

**Jeffrey G. Condit**  
jeff.condit@millernash.com  
(503) 205-2305 direct line

**DEPT OF**

**OCT 08 2010**

**LAND CONSERVATION  
AND DEVELOPMENT**

October 7, 2010

**BY E-MAIL AND  
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Urban and Rural Reserves Specialist  
Department of Land Conservation and Development  
635 Capitol Street NE, Suite 150  
Salem, OR 97301

Subject: Exceptions to the Department's Report on the Objections to Portland  
Metro Area Urban and Rural Reserve Designations

Dear Urban and Rural Reserves Specialist:

We represent the Cities of Tualatin and West Linn (the "Cities"). The Cities submitted valid objections to Metro's and Clackamas County's decisions<sup>1</sup> with regard to the urban and rural reserve designations to the Department of Land Conservation and Development ("DLCD" or "Department") on July 14, 2010. The Department issued its report on September 28, 2010 (the "Report"). The Report recommends that the Land Conservation and Development Commission ("LCDC" or "Commission") deny the Cities' objections, as well as all of the other objections submitted to the Department, and approve the submittal. Please accept this letter as the Cities' exceptions to the Report filed pursuant to OAR 660-025-0160(4).

**1. The Department Misinterprets the Applicable Law.**

A fundamental flaw that infects the entire Report is the Department's interpretation that the regulatory scheme grants Metro and the counties an unprecedented level of discretion over the location of urban and rural reserves:

"It is important to understand that the process and criteria for designating urban and rural reserves is unlike any other large-scale planning exercise previously carried out in Oregon. With two exceptions, the Department

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<sup>1</sup> Because Metro's and Clackamas County's findings with regard to the four Stafford sub-area are substantively identical, the City's refer to the "Metro Findings" or "Metro Decision" for convenience.



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believes that the statute and the rules that guide this effort replaced the familiar standards-based planning process with one based fundamentally on political checks and balances, together with the factors that local governments are required to consider in making their decisions.

\* \* \*

“The result is that, in the Department’s opinion, the region has substantial discretion in determining the *location* of urban and rural reserves – the framework that will guide where the region will grow over the next 50 years *if* the region shows that its needs for housing and employment require additional lands beyond the current urban growth boundary.” (Emphasis in the original.) Report, Page 3.

“With one exception [designation of Foundation Farmland], the 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.*” (Emphasis in the original.) Report, Page 18.

In other words, according to the Department, the decision as to the location of the urban and rural reserves is primarily a political decision and the Commission must defer to that decision as long as the findings contain *some* explanation of the decision and can point to *some* evidence in support of the decision. The statute and the rule do not support this interpretation.

In determining the meaning of a statute or rule, the first step is examination of the text and context of the statute and the legislative history of that statute. State v. Gaines, 346 Or 160, 206 P3d 1042 (2009); PGE v. Bureau of Labor and Industries, 317 Or 606, 859 P2d 1143 (1993).

ORS 195.145(5) set forth the standard for location of urban reserves:

“(5) A district and a county shall base the designation of urban reserves under subsection (1)(b) of this section upon consideration of factors including, but not limited to, whether land proposed for designation as urban reserves, alone or in conjunction with land inside the urban growth boundary:



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- (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.”  
(Emphasis added.)

As the underscored statutory language indicates, the six urban reserve locational factors are unambiguously mandatory considerations when determining the location of urban reserves. The Department correctly points out that these considerations are described as “factors” and not “criteria,” and so the Cities would agree that Metro and the counties do not have to find that an area complies with each and every one of these factors. But that does not justify a leap to the conclusion that the statute grants Metro and the counties a higher level of political discretion over the location of the reserves than they have over any other land use decision subject to compliance with state law.

In point of fact, Goal 14 uses almost exactly the same language as ORS 195.145 to describe the analysis required for the location of an urban growth boundary (“UGB”) amendment:

The location of the urban growth boundary and changes to the boundary shall be determined by evaluating alternative boundary locations consistent with ORS 197.298 and with *consideration of the following factors*:

- (1) Efficient accommodation of identified land needs;
- (2) Orderly and economic provision of the public facilities and services;



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- (3) Comparative environmental, energy, economic and social consequences; and
- (4) Compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside of the UGB.”

