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I. Statement of the Case

A. Nature of Proceedings and Relief Sought

Petitioners 1000 Friends of Oregon, Dave Vanasche, Bob VanderZanden, and Larry Duyck (together, 1000 Friends) seek judicial review of the Land Conservation and Development Commission (LCDC) final acknowledgment order, 12-ACK-001819 (Order).

B. Nature of Judgment Sought to be Reviewed

LCDC's order approves Metro's amendments to its Regional Framework Plan ("RFP") and Urban Growth Management Functional Plan (UGMFP) designating urban reserves, and amendments by Clackamas, Multnomah, and Washington counties to their respective comprehensive plans designating rural reserves.[1]

C. Statutory Basis for Appellate Jurisdiction

The Court of Appeals has jurisdiction pursuant to ORS 197.651.

D. Dates of Order and Petition for Judicial Review.

LCDC issued its order on August 14, 2012. JER-1. Petitioners timely filed and served their Petition for Judicial Review, under ORS 197.651(3), on September 4, 2012.

[1] The reserves statute authorizes Metro and each county to simultaneously authorize urban and rural reserves through an intergovernmental agreement (IGA). No IGA may designate urban reserves in a county unless it also designates rural reserves. ORS 197.143.

E. Nature of and Jurisdictional Basis for Agency Action

LCDC reviews a decision designating urban and rural reserves under ORS 195.137-.145 "in the manner of periodic review," pursuant to ORS 197.626(1)(c) and (f).

F. Questions Presented on Appeal

Did LCDC correctly interpret and apply the rural and urban reserve factors in acknowledging the individual reserve areas and in holding that the overall decision correctly balanced the rural and urban objectives?

Did LCDC correctly approve Metro's use of an alternate agricultural analysis to evaluate land for rural reserve designation in Washington County, and was its approval supported by substantial evidence?

G. Summary of Arguments[2]

LCDC failed to correctly interpret and apply the legislative and regulatory factors controlling designation of urban and rural reserves. Instead, LCDC substituted an essentially "political" calculus under which it mistakenly viewed its legal obligation as satisfied as long as Metro designated what Metro believed to be a sufficient *quantity* of land as rural reserves, when the legal standard is a *qualitative* one. LCDC's order approving Metro's use of an alternate agricultural

[2] Petitioners incorporate the related arguments of petitioners Save Helvetia and Carol Chesarek and Cherry Amabisca.

analysis to evaluate land for rural reserves designation in Washington County is unlawful and not supported by substantial evidence.

H. Summary of Material Facts

On June 23, 2010, seeking acknowledgment, Metro and the counties of Multnomah, Clackamas, and Washington submitted a joint and concurrent decision proposing urban and rural reserve land designations to the Department of Land Conservation and Development (DLCD).[3] In October 2010, LCDC held hearings and approved Metro's urban and rural reserve designations in Clackamas and Multnomah counties. LCDC approved the Washington County urban reserves with two exceptions: it reversed the urban reserve designation of Area 7I (Cornelius) and remanded the urban reserve designation of Area 7B (Forest Grove). LCDC remanded all rural reserve designations in Washington County for further findings.

Upon remand, Washington County redesignated its urban and rural reserves to: (1) leave all but 28 acres of Area 7B as urban reserves; (2) change 263 acres in Area 7I from urban reserve to rural reserve, leaving the remaining 360 acres undesignated;[4] (3) change 352 acres in Area 8B(Helvetia) from undesignated to urban reserve; (4) change 383 acres in Area 8SBR(Helvetia), from rural reserves to

[3] This brief refers to Washington County and Metro jointly as "Metro," except when differentiation is necessary for clarification.

[4] "Undesignated" refers to lands Metro left without either urban or rural reserve designation. JER-29.

undesignated; and (5) change 383 acres in Area 6E (Rosedale Road) from rural reserve to undesignated. JER-9;App-1.

Metro agreed with Washington County's changes and adopted them through intergovernmental agreements designating 28,256 acres as urban reserves and 266,628 acres as rural reserves throughout the three-county region. JER-10. Of the urban reserves, 11, 915 acres are classified as "Foundation Agricultural Land," which is the Oregon Department of Agriculture's (ODA) most valuable rating for farm areas. Of the Foundation farmland, 9,730 acres are in Washington County. JER-84.

On August 14, 2012, LCDC issued its final written order, acknowledging the Metro urban and rural reserves submittal in its entirety, including the 2010 initial submittal as revised by the 2011 re-designation submittal.

II. Petitioners' Standing

Petitioners presented oral and written testimony at the county, Metro, and LCDC level proceedings, including objections and exceptions to LCDC on both the initial and final decisions.[5]

III. Assignments of Error

INTRODUCTION

Legislative Delegation to LCDC on Urban and Rural Reserves

[5]R-3(82-92);R-5(1-17);R-8(61-106);R-16(38-71);R-18(142-157);R-21(476-495).

The Legislature's purpose for reserves is to ensure "long-range planning" and "greater certainty":

> "(1) Long-range planning for population and employment growth by local governments can offer greater certainty for:
> (a) The agricultural and forest industries, by offering long-term protection of large blocks of land with the characteristics necessary to maintain their viability; and
> (b) Commerce, other industries, other private landowners and providers of public services, by determining the more and less likely locations of future expansion of urban growth boundaries and urban development.
> (2) State planning laws must support and facilitate long-range planning to provide this greater certainty."

ORS 195.139.

The Legislature established "factors" on which Metro and each county "shall base" designation of rural and urban reserves. It delegated to LCDC the authority to establish a "process and criteria" for implementing the statutory factors to determine the suitability of lands for designation as either rural or urban reserves. ORS 195.141,-.145. Finally, the Legislature directed LCDC to consult Oregon Department of Agriculture (ODA) in adopting the rural reserve "process and criteria." ORS 195.141(4).[6]

LCDC adopted rules amplifying the statute's purpose, and prescribing the use of "criteria and factors" for both rural and urban reserves to implement this purpose in two steps. First, Metro and each county must use the criteria and factors to evaluate individual "lands" for designation as rural or urban reserves.

[6] Portions of the reserve rules are at App-48-50.

Second, Metro must determine if the resulting decision "in its entirety best achieves" the law's purpose. OAR 660-027-0005(1),(2) (App-49-50).

LCDC states the purpose of urban reserves is to support both urban *and* rural objectives.

> "Urban reserves…are intended to facilitate long-term planning for urbanization…and to provide greater certainty to the agricultural and forest industries, to other industries and commerce, to private landowners and to…service providers, about the locations of future expansion of the Metro Urban Growth Boundary."

OAR 660-027-0005(2).

In contrast, the purpose of rural reserves is to support rural objectives while *limiting* urban development:

> "Rural reserves…are intended to provide long-term protection for large blocks of agricultural land and forest land, and for important natural landscape features that limit urban development or define natural boundaries of urbanization."

OAR 660-027-0005(2).

