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DEPT OF
OCT 08 2010
LAND CONSERVATION
AND DEVELOPMENT

October 8, 2010

VIA EMAIL ONLY

John H. VanLandingham, Chair
Land Conservation and Development Commission
635 Capitol Street NE, Suite 200
Salem, OR 97301

Re: Exceptions to the September 28, 2010 Staff Report on the Objections to Portland Metro Area Urban and Rural Reserve Designations

Dear Chair VanLandingham and Members of the Commission:

This office represents Metropolitan Land Group ("MLG"), the owner of approximately 38 acres of property located in the 607-acre study area known as East Bethany in Multnomah County ("Property"). The purpose of this letter is to submit written exceptions to the September 28, 2010 staff report ("Staff Report") prepared by the Department of Land Conservation and Development ("DLCD") on the objections to the Portland Metro area urban and rural reserve designations adopted by the Metro Council ("Metro") and the Counties of Clackamas, Multnomah, and Washington (together, the "Counties"). Please place this letter in the official record before the Land Conservation and Development Commission ("LCDC") in this matter.

A. Executive Summary

MLG files the following six exceptions to the Staff Report:

- DLCD erred in deferring to Metro and the Counties' designation of the Property as a "rural reserve" when the decision to adopt such designation misconstrued applicable law and was not supported by substantial evidence.
- DLCD erred in recommending denial of MLG's objection that substantial evidence supports designating the Property as an "urban reserve."

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- DLCD erred in determining that Metro complied with state law when it relied upon a new unacknowledged report extraneous to its acknowledged functional plan for the purpose of identifying population and employment growth forecasts to determine land needs for reserve designations.
- DLCD erred in finding that there is an adequate factual base to support the conclusion that all lands within three (3) miles of the Urban Growth Boundary ("UGB") are necessarily "subject to urbanization" for purposes of OAR 660-027-0060(2)(a).
- DLCD erred in finding that Metro and the Counties were not required to apply the Oregon Transportation Planning Rule ("TPR") when the Decision included amendments to each local government's comprehensive plan, and no provision of law exempted the reserve process from the TPR analysis.
- DLCD erred in finding that MLG's Objection #6 was invalid for lack of a remedy, when MLG suggested a remedy when it filed the objection. Further, DLCD erred in failing to consider and grant the objection on the merits when the enforcement of OAR 660-027-0060(4) ("safe harbor" rule) by Metro and the Counties violates ORS 195.141(3) and (4).

As explained in greater detail below, MLG requests that LCDC grant these exceptions and remand the reserves designations to Metro and the Counties with direction that the four governments remove the "rural reserve" designation from the Property, redesignate the Property as "urban reserve," and otherwise address the legal deficiencies identified herein.

B. Procedural History

The following actions and corresponding dates provide the relevant history of this matter:

6/28/2007	SB 1011 authorizing designation of urban and rural reserves becomes effective
2/17/2009	MLG submits letter to Multnomah County Urban and Rural Reserves CAC
7/20/2009	MLG submits letter to Multnomah County Urban and Rural Reserves CAC
8/6/2009	MLG submits letter to Multnomah County Planning Commission
10/21/2009	MLG submits letter to Metro Reserves Steering Committee Core 4
12/7/2009	MLG submits letter to Washington County Board of Commissioners
5/6/2010	MLG submits letter to Multnomah County Board of Commissioners
5/18/2010	MLG submits additional materials to Metro Councilors
5/20/2010	MLG submits letter and exhibits to Metro Council
6/23/2010	Metro and the Counties submit reserves decision ("Decision") to DLCD
7/14/2010	MLG timely submits letter with six objections to Decision ("Objection Letter")
9/3/2010	DLCD refers the matter to the LCDC
9/28/2010	DLCD issues Staff Report recommending denial of all six (6) MLG objections

C. Standard of Review

1. LCDC Review of Decision

Pursuant to OAR 660-027-0080, LCDC must review the Decision 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 set forth in ORS 195.137 *et seq.* and OAR Chapter 660, Division 27. 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). LCDC must remand the Decision to Metro and the Counties if it finds that these standards are not satisfied.

