IN THE COURT OF APPEALS OF THE STATE OF OREGON

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.

EXPEDITED PROCEEDING UNDER ORS 197.651

Land Conservation and Development Commission No. 12ACK001819

CA No. A152351

PETITIONERS SAVE HELVETIA and ROBERT BAILEY OPENING BRIEF

November 2012

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I. STATEMENT OF THE CASE

A. Nature of the Proceedings.

Petitioners Save Helvetia and Robert Bailey ("Petitioners") seek judicial review of the final order of the Land Conservation and Development Commission ("LCDC") acknowledging the Metro Urban Reserves and the Clackamas County, Multnomah County and Washington County Rural Reserves, Order 12-ACK-001819, ("LCDC Order"). JER-1-156.[1]

This brief, as well as the opening briefs submitted by 1000 Friends of Oregon, Dave Vanasche, Bob Vanderzanden, Larry Duyck ("1000 Friends"), and Carol Chesarek and Cherry Amabisca ("Chesarek") are directed more particularly to LCDC's Order with regards lands located in Washington County. In addition to adopting all arguments presented in these other two briefs, Petitioners respectfully request that this court consider the Introduction to the Reserves Law set forth in 1000 Friends' brief first as outlining the statutory and

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[1] The document reference scheme adopted in this brief is as follows:

Where a document is contained within the Joint Excerpt of Record, it is cited as "JER-," followed by the page number. Where a document is contained within the Appendix, it is cited as "APP-," followed by the page number. Documents that are contained within the Record but not within the "JER-" or "APP-," are referenced as "R-" for Record, followed by the Item number or Attachment letter, a volume number, where available, and then followed by the page number. For example, R-D(8)(3118-3138) refers to Record Attachment D (Washington County rural reserve record submittal), volume 8, pages 3118-3138.

regulatory requirements for designating reserves and relevant to the arguments presented here.

B. Nature of the Judgment Sought to Be Reviewed.

LCDC's order acknowledges amendments to the Metro Regional Framework Plan ("RFP"), the Urban Growth Management Functional Plan ("UGMFP"), as well as amendments to the Clackamas, Multnomah, and Washington County comprehensive plans to designate urban and rural reserves throughout the tri-county Portland metropolitan area.

C. Statutory Basis of Appellate Jurisdiction.

This court has jurisdiction over LCDC orders concerning the designation of urban and rural reserves pursuant to ORS 197.651(1). LCDC's acknowledgment decision is a final order pursuant to ORS 197.626(2). Petitioners have standing because they were parties to the proceedings before both LCDC and Washington County. R-3(62-81), 16(474-478), 18(189-203), 21(607-639). Pursuant to ORS 197.626(c) and (f), LCDC review of urban and rural reserves decisions is to occur "in the manner provided for periodic review" and ORS 197.650(1) confers standing on "persons who participated in proceedings, if any, that led to issuance of the final order being appealed." *Kellas v. Dep't of Corr.*, 341 Or 471, 145 P3d 139 (2006).

D. Dates of Order and Petition for Judicial Review.

LCDC issued its order on August 14, 2012. JER-1-156. Petitioners filed and served their Petition for Judicial Review on September 4, 2012. Petitioners' Petition for Judicial Review was timely filed under ORS 197.850(3)(a).

E. Statement of Nature of and Jurisdictional Basis of Agency Action.

Petitioners seek review of an LCDC acknowledgment order. Pursuant to ORS 197.626(c) and (f), LCDC review of urban and rural reserves decisions is to occur "in the manner provided for periodic review" and therefore LCDC had jurisdiction over the decision.

F. Questions Presented on Appeal.

Given the statutory structure for urbanizing lands, did LCDC, Metro, and Washington County misinterpret and misapply the reserve factors and in balancing the overall decision?

Did LCDC correctly affirm Washington County's refusal to consider "other lands" beyond its borders as well the county's unique sub-regional approach to applying the reserve factors?

G. Summary of Arguments.

LCDC incorrectly affirmed Metro and Washington County's misapplication of the reserve factors and failed to require balancing of the overall decision.

LCDC's order is unlawful and lacks substantial evidence in that it failed to require that Washington County consider "other lands" beyond its borders and failed to require uniform application of the factors across the region.

H. Statement of Material Facts.

State law requires that Metro establish an urban growth boundary ("UGB") that includes sufficient lands to accommodate housing and employment demand for 20 years. ORS 197.296. ORS 197.298 prioritizes lands for inclusion within the UGB. First priority for inclusion within the UGB is land designated urban reserve. If the amount of urban reserve land proves inadequate, the second priority is to expand on nonresource or exception lands. The last priority is lands designated for agriculture or forestry, with a higher priority given to land of "lower capability as measured by the capability classification system or by cubic foot site class." ORS 197.298(2).

In the late 1990s, Metro adopted urban reserves through the then-applicable, OAR Division 660-021. This court remanded that decision. *DS Parkland Development, Inc. v. Metro,* 165 Or App 1, 994 P2d 1205 (2000).

In 2007, Metro spearheaded an effort to adopt a revised reserves designation process noting, in part, the need to expand the factors to provide for an efficient and effective urbanization area and to add criteria other than "soil type" within the "land hierarchy" to decide what farmland is "truly worth protecting." APP-18-42. The result was the enactment of SB 1011, now

codified in ORS 195.137 *et seq.*, implemented by OAR Division 660-027. APP-10-18. OAR Division 660-027 identifies factors for designating reserves that, when considered together, achieve a balance that "best achieves liveable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents." APP-11.

On June 23, 2010, Metro, along with Multnomah, Clackamas and Washington Counties, submitted a joint and concurrent decision proposing urban and rural reserves pursuant to OAR 660-027 to the Department of Land Conservation and Development ("DLCD") seeking acknowledgment. The initial submittal designated 28,615 acres of urban reserves and 266,954 acres of rural reserves. JER-8.

In the fall of 2010, LCDC held hearings to consider the proposal and passed a motion to (1) approve the urban and rural reserve designations as submitted in Clackamas and Multnomah counties; (2) approve the urban reserves in Washington County, with certain exceptions. More particularly, regarding Washington County, LCDC (1) reversed the urban reserve designation of Area 7I, an area north of Cornelius; (2) remanded the urban reserve designation of Area 7B, an area north of Forest Grove, for further findings, and (3) remanded the rural reserve designations in Washington County for further findings. JER-8; Map at APP-1.

On remand, Washington County redesignated the County's urban and rural reserves to: (1) leave all but 28 acres of Area 7B urban reserves; (2) change 263 acres in Area 7I from urban reserve to rural reserve, leaving the remaining 360 acres undesignated; and (3) designate 352 formerly undesignated acres in Area 8B, the Helvetia area north of Highway 26 and east of Groveland Road, urban reserves, and change 383 acres in Area 8SBR,[2] also in the Helvetia area, from rural reserves to undesignated. JER-8-10; Maps at APP-2-3.

During these hearings, Petitioners presented uncontroverted testimony on the quality of the farmland north of US-26, particularly noting that Areas 8B and 8SBR contains: (1) a rare concentration of Class I soils (Willamette Silt Loam); (2) top soils six feet in depth that allows for good water retention; (3) a gentle and south facing topography allowing for prolonged sub-irrigation that results from the artesian pressure surface created by the precipitation that drains south from the Tualatin Mountains; and (4) an integrated drainage system. Maps at App 5 - 6. R-3(67-69), D(12)(5573,5576,5578).[3] Together, this

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[2] Washington County did not title the 383 acre area left undesignated as part of the remand proceeding. Petitioners named it Area 8SBR and Petitioners adopt this same naming convention throughout their brief.

[3] Over the past 100 years, Helvetia's farmers have worked these extraordinary natural resources and created an extensive, interconnected network of sub-surface field tiling drainage system that links water resources with field contours and the area's natural hydrology, making irrigation cost-free, field flooding a phenomenon of the past and optimizing crop productivity. R-3(71-73).

approach allows farmers diverse crop selections at lower cost inputs, while approaching the highest yields per acre in the Tualatin Valley. R-D(13)(6663) and 12(2)(2354).

On August 19, 2011, LCDC voted to acknowledge the Metro Urban and Rural Reserves submittal in its entirely, including the 2010 initial submittal, as revised by Metro and Washington County in the 2011 re-designation submittal. On August 14, 2012, LCDC issued its final written order of acknowledgment. This appeal followed.

II. ASSIGNMENTS OF ERROR

A. First Assignment of Error: LCDC Misinterpreted and Misapplied the Reserves Factors. Moreover, the Findings Applying the Reserve Factors Lack Adequate Explanation making them Inadequate for Judicial Review.

1. Preservation of Error.

Petitioners raised objections and exceptions to Metro and Washington County's interpretation of how to apply the factors to specific areas and failure to properly balance the decision overall. R-21(610-612), 18(190-193, 198-199, 200-201), 8(74-78), 5(54-55, 58-59). Accordingly, these issues were preserved.

2. Standard Of Review.

ORS 197.651(10) provides that when reviewing LCDC's decision on urban and rural reserves, this court may "affirm, reverse or remand and order"

upon a finding that the order is: (a) "unlawful in substance or procedure;" (b) "unconstitutional;" or (c) "not supported by substantial evidence in the whole record as to facts found by the commission."