The rural reserve factors, OAR 660-027-0060, are specific:

> "(2) Rural Reserve Factors: When identifying and selecting lands for designation as rural reserves intended to provide long-term protection to the agricultural industry or forest industry, or both, a county shall base its decision on consideration of whether the lands proposed for designation.
>
> "(a) Are situated in an area that is otherwise potentially subject to urbanization during the applicable period described in OAR 660-027-0040(2) or (3) as indicated by proximity to a UGB or proximity to properties with fair market values that significantly exceed agricultural values for farmland, or forestry values for forest land;

> "(b) Are capable of sustaining long-term agricultural operations for agricultural land, or are capable of sustaining long-term forestry operations for forest land;
>
> "(c) Have suitable soils where needed to sustain long-term agricultural or forestry operations and, for agricultural land, have available water where needed to sustain long-term agricultural operations; and
>
> "(d) Are suitable to sustain long-term agricultural or forestry operations, taking into account:
>
> "(A) for farm land, the existence of a large block of agricultural or other resource land with a concentration or cluster of farm operations, or, for forest land, the existence of a large block of forested land with a concentration or cluster of managed woodlots;
>
> "(B) The adjacent land use pattern, including its location in relation to adjacent non-farm uses or non-forest uses, and the existence of buffers between agricultural or forest operations and non-farm or non-forest uses;
>
> "(C) The agricultural or forest land use pattern, including parcelization, tenure and ownership patterns; and
>
> "(D) The sufficiency of agricultural or forestry infrastructure in the area, whichever is applicable." [7]

The reserve rules require that Metro and the counties "shall base" the decision on the factors, OAR 660-027-0050 and-0060, and "shall apply" the factors, "concurrently and in coordination with one another." OAR 660-027-0040(10). Metro and any county that enters into a reserves agreement with Metro must "adopt a single joint set of findings of fact, statement of reasons, and conclusions explaining why areas were chosen as urban or rural reserves, how these designations achieve the objective stated in OAR 660-027-0005(2), and the

[7] App-50.

factual and policy basis for the estimated land supply determined under section (2) of this rule." OAR 660-027-0040(10). That is, Metro must demonstrate how, using the factors, designation of *each* area as rural or urban meets the reserves' purpose and how the decision, "in its entirety, best achieves" the reserves' purpose. "Best achieves" is neither merely a math equation – adding up the numbers of each reserve type – nor a purely discretionary choice; rather, it means the designation must be that which most achieves the statutory and regulatory standard.

The rules give special consideration to ODA's categorization of the region's agriculture lands as "Foundation," "Important," or "Conflicted," as described in the ODA report, *Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands* (*ODA Report*), and prepared for Metro. OAR 660-027-0010(1),(2),-0040(11), and -0060(4). Foundation Agricultural Lands are the best of the best farmlands. They "provide the core support to the region's agricultural base [and] incubate and support the larger agricultural industry and are vital to its long-term viability. They have the attributes necessary to sustain current agricultural operations and to adapt to changing technologies and consumer demands."[8] "Important" and Conflicted" lands are somewhat less valuable, but still significant, agricultural lands and thus require consideration under the factors.

[8]App-15;R-12(75).

LCDC used the *ODA Report* in creating at least three of the rules. First, the *Report* is basis for the rural reserve factors.[9] Rural reserve factors OAR 660-027-0060(2)(b)-(d)(A)-(D) describe the land and other characteristics necessary to ensure the "long-term protection" of the agricultural land base.

Second, a county may "deem that Foundation Agricultural Lands or Important Agricultural Lands within three miles of a UGB qualify for designation as rural reserves….without further explanation," because of the likelihood of urbanization pressure in such close proximity to urban use. OAR 660-027-0060(4). While rural reserve factors OAR 660-027-0060(2)(b)-(d) are based on the *ODA Report*, factor (a) adds that rural reserve designation is intended for qualifying lands that also are "subject to urbanization during the applicable [urban reserve] period." Therefore, any Foundation or Important agricultural lands within three miles of the UGB, by definition, meet each rural reserve factor.

Third, because Foundation farmland "is the most important land for the viability and vitality of the agricultural industry," the rules provide a higher standard of justification if Metro designates Foundation farmland as urban reserves.

> "Because the [*ODA Report*] indicates that Foundation Agricultural Land is the most important land for the viability and vitality of the agricultural industry, if Metro designates such land as urban reserves, the findings and statement of reasons shall explain, by reference to the factors in OAR 660-027-0050 and 660-027-0060(2), why Metro chose the Foundation

[9]JER-285,288.

> Agricultural Land for designation as urban reserves rather than other land considered under this division."

OAR 660-027-0040(11).

Use of "rather than" is a comparative standard. That is, Metro must explain, using the factors, not only why the candidate area's suitability for urban reserve outweighs the area's Foundation farmland status, but also why it was designated urban reserve "*rather than* other land considered under this division." Metro must make this comparison with all "other land considered" in Metro's entire reserves study area. OAR 660-027-0040(11)(emphasis added).

In sum, the rules require Metro to apply the factors and purpose in three ways: to evaluate whether individual areas should be designated as rural reserves or urban reserves; to decide whether a Foundation Agricultural area should be designated as urban reserve, rather than other lands; and to determine whether the overall reserve decision achieves the law's purpose.

In *1000 Friends of Oregon v. Metro (Ryland Homes),* 174 Or App 406, 409-11, 26 P3d 151 (2001), the court explained Metro's obligations when applying the Goal 14 locational factors.[10] Evidence that a factor was considered is insufficient alone; the findings must also explain how balancing the factors leads to the particular result:

[10] While we are not dealing with Goal 14 location factors here, the court's discussion is instructive.

> "[T]he locational factors are not independent approval criteria. It is not necessary that a designated level of satisfaction of the objectives of each of the factors must always be met before a local government can justify a change in a UGB. Rather, the local government must show that the factors were 'considered' and balanced by the local government in determining if a change in the UGB for a particular area is justified.
>
> "* * * *
>
> "If the local government has not specifically articulated its findings regarding a particular factor and explained how it balanced that factor in making a decision regarding a change in a UGB, it is not properly within our scope of review to make assumptions and draw inferences from other portions of the local government's findings in order to surmise what the local government's decision really was."

This court also clarified that individual factors cannot be weighted against one another. Rather, "local governments 'must apply each Goal 14 [locational] factor equally and include lands in urban reserves only where all of the factors justify that inclusion'." *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 24, 994 P2d 1205 (2000).

In adopting the rules, LCDC described the comparative alternatives analysis and explanation required in evaluating individual areas.

> "Metro and the counties must apply all the factors, not merely 'consider' them, and must use the factors to compare alternative locations for the reserves."[11]

The reserves statute and rules are unambiguous: Metro and the counties must apply the factors both in evaluating individual areas and in evaluating the decision in its

[11] JER-27, n.16.

entirety, to see if the reserves' purpose is met. However, that is not what LCDC did.

FIRST ASSIGNMENT OF ERROR

LCDC incorrectly applied the rural and urban reserve factors in evaluating individual land areas and in balancing the overall decision.

A. Preservation of Error

Petitioners raised objections and exceptions to Metro's interpretation of how to apply the factors, application of that interpretation to specific areas, and failure to properly balance whether the regional decision best achieved the law's purpose.[12] LCDC found that petitioners have standing and responded to the objections and exceptions.[13]

B. Standard of Review

This court reviews an LCDC order made pursuant to ORS 195.137-.145 to determine if it is "unlawful in substance or procedure," unconstitutional, or "not supported by substantial evidence as to facts found by the commission." ORS 197.651(10).

