

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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BARKERS FIVE, LLC; SANDY  
BAKER; CITY OF TUALATIN;  
CITY OF WEST LINN; CAROL  
CHESAREK; CHERRY AMABISCA;  
SAVE HELVETIA; ROBERT  
BAILEY; 1000 FRIENDS OF  
OREGON; DAVE VANASCHE;  
BOB VANDERZANDEN; LARRY  
DUYCK; SPRINGVILLE  
INVESTORS, LLC; KATHERINE  
BLUMENKRON; DAVID  
BLUMENKRON; METROPOLITAN  
LAND GROUP; CHRIS MALETIS;  
TOM MALETIS; EXIT 282A  
DEVELOPMENT COMPANY, LLC;  
LFGC, LLC; ELIZABETH GRASER-  
LINDSEY; and SUSAN MCKENNA,

Petitioners,

v.

LAND CONSERVATION AND  
DEVELOPMENT COMMISSION,  
METRO, WASHINGTON COUNTY,  
CLACKAMAS COUNTY,  
MULTNOMAH COUNTY, STATE  
OF OREGON, and CITY OF  
HILLSBORO,

Respondents.

Land Conservation and Development  
Commission No. 12ACK001819`

CA A152351

**EXPEDITED PROCEEDING  
UNDER ORS 197.651**

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RESPONDENT LAND CONSERVATION AND DEVELOPMENT  
COMMISSION'S ANSWERING BRIEF

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*Continued...*

Petition for Judicial Review of the Final Order of the  
Land Conservation and Development Commission

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**RESPONDENT LAND CONSERVATION AND DEVELOPMENT  
COMMISSION'S ANSWERING BRIEF<sup>1</sup>**

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**STATEMENT OF THE CASE**

In this combined respondents' answering brief, the Land Conservation and Development Commission (LCDC) restates the petitioners' statements of the case and provides a brief supplemental statement of facts.

**Nature of the Proceeding and Relief Sought**

Petitioners collectively seek judicial review of LCDC's Compliance Acknowledgement Order 12-ACK-001819 (Order). The petitioners seek reversal and remand of the Order.

**Nature of the Judgment**

The Order approves designation of urban and rural reserves in the tri-county Metropolitan area as set forth in the Metro Urban and Rural Reserves Submittal.

**Jurisdiction**

This court has jurisdiction under ORS 197.651.

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<sup>1</sup> This brief responds to the second assignment of error of petitioner Maletis/Exit 282A Development Group, the second assignment of error of petitioner Barkers Five, the first assignment of error of petitioner Springville Investors, the first assignment of error of petitioner Metropolitan Land Group, and the second and third assignments of error of petitioners Chesarek and Amabisca. For all other assignments of error, under ORAP 5.77, LCDC adopts the answering briefs of respondents Metro, Multnomah County, Washington County, City of Hillsboro, and Clackamas County. A table indicating which respondent's brief answers which assignment of error is attached at App-1.

**Dates of Order and Petitions for Review**

LCDC issued the Order on August 14, 2012. The petitioners all timely filed their petitions for judicial review by September 4, 2012.

**Nature of and Jurisdictional Basis for Agency Action**

ORS 197.626 grants LCDC jurisdiction to review designation of urban and rural reserves in the manner provided for periodic review under ORS 197.633.

**Summary of Arguments**

This brief contains arguments in response Maletis/Exit 282A Development Group's second assignment of error, Barkers Five's second assignment of error, Springville Investors' first assignment of error, Metropolitan Land Group's first assignment of error, and Chesarek and Amabisca's second and third assignments of error. LCDC summarizes the responses to those assignments of error below.

## 1.

A local government's designation of rural reserves must be based on a consideration of a list of factors relating to an area's characteristics. ORS 195.141(3). The "safe harbor rule," provides that a local government may designate an area rural reserve if the area has been deemed "Foundation Agricultural Land" by the Department of Agriculture (ODA). The ODA's categorization process includes an analysis based on the same factors that must

be considered in the designation of urban reserves. Property belonging to petitioners Maletis and Exit 282A Development Group (Maletis) was designated rural reserve under the rule. They contend that the safe harbor rule exceeded the scope of LCDC's authority as applied to their property because it relieved the county of its obligation to consider the statutory factors before designating rural reserves. But because the ODA's categorization of land as Foundation Agricultural Land included an analysis under the rural reserves factors, LCDC did not exceed the scope its statutory authority by promulgating a rule allowing local governments to rely on the ODA's analysis.

Petitioners Barkers Five, LLC, and Sandy Baker also challenge the safe harbor rule but their argument fails for the same reason. Their argument is also unpreserved.

2.

Petitioners Springville Investors, LLC, and Katherine and David Blumenkron challenge the OAR chapter 660 division 27 rules generally, contending that they were promulgated without an adequate consideration of their economic impact. But review of a rule challenge on the ground that it was promulgated in violation of proper procedures requires a review of the agency's rulemaking record. That record is not before this court. Accordingly, the challenge is unreviewable.

3.

Petitioner Metropolitan Land Group (MLG) alleges that Metro and the Counties conducted an illegal and “standard-less” review of reserves lands, and that LCDC erred by letting them to do so. As MLG concedes, it did not raise the claim in the administrative process. MLG’s claim thus fails under principles of exhaustion.

MLG’s claim also fails on its merits. LCDC did not error construing the statutory factors that must be considered as criteria that must be met. Nor did LCDC err by not promulgating area-specific approval criteria for the designation of rural reserves. In addition, contrary to MLG’s contention, LCDC applied the rules in a manner consistent with LCDC’s interpretation of the rules.

Petitioners Carol Chesarek and Cherry Amabisca argue that LCDC erred in approving the urban reserve designation of a parcel called the “Peterkort property.” Specifically, they contend in their second assignment of error that the rules required a simultaneous consideration of urban and rural reserves factors with regard to the property. But the rules only requires that the counties and metro conduct their analysis “concurrently and in coordination” with each other. LCDC interpretation that that does not require simultaneous consideration of the factors is reasonable. Moreover, the rules only require that