The Goal 14 locational factors are clearly the context for the urban reserve locational factors. They were in effect at the time ORS 195.145 was adopted and address very similar considerations. If anything, the urban reserve factors are far more specific and detailed as to what must be analyzed than the Goal 14 factors.

The Commission and the courts have never interpreted “consideration” and “factors” as used in Goal 14 to mean that the determination of the location of a UGB is a political decision to which the Commission must defer. Rather, the Commission and the courts have concluded that under Goal 14, a local government must consider *all* of the factors, must balance those factors when determining the location of the UGB, and that no one factor controls (because they are “factors”). See e.g., City of West Linn v. Land Conservation and Development Commission, 201 Or App 419, 440, 119 P3d 285 (2005); Citizens Against Irresponsible Growth v. Metro, 179 Or App 12, 17, 38 P3d 956 (2002). The local government’s decision has to be sufficiently explained and has to be supported by substantial evidence in the *whole* record, not just one piece selected by the local government. 1000 Friends of Oregon v. City of North Plains, 27 Or LUBA 372, 377, aff’d 130 Or App 406 (1994). For these reasons, the Cities argued in their objection No. 6 that the urban reserve factors should be applied the same way as the Goal 14 factors, and the Commission’s scope of review should also be the same.

Far from indicating that the statute and the rules intended to replace “the familiar standards-based planning process with one based fundamentally on political checks and balances,” the text and context indicates that the intent was to adopt the very familiar analysis long established in Goal 14.

## **2. The Department Misapplies the Applicable Law.**

Given that the Report misinterprets the applicable law, it is unsurprising that it also misapplies it. The common theme of the Cities’ objections 2-6 is that Metro’s findings with regard to the factors are conclusory and fail to demonstrate support by substantial evidence. Metro’s decision recites the factors and reaches a conclusion, many times without citing any evidence in the record at all. At no time does Metro address the substantial evidence to the contrary submitted by the Cities or explain why Metro found other evidence more persuasive.

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According to the Department, Metro only has to show that it took the factors into consideration and that there is some evidence in the record to support its conclusion. As noted in the Cities' first exception, Metro should have analyzed the urban reserve factors in the same manner as required for the UGB factors in Goal 14. Because Metro failed to do so, the decision should be remanded.

Similarly, nothing in the urban reserve rule or statute implicitly or explicitly changes LCDC's scope of review. Goal 2 requires Metro's decision to be supported by substantial evidence. ORS 197.651 requires the Commission's findings to be supported by substantial evidence in the whole record. As noted above, "substantial evidence" is evidence in the whole record, and requires consideration of competing or conflicting evidence. Where conflicting evidence has been submitted, a local finding cannot just point to evidence that supports its decision, it must explain why it found such evidence more persuasive than the conflicting evidence. See e.g., Younger v. City of Portland, 305 Or 346, 752 P2d 262 (1988). Metro's findings fail to do so and therefore its decision must be remanded.

The Report parrots Metro's conclusory findings with regard to the Stafford subareas and does not analyze the substantiality of the evidence. The Cities therefore adopt and incorporate by reference the objections contained in their July 14 submittal as exceptions to the Report.

If LCDC approves Metro's decision based on the Report, it will have misapplied the substantial evidence test and adopted findings insufficient for judicial review. See e.g., 1000 Friends of Oregon v. LCDC and the City of Woodburn, \_\_\_ Op App \_\_\_, \_\_\_ P3d \_\_\_ (CA A135375, September 8, 2010).

### **3. The Report Does Not Fully Respond to the Cities' Objections With Regard to Factors 1 and 3.**

In their second objection, the Cities argued that Metro had failed to demonstrate that the four Stafford subareas can be developed at urban densities in a way that makes efficient use of existing and future transportation infrastructure or can be efficiently and cost-effectively served with transportation facilities. Exhibit A for the Cities' argument is Metro's own 2035 Regional Transportation Plan, which concludes that even under the rosier of financial assumptions, the road providing service to the Stafford area will be failing by 2035.