In reviewing Metro's reserves decision, "LCDC must 'demonstrate in [its] opinion the *reasoning* that leads the agency from the *facts* that is has found to the *conclusions* that it draws from those facts'." *1000 Friends of Oregon v. LCDC*

[12] R-21(478-482,485-488);R-18(142-154);R-8(61-106);R-5(6-8,12-16).
[13]R-6(12,23).

(McMinnville), 244 Or App 239, 267, 259 P3d 1021 (2011) (quoting *1000 Friends of Oregon v. LCDC (Woodburn),* 237 Or App 213, 225, 239 P3d 272 (2010)). The court has described why this demonstration is important:

> "If there is to be any meaningful judicial scrutiny of the activities of an administrative agency—…for the purpose of requiring the administrative agency to demonstrate that it has applied the criteria prescribed by statute and by its own regulations and has not acted arbitrarily or on an ad hoc basis—we must require that its order clearly and precisely state what it found to be the facts and fully explain why those facts lead it to the decision it makes. Brevity is not always a virtue."

Home Plate, Inc. v. OLCC, 20 Or App 188, 190, 530 P2d 862 (1975). *See*, *Sunnyside Neighborhood v. Clackamas Co. Comm.,* 280 Or 3, 21, 569 P2d 1063 (1977).

ARGUMENT

The law requires Metro to apply the factors at two steps: whether individual areas should be designated as rural reserves or urban reserves, and whether the overall reserve decision achieves the law's purpose. Metro did neither, and LCDC approved it. Instead, LCDC interpreted Metro's authority to be so discretionary that neither LCDC nor this court can determine if the law has been met. LCDC's approval of these legal and evidentiary errors infects all reserve designations in Washington County.

Although LCDC cites *Ryland* as the legal basis for applying the factors to individual areas, [14] and states the factors must be used to "*compare alternative locations* for the reserves,"[15] it states Metro has "substantial discretion in determining the location of urban and rural reserves."[16] This unfounded assumption of ill-defined discretion leads LCDC to alter the requirement of OAR 660-027-0040(10) that Metro apply the factors "concurrently and in coordination with one another," instead allowing Metro to look only at the urban reserve side of the ledger when determining whether Foundation land should be urban or rural. Metro stated its confused understanding:

> "[T]here is no requirement for Metro to show that an area is better suited as an urban reserve than as a rural reserve before it designates any land as urban reserves."[17]

However, the law does not permit such a subjective and incomplete process. Rather, the statute and rules explicitly require Metro to apply clear "criteria" and both sets of "factors" in "coordination" to explain why an area was chosen as either an urban or rural reserve. ORS 195.141(4), -.145(6), OAR 660-027-0040(10). LCDC's statement is simply contrary to the rule's plain language.

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[14] JER-28, n.16: "'[F]actors'…are intended to be employed and interpreted in the same manner as the UGB factors in Goal 14. * * * [T]he courts have indicated factors are a type of 'criteria'…."
[15] JER-27, n.16(emphasis added).
[16] *Id.*
[17] JER-30.

Recognizing its significance to the agricultural industry, OAR 660-027-0040(11)[18] grants special consideration to Foundation Agricultural Land and requires additional and comparative findings. LCDC accurately described Metro's heightened obligation when selecting Foundation farmland as urban reserve rather than rural reserve:

> "Metro must consider both sets of factors, and explain why it selected the lands in question *instead of* other lands."[19]

Yet, LCDC inexplicably concluded that the special Foundation lands section, OAR 660-027-0040(11), "does not establish that Metro was required to include such an explanation in its findings and statement of reasons."[20] LCDC cited as sufficient Metro's "analyses and conclusions."[21] Metro's analysis, however, relies on: (1) several considerations not in the factors, (2) a mere restatement of the urban reserve factors themselves, (3) "general findings as to why the region designated any Foundation Agricultural Land as urban reserve,"[22] and (4) an irrelevant quantitative analysis.

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[18] OAR 660-027-0040(11); "…if Metro designates [Foundation] land as urban reserves, the findings and statement of reasons shall explain, by reference to the factors in OAR 660-027-0050 and 660-027-0060(2), why Metro chose the Foundation Agricultural Land for designation as urban reserves rather than other land considered under this division."
[19] JER-30(emphasis added).
[20] JER-141.
[21] JER-85.
[22] JER-141.

First, LCDC approved Metro's reliance on considerations not in the rules - "declining sources of revenue," and the "political[] difficult[y]" of urbanizing some areas- as appropriate considerations in choosing Foundation farmland for urban reserves.[23] LCDC justifies this departure from the reserves statute and rules by claiming they are only a "guide" and they "replaced the familiar standards-based planning process with one based fundamentally on political checks and balances."[24] Nothing in the statute or rules provides a basis for this "political" theory, or a conclusion that the law is merely a "guide." The rules do not provide for applying any considerations other than the factors listed.

Next, LCDC repeated Metro's finding on why Metro designated Foundation farmland as urban reserves:

> "Urban reserves, if and when added to the UGB, will take some land from the farm and forest land base. But the partners [the three counties] understood from the beginning that some of the very same characteristics that make an area suitable for agriculture also make it suitable for industrial uses and compact, mixed-use, pedestrian and transit-supportive urban development."[25]

This truism simply states the challenge that led to legislative authorization for urban and rural reserves in the first place: that good farm land is often also good for urbanization. But it neglects the solution the rules require: an analysis and explanation of why particular Foundation areas should be urban reserve, and

[23] JER-85,86.
[24] JER-7.
[25] JER-86,87.

how in selecting urban reserves, the "long-term protection for large blocks of agricultural land…that …achieves…the viability and vitality of the agricultural…industr[y]" is met. OAR 660-027-0005(2).

While LCDC accurately described that a comparative analysis is required before selecting Foundation land for urban reserve,[26] that is not what LCDC approved. Rather, LCDC claims Metro's "general explanation" is sufficient, since "most of the lands surrounding existing urban areas in Washington County were…Foundation,…*any* significant urban reserve designations in Washington County would necessarily require using some Foundation lands."[27] This "explanation" is irrelevant; ODA identified Foundation farmlands *prior* to adoption of the reserves statute and rule, and yet the rules say the factors "shall" be applied. And it misses the legal standard, Metro's application of the law fails on its face to apply the factors.

Lastly, LCDC approved an irrelevant quantitative analysis. In evaluating the entire reserves decision, LCDC may only approve Metro findings that explain why, after selecting rural and urban reserves, the designation, "in its entirety, best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features." OAR

[26] JER-30.
[27] JER-139(original emphasis).

660-027-0005(2). Metro made no such finding. Instead, LCDC approved two ways in which Metro erroneously applied this obligation.

First, LCDC's decision addresses only whether there is "too little" or "too much" rural reserve in Washington County alone.[28] Not only does this subjective evaluation not meet the law, nothing in the statute or rule limits the alternatives analysis required under OAR 660-027-0040(11) to a single county.