In order to provide meaningful review of an agency action to determine if the agency correctly applied the applicable approval standards, Oregon appellate courts require that agency orders include a clear articulation between the facts and the legal conclusions upon which decisions are based or substantial reason. As the Supreme Court has explained,

> "[w]hat is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient." *Sunnyside Neighborhood v. Clackamas County Comm.* 280 Or 3, 21, 569 P2d 1063 (1977).

An unreasoned order substantially affects a party's statutory right to meaningful judicial review, and therefore is not harmless error. *Salosha, Inc. v. Lane County*, 201 Or App 138, 144-145, 117 P3d 1047 (2005). In the land use context, LCDC 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.' " *1000 Friends of Oregon v. LCDC*, 237 Or App 213, 225, 239 P.3d 272 (2010) (Woodburn) (quoting *Drew v. PSRB*, 322 Or 491, 500, 909 P.2d 1211 (1996)).

3. Argument.

a. Application of the Factors must be Consistent with ORS 215.298 and the Statewide Land Use Goals, or Explain Deviations, so as to Further the Reserves Objectives.

As noted above, lands designated urban reserves are first in the prioritization scheme for inclusion within a UGB. ORS 197.298. Therefore, rather than retaining their last priority status, lands with higher quality Class I soils, such as Area 8B, upon being designated urban reserves, will be urbanized before any undesignated lands containing a lower agricultural capability, any non-resource or any exception lands. This result turns the priority scheme of ORS 197.298 and Goal 14 entirely upside down. The reserves statute and rules cannot be interpreted and applied so broadly and, if such an interpretation is permissible, the decision must be accompanied by an explanation of how, given the facts, this result was justified.

Nothing in ORS 195.137 through .145 or OAR Division 660-027 suggests that the designation of reserves is intended to override or otherwise replace Oregon's basic land use framework of preserving lands suitable for agriculture for farm uses pursuant to Goal 3. Rather, one of the primary points in advocating for new reserves rules was to provide long-term protection to lands that are "functionally critical to the agricultural economy." APP-21. The legislature included this objective in its legislative findings in ORS 195.139 to

provide "long-term protection of large blocks of [farm] land with the characteristics necessary to maintain their viability." Areas north of US-26, more particularly Areas 8B and 8SBR, contains large blocks of the highest quality farmland in the region and yet, these areas were placed in first priority for urbanization ahead of other non-resource lands and lower quality resource lands. APP-5. This was done without adequate explanation.

Selecting lands to designate as urban reserves or rural reserves requires the application of "criteria and factors."[4] OAR 660-027-0005(1). The 1000 Friends' Opening Brief explains the factors that govern the designation of rural reserves are set out in ORS 195.141(3) and OAR 660-027-0060(2) and (3).

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[4] In a 2010 report to the Commission, the DLCD described the relationship of the factors and criteria as follows:

> "It is also important to understand that the process and criteria set by the Oregon legislature for designating urban and rural reserves is unlike any other large-scale planning exercise previously carried out in Oregon. With two exceptions, the Department believes that the statutes and rules that guide this effort replaced the familiar standards-based planning process with one based fundamentally on political checks and balances, together with factors that local governments are required to consider in making their decisions. The two exceptions, where the legislature and the Commission have set general standards for reserves are in terms of the overall amount of urban reserves, which must be based on forecasted population and employment growth (ORS 195.145(4)) and the commission's articulation of the purpose of reserves: 'a balance in * * * urban and rural reserves that, 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 that define the regions for its residents.'" OAR 660-027-0005(2). JER-7.

App.13-14. Designating lands for urban reserves requires consideration of factors set out in ORS 195.145(5) and OAR 660-027-0050. APP-13. For urban reserves, tracking with the Goal 14 location factors,[5] the focus is on whether public amenities and services can be extended efficiently and cost-effectively to serve the reserve area in a way that is compatible with adjacent agricultural activities.

Washington County, Metro and LCDC failed to properly analyze or explain how they considered the factors. LCDC's approach undermined the existing land use system, which is premised on giving lands with the highest agricultural capability the lowest priority for inclusion in the urban growth boundary.[6] The findings supporting LCDC's order are peppered with

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[5] Seven factors in Goal 14 regulate the establishment and amendment of UGBs. Factors 3 to 7 are known as the "locational factors" and require consideration of:

> "(3) Orderly and economic provision for public facilities and services;
> "(4) Maximum efficiency of land uses within and on the fringe of the existing urban area;
> "(5) Environmental, energy, economic and social consequences;
> "(6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI being the lowest priority; and
> "(7) Compatibility of the proposed urban uses with nearby agricultural activities."

[6] The legislative history for the adoption of ORS 195.137 *et seq.* and the administrative rule suggest that the impetus for new reserve rules was the need to consider other qualitative factors other than strictly a priority system based solely on soil type, most particularly adding factors related to efficient and effective urbanization, but the addition of those factors did not have the effect of overriding the statutory directive to preserve farmland. APP-23-24.

statements about how LCDC minimized any obligation that Metro and Washington County have to use the factors as a measuring stick when designating reserves. Instead, the order concludes that the factors require consideration only to the extent that some evidence of compliance entered the minds of the decision-maker. In discussing the role of the factors, the Order explains:

> "In most instances, with one important exception, the Commission does not review the decision to determine whether an area would be better as a rural reserve than as an urban reserve, or even whether Metro was right in its designations. The question is a narrow one: whether Metro considered what the statute and rules require it to consider, and whether Metro's findings explain its reasoning, and whether there is substantial evidence in the record to support Metro's decision.
>
> The exception is for lands that the Oregon Department of Agriculture (ODA) has identified as Foundation Agricultural Land, where the rules require Metro to engage in an additional explanation. Under OAR 660-027-0040(11), if Metro designates such land as an urban reserve, it must "* * * explain, by reference to the factors in OAR 660-027-0050 and 660- 027-0060(2) [the urban and rural factors], why Metro chose the Foundation Agricultural Land for designation as urban reserves *rather than* other land considered under this division." (Emphasis added.) For these lands, Metro must consider both sets of factors, and explain why it selected the lands in question instead of other lands.
>
> The administrative rules and the applicable statutes grant substantial discretion to Metro and the counties in deciding which lands to designate as urban and rural reserves and, as long as Metro can demonstrate that it considered the factors, there 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. Nor is there any requirement that Metro or the counties consider any particular lands for either designation, and

> there is no requirement that either Metro or the Counties make any findings regarding areas they do not designate." JER-29-30.

To summarize LCDC's reasoning, once the decision-maker has given the most general modicum of consideration to the factors, LCDC was free to bless the designation of reserves without regard to the acreage at issue, unique physical attributes, conflicts between adjacent uses and boundaries,[7] any consideration of alternatives, or explanation that this scheme of designating lands achieved the required "balance." This is exactly the type of conclusory reasoning the Supreme Court rejected in *Sunnyside Neighborhood.*

The findings explain that the "reserve factors derive from the Goal 14 locational factors" and the Order cites to judicial precedent considering application of the Goal 14 factors as a means of clarifying "consideration of the factors."[8] JER-28. In *1000 Friends v. Metro (Ryland Homes),* 174 Or App 406

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[7] The importance of natural or other physical boundaries dividing uses and LCDC, Metro and Washington County's failure to properly consider and explain this factor is discussed in the brief filed by Carol Chesareck and those arguments are adopted herein.

[8] Although acknowledging that the statewide land use goals apply to the decision, the LCDC order asserts that compliance means "the submittal on the whole conforms to the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature." JER-25. LCDC makes no Goal 14 findings presumably, because no expansion of the urban growth boundary is proposed. If LCDC believes that Goal 14 does not apply to this decision directly, LCDC's failure to require application of the reserves factors consistently with Goal 14, especially when it relies on Goal 14 cases as precedent, represents a significant deviation from the purpose of Goal 14 and state law.

(2001), referred to repeatedly in the Order to justify this "factors as considerations" approach, this court held:

> 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. *Id.* at 411.

The reserves statute and rules are clear, that in designating rural and urban reserves, Metro "shall base" its decision on the factors and "explain[] why areas were chosen as urban or rural reserves" and "how these designations achieve the objective stated in OAR 660-027-0005(2)." No discretion is conferred upon the decision-maker and the further the decision deviates from the priority scheme set forth in ORS 197.298 and Goal 14, the greater Metro and Washington County's obligation to explain and analyze the decision through more thorough findings. The factors cannot be so diluted and the reasoning so sparse as to provide no meaningful basis for the resulting decision.

Further, if as LCDC states, the urban reserve factors originate from and are largely duplicative of the Goal 14 location factors, it is likely that when a UGB expansion occurs, Metro will find that the location factors are satisfied by relying *ipso facto* on its urban reserve findings and conclusions. Therefore, not only will large-blocks of the best farmland such as Area 8B be eligible for urbanization, when it was previously the last priority for inclusion, it is likely

that the soil quality criterion of Goal 14 will be deemphasized once the urban reserves designation is in place.

