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DEPT OF
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LAND CONSERVATION AND DEVELOPMENT

November 6, 2017

VIA HAND DELIVERY

Land Conservation and Development Commission
635 Capitol Street NE, Suite 150
Salem, Oregon 97301

Re: Exceptions to the October 26, 2017 Department of Land Conservation and Development (DLCD) Report Concerning Portland Metro Urban and Rural Reserve Designations

Dear Chair Lidz and Members of the Commission:

I. Introduction

This letter presents written exceptions by landowners Katherine Blumenkron, David Blumenkron, Springville Investors, LLC, Burnham Farms, LLC, and Bob Zahler (collectively, the "Objectors") to the October 26, 2017 report and recommendations (the "Report") of the Department of Land Conservation and Development ("DLCD" or the "Department") to the Land Conservation and Development Commission (the "Commission" or "LCDC") concerning the July 24, 2017 submittal by Metro, Multnomah County, and Clackamas County (collectively, the "Agencies") to DLCD concerning the urban and rural reserve designations in the Portland Metro region (the "Submittal").

The Report carefully recites the procedural rules it finds applicable to the Objectors' August 14, 2017 objections (Attachment H to the Report) and asserts the options of the Commission thereby. However, the Agencies' Submittal fails to protect the substantial rights of these Objectors, and the Report fails identify the Commission's obligations, under its rules, for that failure.

The Commission rules require it to reject a submittal that prejudices the substantial rights of party. Further, the Commission is required to apply all rules applicable to the designation of urban and rural reserves, including state statues, LCDC's administrative rules, and of course, substantial rights including those protected from State violation by the Federal Constitution (and any additional rights protected by a State Constitution).

The Report sets the statutory obligation of the Commission under ORS 197.633(3) thus:

> "The commission's standard of review:
>
> (a) For evidentiary issues, is whether there is substantial evidence in the record as a whole to support the local government's decision.

(b) For procedural issues, is whether the local government failed to follow the procedures applicable to the matter before the local government in a manner that prejudiced the substantial rights of a party to the proceeding.

(c) For issues concerning compliance with applicable laws, is whether the local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations. The commission shall defer to a local government's interpretation of the comprehensive plan or land use regulations in the manner provided in ORS 197.829. For purposes of this paragraph, "complies" has the meaning given the term "compliance" in the phrase "compliance with the goals" in ORS 197.747."

ORS 197.633(3) (emphasis added). The Oregon Court of Appeals further explained the standard of review, stating "the Commission must demonstrate in its opinion the reasoning that leads the agency from the facts that it has found to the conclusions that it draws from those facts." Report at 10. And it and the Commission recognized that its limited scope of review did not address Constitutional issues. *See* Report at 27 ("Constitutional matters were not addressed by the Court of Appeals in *Barkers Five.*").

The Commission rules further require that the Submittal "include findings of fact and conclusions of law that demonstrate that the adopted or amended plans, policies and other implementing measures to designate urban and rural reserves comply with this division, the applicable statewide planning goals, and other applicable administrative rules." OAR 660027-0080(4). That Court further explained as to Area 9D that the County "acknowledge the dissimilarities (within area 9D) and explain why, nonetheless, the county opted for the reserves designation that it did." *Barkers Five*, 261 Or App 259, 346 (2014); *see also* Report at 21.

Separately, the Commission maintains that Order 14-ACK-001867 removed all reserve designations previously approved under Order 12-ACK-001819, even those not remanded by the Court of Appeals. *See* Report at 5 ("[T]he commission has not approved the reserves that were individually unaffected by the remand.").

II. The Submittal does not comply with the Commission's administrative rules and iiishould be remanded per the Alternative Motion proposed by the Department (Report at 34), and require adherence to the rules by Metro and Multnomah County.

Despite the rules applicable to the Submittal, Multnomah County did not adhere to the rules set forth above. Objectors have clearly established evidence of the failure to comply with the rules. First among those violations, clear evidence that the reserves designation decisions by Multnomah County was influenced by the opinions of the Commissioners' constituents, rather than being determined by impartial application of the urban and rural reserves factors.

The evidence includes:

1. In its February 25, 2010 decision regarding the designation of Area 9B, Multnomah County based its decision on political grounds, not the applicable criteria in ORS and OAR's. This was admitted on the record by two Commissioners who voted against the rural reserve designation of Area 9B (Commissioners Wheeler and Bragdon), and by Commissioner Kafoury who stated in regard to her vote that she had received nearly 700 letters, emails, and phone calls from the public in support of rural reserve designation for Area 9A and 9B, and she "can't not take that into consideration." Attachment H to Report, at 10. Previously, on December 10, 2009, the County Commission recommended to the "Core 4" of the Reserves Steering Committee that to designate Area 9B as "undesignated" (neither urban or rural) in order to allow for future events to clarify a future assignment of appropriate reserve designations, if any, and allow for further consideration of a development concept "that would leverage revenue from more intensive development east of N. Bethany to support lower density development in targeted areas to the east and acquire other land for public ownership." Attachment A to Multnomah County Resolution No. 09-153, at 2.