The Report treats this as a Goal 12/TPR argument and rejects that argument. The Cities did make such arguments (and continue to believe that they are



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correct). This Cities also argued, however, that as a matter of substantial evidence, a reasonable person could not conclude that the Stafford area would or could be adequately served by transportation facilities, when Metro's own RTP analysis concludes that it will not be so served. The evidence relied on by Clackamas County (and cited in the Report) is a July 8, 2009, outline analysis of the subareas. It ranks the Stafford area as "medium to low" suitability for transportation. Neither Metro nor the County explain why they found this evidence more persuasive than the subsequently developed—and now adopted—RTP, which concludes that adequate facilities will not be in place by 2035 and that there is no current or projected funding source available to change this outcome.

As noted in the Cities' Objection No. 2, the City of West Linn submitted the relevant portions of the final draft RTP to the Clackamas County Board of Commissioners on April 21, 2010. The final draft RTP was adopted by the Metro Council on June 10, 2010. Metro's findings are inadequate because they fail to explain why it found the July 8, 2009, outline more persuasive than the RTP. In addition, a reasonable person would not find a year-old outline more persuasive than the RTP, particularly when that same "person" has now adopted the RTP as the transportation planning document for the region for the next 25 years.

The Cities made a final argument, also not addressed in the Report, that Metro's urban reserves decision is inconsistent with the RTP in violation of Goal 2. A number of other objectors have also cited to inconsistencies between the RTP and Metro's urban/rural reserves decision. The Department's response is, variously, that the planning period for urban and rural reserves is different than the planning period for the RTP, and that the TPR and Goal 12 do not apply to designation of reserves, and that the RTP wasn't adopted until a week after adoption of the urban/rural reserves decision and isn't yet acknowledged.

First, the RTP is a 25-year document because that planning horizon is required of a regional plan by the federal government. So at least from an analytical standpoint, it applies to the first five years of the 30 to 50-year reserves period.

Second, the effect of the designation of an area as an urban reserve is to move it to the front of the priority line the next time the UGB is expanded. See ORS 197.298. Metro must update its inventories and determine whether to amend the UGB every five years (and is doing so right now). ORS 197.299. Every designated urban reserve will therefore be under consideration for addition to the UGB within the time frame governed by the RTP. It makes no sense from a consistency or a planning



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standpoint to designate a territory as urban reserve that the RTP demonstrates cannot and will not be served for the next 25 years.

Finally, the date of adoption of the RTP is irrelevant to the consistency and evidentiary considerations. The period review process has long been held to be an “iterative” process that has to take into consideration new regulations adopted prior to acknowledgment. The urban/rural reserve decision is not yet acknowledged and the RTP has been adopted. They are required to be consistent under Goal 2 and they are not.

#### **4. The Report Misconstrues the Cities’ First Objection.**

In their first objection, the Cities argued that Metro had no authority to designate urban reserves under the optional OAR 660 Division 27 process, because its code requires it to designate urban reserves under OAR 660, Division 21. For this reason, the Cities argued that Metro had not made the choice to select that optional process. The Department claims that this argument is “nonsensical” because the Metro Code provision was adopted prior to OAR Division 27 and so could not reflect a “choice.”

The “choice” (or inadvertent mistake) was *not* to amend the Metro Code *after* the statute and Division 27 were adopted to authorize Metro to designate urban reserves under that process. A state statute does not preempt a local regulation unless the intent to preempt local legislation is express. See e.g., Thunderbird Mobile Club v. City of Wilsonville, 234 Or App 457, 228 P3d 650 (2010), rev den 348 Or 524 (2010). Not only is there no intent to preempt local legislation, the Division 27 process is expressly optional. A county that has adopted a 100-acre minimum lot size in its EFU zone, for example, cannot ignore this requirement merely because the state or the Commission subsequently enacts a statute or rule allowing an 80-acre minimum lot size; it must first amend its code. And so must Metro.

#### **5. Don’t Make the Same Mistake Twice.**

The Cities find ironic the Department’s favorable citation to Metro’s finding with regard to the City of Damascus. Report page 53. Metro’s finding supports its decision to designate some foundation farm land as urban reserves over some exception lands. It notes the difficulty of converting existing low-density rural residential development to urban development due to expense and politics:

“There is no better support for these findings than the experience of the City of Damascus, trying since its addition to the UGB in 2002 to gain



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acceptance from its citizens for a plan to urbanize a landscape characterized by a few flat areas interspersed among steeply sloping buttes and incised stream courses and natural resources.”