In sum, LCDC misinterpreted and misapplied the reserves law to grant Metro and Washington County boundless discretion in applying the factors in a manner inconsistent with the purpose and history for adopting reserves, without regard to the overall statutory structure governing UGB expansions and without sufficient explanation to allow for meaningful judicial review.

b. LCDC Overlooked the Balancing Obligation as Providing Boundaries for Metro and County Discretion in Applying the Factors.

The purpose of designating urban and rural reserves is "to facilitate long-term planning for urbanization" as well as provide "long-term protection for large blocks of agricultural land and forest land with the characteristics necessary to maintain their viability" to find a "balance …that, in its entirety, *best achieves* livable communities." APP-10. LCDC acknowledges that the "best achieves" inquiry is an applicable *criterion*, as opposed to merely a factor. JER-7. However, neither the counties, Metro, nor LCDC adopted any findings explaining or distinguishing among alternative lands as would be necessary in order to determine what land designation formula "best achieves" the objectives analysis. Rather, the concept of "criteria," although applicable under OAR 660-

027-0005(1), drops out of LCDC's analysis entirely and is relegated only to considerations with no analysis, comparative or otherwise.

LCDC continually rejects the notion that Metro or the counties had any obligation to consider alternatives in order to select lands that are most suited to urbanization or the least valuable for agriculture thereby achieving the "best achieves" balance. The findings state:

> This evaluation does not require a ranking, nor does it require that the "best" suited lands be designated as either an urban or rural reserve, but it does require the county and Metro to show that they evaluated alternative areas in terms of each of the factors, *1000 Friends of Oregon v. Metro* (Ryland Homes), 174 Or App 406, 409-410, 26 P3d 151 (2001), and that their findings explain why each area's designation as an urban or rural reserve is appropriate. JER-27.

However, the court in *Ryland* went on to conclude that consideration of Goal 14 location factor 7, the proposed compatibility of urban uses with nearby agricultural activities, requires a comparison between the impacts of urbanizing a particular site against the impacts of urbanizing alternative sites. *Id.* at 417. The LCDC order cannot both rely on *Ryland* as governing application of the factors in ORS 195.137 and yet reject its express obligation to consider alternative sites when considering, for example, urban / rural compatibility, an urban reserves factor, OAR 660-027-0050(8) that mirrors Goal 14 location factor 7.

The Commission interpreted the "best achieves" obligation to "focus on the collective overall regional process" and "looking for the best fundamental

balance between the competing areas." JER-25. In essence, LCDC concluded that if the factors were met, the objectives were balanced. Such reasoning is entirely circular and reads out the existence of the "best achieves" obligation entirely.

These rules do not permit wholesale abdication of the criteria and deviation from the rules to such an extent that some of the highest-quality and most viable farmland in Washington County were designated urban reserves without a coherent explanation. There are no findings explaining how the urban need for certain Foundation Farmlands, a special category of farmland designated under OAR 660-027-0010(1) as having long-term commercial viability within the Metro region, were greater than the agricultural need for the same land – in other words, how it "best achieves" the identified objectives which requires the preservation of Foundation Farmlands.[9] Determining what solution is "best" requires the consideration of alternatives and an explanation of how the factors and decisions were balanced against each other to achieve the "best" result.

Petitioners do not argue that the "best achieve" obligation is a policy preference with which Petitioners disagree or that any designation of Class I,

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[9] OAR 660-027-0040(11) imposes an additional alternatives analysis obligation when considering designating Foundation Lands, as discussed in Save Helvetia's Second Assignment of Error. An additional challenge to Washington County's application of the urban and rural reserve factors is set out in the brief submitted by 1000 Friends.

Foundation Farmland, as urban would undermine the "best achieves" obligation. Rather, compliance with the "best achieves" criterion requires findings explaining how the benefits achieved by urbanizing particular lands, most particularly Foundation lands, outweighs the loss of those lands to the agricultural community. The findings must identify and explain how Metro concluded that the lands selected for reserves "best achieves" the statutory standards and the public purposes identified. The challenged orders do not provide this necessary explanation.

Rather LCDC's findings were that "most of the lands surrounding the existing urban areas in Washington County were…Foundation, …*any* significant urban reserve designations in Washington County would necessarily require using some Foundation lands." JER-139. This conclusion fails to provide any analysis of how the particular lands selected "best achieve" the objectives and goes beyond the discretion authorized by the rule.

LCDC erred by failing to require that Washington County and Metro explain the areas selected for application of the factors and some alternatives analysis or balancing to justify the selection of one area over another in the context of explaining how it "best achieved" a balance that is consistent with the statutory requirements.

c. LCDC's Weighing the Reserves Factors when Re-designating Area 8B as Urban Reserves Lacks Substantial Reason.

The reserve criteria provide the only standards against which to provide any meaningful judicial review of this decision. LCDC's order failed to provide sufficient explanation and analysis in the findings to conclude if the reserves objectives are met. As for Area 8B, the Order states:

> "As discussed above, the OAR 660-027-0050 urban reserves factors are *not criteria* in the sense that Metro has to show each area complies with each factor. Rather, these are *considerations,* which Metro must take into account when deciding whether to designate an area as an urban reserve." (emphasis supplied). JER-143.

In addition:

> "Reading OAR 660-027-0040(10) in the context of the balance objective provided in OAR 660-027-0005(2), the Commission holds that division 27 affords Metro and the counties the discretion, even in circumstances as described by objectors where "land more closely satisfies rural objectives over urban" to nonetheless determine that the balance in designation of urban and rural reserves best achieves the objectives of division 27 with an urban designation." JER-147.

These findings are simply conclusory and are contrary to the plain language of the rule or statutory language to require that Metro and Washington County "shall apply" the factors. That is insufficient under *Sunnyside Neighborhood* and *1000 Friends (Woodburn).*

In its initial decision designating lands north of US-26 for urban reserves, the County designated Area 8B, approximately 88 acres very near the Shute Road Interchange, as urban reserves. APP-1. The Metro findings note that this area was identified as a part of the North Hillsboro Pre-Qualifying Concept

Plan (PQCP) area produced by the City of Hillsboro as summarizing its aspirational, long-term growth needs. JER-317-418. APP-6. This PQCP covered approximately 7,890 gross acres[10] and, according to the Washington County findings attached to the initial reserves decision, provided the "findings demonstrating conformance with the 'Factors for Designation of Lands as Urban Reserves' under OAR 660-027-0050." R-D(8)(3113-3138) and JER-394.

The findings lack any explanation of why application of the *urban reserve factors* to a 7,890 acre area is appropriate to justify the inclusion of this 88 acres and no explanation of why Washington County settled on 88 acres and not some smaller (or larger) area considering the factors and the objectives. The only site-specific finding notes the recent securing of funding for a freeway interchange upgrade and that designating the site as an urban reserve will provide flexibility in planning needed for this intersection improvement. JER-394-395. During the re-designation proceedings, the Oregon Department of Transportation confirmed that the area slated to accommodate an intersection *need not be* designated urban in order to accommodate the intersection and the

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[10] The PQCP contains inconsistent references to the overall acreage contained within the area designated as North Hillsboro. In one place, the plan identifies gross acreage of 8,159 acres, R-D(8)(3113), and another it is listed as 7,890 gross acres, R-D(8)(3115). The findings for the redesignation decision state that the North Hillsboro PQCP area consists of 7,890 gross acres. JER-575.

intersection objective was subsequently dropped as a justification for urban reserves. R-12(1414).

Unlike the findings justifying the smaller 88-acre area, on their face, Washington County appears to have applied all of the urban reserves factors in deciding to add another 352 acres to Area 8B upon remand, making a total of 440 acres. JER-575-600. However, a closer examination of these findings reveals that application of the factors is once again based entirely on the consideration of the same 7,890-acre area. For example, the findings make much of the need for large-lot industrial in Western Washington County with no particular reference to areas north of US-26 or to these particular 440 acres. JER-579-580.

The only analysis considering land areas north of US-26 in particular is a CH2MHill study, R-12(1576-1590), which considers potential large industrial sites. APP-7-9. This study identifies 10 potential large industrial sites within the proposed Urban Reserve and Undesignated areas north of Hillsboro. One of these sites includes 200+/- acres of which the 88-acre area originally designated for urban reserves is a part. The study concludes that the 200+/- acres is the "most suitable and holds the best opportunity for development in the short term." R-12(1590).

Metro's findings, on which LCDC relies, fail to note that the CH2MHill study prioritized sites based on whether they are "development-ready" and how

quickly or desirable property would be for industrial development; however these considerations are not identified in the OAR 660-027-0050 urban reserve factors.[11] Further, there is no comparative analysis within the CH2MHill study considering whether the initial 88 acres or the 440 acres, upon re-designation, would satisfy the need or whether other lands, in similar proximity to the highway also provided good sight visibility, a key distinguishing factor within the study, that would also serve the need.

As with Metro and Washington County's consideration of the factors, the CH2MHill study considers the urban reserve factors in a vacuum; the study examined only the suitability of the land for urban reserves. There is no explanation or analysis examining the value of the land to the agricultural community or the region or how the loss of this land for agricultural purpose will affect the viability of surrounding farms or the region as a whole. Rather, LCDC approved a complete abdication when it came to Metro and Washington County failing to protect its very best farmland. Metro and Washington County's conclusion, in essence, was that whatever land is left over is what is necessary to preserve the agricultural land base. This conclusion is inconsistent with the requirement to strike a balance consistent with the statutory mandate.