2. Judicial Review of LCDC Decision

LCDC's decision in this matter is subject to appeal to the Court of Appeals of Oregon. ORS 197.651(1). The Court of Appeals shall reverse or remand LCDC's decision in the event the Court finds that the decision is:

- (1) Unlawful in substance or procedure, provided the procedural errors prejudiced the substantial rights of the petitioner;
- (2) Unconstitutional; and/or
- (3) Not supported by substantial evidence in the whole record as to facts found by LCDC.

ORS 197.651(10). In a recent case, the Court of Appeals of Oregon reversed and remanded a decision of the LCDC affirming the City of Woodburn's adoption of an amendment to its urban growth boundary because LCDC's decision failed to provide an adequate basis for judicial review. *1000 Friends of Oregon v. LCDC*, ___ Or App ___ (slip opinion, September 8, 2010). In reaching this conclusion, the Court applied the rule of substantial reason set forth in *Drew v. PSRB*, 322 Or 491, 500, 909 P2d 1211 (1996), which provides that "[a]gencies are also required to demonstrate in their opinions the *reasoning* that leads the agency from the *facts* that it has found to the *conclusions* that it draws from those facts." (Emphasis in original). The Court determined that LCDC's decision was conclusory and did not adequately explain reasons why the City of Woodburn's decision was consistent with the applicable approval criteria. *1000 Friends*, ___ Or App at ___. Thus, LCDC may not simply blindly endorse the Decision. Rather, LCDC must issue its own independent written findings that fully identify the facts at issue, LCDC's

legal conclusions, and the reasoning that these facts lead to and, indeed, constitute substantial evidence in the whole record in support of, these legal conclusions. Failure to comply with this requirement when rendering a decision in this matter will subject LCDC to another reversal and remand on appeal.

D. Description of MLG's Property

The Property is a portion of approximately 607 acres located in the East Bethany area of western Multnomah County (Township 1 North, Range 1 West, Section 16). The Property is characterized by only limited agricultural operations but is more predominately defined by small-tract rural residential uses, which have justified mapping of numerous exception parcels. These exceptions parcels are located in a wide swath that effectively bisects the East Bethany area, leading to further parcelization on nearby agricultural lands. As a result, the Oregon Department of Agriculture ("ODA") has identified the Property as "conflicted" for agriculture.

The Property is situated in a transition zone between steep forested habitats to the north and east and urbanized or urbanizing areas within the UGB immediately adjacent to the south and west. On the Property, areas south and west of Abbey Creek are flat in nature, with slopes of generally 10% or less. North and east of Abbey Creek, slopes in excess of 10% are found, but they are generally gradual in nature. The north and east boundaries of the Property are established by the base of a hillside area. This topographic feature, where slopes begin to exceed 20%, establishes a logical urban edge, as depicted in the composite "North & East Bethany Concept Plans" attached to MLG's Objection Letter and incorporated herein by reference. Establishing the extent of potential urban development based upon topographic features is far more defensible than many of the arbitrary political boundaries designated by Metro and the Counties in the Decision.

As depicted in the "East Bethany – Metro Context Map" also attached to MLG's Objection Letter and incorporated herein by reference, the Property is located immediately adjacent to designated exception lands to the north and existing and planned development inside the UGB to the west and southwest, including North Bethany and Bethany. The Bethany Town Center, which is a designated Town Center on Metro's 2040 Growth Concept Map, is located approximately 0.65 miles away. Designated Town Centers are intended to provide localized services to tens of thousands of people within a two- to three-mile radius. Portland Community College ("PCC")'s Rock Creek campus is approximately 1.3 miles away.

E. Exceptions

Exception #1: DLCD erred in deferring to Metro and the Counties' designation of the Property as a "rural reserve" when the decision to adopt such designation misconstrued applicable law and was not supported by substantial evidence.

MLG takes exception to DLCD's decision to defer to Metro and the Counties' designation of the Property as a "rural reserve." LCDC should grant this exception because the "rural reserve" designation is not supported by substantial evidence in the whole record.

a. DLCD has defined its review authority too narrowly.

