

**BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON**

**IN THE MATTER OF THE REVIEW OF
THE DESIGNATION OF URBAN
RESERVES BY METRO AND RURAL
RESERVES BY CLACKAMAS COUNTY,
MULTNOMAH COUNTY, AND
WASHINGTON COUNTY**

**RESPONSE BRIEF OF CHRIS MALETIS;
TOM MALETIS; EXIT 282A
DEVELOPMENT COMPANY, LLC; AND
LFGC, LLC ON REMAND FROM THE
OREGON COURT OF APPEALS**

I. Introduction.

Pursuant to the Land Conservation and Development Commission (“LCDC”) Scheduling Order dated September 4, 2014, Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC, and LFGC, LLC (together, “Maletis”) file this Response Brief on remand from the Oregon Court of Appeals (“Court”).

For the reasons explained below, LCDC should deny three contentions made by Metro that argue against a remand of this matter to Metro and the Counties of Clackamas, Multnomah, and Washington (together, “Counties”). Furthermore, LCDC should then remand the reserves matter in its entirety to Metro and the Counties to address the remand issues identified by the Court in the first instance.

II. Reply to Opening Brief of Metro.

LCDC should deny the contentions in Metro's Opening Brief for the following three reasons:

- House Bill ("HB") 4078 does not address the "best achieves" standard, so it does not preempt Metro and the Counties from applying this standard on remand;
- Metro and the Counties retain broad authority to act on remand, including, as needed, redesignating and changing reserves designations; and
- Metro does not identify any "evidence" "in the record" to support the designation of the Stafford area as an urban reserve.

A. LCDC Should Deny Metro's Erroneous Contention that HB 4078 Negates the Need for a Remand to Address the "Best Achieves" Standard.

Although Metro contends that HB 4078 preempts further consideration of the "best achieves" standard by Metro and the Counties, Metro's contention is baseless. In fact, there is no indication in the text, context, or legislative history that the Legislature intended to, or did, address the "best achieves" standard in HB 4078 or that the Legislature intended to preempt LCDC, Metro, and the Counties from doing so on remand. Furthermore, the case law cited by Metro is either inapposite or inconclusive. Therefore, LCDC should deny Metro's

contention and remand the issue for further consideration by Metro and the Counties.

1. There is No Indication that the Legislature Intended to Preempt Metro and the Counties from Applying the “Best Achieves” Standard as Required by OAR 660-027-0005(2).

First, although Metro contends that the Legislature intended to preempt LCDC, Metro, and the Counties from addressing the “best achieves” standard on remand, there is no text, context, or legislative history that supports this contention. For example, HB 4078 does not include any express findings or substantive provisions addressing the “best achieves” standard by citation or by reference to its operative terms. Further, HB 4078 does not include any express or implied preemption on this issue.

Although Metro contends that the Legislature’s inclusion of the introductory phrase “[f]or purposes of land use planning in Oregon * * *” indicates that the Legislature was aware that adoption of the bill would preempt standard land use processes, Metro’s contention assumes too much. Because HB 4078 expressly maps reserves in Washington County, it is reasonable to conclude that the Legislature intended to preempt action to further map reserve designations in Washington County for the time being. However, there is simply no indication that the Legislature intended to preempt Metro and the Counties

from engaging in the wholly separate inquiry whether, subsequent to the mapping of reserves in HB 4078, the “entire [reserves] submittal” was consistent with the “best achieves” standard. Not only is there no textual support for this conclusion, but Metro does not identify any context or legislative history in support of its interpretation of HB 4078 either.

Therefore, LCDC should deny Metro’s contention on this issue.

2. Case Law Cited by Metro in Support of its Position is Either Not Applicable or is Inconclusive.

Second, although Metro cites to various judicial decisions to support its contention that HB 4078 overrides the need for a remand, Metro’s reliance on these cases is misplaced. For example, although Metro contends that the Supreme Court’s decision in *Blachana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 691, 318 P3d 735 (2014) stands for the proposition that the Legislature is presumed to be aware of existing law when it enacts new legislation, this rule of law is of little assistance in this case because there is “existing law” on both sides of the issue. On the one hand, as Metro notes, it is presumed that the Legislature was aware of the requirement in OAR 660-027-0005(2) that Metro and the Counties are to designate reserves consistent with the “best achieves” standard

of OAR 660-027-0005(2). Thus, according to Metro, the Legislature's adoption of HB 4078 intended to either apply or override this standard.

On the other hand, the Court's decision in *Barkers Five v. LCDC*, 261 Or App 259, 323 P3d 368 (2014) was also "existing law" at the time the Legislature considered HB 4078, so the Legislature can be presumed to be aware of it as well. The Court's decision expressly directed LCDC to "remand the entire submittal to Metro and the counties so they can ultimately assess whether any new joint designation, in its entirety, satisfies that standard." *Barkers Five, LLC*, 261 Or App at 333. By not addressing the "best achieves" standard in HB 4078, the Legislature could have signaled, not that it was applying or overriding this standard, but that it was not disturbing the Court's direction that Metro and the Counties address this issue. Thus, because there is "existing law" on both sides of the issue, it is unreasonable to conclude that LCDC intended to apply or override the "best achieves" standard by adopting HB 4078. LCDC should deny Metro's contention that *Blachana, LLC* supports its position.

Likewise, although Metro contends that *Avis Rent A Car System, Inc. v. Dept. of Rev.*, 330 Or 35, 41, 995 P2d 1163 (2000) stands for the proposition that statutes control over conflicting administrative rules and thus HB 4078 controls

over the “best achieves” standard in OAR 660-027-0005(2), LCDC should deny this contention because the decision in *Avis Rent A Car* is not applicable.