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[11] Further, the findings lack any explanation of how LCDC may rely on this detailed parcel-by-parcel, use-specific analysis when designating urban reserves, but LCDC entirely rejects the same particular parcel-by-parcel detailed findings obligation when evaluating rural lands. This is another inconsistency not adequately explained.

Nothing in these findings identifies any characteristic particular to the subject 440 acres that relates to the urban or rural factors, nor do the findings use the factors to explain why or how the county determined that the appropriate acreage should be 440 acres. Further, there is no identification of suitable boundaries necessary to minimize urban impacts on farm practices as required by OAR 660-027-0050(8).

Substantial reason requires that findings explain the reasoning that leads the agency from the facts that it has found to the conclusions that it draws from those facts. *See, e.g., Home Plate, Inc. v. OLCC,* 20 Or App 188, 530 P2d 862 (1975). The findings do not explain how the County settled on any particularly sized parcel as suitable for urban designation. Rather, it appears that quantity of land - the need to trade some urban lands for others, drove the area for designation determination rather than any analysis required by the reserve factors. Such analysis is conclusory and fails to articulate how the factors were applied when compared with other lands in a way that "best achieves" the objectives.

In response to Petitioners' challenge pointing out that changes in the area designated urban reserves within Area 8B required additional findings explaining how altering the location of urban reserve designations will affect the region as a whole, the LCDC Order at JER-62 states:

> "First, as described above, the re-designation submittal does not significantly change the amount of land designated for either urban

> or rural reserves, either in Washington County or in the region as a whole and, therefore, did not significantly alter the overall [the] balance or otherwise affect the livability, viability or vitality in the region as a whole."

This statement not only lacks any supporting facts, it represents another example of the complete disregard for the qualitative nature of the reserves process. The decision focuses solely on quantity rather than particular land quality, the thrust of the reserve factors. LCDC's findings resonate within a long line of "substantial compliance" standard cases, specifically disapproved in *Marion County v. Federation for Sound Planning*, 64 Or App 226, 668 P2d 406 (1983).[12] In other words, a *de minimis* adjustment in land areas does not

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[12] In *Prentice v. Land Conservation and Development Com'n*, 71 Or App 394, 397-398, 692 P2d 642, (1984), the court considered Commission findings as follows:

> "'The Commission recognizes that the Department reaches a different conclusion as to Areas 1 and 2, but a majority of the Commission feels that Clackamas County has adequately justified the exceptions for those areas. It should be noted that these two areas comprise less than 1/20 of 1 percent of the land in Clackamas County. While there will always be room for disagreement in making the 'judgment call' whether an exception has been adequately justified, the Commission finds that in view of the complexities involved, the extent of good-faith planning, the findings, reasons and *supporting information provided by the County*, the positive achievements of the plan in resource protection, and *particularly the relatively small amount of land at issue, the plan as a whole complies with the Goals* and acknowledgment, except as provided for in Continuance Order 83-CONT-15, is warranted.' (Emphasis supplied.)

obviate the obligation to explain how the new proposal is "best suited" to achieve particular objectives. Moreover, the loss of 440 acres of highly viable Foundation farmland is not *de minimis.*

Further, this obligation to explain through analysis how the facts lead to a decision is not diminished by any deference owed to the decision-maker.[13] In *Drew v. PSRB supra,* the court rejected an argument by the parole board that "there's enough evidence but even if it doesn't seem like enough to you-trust us." In *Drew,* the court rejected that approach noting that the relationship between factors, criteria, and facts must be explained. LCDC's reliance on the

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> Petitioners contend that the above-emphasized language evidences that the commission applied a "substantial compliance" standard to the acknowledgment request, in contravention of our holding in *Marion County v. Federation for Sound Planning, supra*. In that case, we concluded that LCDC had no statutory authority to acknowledge plans which do not comply fully with all applicable goals. Because the commission's final order conceded that there were goal violations of a "de minimis nature," offered statutory justification for approving the plan in spite of the discrepancies and admonished other jurisdictions not to apply the standards approved therein, we concluded that the commission made a conscious decision to acknowledge a plan containing goal violations. Accordingly, we reversed and remanded the order of acknowledgment."

[13] During the March 15, 2011 joint hearing to consider the re-designation proposal:

> "Councilor Hosticka pointed out that a lot of land qualifies under both characteristics. He said that Metro Council and the Board are here to make the political judgments about whether or not it is more appropriate for the community to designate it one way or another." R-12(873).

decision being largely political or an assertion that the county had discretion to designate lands urban when they more closely met the rural rather than urban factors are, in essence, little more than the "trust us" defense that requires a remand.

Application of the factors to find a balance that "best achieves" particular objectives must be done in a way that does not contort the general priority scheme of ORS 197.298 and Goal 14 out of existence. Merely restating the factors does not achieve a balance. JER-85. In effect, LCDC blessed an assumption that each parcel or area is interchangeable with any other area, when the evidence, especially with regard to Area 8B, said otherwise. This approach dilutes the factors to such an extent as to make them lose all meaning and relegates the determination to little more than a political game. Failure to make findings identifying the characteristics that make up the balance as well as explain how such impacts will alter the overall livability within the region, especially when the approach deviates so dramatically from the priority scheme of Goal 14 and ORS 197.298, is error and requires remand.

B. Second Assignment of Error: LCDC's Order Was Unlawful in Substance and Lacked Substantial Reason in Applying Reserves on a County-Wide rather than a Region-Wide Basis. More Particularly, LCDC erred in Concluding that (1) the Obligation to Consider "Other Lands" Was Limited to Non-Foundation Lands

within A Single County and (2) the Factors Need Not be Uniformly Interpreted Across the Region.

1. Preservation of Error.

Petitioners raised objections and exception to Metro and Washington County's decisions regarding "other lands" as well as application of the factors. R-21(614-620), 18(202-204), 8(62-67, 95-96), 5(53, 56, 60-61). Accordingly, these issues were preserved.

2. Standard Of Review.

Determining whether the LCDC order properly applied OAR 660-027-0005(2), designating reserves that "in its entirety" meets particular objectives, as well as under OAR 660-027-0040(11), the extent of the local government obligation to consider "other lands" when designating Foundation Agricultural Lands for urban uses requires the interpretation of administrative rules. Interpretation of administrative rules is governed by the same structure as the interpretation of statutes. *PGE v. Bureau of Labor and Industries,* 317 Or 606, 612, 859 P2d 1143 (1993).

Under the *PGE* structure, the court looks first to the text and context of the regulatory provision to determine if it can discern the agency's intent. *Id.* at 610. If that intent is not clear from the first level of analysis, the court then looks to the legislative history of the provision. *Id.* at 611. Finally, if the intent

is not clear from the text, context and legislative history, the court looks to general maxims of construction to resolve any remaining uncertainty. *Id.* at 612.

3. Argument.

LCDC argues that the reserves designation standards require little more than grouping together the sum of the parts – the consolidation of each county acting independently from the others. With regard to the re-designation decision affecting Areas 8B and 8SBR, LCDC found that the re-designation "did not significantly change the amount of land designated for either urban or rural reserves, either in Washington County or in the region as a whole and, therefore, did not significantly alter the overall balance within the region." JER-62. LCDC's inference is flawed because Metro and Washington County failed to consider "other lands" throughout the region or explain how the sum of the re-designated lands, considered as a whole, "best achieved" the balance. In other words, no findings explain how the need for particular urban lands in Washington County, north of US-26, outweighed all other lands with potential for urbanization within the region and, that the particular urban need outweighed the harm to the agricultural land base considering the impact to the region as a whole.

Washington County, Metro and LCDC ignored the "in its entirety" language suggesting, instead, that reserves could be designated from a sub-regional, county-by-county perspective and lands simply substituted for each

other within that region. This approach is inconsistent with the plain language and legislative history underpinning the adoption of these rules.

The legislative history of OAR Division 660-027 provides additional context for how the factors should be applied and, in turn, how the balancing of reserves should be considered "in its entirety." APP-18-42. In supporting the adoption of OAR Division 660-027, Metro completed a "Shape of the Region Study" identifying those lands region-wide that are "functionally critical to the agricultural economy." APP-21. This study served as the basis for the entire urban/rural reserves undertaking. As part of this study, the Department of Agriculture (ODA) authored, "Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands." R-12(1)(57-127). This analysis considered areas within the region against uniformly applied standards including topography, agricultural land use, connectivity, edges and barriers.[14] Presumably, lands identified as "functionally critical" or containing

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[14] During the Reserves Steering Committee meeting of May 14, 2008, Brent Curtis, Washington County planner, explained the relationship between the inventorying of rural lands and the factors. He stated:

> "The Shape of the Region process provided two important inventories. One of those was presented for the Department of
>
> Agriculture by Jim Johnson and provided an analysis of agricultural lands that went beyond the soil types to an understanding of the agricultural economy. When we went to the legislature to get the LCDC rule, we worked backward from the study to replicate and enumerate factors that Jim Johnson used.

"long term commercial viability" would be protected as rural reserves. OAR 660-027-0010(1).