As a preliminary matter and contrary to state law, DLCD has erred because it so narrowly defines its role in reviewing reserves designations to effectively allow mere deferral to all reserves designations made by Metro and the Counties. Rather, pursuant to OAR Chapter 660, Division 27, DLCD must discern whether the reserves designations are supported by substantial evidence. Under ORS 183.482(8)(c), substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.

Specifically, DLCD improperly construes its review authority on appeal in a very limited manner:

"[T]he Department does not believe that the question is whether an area would be better as a rural reserve than as an urban reserve, or even whether Metro was right in its decisions. The questions are narrow: *whether Metro considered what it was supposed to consider, whether Metro's findings explain its reasoning, and whether there is some evidence in the record to support Metro's decision.*"

Staff Report 18 (emphasis in original). DLCD further states that in its review, it accepted broad, area-wide descriptions rather than more specific studies of individual properties because "the Department does not believe that a parcel-by-parcel analysis is required by either the statutes or rules, particularly in light of the fact that the land in question normally will not be urbanized for decades." Staff Report 19. Based upon these narrow articulations of its review authority, DLCD effectively sidestepped any close examination of the myriad objections filed to the Decision.

DLCD's statements are, at once, disappointing and inconsistent with state law for at least two reasons. First, regardless of "whether there is *some* evidence in the record to support Metro's decision," DLCD has apparently wholly failed to consider whether substantial evidence exists in the record that not simply conflicts with, but actually fully rebuts and undermines, the evidence in support of Metro's decision. Stated another way, "some evidence" does not constitute substantial evidence in the whole record, and such limited analysis does not comply with the LCDC's legal obligations on review.

Second, and perhaps more importantly, regardless of whether any statute or rule requires a parcel-by-parcel analysis, the statutes and rules do require that the Decision be supported by

substantial evidence in the whole record. Thus, this requirement extends to all properties under review, regardless of their size. It is simply irresponsible and contrary to the evidence to conclude that because many properties in an area have certain characteristics that support a particular reserves designation that this means that neighboring properties have the same characteristics and warrant the same designation. Thus, LCDC should find that DLCD has erred in defining its review authority.

b. DLCD erred in limiting its review of the decision to designate the Property as a rural reserve.

Likewise, by conducting an inadequate review that failed to comport with the applicable legal standard, DLCD erred in its deferral to the Decision by Metro and the Counties to designate the Property as a "rural reserve." DLCD provided no Property-specific findings on this issue in the Staff Report. Instead, DLCD simply dismissed objections filed by nine different parties in the area with a two-paragraph summary largely restating its deferential standard of review. Staff Report 105-106. These findings concluded with the following: "Multnomah County, however, found the area eligible for rural reserve designation under the factors for significant landscape features in OAR 660-027-0060(3)." Staff Report 106. This statement completely fails to consider the substantial evidence submitted by MLG into the record that the Property does not satisfy the factors for designation as a rural reserve based upon significant natural features. This substantial evidence included the following: Metro's findings that slopes on the Property are less significant than those found in Area 9C; the conclusion of Multnomah County staff that, unlike surrounding areas, the Property was not well-suited for designation as a "rural reserve" ("This small area does not appear to be a good fit with the key landscape features factors and should be ranked low."); and expert testimony from a private environmental consultant that the Property has low suitability as a "rural reserve" upon application of the relevant factors in the context of the available record.

DLCD has further erred by failing to consider, or issue findings in response to, MLG's contention that Metro and the Counties acted contrary to state law and the Oregon Constitution in designating the Property as a rural reserve due to governance and service delivery concerns. MLG presented substantial evidence in the form of a letter from Tom Brian, Chair of the Washington County Board of Commissioners, that Washington County was a ready and willing urban service provider. Metro and the Counties, and subsequently DLCD, ignored this testimony and designated the Property as a rural reserve based upon governance concerns. To the extent that Metro and the Counties' concern is grounded in the new language of Title 11 of the Urban Growth Management Functional Plan ("UGMFP")--which purports to prevent counties from providing urban services to unincorporated areas--Metro and the Counties are acting contrary to ORS Chapter 215 and Article VI, section 10 of the Oregon Constitution, which clearly empower counties to allow for urbanization and service delivery in unincorporated areas that otherwise satisfy the Goals (or any exceptions thereto). As stated above, the applicable standard of review

(as well as that of the Court of Appeals on appeal) requires that the Decision comport with the Constitution. DLCD has erred by not even addressing MLG's stated constitutional concern.