Second, LCDC concluded by relying on Metro's quantitative analysis to find the rule's purpose has been met.

> "Some important numbers help explain why the partners…agree that the adopted system, in its entirety, achieves this balance. Of the total 28,615 acres designated urban reserves, approximately 13,981 are Foundation and Important Agricultural Land. This represents only four percent of the Foundation and Important Agricultural Land studied for possible urban or rural reserve designation. If all of this land is added to the UGB over the next 50 years, the region will have lost five percent of the farmland base in the three-county area."[29]

The reserves statute and rule are based on the quality of land for its urban or rural suitability, not the quantity of acres, a point LCDC admits in its Order and is reflected in the law itself.[30] Moreover, these numerical comparisons are

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[28] JER-91,97.
[29] JER-87.
[30] LCDC states: "[T]he Commission construes OAR 660-07-0005(2) to require a *qualitative balance* in terms of long-term trade-offs between the further geographic expansion of the Portland metro urban area and the conservation of farm, forest and natural areas…This is not a balance in terms of the quantitative amount of urban and rural reserves, but a balance between encouraging further urban expansion versus land conservation." JER-71(emphasis added).

meaningless, proving the adage: "Torture numbers, and they'll confess to anything."

LCDC's decision is essentially an evaluation of whether Metro's "political decision" seems good enough. It is not a substantive and legal assessment of whether the entire set of designations meets the rule's "best achieves in its entirety requirement."

Metro Application of the Factors

LCDC's approval of Metro's illegal application of the reserves law resulted in the systemic improper designation of Foundation farmland in Washington County as urban reserves. Examples of how Metro's application caused erroneous designations of Foundation farmland as urban reserves include areas 8A(North Hillsboro) and 8B(Helvetia).

Area 8A(North Hillsboro) consists of 2712 acres of Foundation farmland, has large farm parcels that are part of a large block of agricultural land, is irrigated by groundwater, and most soils are Class II and prime.[31] Yet LCDC approved Metro findings addressing *only* the urban reserve factors:

> "*Why This Area was Designated Urban Reserve*: Urban Reserve Area 8A was specifically selected for its key location along the Sunset Highway and north of existing employment land in Hillsboro and also because of the identified need for large-lot industrial sites in this region.….* * * Transportation needs for this sector and other development in the reserve can be met by Highway 26, which provides a high-capacity transit link to other areas of the region. Additionally, industrial development in this area will be

[31] App-38,39;R-21(491);App-17-20.

> proximate to existing and future labor pools residing in Hillsboro and nearby cities. These lands will also provide opportunities to attract new industries which would help diversify and balance the local and regional economy."[32]

Metro did not make findings for 8A addressing the rural reserve factors.[33] Instead, LCDC tried to patch together some findings, relying on findings Metro made regarding a *different* study area (7I).[34] In doing so, LCDC cited two pages in the Washington County record containing a graph, showing Area 8A as rating lower in the county's agricultural analysis.[35] It also cited unrelated portions of the record.[36] This modest collection is not an explanation of the rural reserve factors, nor an explanation of how both sets of reserve factors were applied "concurrently and in coordination," nor a comparative analysis of this Foundation Agricultural area with other lands. Moreover, it is improper for LCDC to forge an explanation that Metro did not itself make. LCDC concluded:

> "While the findings could have been more specific, the Commission concludes Metro's findings for Area 8A are based on substantial evidence in the record and supported by an adequate factual base."[37]

It is *Metro's* obligation under OAR 660-027-0040(11) to explain, using both the urban and rural reserve factors, why it chose to designate the 8A Foundation area as urban reserve rather than rural, and rather than other land considered.

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[32] R-A(2)(90-91).
[33] LCDC's record citations refer only to urban reserve factors. JER-135.
[34] JER-135-36.
[35] JER-136, *citing* WashCo.Rec2978-79.
[36] JER-135, *citing* WashCo Rec3924.
[37] JER-136.

LCDC cannot legally conclude that Metro did so for Area 8A in the absence of any actual findings or evidence. LCDC's conclusion does not meet its legal obligation to demonstrate the reasoning that leads from the facts it found to the conclusions it draws from those facts. *Woodburn,* 237 Or App at 225.

Area 8B(Helvetia) is 440 acres of Foundation farmland, consists of Class I and II soils, and has groundwater irrigation and an extensive tiling drainage system.[38] LCDC concluded Metro met the OAR 660-027-0040(11) standard because Metro "applied the…urban reserve factors, followed by an application of [the]…rural reserve factors."[39] A mere description of a sequential application of the factors does not explain how LCDC concluded that Metro met its obligation to show why the area was designated urban rather than rural, nor is it the comparative analysis required for Foundation land.

LCDC's errors in areas 8A and 8B were made in every instance in which Foundation areas were chosen as urban rather than rural reserve, and rather than other lands, for all Foundation farmland urban reserves in Washington County. And that's why in almost every case in Washington County where Foundation farmland *subject to urbanization* was evaluated, Metro designated it as urban reserve or "undesignated."[40] That is not balance.

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[38]JER-575;App-18-20;R-8(74-75,88-94).
[39]JER-141.
[40] App-1,App-36.

LCDC approved a "balancing" that went in only one direction – the importance of the Foundation farmland to urbanization. The converse question was never asked – the importance of the farmland to the "viability and vitality of the agricultural…industry." The thumb was on the urban side of the scale.

Metro's decision fails to properly apply the factors to each area and regionally, and fails to properly determine if the reserves, in entirety, meets the law's purpose. LCDC's decision should be reversed and remanded.

SECOND ASSIGNMENT OF ERROR

LCDC's order approving Metro's use of an alternate agricultural analysis to evaluate land for rural reserves designation in Washington County is unlawful and not supported by substantial evidence.

A. Preservation of Error

Petitioners raised objections and exceptions to Metro's use of an alternative agricultural analysis in designating rural reserves in Washington County.[41]

B. Standard of Review

This court reviews an LCDC order made pursuant to ORS 195.137-.145 to determine if the order is "unlawful in substance or procedure," unconstitutional, or "not supported by substantial evidence as to facts found by the commission." ORS 197.651(10).

ARGUMENT

[41] R-5(9-12);R-8(88-91);R-21(485-488).

Instead of applying the rural reserve factors and criteria as required by statute and the rules, Washington County substituted and Metro and LCDC approved replacement "attributes" for each rural reserve factor. These attributes are simply a misapplication of the factors and criteria under another name. The cumulative impact of discounting these factors was to discount Washington County Foundation farmland.

As described below under each factor, they are inaccurate, contrary to the required factors, or irrelevant. The county employed these attributes with a ranking scheme and assigned each a value, ranging from 1-9, based on the attribute's alleged "relative ability to support the intended use." The county used these weighted values to map the "suitability" of candidate reserve areas under a particular factor.[42] Then, "each [rural reserve] factor was given a 'weighting' relative to other [rural reserve] factors."[43] Washington County used this ranking and weighting system to place each Foundation farmland area into four "Tiers," with 1 as the tier most deserving of rural reserve designation and 4 the least.[44]

Misapplication of the factors, along with weighting them, improperly discounted some Foundation farmland, thereby skewing Metro's evaluation of individual areas for rural or urban designation, and the overall decision. In

[42] R-D(8)(2955), App-23.
[43] *Id.*, *also* 2957(Table 1), App-23,25.
[44] R-D(8)(2978-79), App.30-31.

addition, Metro failed to examine one rural reserve factor at all, OAR 660-027-0060(2)(d)(D).