In *Avis*, rental car companies asserted that they were not subject to ad valorem taxes for their use of public land at the Portland International Airport. In support of their contention, the rental car companies relied upon a particular state administrative rule. The Supreme Court held that the rule was interpretive in nature because the rule simply explained the Department of Revenue’s understanding of the legislative intent in adopting ORS 307.110(1). The Supreme Court further concluded that, to the extent the rule was inconsistent with the legislative intent, the rule was invalid. Thus, properly construed, the *Avis* decision addresses the relationship between a rule and a statute when an agency adopts a rule that is inconsistent with an existing statute; the *Avis* decision does not address the separate issue, and the one at issue in the reserves case, where the rule predated the bill, the bill did not conflict with the rule, and there was no indication that the Legislature considered the rule when adopting the bill. Accordingly, *Avis* is simply not applicable.

In sum, neither the text, context, legislative history, or case law support’s Metro’s interpretation of HB 4078. Therefore, LCDC should deny Metro’s contentions on this issue. Further, for the reasons explained in Maletis’ Opening

Brief, LCDC should find that, consistent with the Court's decision in *Barkers Five, LLC*, remand to Metro and the Counties is necessary to address the "best achieves" standard.

B. Metro Erroneously Contends that a Remand Must be Limited to the Specific Issues Identified by the Court.

LCDC should deny Metro's contention that any remand to Metro and the Counties must be limited in nature and cannot involve redesignation of any lands. In support of its contention, Metro relies upon *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992). However, Metro's contention ignores subsequent decisions. In a case decided after *Beck*, the Court of Appeals held that a remand order may require a local government to decide certain issues on remand, but it cannot prevent the local government from considering other issues. *Schatz v. City of Jacksonville*, 113 Or App 675, 835 P2d 923 (1992). See also *Columbia County Citizens for Orderly Growth v. Columbia County*, 44 Or LUBA 438 (2003) (same).

Schatz is particularly informative for this context, because, like the reserves matter, it concerned an instance where events transpired after the remand order that affected the action the local government took on remand. Specifically, in *Schatz*, after LUBA ordered a remand to the city, LCDC entered an order acknowledging the city's plan and regulations. LCDC's intervening action caused

the city to consider additional issues on remand, and the Court of Appeals held that this was permissible.

In the case of the reserves, the intervening action is the adoption of HB 4078, which will require reconsideration of the “best achieves” standard for the “entire submittal.” Therefore, as in *Schatz*, it is appropriate for Metro and the Counties to have broad, not limited, authority on remand. LCDC should deny Metro’s contentions to the contrary.

C. LCDC Must Remand the Matter to Clackamas County to Address the Designation of Reserves in Stafford.

Additionally, for two reasons, LCDC should deny Metro’s contention that the newly adopted Regional Transportation Plan (“New RTP”) constitutes evidence that “clearly supports” the designation of Stafford as an urban reserve. First, the New RTP is not in the record, so it cannot be considered. HB 4078, Section 9 only authorizes LCDC to rely upon evidence that “clearly supports all or part of the decision” if that evidence is “in the record.” Metro ignores this limitation in its Opening Brief. Therefore, LCDC should deny Metro’s contention that the New RTP supports the designation of Stafford as an urban reserve.

Second, even if LCDC can take official notice of the New RTP as suggested by Metro, LCDC cannot consider it as “evidence.” OAR 660-025-0085(5)(h)

authorizes LCDC to take official notice of various laws, including local government ordinances. However, this provision does not alter the limitation set forth in ORS 197.633(3) and OAR 660-025-0085(5)(g) that LCDC is to confine its review of evidence to that in the local record.

LUBA operates under similar parameters, and while LUBA may also take official notice of laws, it cannot take official notice of adjudicative facts set forth in those laws:

“LUBA’s review is limited by ORS 197.835(2)(a) to the record of the proceeding below * * *. Thus, LUBA may not take official notice of facts within documents that are subject to official notice under OEC 202, if notice of those facts is requested for an adjudicative purpose (i.e., to provide evidentiary support or countervailing evidence with respect to an applicable approval criterion that is at issue in the challenged decision). *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103-104 (2005); *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692 (2007).”

League of Women Voters of Corvallis v. City of Corvallis, 63 Or LUBA 432, 441 n 4 (2011). As explained above, like LUBA, LCDC is also limited to considering the evidence in the local record. Further, no statute or administrative rule authorizes LCDC to take official notice of adjudicative facts in laws for the purpose of determining whether a reserves designation is supported by substantial evidence. Yet, this is exactly what Metro is asking LCDC to do here by asking LCDC to

consider roadway improvements approved by the New RTP. See Metro Opening Brief at 14.

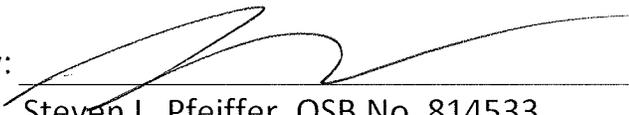
With due respect, LCDC lacks this authority. Therefore, LCDC should decline Metro's invitation to consider the New RTP as evidence. Notably, the New RTP was the only "evidence" identified by Metro. Because LCDC cannot rely upon it, there is not substantial evidence in the whole record to support the findings adopted by Metro and the Counties on the designation of Stafford as an urban reserve. Therefore, LCDC should remand this aspect of the decision for further consideration.

III. Conclusion.

For the foregoing reasons, LCDC should deny Metro's contentions and enter an order remanding the reserves matter in its entirety to Metro and the Counties to address the remand issues identified by the Court in the first instance.

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