For these reasons, LCDC should find that DLCD has clearly erred in defining and applying its standard of review, both in general and as applied to the Property. LCDC should grant this exception.

Exception #2: DLCD erred in recommending denial of MLG's objection that substantial evidence supports designating the Property as an "urban reserve."

MLG takes further exception to DLCD's recommendation that LCDC deny MLG's objection that substantial evidence supports designating the Property as an "urban reserve." For the reasons stated below, LCDC should grant this exception.

First, as explained above in response to Exception #1, which explanation is incorporated herein by reference, DLCD has improperly defined and applied its standard of reviewing reserves designations identified by Metro and the Counties. Second, and on a related point, there is no indication that DLCD even considered the substantial evidence submitted by MLG that demonstrates how the Property satisfies each of the factors for designating urban reserves under OAR 660-027-0050. This evidence was set forth in and attached to MLG's Objection Letter, which, again, is incorporated herein by reference.

In summary, this evidence establishes that the Property is well-suited for designation as an urban reserve. It is ideally located to make efficient use of existing and planned public and private infrastructure investments, including those associated with adjacent developments inside the UGB and the nearby Bethany Town Center. Furthermore, development of the Property with urban uses will complement the existing and planned urban development in the area, potentially by providing neighborhood-serving commercial uses or by providing additional residents that can support area businesses, work for area employers, and attend area educational institutions such as PCC. Development of the Property will also facilitate reasonable and concurrent extensions of public facilities and services (including sanitary sewer line stubs, which are available at three different locations along the boundary of the Property, and an extension of Saltzman Road to alleviate traffic on Skyline Boulevard and Kaiser Road) and also raise additional System Development Charges to make these services more cost-effective and efficient. Washington County also submitted a letter into the record stating that potable water, transportation, sanitary sewer, and "other services" can be made available to the Property. Likewise, the Beaverton School District has committed to providing needed educational facilities to serve students residing in East Bethany.

Moreover, MLG presented substantial evidence (in the form of the East Bethany Concept Plan) that the Property can be designed to preserve all important natural landscape features on the

Property, including riparian corridors, wetland features, and steep slopes exceeding 25%. These on-site preservation efforts will necessarily benefit off-site resources that interconnect with those on the Property. In addition, if necessary, Multnomah County may adopt and apply overlay districts to offer additional resource protection. Finally, the Property can be designed to avoid or minimize adverse effects on resource uses and features on nearby lands for several reasons, including the fact that several nearby properties are exception lands or are developed or planned for urban uses. These reasons substantiate designating the Property as an "urban reserve."

LCDC should grant this exception.

Exception #3: DLCD erred in determining that Metro complied with state law when it relied upon a new unacknowledged report extraneous to its acknowledged functional plan for the purpose of identifying population and employment growth forecasts to determine land needs for reserve designations.

MLG takes further exception to DLCD's finding that Metro and the Counties properly based projections for growth in population, employment, and other measures on a new unacknowledged report. LCDC should grant the exception for two reasons. First, the facts stated by DLCD in the Staff Report are contradicted by substantial evidence in the record. DLCD contends that the projections were "adopted" by the Metro Council in Resolution No. 09-4094 (the "Resolution") and for the express purpose of determining the amount of land needed for urban reserves. Further, DLCD contends that the document that sets out the projections is not "draft" in nature. None of these facts are supported by the record. In fact, both the title and body of the Resolution state that the Metro Council is "accepting" (not adopting) the population and employment forecasts. Second, the Resolution states that the purpose of the Metro Council's action is to serve "as a basis for analysis of need for capacity in the UGB to accommodate growth to the year 2030 and for actions the Council will take to add capacity by ordinance in 2010, pursuant to ORS 197.296(6) and statewide planning Goal 14." All of these referenced actions relate to expansion of the UGB, not to designation of urban and rural reserves. The two processes are independent and will be memorialized in separate decisions. Finally, the document setting forth the growth forecasts is marked "draft" in the record and is referred to in the Resolution as the "*Draft* Urban Growth Report 2009-2030" (emphasis added). Based upon these facts, DLCD's characterization of Metro's action is without factual or legal merit.