No authority exists for Washington County to take this approach. Nor is there any reason to; the factors are unambiguous. The statute lists the urban and rural factors and delegates to LCDC, and only to LCDC, authority to adopt implementing rules. ORS 195.141(4),-.145(6). LCDC did so. The rule provides Metro and a county "shall apply the [rural reserve] factors and each "shall base its decision" on the factors. OAR 660-027-0040(9),-0060(2). OAR 660-027-0040(11) provides that the only way land that qualifies as Foundation farmland can be designated as urban reserves is "by reference to the factors." No provision allows Metro to consider anything other than the rural reserve factors; the "shall base" language is unambiguous.

The state agencies, including LCDC, advised Metro this approach was not lawful.

> "At times counties have indicated that the rural reserve factors in OAR 660-027-0060 are a 'guide' for where rural reserves should be located. The counties and Metro need to…base their decisions on the factors set forth in state statute and rule. These are not "guides" that can be considered along with other policy preferences."[45]

This court has already addressed Metro's approach and rejected it in *Parklane* and *Ryland*. In *Parklane*, Metro designated urban reserves under a

[45]R-A(3)(1382). *See* ODA memo to Washington County, stating the county's methodology and weighting could "undermine the listed factors." R-9(214).

similar statute. Metro used a computer program to classify lands' suitability for urbanization. This court rejected that approach because there was no indication the program used the same factors for designating lands as required by the applicable rule. The court stated:

> "LUBA properly rejected Metro's approach of relying on the URSA-matic data as the determinant of which lands were suitable for designation (…absen[t]….showing…the data was responsive to the considerations required…) LUBA also held-correctly-that local governments "must apply each Goal 14 [locational] factor and include lands in urban reserves only where all of the factors justify that inclusion."
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> * ** *
>
> "Moreover, OAR 660–021–0030(2) does not indicate that the factors are to be weighed or that any one of them may be given decisive weight without consideration of the others."

Parklane, 165 Or App at 24.

LCDC explained it approved Metro's misapplication of the rural reserve factors and use of a weighting system because "[v]irtually all…lands surrounding the existing UGB are identified as Foundation Agricultural Land and the findings reflect that to more fully differentiate and distinguish between those agricultural lands, the county relied on additional, more intensive analysis."[46] LCDC's rationale is legally flawed.

First, that much of Washington County farmland is Foundation was understood when the statute and rules were adopted. Yet the factors were adopted

[46] JER-101.

as they are – Metro's version of what it would like them to be is not in the statute or rules.

Second, as described below for each rural reserve factor, Washington County's "additional, more intensive analysis" is either contrary to the factor's purpose, or based on evidence on which a reasonable person would not rely.

Third, application of the reserve factors as in Goal 14 does not allow "weighting" of individual rural reserve factors relative to one another, yet that was the purpose and result of Washington County's system. *Parklane* 165 Or App at 24.

Finally, if Metro is concerned that the amount of Washington County Foundation farmland presents a problem for designating urban reserves, at least two solutions exist. Metro could have designated urban reserves for a shorter time period. The statute allows Metro to designate urban reserves for 20-30 years beyond the current UGB time period. Metro chose the largest amount of land and longest time-span: 30 years. It could have chosen fewer years if it found it just too hard to make the call between urban and rural. Secondly, Metro could have designated urban reserves on non-Foundation land in other parts of the region. While Washington County evaluated its own county, Metro is charged with evaluating the designations "in its entirety." Metro should have, but did not, evaluate whether non-Foundation land in other parts of the region could have been designated urban reserves to meet the 30-year period.

The other two counties did not use their own interpretation of the factors, creating an inconsistency Metro does not justify, thereby making it factually and legally impossible for Metro or LCDC to conclude the final decision "in its entirety" "best achieves livable communities, the viability of the agricultural and forest industries and the protection of the important natural landscape features that define the region." OAR 660-027-0005(2).

Application of Individual Rural Reserve Factors

LCDC could not conclude that Metro properly applied the reserves law based on Washington County's use of alternative attributes for rural reserves. As described below for each factor, (a)-(d), the evidence is either not responsive to the required factor, is contrary to the factor, or is not evidence on which a reasonable person could rely. Washington County did not address one factor at all. The result of Washington County's distortion of the factors is Metro's and LCDC's after-the-fact justification of the decision on a political and quantitative basis.

(a) Potentially Subject to Urbanization

Rural reserve factor (a) is whether land is "potentially subject to urbanization."[47] ORS 195.141(3)(a), OAR 660-027-0060(2)(a). This factor is designed to narrow those lands having "the characteristics necessary to maintain [agriculture's long-term] viability," to those lands that *need* rural reserve protection because they are threatened by urbanization during the urban reserve time period.

[47] R-21(480), petitioners' objection.

Regrettably, rather than reviewing lands under threat from urbanization and determining which to protect as rural reserves, the commission approved the county's and Metro's choice to protect land not under threat of urbanization. The result was a large, but largely meaningless, rural reserve designation, with little consideration of whether that land is even appropriate as rural reserve.

Washington County divided its Foundation farmlands into areas subject to high, medium, or low threat from urbanization.[48] Every acre Washington County designated and Metro approved for urban reserve is under a "high" threat of urbanization, while little of the land designated as rural reserves is.[49] Metro designated 151,209 acres of rural reserves in Washington County; however, the vast majority is beyond the three-mile *de facto* "subject to urbanization" boundary, and is rated by the county as under a "low" or "medium" urbanization threat.[50] With one exception, no Foundation farmland under "high" threat from urbanization in Washington County was designated as rural reserve.[51] The legal requirement is not a numbers game, but a qualitative assessment – not how *many* lands, but *which* lands.

LCDC compounds this legal error by erroneously stating that no time period exists for rural reserves: "Neither the statute nor the…rule mandate that the county

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[48] App-30, 36.
[49] App-1,App-36.
[50] *Id.*
[51] The exception is Area 7I(Cornelius), which LCDC found did not qualify as an urban reserve. JER-8.

'conclude' the land is subject to urbanization…to designate it as a rural reserve."[52] Metro set its urban reserves for 30 years; during that time, Metro "shall not" expand the UGB into areas designated as rural reserves. OAR 660-027-0040(5). If the lands designated as rural reserves are not subject to urbanization during the 30 years, then little or no possibility exists that the UGB would expand there anyway, and the rural reserve designation is meaningless.

LCDC's approval of Metro's application of "subject to urbanization" renders meaningless the rule's requirement for balancing rural and urban reserve designations to best achieve the law's purpose. Metro "protected" lands as rural reserves that do not need protection from urbanization.