However, LCDC, Metro and Washington County's findings lack any explanation for how or why their conclusions deviated so significantly from the findings contained in these studies, which served as the basis for creating the reserves factors and objectives. The re-designation of Areas 8B and 8SBR discounted the farmland quality based on an outdated and unreliable soils study and that the land is not within an irrigation district, even though water is not needed, as described in the 1000 Friends opening brief. This contorted, skewed and entirely subregional application of the factors allowed Areas 8B and 8SBR to be designated as urban reserves or leaving them as undesignated lands, even though they contain some of the best farmland in the region.

LCDC rejected arguments presented by the Coalition for a Prosperous Region claiming that the "balance" required by OAR 660-027-0005(2), when it comes to assessing the need, must be done on a county-wide, sub-regional,

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> To a very major extent, the factors found in the law and rule have already been fundamentally applied to agriculture." R-A(2)(1062).

At the time the factors were adopted, it was contemplated they would be interpreted uniformly across the region. This statement further supports the presumption favoring protections for Foundation Lands in the rule was intended to produce results consistent with ORS 215.298 and Goal 14 in protecting the highest value farmland for farm use. In addition, this provides additional context for Washington County's complete departure in selectively not applying particular factors or adding factors as set out in the 1000 Friends of Oregon brief.

rather than a regional basis. JER-59-60. Yet, when it came to the interpretation and application of the reserves factors, LCDC affirmed Metro and Washington County's independent consideration and application of the factors without reference to each other, most particularly with regard to the treatment of "Foundation Lands" and "Undesignated Lands." Nothing in ORS 195.137 *et seq.* or OAR Division 660-027 grants LCDC, Metro or Washington County the discretion to vacillate between interpreting some standards to mandate a region-wide or sub-regional assessment to establish compliance.

It is only through a uniform interpretation and application of the factors that Metro and the counties could be in any position to determine whether the reserves proposal was balanced. Instead of following that course, LCDC blessed Washington County's sub-regional approach. Further, LCDC failed to require Metro and Washington County to explain why, given the strong presumption in favor of protecting Foundation lands, Areas 8A and 8SBR which would have been designated rural reserve had they been located in Clackamas or Multnomah counties, were not protected simply by virtue of being located in Washington County.[15]

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[15] Multnomah County employed a suitability ranking of high, medium or low for both the urban and the rural reserve factors allowing for a comparison to determine whether lands were more appropriate for urban or rural protection. JER-611. Sauvie's Island, which does not contain soils of as high a quality as in Areas 8B and 8-SBR, was designated rural reserves because it contained Foundation farmland within three miles of a UGB. APP-4. JER-613-616.

a. OAR 660-027-0040(11) Requires the Consideration "Other Lands" Throughout the Region Rather than Just the County.

"Foundation Agricultural Lands" are those lands mapped by the ODA as having long-term commercial viability for agricultural lands. OAR 660-027-0010(1). Foundation lands consist of "large blocks of land with the characteristics necessary to maintain their viability." ORS 195.139. Foundation lands will not be designated for urban reserves where other non-Foundation lands are available. OAR 660-027-0040(11) provides:

> Because the January 2007 Oregon Department of Agriculture report entitled "Identification and Assessment of the Long-Term Commercial viability of Metro Region Agricultural Lands" 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 Agricultural Land for designation as urban reserves rather than other land considered under this division. APP-14.

The text and contextual analysis of the "other lands" provision indicates that it is to apply to all "other land considered under this division" and cannot be construed to limit this obligation to the consideration of "other land" within a particular county.

The Commission interpreted this "other lands" obligation:

> "to require Metro to explain why it chose Foundation Agriculture Lands, including those in Area 8B, 'rather than other lands considered under this division.' Metro has done so in its findings.

> For the modified Area 8B, Metro and Washington County applied the OAR 660-027-0050 urban reserve factors, followed by an application of OAR 660-027-0060 rural reserve factors. JER-575-592. Metro and Washington County also made express "Findings and Statement of Reasons for Foundation Agricultural Lands as Urban Reserves." JER-596-599. JER-141.
>
> Metro's order finds:
>
> "Why did the region designate *any* Foundation Agricultural Land as urban reserve? The explanation lies in the geography and topography of the region, the growing cost of urban serves and the declining sources of revenues to pay for them, and the fundamental relationships among geography, topography and the cost of services..." JER-85.

Metro and Washington County never compared the topography, the quality of the farmland or the cost of extending services amongst non-Foundation lands region-wide.

As explained above, the findings in JER-575-592 consist of a summary of the application of the reserves factors to a 7,890-acre swath of land located north of Hillsboro as part of the PQCP. No "other lands" are referenced, nor considered. As for the reasons contained on JER-596-599, Metro and Washington County concluded:

> Washington County understands, at a minimum, the phrase "other land considered under this division" to mean land under study by the region and classified something other than Foundation Agricultural land in the ODA report entitled "Identification and Assessment of the Long-Term Agricultural Lands" (R-12(57-127)). The ODA report also classifies land as Important and Conflicted. (Emphasis added.) JER-596.

Although Washington County appears to acknowledge that this alternatives analysis requires consideration of lands throughout the region, these findings

are limited to considering non-foundation lands in Washington County only. Further, the findings fail to provide any analysis comparing the cost of providing services to other areas against the loss of long-term protection for Areas 8B, 8SBR and adjacent lands that will also be affected by urbanization north of US-26. Again, there is no comparative analysis, nor adequate explanation.

No party disputed that the farmland in Helvetia is of a higher quality and more suitable to the long-term vitality of farming than any other area in Washington County. R-12(2352-2361). Yet these lands were dedicated for future urban development without any consideration of whether other lands were available region-wide or whether the selection of these particular lands, in the sizes and locations selected, would be the least impactful to the viability of the surrounding agricultural lands or the overall productivity of the agricultural lands within the region as a whole. Again, this approach results in the uncoordinated and unexplained loss of high-value farmland that is inconsistent with the reserves rules and requires remand.

b. Failure to Designate Foundation Lands for Rural Reserves in Washington County When Appropriate Undermines a Balance, In Its Entirety.

Unlike the approaches taken in Multnomah and Clackamas County, Washington County elected not to apply a "rural reserves" designation to lands

that met the "rural reserves" factors; instead Washington County elected to leave a number of Foundation lands "undesignated."[16] In explaining the extent of the obligation to designate lands, LCDC found:

> "In most instances, with one important exception, the Commission does not review the decision to determine whether an area would be better as a rural reserve than as an urban reserve, or even whether Metro was right in its designations. The question is a narrow one: whether Metro considered what the statute and rules require it to consider, and whether Metro's findings explain its reasoning, and whether there is substantial evidence in the record to support Metro's decision.
>
> The exception is for lands that the Oregon Department of Agriculture (ODA) has identified as Foundation Agricultural Land, where the rules require Metro to engage in an additional explanation. Under OAR 660-027-0040(11), if Metro designates such land as an urban reserve, it must "* * * explain, by reference to the factors in OAR 660-027-0050 and 660-027-0060(2) [the urban and rural factors], why Metro chose the Foundation Agricultural Land for designation as urban reserves rather than other land considered under this division." (Emphasis added.) For these lands, Metro must consider both sets of factors, and explain why it selected the lands in question instead of other lands.
>
> The administrative rules and the applicable statutes grant substantial discretion to Metro and the counties in deciding which lands to designate as urban and rural reserves and, as long as Metro can demonstrate that it considered the factors, there 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. Nor is there any requirement that Metro or the counties consider any particular lands for either designation, and there is no requirement that either Metro or the Counties make any findings regarding areas they do not designate." JER-29-30.

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16 The only lands left undesignated by Clackamas County were those consisting of Conflicted or Important Agricultural lands that did not qualify as either rural or urban reserves. No Foundation farmland in Clackamas County was left undesignated. JER-679 and 953.

In explaining the decision not to leave lands undesignated, LCDC summarized Washington County's approach as follows:

> "While it was under no statutory or rule obligation to do so, Washington County has explained its decision not to designate lands around North Plains and Banks, with findings that: (1) the lands are outside of Metro's jurisdiction to designate urban reserves, (2) analysis of these lands did not identify them as the highest priority for rural reserves, and (3) it was deemed appropriate to retain some undesignated lands to address the potential long-term population and employment needs of communities outside of Metro but inside of Washington County (given the county's coordinating role)." JER-103.

This approach is contrary to the statute and rule in a number of respects. First, once a county decides to designate urban reserves, it must also agree to designate rural reserves. OAR 660-027-0020(3). Nothing in the law or rule authorizes overlooking "large blocks of agricultural lands" containing those "characteristics necessary to maintain their viability" that is found to qualify as rural reserves and instead leaving them undesignated simply because they are beyond Metro's jurisdiction. Counties designate lands for rural reserves; lands need not be within Metro's jurisdiction to qualify.

Second, the consequence of leaving these lands undesignated is to deprive them of the long-term protection provided by the rural reserves rules merely by virtue of being located in Washington County. See footnote 16 *infra.* If these lands were located in another county, they would qualify for such protection. Implicit is an assumption that Washington County Foundation lands

are somehow less valuable or viable, when the rule imposes a region-wide obligation to promote the vitality of farmland, wherever it is located. Such a result lacks adequate explanation and substantial reason.