Second, even assuming that DLCD's cited facts are true, the Decision still fails to comport with Goal 2 and binding precedent of the Court of Appeals of Oregon, because neither the Resolution nor any other action of the Metro Council has incorporated the growth projections into the acknowledged UGMFP. 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 it based its estimate for needed land for urban reserves on an informal study that was not a

part of the acknowledged UGMFP. *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 994 P2d 1205 (2000). In *Parklane*, the Court affirmed LUBA's remand of Metro's decision to designate urban reserves on a prior occasion, stating 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 *City of Dundee* are directly applicable to the instant case, yet Metro has not complied with this precedent when estimating the region's 50-year land needs. As explained above, the Metro Council has not formally "adopted" the "Draft Urban Growth Report 2009-2030" or incorporated it within the UGMFP. Likewise, Metro has also not incorporated the "COO Recommendation, Urban Rural Reserves," which modified assumptions and trends underlying the growth projections, into the UGMFP. Thus, in clear contravention of *Parklane* and *City of Dundee*, Metro has relied upon unacknowledged documents extraneous to the UGMFP when estimating the region's 50-year land needs for purposes of designating urban reserves. Therefore, Metro and the Counties have erred, and DLCDC has erred in contending that MLG's objection on this point should be denied. LCDC should grant this exception.

Exception #4: DLCDC erred in finding that there is an 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).

MLG takes further exception to DLCDC's finding that there is an adequate factual base to support Clackamas County's conclusion that all lands within three (3) miles of the UGB are "subject to urbanization." LCDC should grant the exception for three reasons. First, DLCDC attempts to downplay the significance of this factor by noting that it is not a mandatory approval criterion but simply one factor considered among many. This statement misses the point. Whether the factor is mandatory or optional, Clackamas County's interpretation of it is wholly arbitrary in nature. There is no evidence in the record to support the selected distances or to explain why

properties within three (3) miles of a UGB, as opposed to 2.75 miles or 13 miles, were more or less 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. In the absence of any evidence at all to support the 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.

Second, DLCD contends that there is substantial evidence to support Clackamas County's characterization of this factor. Specifically, DLCD contends that Clackamas County relied upon the "safe harbor" rule of OAR 660-027-0040(4) in identifying a radius of lands subject to urbanization. For the reasons explained below in response to Exception #6, which reasons are incorporated herein by reference, the "safe harbor" rule itself is invalid. Therefore, it cannot serve as an adequate factual base to justify Clackamas County's decision.

Finally, DLCD does not cite to any other evidence (substantial or otherwise) to support Clackamas County's action. Thus, DLCD's recommendation is likewise not supported by substantial evidence. LCDC should grant this exception.

Exception #5: DLCD erred in finding that Metro and the Counties were not required to apply the TPR when the Decision included amendments to each local government's comprehensive plan, and no provision of law exempted the reserve process from the TPR analysis.

MLG takes further exception to DLCD's recommendation that LCDC deny MLG's fifth objection. This objection concerns the failure of Metro and the Counties to issue any findings whatsoever regarding the Oregon Transportation Planning Rule ("TPR"), despite the fact that they were each amending their respective functional and comprehensive plans.

DLCD's contends that the TPR is inapplicable for three reasons, but none of these reasons is persuasive. First, DLCD contends that the proposed plan amendments will not significantly affect any existing or planned transportation facilities because the plan amendments are not described in any of the "categories listed in OAR 660-012-0060(1)." This contention completely misconstrues the TPR, which by its terms, is applicable to any "amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation." OAR 660-012-0060(1). It is undisputed that Metro and each of the Counties are adopting comprehensive plan amendments in conjunction with the reserves designations. Accordingly, the TPR is applicable. Second, DLCD contends that the horizon for calculating a significant effect for purposes of the TPR (the end of the planning period, which in many cases is 20 years) is incompatible with the long-range planning associated with reserves planning. It may be true that the TPR is not well-suited to the instant amendments; however, some would argue that the TPR is not well-suited to various other

plan amendments. Regardless, no provision of the TPR or the urban reserves rules relieves Metro and the Counties of completing the analysis prior to adopting the amendments at issue.