2. With respect to Multnomah County Ordinance No. 1246 (2017), the majority of Commissioners expressly stated in the record that they were relying on the determination of the previous Commission in affirming the urban and rural reserves designations. *See* Attachment H to Report, at 6 (discussing Commissioner statements at the County's May 4, 2017 hearing). In other words, they were making no independent or impartial determination of the designations. That is, their decision in 2017 is entirely dependent on the bona fides of the Commission's decision in 2010. If Multnomah County Ordinance No. 1161 (2010), as amended, was improper, then County Ordinance No. 1246 is also improper.

3. In Washington County, the reserves designations were determined by express legislative statue, HB 4078, not criteria. And in Clackamas County, the designation was accomplished by an intergovernmental agreement/settlement—again, a political determination, not a criteria-based determination.

Second, the Objectors have identified the failure in "reasoning" that supposedly underlies the logic and policy of the designation of Area 9B.

1. A rural reserve designation "means land reserved to provide long-term protection for agriculture, forestry or important natural landscape features that limit urban development or help define appropriate natural boundaries or urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains." ORS 195.137. Area 9B simply does not have natural landscape features that meet this definition.

2. Two counties found it necessary to split certain study areas (e.g. Areas 7B, 7I, and 8C) between rural and urban reserve designations—such decisions could only be based on evidence that lands within the particular study area were different. Those study areas, and the land they comprised, were smaller than Area 9B.

3. The third option for designating study areas ("undesignated") is ignored in the reserves designation process. The statues and rules pertaining to urban and rural reserves do not explain an application for "undesignated." Yet "undesignated" status was initially recommended by Multnomah County for Area 9B under Resolution No. 09-153.

4. The designation of rural reserves is not based upon the "best achieves" standard. If that standard could change the character of the land, it would obviate the need for the rural designation criteria. Land that does not inherently qualify as "rural" cannot be made "rural".

5. The standard of the Court of Appeals regarding reasoning for a decision is violated by all of the above.

III. The rights of Objectors guaranteed by the U.S. Constitution are at issue in the Submittal.

Multnomah County's written correspondence to the Department dated September 13, 2017 concerning Objectors' August 14, 2017 objections admits the application of parts of the U.S. Constitution, but contends that they don't apply to their actions, or alternatively their actions did not fail to meet constitutional standards. Multnomah County Written Correspondence, September 13, 2017, at 9-23.

The Court of Appeals specifically did not reach or rule on Constitutional issues concerning the reserves designations. See Report at 27 ("Constitutional matters were not addressed by the Court of Appeals in *Barkers Five*.").

The first Constitutional question, then, is what requirements of the U.S. Constitution apply to the Designation process? No State can operate in violation of constitutional requirements, but does a state need to include them in its legislation for them to apply? No—that is an absurd premise, but one that is maintained by Multnomah County in its written correspondence, as well as by the Department. *See* Report at 27 (finding that Objectors' constitutional objections are invalid because they do "not identify a statute, goal, or rule alleged to have been violated."). In other words, the Report submits that unless the OARs mention the Constitution, it does not apply to the Submittal, and any objections concerning constitutional matters are invalid. The Objectors maintain and support with evidence that the protections of the Equal Protection Clause and the Due Process Clause apply to the Submittal, and have been violated.

Under these circumstances, what is the obligation of LCDC to determine if that is the case? The Report states Constitutional issues were addressed by LCDC in its 2012 approval order. Report at 27. They now seek to apply any such determinations to events in 2017.

Additionally, illogical positions arise from OARs that actually expand or contradict the express provisions of Oregon statutes. Foremost is the statutory definition of rural reserve: to provide long-term protection for agriculture, forestry or important natural landscape features that limit urban development or define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains. ORS 195.137.

IV. ORS 197.040 applies to the rural reserve Designations and precludes rural reserve designation to Objectors land.

The Report submits this that legal issue has been decided by LCDC. Report at 29-30. It cites the Commission's finding that ORS 197.040 simply "guides the Commission" in designing its administrative requirements" and thus "[r]eview of the Metro Urban and Rural Reserves Submittal in the manner of periodic review is not subject to OS 197.040." Report at 30. However, the application of ORS 197.040 is mandatory for LCDC.[1] The equitable balancing of land use regulations is mandatory, and the effect of a draconian rural reserve designation on an Area or a property when two different designations are appropriate would mean every policy and legal objective of the urban and rural reserves designation process is a clear violation of ORS 197.040.

V. Conclusion.

The Departments proposed Alternative Motion for remand of the Submittal as to Objectors' land is the only procedure that will comply with the requirements of the U.S. Constitution. A failure to recognize the application of the Constitution, and to proceed in opposition to it will lead to failure of the urban and rural reserves designation process as not protecting the substantial rights of a parties affected by it.

Respectfully Submitted,

THE JAMES LAW GROUP, LLC

s/ Christopher James

On behalf of:
Springville Investors, LLC
Katherine Blumenkron
David Blumenkron
Burnham Farms, LLC
Bob Zahler

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[1] ORS 197.040 (1) The Land Conservation and Development Commission shall:
* * *
(b) In accordance with the provisions of ORS chapter 183, adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197. Except as provided in subsection (3) of this section, in designing its administrative requirements, the commission shall:
* * *
(C) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;
(D) Assess the likely degree of economic impact on identified property and economic interests; and
(E) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.
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