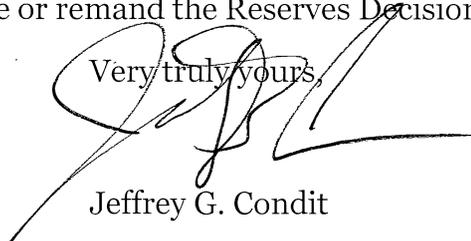
This could be a word-for-word description of both the physical and political landscapes with regard to Stafford: A heavily parcelized area consisting of steep slopes, rivers and streams, very expensive and difficult to adequately serve, and inhabited by residents and surrounded by cities that, for these reasons, have always strongly opposed urbanization.

The Cities hope that LCDC will have its own revelation on the road to Damascus and remand the urban/rural reserves decision back to Metro and the counties.

### CONCLUSION

Based on its July 14 objections and its above exceptions, the Cities respectfully request that LCDC reverse or remand the Reserves Decision.

Very truly yours,



Jeffrey G. Condit

cc: Sherilyn Lombos, City of Tualatin  
Chris Jordan, City of West Linn  
Laura Dawson Bodner, Metro  
Maggie Dickerson, Clackamas County  
Chuck Beasley, Multnomah County  
Steve Kelly, Washington County

From: Origin ID: VKWA (503) 205-2305  
 Jeff Condit  
 Miller Nash LLP  
 Suite 3400 US Bancorp Tower  
 111 SW Fifth Avenue  
 Portland, OR 97204



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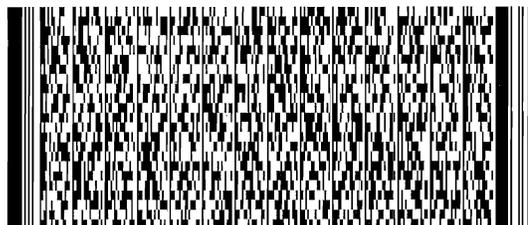
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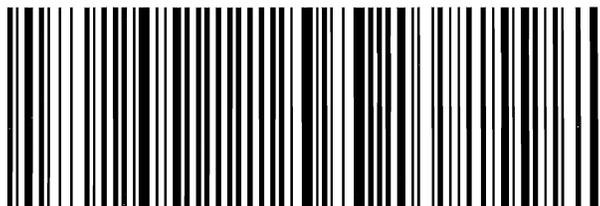
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3400 U.S. Bancorp Tower  
111 S.W. Fifth Avenue  
Portland, Oregon 97204-3699  
OFFICE 503.224.5858  
FAX 503.224.0155

Jeffrey G. Condit  
jeff.condit@millernash.com  
(503) 205-2305 direct line

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OCT 08 2010  
LAND CONSERVATION  
AND DEVELOPMENT

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Urban and Rural Reserves Specialist  
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**French, Larry**

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**From:** Donnelly, Jennifer [jennifer.donnelly@state.or.us]  
**Sent:** Friday, October 08, 2010 9:15 AM  
**To:** larry.french@state.or.us  
**Cc:** Whitman, Richard; Hallyburton, Rob  
**Subject:** FW: Exceptions to Department Report on Metro Urban/Rural Reserves Decision,  
**Attachments:** Letter to DLCDC 10-7-10.pdf

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**From:** Condit, Jeffrey G. [mailto:Jeff.Condit@millernash.com]  
**Sent:** Thursday, October 07, 2010 5:43 PM  
**To:** jennifer.donnelly@state.or.us  
**Subject:** Exceptions to Department Report on Metro Urban/Rural Reserves Decision,

Jennifer: Attached please find a copy of exceptions to the Departments Report on the Metro Urban/Rural Reserves Decision filed by the Cities of Tualatin and West Linn. The original has been fed-exed and should arrive at DLCDC tomorrow.

Thanks for your consideration.

- Jeff

**Jeffrey G. Condit**  
**MILLER NASH LLP**

3400 U.S. Bancorp Tower | 111 S.W. Fifth Avenue | Portland, Oregon 97204-3699

Office: 503-224-5858 | Fax: 503-205-8639

[Jeff.Condit@millernash.com](mailto:Jeff.Condit@millernash.com) | [www.millernash.com](http://www.millernash.com)

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