Finally, DLCD contends that, by analogy to OAR 660-024-0020(1)(d), designation of urban and rural reserves does not commit any lands to urban use and actually maintains existing land uses. Therefore, according to DLCD, no new vehicle trips can be generated by designating urban and rural reserves. Again, DLCD misses the point. The exception in OAR 660-024-0020(1)(d) is limited to certain urban growth boundary amendments. It does not apply to designation of reserves. Furthermore, even if no development is proposed at all, 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 a plan amendment. *Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29, 220 P3d 445 (2009). As a result, Metro and the Counties may not avoid such compliance merely because the adoption of urban reserves does not authorize immediate development.

DLCD goes to great lengths to argue that adoption of the amendments will not have a significant effect. However, until Metro and the Counties actually apply the rule in this context, there is simply no substantial evidence in the whole record to support this conclusion. LCDC must remand the Decision to Metro and the Counties to reopen the record and correct this deficiency.

Exception #6: DLCD erred in finding that MLG's Objection #6 was invalid for lack of a remedy, when MLG suggested a remedy when it filed the objection. Further, DLCD erred in failing to consider and grant the objection on the merits when the enforcement of OAR 660-027-0060(4) ("safe harbor" rule) by Metro and the Counties violates ORS 195.141(3) and (4).

MLG takes further exception to DLCD's recommendations in the Staff Report that LCDC: (1) reject MLG Objection #6 as invalid under OAR 660-025-0140(2); and (2) not accept argument on the merits from MLG on this objection (page 109). LCDC should reject DLCD's recommendations and grant this exception.

a. Objection #6 is valid.

First, LCDC should accept Objection #6, because it is valid. In the Staff Report, DLCD indicates that the objection is invalid because there is "[n]o remedy." Regarding this issue, OAR 660-025-0140(2)(c) states that, to be valid, objections must "[s]uggest specific revisions that would resolve the objection."

MLG's Objection #6, which is addressed on the merits in more detail below, was originally set forth in MLG's Objection Letter at page 19. The objection contends that Metro and the Counties improperly applied OAR 660-027-0060(4)—the so-called "safe harbor" rule—in violation of

ORS 195.141(3) and (4). In accordance with OAR 660-025-0140(2)(c), MLG requested on page 20 of the Objection Letter that "DLCD, or the LCDC if assigned, should remand this matter with direction to Metro and the Counties to...otherwise address the legal deficiencies identified herein." Thus, MLG suggested a specific revision (remand and direction) that would resolve the objection (misapplication of the rule). The objection was therefore valid.

It is possible that DLCD staff determined that no remedy was available because the objection related to the rule "as applied," and there is no evidence that Metro or Multnomah County ever applied the rule to the Property. If this is DLCD's reasoning, it should be rejected. The record clearly reflects that Clackamas County applied and relied upon the "safe harbor" rule as a basis for designating properties as rural reserves. In the Decision, Metro and the Counties made coordinated decisions to identify and designate properties to fulfill projected land needs. As such, a decision to designate a single property in one part of the region as an "urban reserve" in order to fulfill projected land needs necessarily reduced the need for other lands to be designated as "urban reserves." In this way, the misapplication of the "safe harbor" rule, particularly as multiplied many times over across the region, had indirect and far-reaching ramifications for various other properties throughout the region, including the Property. Likewise, a remedy that corrects this misapplication (reconsideration of reserves designations without applying the rule) will necessarily have similar, though opposite, ramifications for properties throughout the region, including the Property.

b. As applied, the "safe harbor" rule violates Oregon law.

