. First, the value to society of these Reserves is greater than if they are developed. Second, since it is not cost-effective to develop much of the Reserves, there is no sense in which keeping them in their current status is a taking. I do not mean just legally, but on every measure of fairness and ethics.

The key value of designating the areas as Rural Reserves is to remove all the bad aspects of speculating and overly-short-term planning. Excepting speculators, the current owners of farm and forest land believed they were acquiring farm and forest when they acquired it. In many cases, of course, it was acquired by parents or grandparents who clearly were intent on acquiring farm or forest.

So, designating the areas as Rural Reserves is good for society and at least fair for the landowners.

Part of the above is that the current owners will be able to invest in long-term improvements such as planting perennials or other crops that take several years to return profits. Also, current owners, especially aging farmers, should be able to sell to folks who want to take on the physical burdens. A key part of that, effected by the RR designation, is that the land price not go up so much that mortgages AND taxes are larger than likely profits. Pre-2008 crash, farmland was worth about \$10,000 per acre. The North Bethany 'price' of \$500,000 under a mortgage, even of 5%, would cause an interest burden of \$25000 which cannot be offset from the profit of legal crops. BTW: A mortgage for even a 40 acre farm will typically be 2% higher than the mortgage for a non-farm. Since we are already in non-conforming, 5% is low.

I am concerned with proposals that will make it easier to run large roads through the Rural Reserves areas. Washington County's request included some ideas with respect to allowing Churches. I have heard 'worst-case' discussion about the possibility of someone requesting a

change from CFU to EFU. This would allow for clear-cutting trees without requiring re-planting. Subsequently, the 'farm-owner' could apply to convert the farm to something like a golf course. Even for CFU, I have heard that one can apply to do some cutting and create an ATV park. The latter may just be paranoia from others. (One of the owners of the property next door lives on a 10-acre 'ranch' in Texas. A few years after he bought it, his neighbor actually converted his land to an ATV and Motocross race course. In Texas, where they do not have very much concern for the habitat and neighbors, there was not a prayer of stopping this.)

Each of the above issues would involve an increase in the traffic through the Rural Reserves. A church or golf course would once again introduce the problem of conflicts between and agricultural and urban uses. They and an ATV course would lead to damaging the protection of habitat and very often stream. The increase in traffic would put a larger load on whatever rural roads exist.

But, at the larger level, the traffic, conflicts and direct damage would interfere with farm and forest activities. Effectively they would lower the protection afforded by the Rural Reserves designations. Other than the owners of land acquired for the road or of the land on which non-Rural activities would occur, all other Rural land owners would be damaged. At that point, the 'fairness' to those owners discussed above is destroyed.

Even if the developers paid the nearest farmers for the 'damage' (which they have resisted mightily), it makes the interdependent ecosystems (farm, forest and habitat) weaker. Hence, it is bad for society.

To close an issue I raised at the very beginning. I would hope that the Rural Reserves protection would make it very difficult to bring large roads through the protected areas. I also hope that any of the proposed uses above would be constrained by not allowing the new use if it would increase traffic on any existing rural road. Also, that improvements to rural roads, which are needed to allow such uses, would not be allowed.

The non-Rural uses discussed above appear to need to be 'large' enough to cause degradation in order to be practical or profitable. While I believe it is premature to make changes now, I ask the Commissioner to consider this as 'proof' that strengthening of the protection may be appropriate in the future.

From a practical point of view, they are very few places in the Rural Reserves in North Washington County and Northwest Multnomah County that make sense for a new major road. Jim Thayer, an author of a book about hiking trails in and around Portland, was a member of the Multnomah County CAC. He described the entire area as 'gnarly' and so cut with ravines and steep hillsides that much of it could not be developed as trails.

These same topographical features make a road very difficult to build, even with wholesale earth moving. It is bad enough for twisty country roads that can bend around inconvenient blockages. Washington County is widening Cornelius Pass Road (noting the word Pass in there). This should reduce the most critical Urban Road Need in the North County. So, we can afford to wait a few years to see if more roads are needed.

I believe that Highway 219 south out of Hillsboro can carry the known traffic between Washington County and Yamhill. Since much of the land along that path is to be Rural Reserves, there is no reason to expect the traffic load to increase unless Yamhill County somehow undergoes dramatic growth. Given the (I am not sure I know a word bad enough to describe) economy, this seems unlikely. With respect to the frequently discussed West-Side Bypass, it seems unlikely that there will be funds for such thing for at least the next few years. Again, we can certainly take time to wait and see.

Please leave the current rules as they are.

Thanks for your attention.

Joe Rayhawk

DEPT OF

AUG 27 2010

**LAND CONSERVATION
AND DEVELOPMENT**