Nine state agencies, including DLCD, agreed with petitioners. The agencies explained:

> "The state agencies believe that too much land is proposed as rural reserves in the current…recommendations from the counties. Rural reserves are intended'* * * to provide long-term protection for large blocks of agricultural land and forest land, and for important natural landscape features that limit urban development or define natural boundaries of urbanization.' *Rural reserves are appropriate for lands that are under threat of urbanization.* *** [T]hey should not be applied to agricultural or forest lands that have a low likelihood of urban development. In general, the approach used by Clackamas County is consistent with how the agencies believe rural reserve designations should be used (to 'steer' urban development away from or toward particular areas, rather than as a blanket treatment of everything that is not an urban reserve).
>
> "* * *

[52] JER-89.

> "It is somewhat puzzling to observe how Washington and Clackamas County [53] are applying the threat of urbanization factor to reserves. Washington County has designated most rural lands within the study area that are not proposed as urban reserves as rural reserves beyond three miles from the existing Metro UGB."[54]

Despite this admonition, LCDC approved Metro's erroneous application of this factor. LCDC found legitimate Metro's reliance on a *quantitative* "balancing" rather than a *qualitative* one: because Metro designated so many acres as rural reserves, LCDC could claim the decision is "balanced" in its entirety.

> "[T]hat…as originally submitted, 7.4 percent of the Foundation…Lands designated as reserves in Washington County were urban reserves, and 92.6 percent are rural reserves, indicates that most of the county's key agricultural lands have been protected. * * * [T]he redesignation did not significantly alter those percentages."[55]

ODA pointed out the flaw in Metro's reasoning:

> "[M]ost of the rural reserves lands [in Washington County] are under "low" or "medium" threat from urbanization. In contrast, all land designated as urban reserves in Washington County are subject to 'high' threat from urbanization and…most of those are Foundation Agricultural Land."[56]

Metro's after-the-fact calculation of the amount of lands in each category is not the qualitative findings and reasoning required by the law to explain how this factor was considered and applied. Metro does not describe how it applied the "subject to urbanization" factor in Washington County, or how Metro balanced this

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[53] Clackamas County used the rule's 3-mile limit for which lands were "subject to urbanization." JER-89.
[54] App-44,-46(emphasis added); *see* R-21(396-97).
[55] JER-92.
[56] R-21(397).

factor with the other factors. Given the skewed results, it is reasonable to conclude it was not given any effect whatsoever. Metro's decision provides no basis on which LCDC could determine whether or how Metro applied the first rural reserve factor of whether the land is "potentially subject to urbanization."

(b) Capable of sustaining long term agricultural operations

Rural reserve factor (b) is whether lands are "capable of sustaining long term agricultural operations." ORS 195.141(3)(b), OAR 660-027-0060(2)(b).[57] To address factor (b), Metro approved Washington County's characterization of the only relevant criterion ("attribute") as whether farmland is suitable for viticulture, thereby giving viticulture lands greater weight than other agricultural lands. [58] Metro and the county did not evaluate suitability for agriculture, just suitability for a vineyard. Not only is this Foundation farmland stratification not provided for in rules or statute, as the state agencies observed:

> "This [use of viticulture] tends to devalue the bulk of the county's non-viticulture agricultural land base located in the Tualatin Valley. ODA strongly agrees that viticulture lands are an important part of the region's agriculture base. However, they do not provide the wider range of options for agriculture as do lands on the valley floor, and viticulture products do not rank higher in total value than other products grown in the county, such as nursery products, seed crops, fruits and nuts."[59]

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[57] LCDC did not address objections of petitioners and ODA. R-5(11);R-8(62-67,88-89), App-46,47.
[58] App-23(figure 4),App-24,App-25(Table 1).
[59] App-46,47; *see also* ODA memo, R-9(214-216).

The state's expert agricultural agency concluded that valuing certain farmlands higher simply because of their suitability for viticulture, and discounting other non-viticulture Foundation land, is contrary to this factor's objective, and is not useful in balancing the factors to determine which lands should be designated as rural or urban reserves.

LCDC does not provide its own or cite to any reasoning in Metro's decision that explains why categorizing Foundation farmland based on the narrow aspect of its suitability for viticulture is an appropriate methodology to demonstrate "consideration" of this factor. LCDC cannot conclude that this factor was properly considered and applied. *Ryland,* 174 Or App at 409-10.

(c) Soil Suitability and Water Availability

Rural reserve factor (c) is whether lands have "suitable soils *where needed* to sustain long-term agricultural or forestry operations and, for agricultural land, have available water *where needed* to sustain long-term agricultural operations." OAR 660-027-0060(2)(c)(emphasis added); ORS 195.141(3)(c). The petitioners, others, and ODA objected to Metro's decision on two grounds: one concerning how Metro dealt with water availability, and one concerning how Metro dealt with soil suitability.[60] It appears LCDC addressed only the water issue.

i. Water

[60] R-21(486);R-18(154);R-8(88-89);R-5(9-12).

This factor requires Metro to consider water "where needed." LCDC, Metro, and Washington County never addressed whether water is needed *anywhere* in the region. They simply assume water is needed everywhere, that it must be from an irrigation district, and they discounted Foundation farmland not in an irrigation district. In approving this approach, LCDC restates Metro's finding:

> "[T]he statute and rule do not preclude the county from considering water availability when determining whether land is 'capable of sustaining long-term agricultural operations.'… [T]he Commission interprets OAR 660-027-0060(2)(b) as giving a county substantial discretion in determining how it evaluates the 'capability of sustaining long-term agricultural operations'."[61]

LCDC's interpretation reads "where needed" right out of the law. Its discretion is not so broad.

Metro approved Washington County's ranking land according to whether it is in an irrigation district, giving land that is "in" a value of "9," and land that is outside an irrigation district or in a "water-restricted" area a "1." The county included land that has a water right, but it is unclear how it ranked that between 1-9.[62] The ODA and state agencies repeatedly testified this was an improper application of the factor, and that use of the phrase "where needed" in the rule was purposeful.[63] As the state agencies explained, Metro's use of irrigation reflects a lack of understanding of regional farming, resulting in a decision lacking

[61] JER-94-95.
[62] App-24,-25 (Table 1); App-37.
[63] R-21(397);App-46,47.

substantial evidence. Many high value crops grown in Washington County do not require irrigation. As the state agencies explained to Metro:

> "Many high-value crops are grown in the region without irrigation. Irrigation typically is not needed for several key crops (grass seed, legume seeds, hay, grapes once established, etc.). We also note that Washington County ranks lands within water-restricted areas lower. Agricultural lands with water rights in these areas should be protected (not identified for urbanization) since they have a supply of water, and additional supplies will not likely be available."[64]

Curiously, LCDC acknowledges the accuracy of the state's admonition: "ODA is correct that Washington County gives its highest agricultural productivity rating only to lands with access to water, even where high-value crops are grown without irrigation and even for high-value farmland."[65] However, LCDC defers to the non-expert, conclusional opinion of Washington County planning staff: "The county found that 'water availability appears to be a significant factor in preservation of farmland over the long-term."[66] Then LCDC reached a contrary result to its own previous statements. No evidence is cited to support this conclusion, while there is much evidence to the contrary from experts.[67] In fact, Metro's interpretation is contrary to the *ODA Report* on which the rural reserve factors are based:

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[64] App-46,47.
[65] JER-94.
[66] JER-94.
[67] R-9(188,215);R-21(486).