On the merits of this objection, LCDC should reverse and remand the Decision because the application of the "safe harbor" rule of OAR 660-027-0060(4) violates Oregon law. ORS 195.141(3) requires that Metro and each County "*shall* base [a rural reserve] 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 not required to apply these review factors. Notwithstanding this fact, when adopting administrative rules to implement ORS 195.141(3), LCDC adopted OAR 660-027-0060(4), which permits a county to ignore the enumerated factors of OAR 660-027-0060(2) and simply focus on whether the land in question is designated a Foundation or Important Agricultural Land by the ODA. This explicitly violates ORS 195.141 and LCDC's rule-making authority under the statute. LCDC clearly exceeded its statutory authority in enacting this provision. To the extent that Metro and any of the Counties relied on OAR 660-027-0060(4) as the basis to designate any rural reserves (and it appears the Clackamas County in particular has engaged in this practice), such action misconstrues the applicable statute.

The Staff Report does not respond on the merits because staff deem the objection invalid. In response to a similar objection that was deemed valid, DLCD contends that the rule simply identifies a circumstance where the rural reserve factors have already been considered through an

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analysis prepared by the ODA. Staff Report 81. DLCD's response misses the point. ORS 195.141(3) requires that Metro and the Counties, not the ODA or any other third party, consider the factors for designating rural reserves. Furthermore, none of these statutory factors concern a property's designation as Foundation or Important Agricultural Land or a property's location within three (3) miles from the UGB. Thus, LCDC had no reasonable basis for determining that the "safe harbor" rule was an adequate surrogate to application of the factors actually delineated in the statute.

LCDC should remand the Decision to correct this error with direction that Metro and the Counties reconsider the reserves designations without applying the "safe harbor" rule at all.

F. Recommended Action and Conclusion

For the reasons set forth herein, LCDC should: (1) grant MLG's exceptions; and (2) remand this matter with direction to Metro and the Counties to remove the "rural reserve" designation from the Property, to redesignate the Property as "urban reserve," and to otherwise address the legal deficiencies identified herein. This matter is scheduled to come before LCDC at its meeting on October 19-22, 2010. MLG requests the opportunity to present oral argument relating to these exceptions at that meeting and prior to LCDC's decision in this matter. MLG is happy to answer any questions at that time.

Thank you for your attention to these exceptions and for your time in considering this complex and important matter.

Very truly yours,

Handwritten signature of Steven L. Pfeiffer, consisting of stylized initials 'SLP' followed by the word 'for'.

Steven L. Pfeiffer

cc: John O'Neil, Metropolitan Land Group, LLC
Matt Wellner, Metropolitan Land Group, LLC
Seth King, Perkins Coie

French, Larry

From: French, Larry [larry.french@state.or.us]
Sent: Monday, October 11, 2010 11:11 AM
To: Pfeiffer, Steven L. (Perkins Coie)
Cc: 'larry.french@state.or.us'; 'johno@metlandgroup.com'; 'Matt.Wellner@MetLandGroup.com'; King, Seth J. (Perkins Coie)
Subject: RE: Metropolitan Land Group / Exceptions to the 9/28/10 Staff Report on the Objections to Portland Metro Area Urban and Rural Reserve Designations

Steve,

Thank you for your exception report for your Metropolitan Land Group Client, which was received on Friday 10/08/10. All 13 pages are readable.

Best regards,

Larry French | Grants Administrative Coordinator
Oregon Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem OR 97301-2540
Phone: 503-373-0050 x283 Email: larry.french@state.or.us

From: Lundgren, Christina (Perkins Coie) [mailto:CLundgren@perkinscoie.com] **On Behalf Of** Pfeiffer, Steven L. (Perkins Coie)
Sent: Friday, October 08, 2010 4:41 PM
To: 'Larry.French@state.or.us'
Cc: 'johno@metlandgroup.com'; King, Seth J. (Perkins Coie); 'Matt.Wellner@MetLandGroup.com'
Subject: Metropolitan Land Group / Exceptions to the 9/28/10 Staff Report on the Objections to Portland Metro Area Urban and Rural Reserve Designations
Importance: High

Please accept the attached exceptions to the DLCD staff report on urban and rural reserves, which are filing on behalf of Metropolitan Land Group. Please confirm receipt. Thank you for your assistance.

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Sent by Christina R. Lundgren | Perkins Coie LLP

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