Third, Washington County's reasoning for electing to leave lands undesignated finds no authority within the reserves rules. It is up to the counties to designate lands for rural reserves and Metro's jurisdictional boundary has no bearing on such determinations. OAR 660-027-0020(2).

Lands either meet the factors and qualify for rural reserves designations under OAR 660-027-0060 or they do not. Washington County's unique approach to applying the reserve factors resulted in allowing lower capability Foundation lands located in other counties to be protected as rural reserve whereas higher capability lands located in Washington County were not.[17] Again, the decision suffers from a lack of findings explaining this patchwork result of higher capability Foundation farmland being designated urban reserve above all other Foundation or other land within the region and how such a decision can work to achieve the required balance, when considered in its entirety.

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[17] Assuming Washington County need only designate the "highest priority rural lands," Areas 8B and 8SBR represent the highest priority lands for rural reserve as set out in the Department of Agriculture "Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands." *See* the brief submitted by 1000 Friends.

With regard to Washington County's decision to leave lands undesignated as extra lands, Metro establishes population and employment forecasts for the region pursuant to OAR 660-027-0040(2) and (3). These rules do not contemplate retaining extra lands for designation later if the need turns out to be inadequate. Such an approach is comparable to LCDC's blessing of a UGB expansion that included extra lands to allow for "market choice" which was found by this court to lack substantial reason. *1000 Friends of Oregon v. LCDC,* 237 Or App 213, 224-225, 239 P3d 272 (2010).

Washington County left Area 8SBR undesignated although it contains Foundation farmland and the County also concluded that it satisfied the rural reserve factors. Had this land been located in another county, it would have been given rural reserves protection and Washington County's failure to provide similar protection when all evidence indicated that it qualified as rural reserves, without explanation, is arbitrary and unlawful in substance.

c. Metro and the Counties Failed to Consider the Region as a Whole in Balancing the Reserves Decision.

When considering the balancing objective of OAR 660-027-0005(2), not only did LCDC fail to explain how their reserves decisions "best achieves" the standards as discussed above, the only consideration of the region, as a whole,

relates solely to quantitative determinations rather than the qualitative character of the region and how the decision furthers those objectives. LCDC found:

> "As discussed above, the Commission construes OAR 660-027-0005(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 that surround the metro area. 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." (emphasis added). JER-71.

LCDC's assertion that it focused on the qualitative characteristics of the lands as opposed to quantity is not supported by the record, which is replete with references indicating that LCDC, Metro and Washington County relied solely on quantitative comparisons to justify the balance:

> "This [non-foundation land designated for urban reserves] totals approximately 15,697 acres, 55 percent of the lands designated urban reserve." JER-320 (footnote and some citations omitted). JER-86.

> And

> "Some important numbers help explain why the partners came to agree that the adopted system, in its entirety, achieves this balance. Of the total 28,615 acres designated urban reserves, approximately 13,981 acres are Foundation or 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. JER-424 (citations omitted)." JER-87.

> And

> "The fact that, as originally submitted, 7.4 percent of the Foundation Agricultural 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. While the re-designations did not significantly alter those percentages, it did reduce the amount of land designated for urban reserve by 299 acres, compared to a reduction of 120 acres of rural reserve land. On a regional basis, the percentages are even more weighted toward protection of agricultural lands, with 6.1 percent of the Foundation Agricultural Lands designated as urban reserves and 93.9 percent rural reserves." JER-92.

More particularly, as part of the re-designation proposal, LCDC affirmed Metro's conclusion that an adequate balance was achieved based entirely on quantitative and urban-focused determinations. JER-68 referencing Metro findings at JER-424-426. Two of these three pages of Metro findings are concerned entirely with quantitative conclusions indicating that sufficient amounts of farmland will be saved. No decision maker made findings as to the quality or vitality of the farmland that is saved or lost or whether this remainder "best" preserves the vitality of the agricultural land base. Rather, Metro's final page of findings focuses on urban objectives and explains why Foundation farmland is the most suitable for urban reserves.

None of these findings attempt to balance the qualitative characteristics of lost farmland, either generally or as they relate specifically to Areas 8B and 8SBR, the areas most hard hit by the re-designation decision. There is no explanation as to how a balance is struck when the loss includes an incursion north of US-26, onto an area that contains the most highly capable and viable farmland in the region. JER-424.

For these reasons, LCDC's decision is inconsistent with the statutes and rules requiring the uniform protection of Foundation lands region-wide and, to the extent that the rules allow for such pervasive flexibility, they lack any explanation and analysis of how such an approach achieves a balance, in the entirety. Accordingly, LCDC's order is unlawful in substance.

III. CONCLUSION

Although these arguments are directed at LCDC's affirming the decisions of Metro and Washington County, these findings are bound up within the same decision establishing urban and rural reserves in Clackamas County and Multnomah County. Therefore, LCDC's entire decision on acknowledgment must be remanded for further proceedings for the reasons set out above.

DATED this 5th day of November, 2012.

GARVEY SCHUBERT BARER

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By _____
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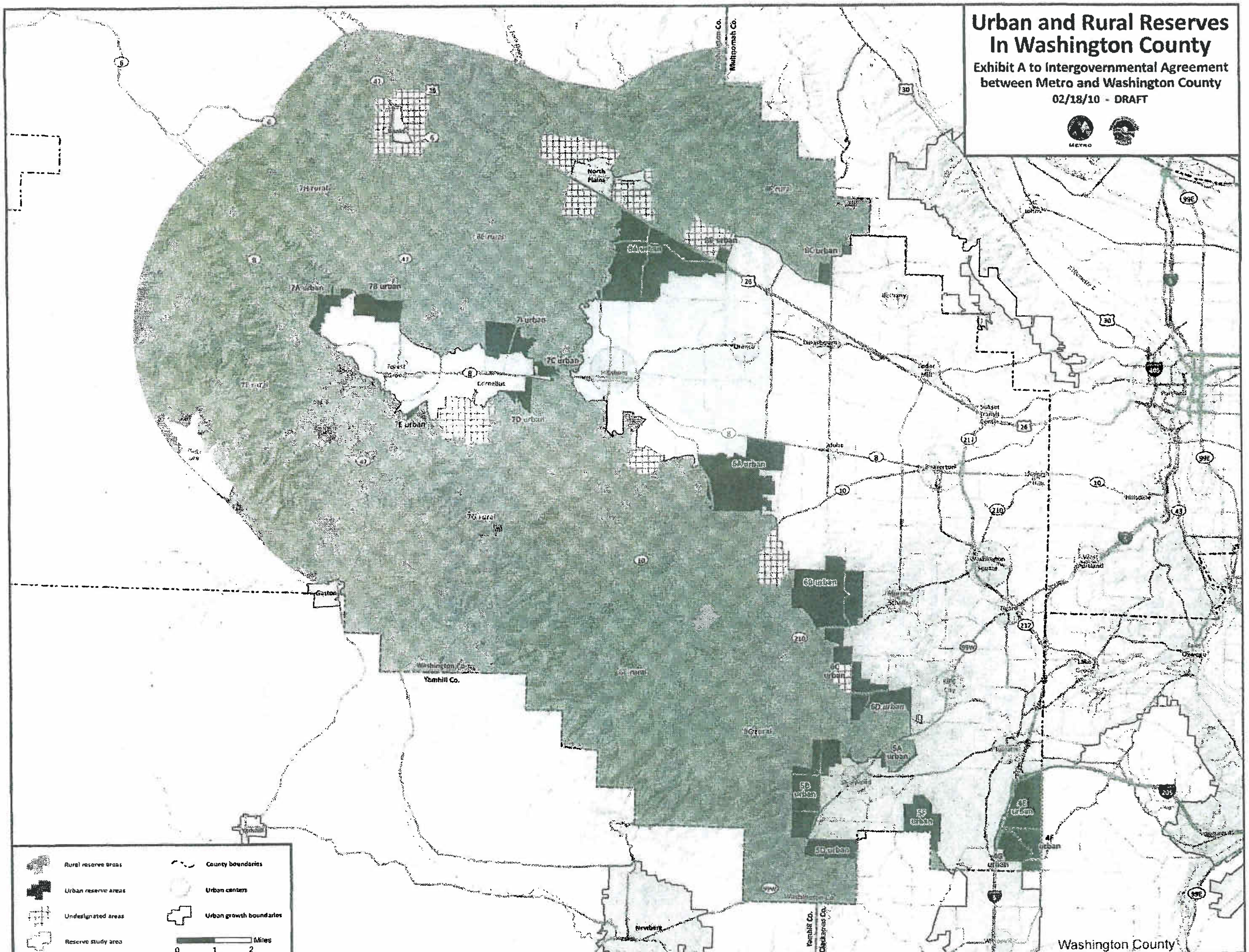
Of Attorneys for Petitioners Save Helvetia and Robert Bailey