> "[M]any crops, including high-value crops, can be produced using dryland agricultural practices. Dryland production is most feasible where precipitation is adequate to allow economic return on a non-irrigated crop. [68]

The county's lack of expertise is revealed by its own application of its interpretation. Washington County rated water-restricted areas lowest in value. However, as pointed out by the state agencies and ODA, water-restricted areas should receive the highest protection, not lowest, since they have a dedicated water supply and additional supplies will not be available.[69] It is also contrary to the *ODA Report* on which this factor is based, which states: "It is especially important to recognize existing agricultural irrigation in groundwater restricted areas because new irrigation rights are difficult to obtain."[70] Neither LCDC nor Metro provides an explanation for interpreting factor (c) (water availability) contrary to the expert report on which the factor is based.

Metro's approval of Washington County's improper interpretation of "water where needed" artificially discounted Foundation farm land. For example, Metro's decision makes no findings regarding any rural reserve factors for Area 8A (North Hillsboro).[71] However, Washington County's reserves recommendation documents that even though Area 8A is irrigated, because it is by groundwater and

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[68] App-11; *see* 18,16 ("The area is fortunate to have abundant water available for irrigation. There are significant numbers and quantities of both surface and ground water withdrawals…."

[69] App-46,47;R-21(397);R-9(188).

[70] App-11.

[71] JER-134-36. The Washington County record pages cited address urban reserves.

not in an irrigation district,[72] the county discounted 2712 acres of Foundation farmland, resulting in the area being categorized as "Tier 2" and "Tier 3."[73] Washington County's improper application of "water where needed" is the only reason that land which otherwise should rate highest of Foundation lands – Class I and II soils, a large block of agricultural land currently in production made up of large parcels, and highly subject to urbanization – would rate anything less than Tier 1.

Metro's approval of Washington County's findings for Area 8B(Helvetia), demonstrates the area was downgraded because it is not in the Tualatin Valley Irrigation District, without any analysis of whether water is "needed," as required by OAR 660-027-0060(2)(c).[74]

The reserves rule requires consideration of water "where needed." Metro made no findings explaining why lands that were discounted due to lack of being in an irrigation district "needed" water, and it provides no explanation for distinguishing between whether land is in an irrigation district or depends on groundwater. Metro's inconsistent application of this factor in water-restricted areas demonstrates the arbitrary way in which Metro applied this factor. Without a factual or legal basis for this interpretation, LCDC's decision violates the reserves rule. *Ryland,* 174 Or App at 409-10.

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[72] JER-134.
[73] App-40; App-30,31.
[74] JER-586.

ii. Soil

LCDC's order does not address the second set of objections that petitioners and others raised[75] to the county's alternative ranking system for this factor: Metro's approval of Washington County's use of an outdated and now incorrect soil suitability study to evaluate whether lands "have suitable soils where needed to sustain long-term agricultural or forestry operations."

To evaluate soil suitability, Washington County turned to an undated report titled *Agricultural Productivity Ratings for Soils of the Willamette Valley,* by J. Herbert Huddleston of the OSU Extension Service. However, as testified to by ODA and other state agencies, the "Huddleston Report" is outdated and unreliable. The county failed to use the readily-available, most up-to-date USDA information available online. As the ODA explained:

> "[T]he "official" soil survey for Washington County… is now found electronically on the Internet. Electronic soil surveys are the source for most spatial analysis relating to soils used involving geographic information systems. The USDA NRCS Soil Survey Geographic (SSURGO) database for Washington County was the source of soils data used by ODA to conduct all analysis related to soils. Since 1982, this database has been updated numerous times by the NRCS. According to the most recent meta data information from SSURGO, the Washington County Soil Survey has received several updates since 2000, the most recent in 2010.
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> "ODA staff …reviewed the Huddleston report. * * *[T]he report is not dated, however cover notes within the report indicate that research on the subject began in 1976, making some of the assumptions about crop diversity and value rather dated. Data currently available within the official

[75] R-8(89-90);R-5(10-11).

> Washington County Soil Survey would be a much better source for data relating to agricultural capability." [76]

ODA submitted to Metro a critique of the Huddleston Report by ODA's expert hydrologist, who stated the Huddleston report's "assumptions about crop diversity and value [are] rather dated," and that "many assumptions made…are not valid for certain crop types and agricultural practices that are now common in the Willamette [Valley]."[77]

Use of the Huddleston Report is not substantial evidence on which Metro can make or LCDC can approve a decision. The most up-to-date information is readily available online, as the state's expert agricultural agency directed Metro.

Finally, Metro improperly used the *Wildland Forest Inventory* to evaluate soils for *agricultural* rural reserve designation.[78] Although petitioners raised this objection, and the state agencies raised this issue,[79] LCDC did not address it in its Order.[80] The state agencies explained using a forest index is both a factual error in how to evaluate farmland, and it is a legal error in how to "consider" this factor under rural reserves:

> "The Wildland Forest Inventory should not be used as a tool to measure the value of land for agriculture. This inventory appears to devalue most of the

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[76] R-8(163).
[77] R-9(217-218).
[78] App-24, #25(Table 1).
[79] R-5(11);R-8(90);App-47.
[80] While Washington County applied the forestry considerations separately when considering which areas were suitable as rural reserves on *forestry* grounds, it also used forestry in evaluating areas for a*gricultura*l rural reserves.

> agricultural lands that ODA determined to be Foundation Agricultural Lands….These lands are the heart of Washington County agriculture. * * *A separate measure of forestry and a separate measure of natural features could be combined to determine where they overlap, but each characteristic should not be used to measure the value of another."[81]

Despite this admonition, Metro approved Washington County's ranking of this attribute to inform categorizing Foundation farmland into Tiers 1-4. Foundation lands that were rated as "Wildland Forest" were given a 9, while those with a forestry rating of "Intensive Agriculture" were given a 3.[82] Application of the Wildland Forest Inventory to evaluate agricultural productivity resulted in Metro weighting Foundation farmland areas such as Areas 8A, 8B, and 7B(Forest Grove North) lower on rural reserve suitability,[83] it placed Areas 8A and 8B in Tiers 2 and 3,[84] and it contributed to all three areas being designated as urban reserves. Farmland's ability to grow trees is not relevant evidence to whether land should be in an *agricultural* rural reserve; thus, the evaluation of this factor lacks substantial evidence.

Metro failed to adequately or legally address rural reserve factor OAR 660-027-0060(2)(c), agricultural soil suitability. LCDC's approval therefore does not does not meet this court's standard in *Ryland*, 174 Or App at 409-10.

(d) Suitability to sustain long-term agricultural operations

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[81] App-47.
[82] App-25;App-34.
[83] App-25; App-35.
[84] App-40.