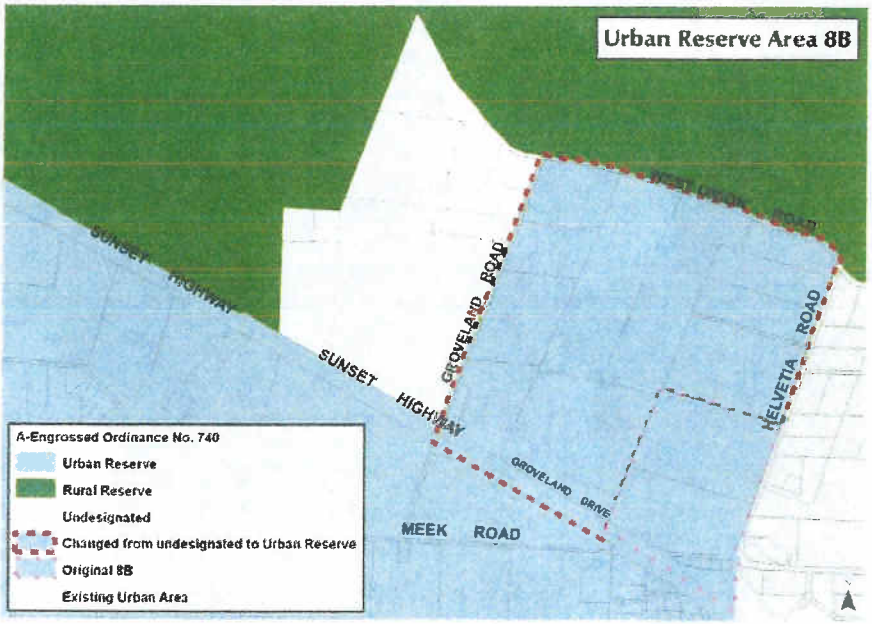

Urban and Rural Reserves
In Washington County
Exhibit A to Intergovernmental Agreement
between Metro and Washington County
02/18/10 - DRAFT
North Plains
8A urban
8B urban
8C urban
7A urban
7B urban
7I urban
7C urban
7D urban
7E urban
7H rural
7I rural
7G rural
8B rural
Forest Grove
Cornelius
6A urban
6B urban
6C urban
6D urban
6E rural
6C rural
5A urban
5B urban
5C urban
5D urban
4E urban
4F urban
4G urban
Gaston
Washington Co.
Yamhill Co.
Multnomah Co.
Clackamas Co.
Newberg
Rural reserve areas
Urban reserve areas
Undesignated areas
Reserve study area
County boundaries
Urban centers
Urban growth boundaries
0 1 2 Miles

"Nothing in statute or the Commission's rules requires the county to adopt findings concerning lands that it did not propose to designate as rural reserves. See, OAR 660-027-0060(2)(" * * a county shall base its decision on consideration of whether the lands proposed for designation"). [cite to page 103 of August 2010 DLCD staff report]*

Nonetheless, the very nature of LCDC's oral remand seems to require an explanation of how Metro and Washington County dealt with "Undesignated lands" issues. This explanation is provided in the following section.

Undesignated Lands Explanation

1) Undesignated Land North of Highway 26



The initial LCDC approval in October 2010 included an undesignated area of 585 acres north of Highway 26, north and west of Urban Reserve Area 8B. Metro and Washington County eventually partially replaced Urban Reserve lands lost in Area 7I (Cornelius North) by converting approximately 352 acres of this area from Undesignated status to Urban Reserve

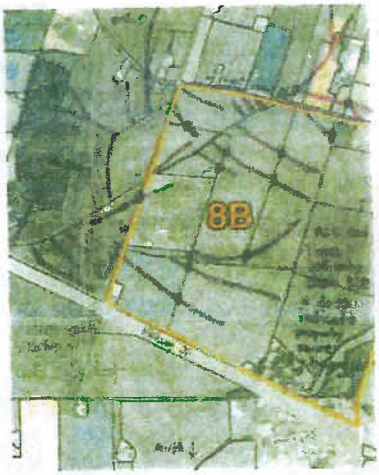
Matt Furrow

Helvetia Area 8B Tiling

EXHIBIT: 25 AGENDA ITEM: 11
LAND CONSERVATION & DEVELOPMENT COMMISSION
DATE: 8-18-11 Save Helvetia
SUBMITTED BY: Matt Furrow

Save Helvetia • August 18, 2011

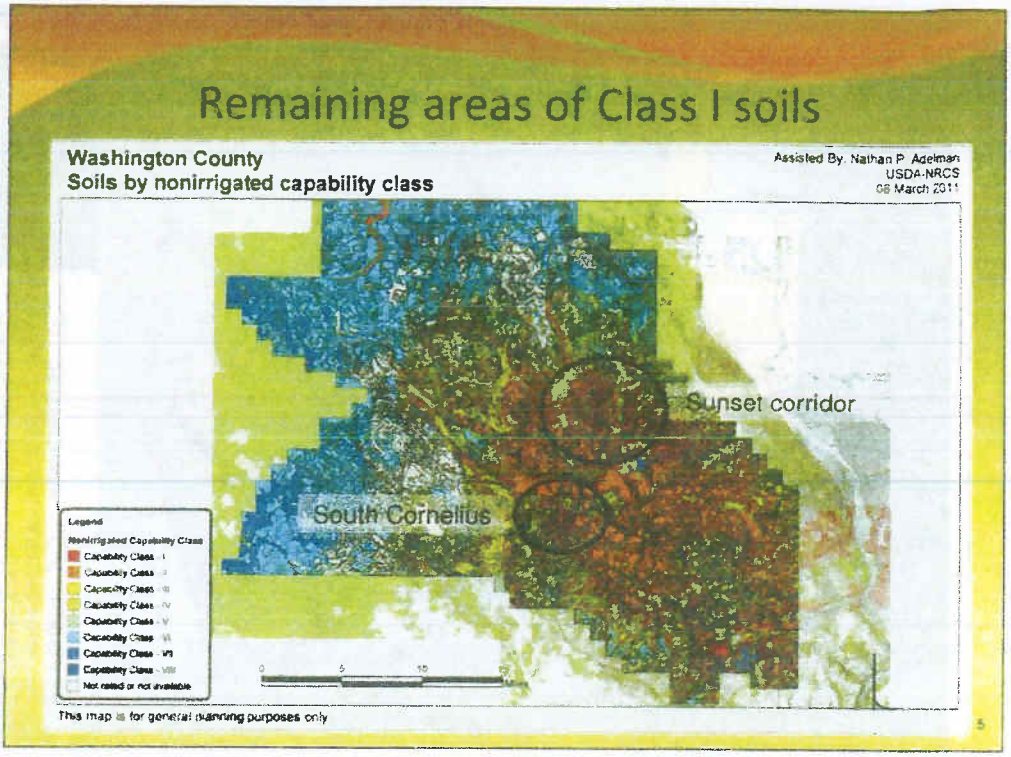
Area 8B: Field Tiling System

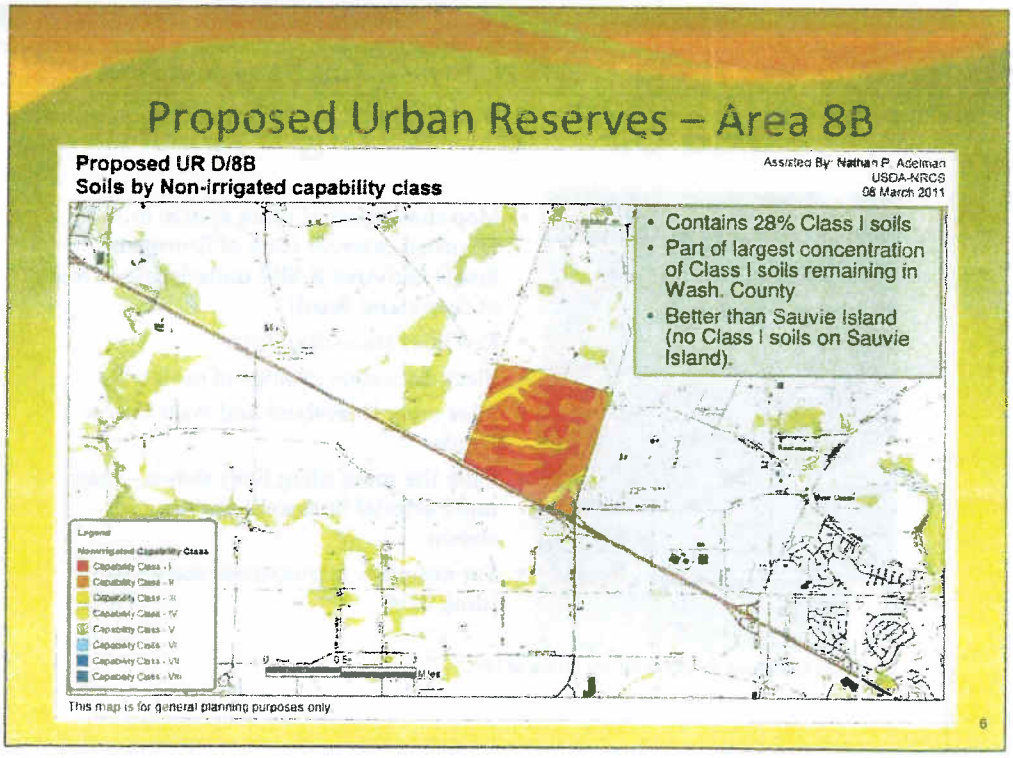


- Map shows partial tiling system in Area 8B urban reserves (east of Groveland Road) and Area 8-SBR undesignated (west of Groveland Road)
- Red lines show drain tile
- Black dots show change of ownership
- Tiles cross Groveland and West Union Roads
- Only the main tiling lines shown – many more arterial lines exist and are not shown
- For example, 12 properties share main tiling lines

Note: Extensive tile patterns are on file at NRCS.