Rural reserve factor (d)[85] is whether lands "[a]re suitable to sustain long-term agricultural or forestry operations, taking into account:

> "(A) for farm land, the existence of a large block of agricultural or other resource land with a concentration or cluster of farm operations, or, for forest land, the existence of a large block of forested land with a concentration or cluster of managed woodlots;
>
> "(B) The adjacent land use pattern, including its location in relation to adjacent non-farm uses or non-forest uses, and the existence of buffers between agricultural or forest operations and non-farm or non-forest uses;
>
> "(C) The agricultural or forest land use pattern, including parcelization, tenure and ownership patterns; and
>
> "(D) The sufficiency of agricultural or forestry infrastructure in the area, whichever is applicable."

OAR 660-027-0060(2)(d) and ORS 195.141(3)(d).

The *ODA Report* explains why "large blocks" of agricultural lands are critical. "Large block" refers to a large, intact farming area; it is not related to land ownership. It describes the relationship of land in farming with other land and activities in the region: whether the land is located in an area that is largely agricultural in nature and whether it is part of a larger farming operation, or whether it is isolated in an area that is already broken up with smaller developed tracts.[86]

LCDC's failure was in approving Metro's perversion of this factor, by focusing on numbers and sizes of tax lots. Metro's analysis of "large blocks"

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[85] Petitioners' objections at R-21(486-87);R-8(89-91).
[86] App-12-14; R-21(397-98); R-8(166-167); App-47.

reflects a lack of understanding of farming. Metro equates "large block" with large "parcel," and "parcelization" with "ownership."[87] Metro considered an area "parcelized," and therefore too small for farming, if the "majority of *tax lots*…were generally 35 acres or less,"[88] regardless of whether the "parcels" were in agricultural use, or part of a larger farming area. It then discounted or excluded farmland areas with parcels under 35 acres. However, a "parcel" is not an area of land in a single ownership. Rather, a "parcel" is created by the partition of a single unit of land. It is a legal definition of land, not a functional one. ORS 92.010(6). A parcel may or may not constitute a large block of land. Even more damaging, a "tax lot" is simply a creature of the county assessor. For example, a farm house located on a tract of EFU land is often on a separate tax lot than the EFU portion for purposes of agricultural lands tax assessment. ORS 308A.053 et seq.

The 35-acre "cut-off" is both arbitrary and clearly wrong. Metro provided no evidence to support a 35-acre tax lot, parcel, or tract cut-off. However, ODA did provide its expert evidence as to why that acreage cut-off is too high:

> "[T]his 35-acre threshold is not a reasonable threshold for determining parcelization and it does not reflect the nature of farming operations in the region. Many farms are comprised of constituent parcels including parcels owned, rented, and/or leased by a farmer. * * * [T]he county analysis becomes even more flawed when it equates residential density as a factor without making an determination as to if the subject dwellings were authorized as dwellings in conjunction with farm use or as nonfarm

[87] R-21(397-398,486-487); R-5(11).
[88] App-29(emphasis added).

> dwellings that may be approved only after an analysis of its impacts to surrounding farming operations has indicated no adverse impacts…."[89]

The state agencies raised the same problem.[90] What matters is whether the area forms a block of land devoted to farm use. Farmers provided extensive testimony that their farm operations consist of many small *and* large sized parcels.[91] However, LCDC did not address any of these objections. Rather, LCDC merely re-stated the law: "Washington County has considered whether lands proposed as rural reserves are suitable to sustain long-term agricultural operations, taking into account both large blocks of agricultural operations and the sufficiency of agricultural infrastructure in the area."[92] LCDC's citations to the Washington County record are not helpful; they simply re-state that county "[s]taff considered a sub-area to be parcelized if a majority of tax lots in the area were generally 35 acres or less."[93]

Application of Washington County's interpretation of "large block" to the 440-acre Area 8B(Helvetia) illustrates its fallacy. While Metro correctly identifies 16 tax lots in Area 8B, it does not note that over 50% of Area 8B is owned by two owners and all are in agricultural production.[94] Neither LCDC nor Metro provided

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[89]R-21(397-98).
[90]App-47.
[91] App-32
[92] JER-95.
[93] App-29.
[94]JER-587;R-8(91).

evidence for the 35-acre cut-off choice, or provided reasoning to explain how 35-acres address this factor.

Finally, neither LCDC nor Metro made findings for subfactor (D), concerning the sufficiency of farm and forest infrastructure. LCDC made a single conclusion that "Washington County…[took] into account…the sufficiency of agricultural infrastructure in the area."[95] LCDC made no findings as to this subfactor and, in fact, neither Washington County nor Metro addressed subfactor (D). Metro cited Washington County's claim: "Generally, staff could not find quantitative information that established a threshold for continued viability of agricultural suppliers when considering this factor relative to a 'tipping point' when considering this factor and the associated loss of farm acreage.[96] However, substantial evidence in the record demonstrates the location, type, and extent of agriculture infrastructure in the county. Once again, Washington County should have looked to the *ODA Report*, on which the factors are based. For example, the *Report* describes the infrastructure in Areas 8A and 8B as follows:[97]

> "This subregion…form[s] a base of agricultural operations that rival any in the state…[T]he delivery infrastructure associated with the Tualatin Valley Irrigation District is well established. Drainage infrastructure is also well developed and maintained."
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> * ***

[95]JER-95.
[96]JER-512.
[97]App-19.

> "Located within this subregion are numerous businesses that provide services required by high-value crop producers. Examples include seed cleaning facilities, processing and storage facilities. Many of these services are located on-farm and available to farmers in the area."

Petitioners, ODA, and other farmers such as Save Helvetia provided extensive and specific information on infrastructure.[98] For example, for Area 7B(Forest Grove), petitioners provided information regarding the Tualatin Valley Irrigation District infrastructure and many farm-related businesses *in* Area 7B, including a seed-cleaning plant, a meat processor, and a farm equipment repair facility, in addition to testimony from local businesses that rely on the farm products from that area.[99] Save Helvetia provided detailed information on the tiled drainage system in Area 8B.[100] Yet Washington County claimed lack of information, resulting in LCDC lacking findings or reasoning demonstrating Metro considered and applied this factor.

LCDC's Order does not address this objection, thus it did not make findings explaining the facts it relied upon and the reasoning it used to conclude that Metro had "specifically articulated its findings regarding a particular factor and explained how it balanced that factor in making a decision." *Ryland*, 174 Or App at 409-10.

LCDC's approval of Metro's misapplication of the rural reserves factors in Washington County based on inaccurate, irrelevant, or contrary "attributes" is not

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[98] R-21(398, 487-88); App-33.
[99] R-21(488-89).
[100] R-8(91).

based on the law and lacks substantial evidence. It resulted in unlawfully discounting some Foundation farmland, thereby skewing the evaluation of individual areas for rural or urban designation. Neither of the other two counties employed any of these or any other "attributes." Given Metro's uneven application of the factors, LCDC cannot conclude that Metro properly rendered an assessment of whether the final decision "in its entirety" "best achieves livable communities, the viability of the agricultural and forest industries and the protection of the important natural landscape features that define the region."

LCDC's decision as to urban reserve areas 7B, 8A, and 8B, and all urban reserve designations in Washington County should be reversed.

CONCLUSION

LCDC's reserves decision should be reversed and remanded.

Respectfully submitted this day November 6th, 2012,

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