2


Remaining areas of Class I soils
Washington County
Soils by nonirrigated capability class
Assisted By: Nathan P. Adelman
USDA-NRCS
08 March 2011
Sunset corridor
South Cornelius
Legend
Nonirrigated Capability Class
This map is for general planning purposes only
5


Proposed Urban Reserves – Area 8B
Proposed UR D/8B
Soils by Non-irrigated capability class
Assisted By: Nathan P. Adelman
USDA-NRCS
08 March 2011
• Contains 28% Class I soils
• Part of largest concentration of Class I soils remaining in Wash. County
• Better than Sauvie Island (no Class I soils on Sauvie Island).
Legend
This map is for general planning purposes only
6

Helvetia: Area 8B, 8D

(Proposed Urban Reserves)

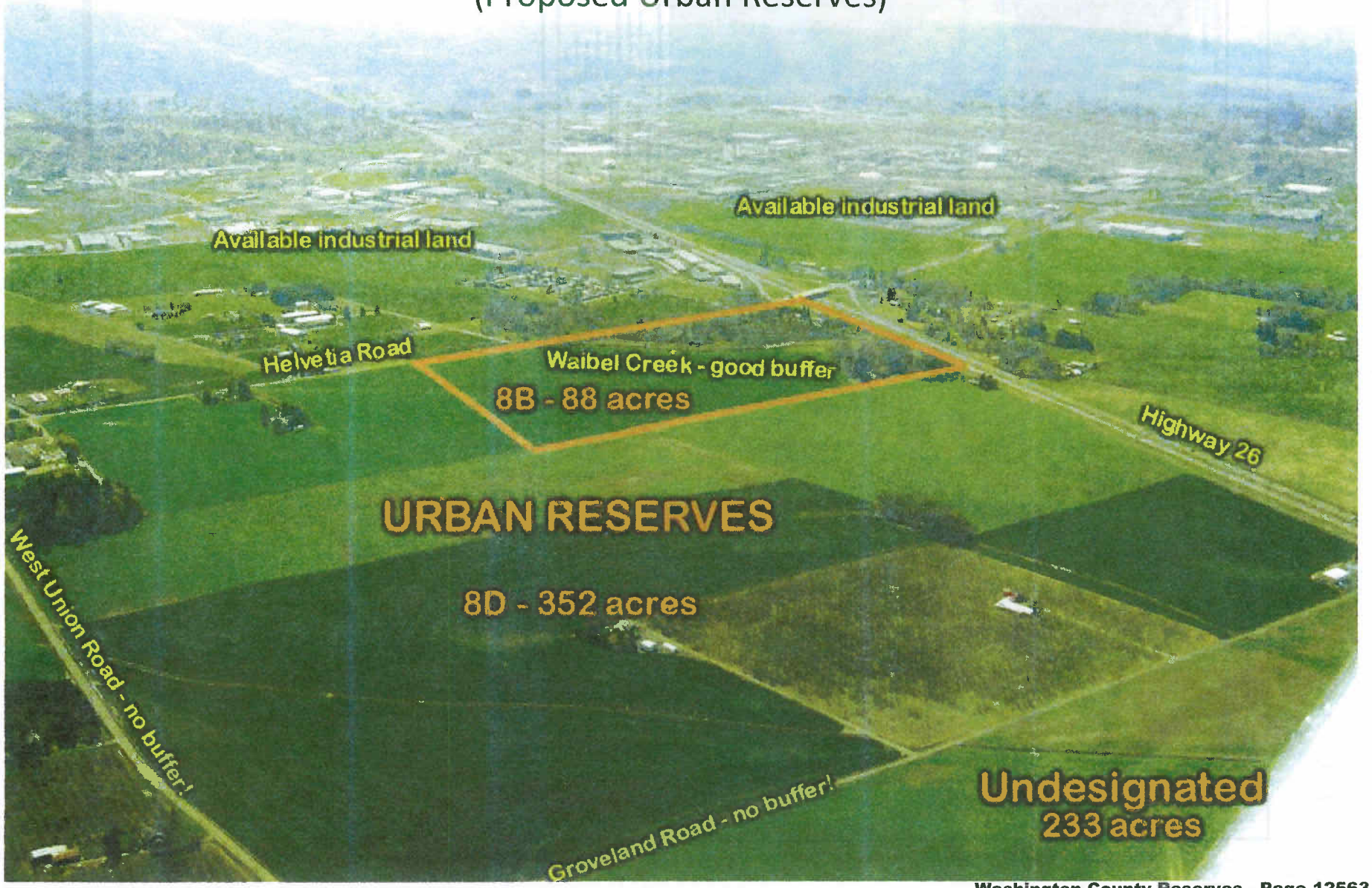
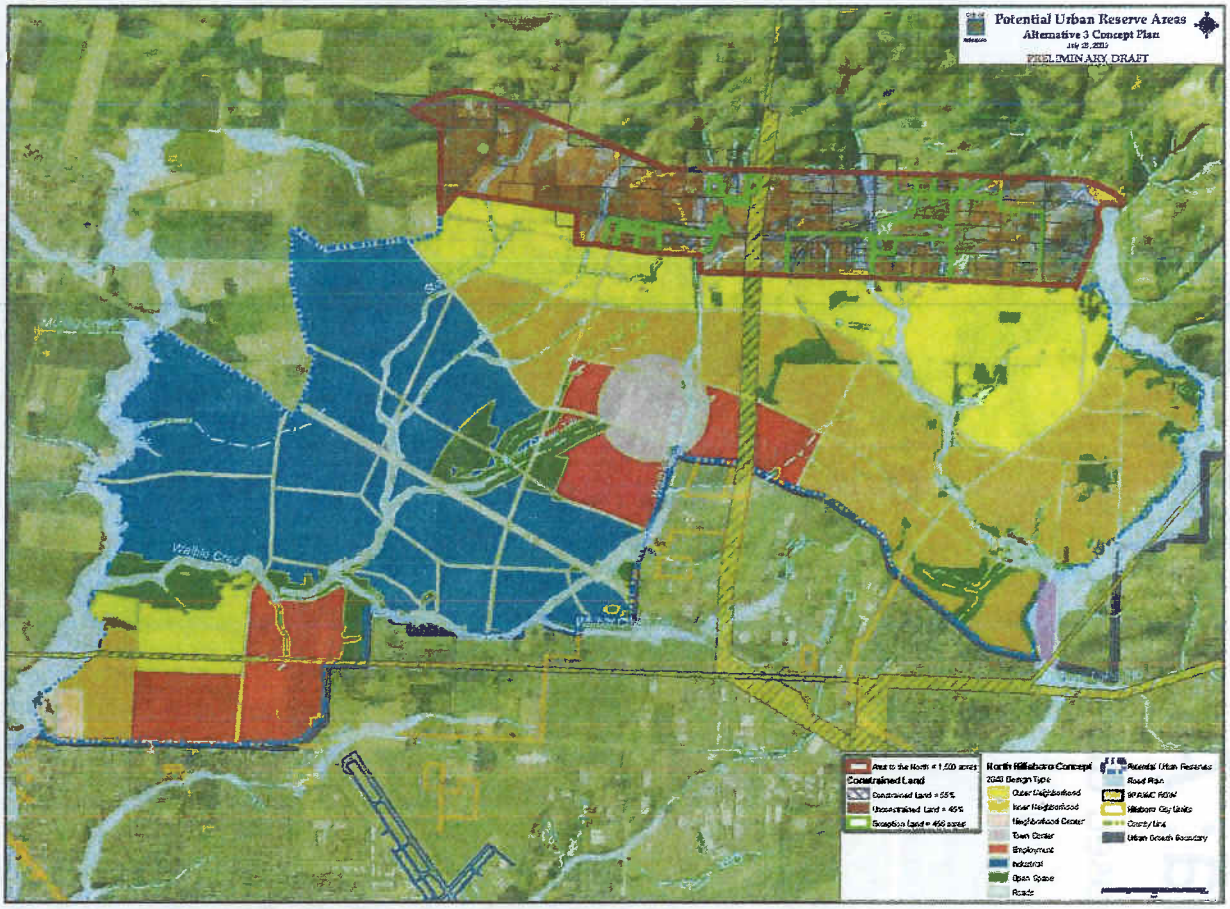


Figure 5 – Northern Edge of Study Area



West Washington County Cluster Need Conclusions

A review of all of the above findings indicates the following cluster large site need conclusions:

- West Washington County is presently uncompetitive regarding large cluster employer site supply with only one site "development ready" though transportation constrained.
- West Washington County is more competitive, but still disadvantaged with improbable maximum site assembly yielding 531 acres in the current UGB, the majority of which would not be site certified.
- Total supply of 1,214 acres matching 20-year cluster demand, including the 531 acres within the current UGB, would significantly enhance competitiveness as several sites could be certified as development-ready. Inventory would still, however, be hard-pressed to match development-ready site supply offered by competitors.

We therefore recommend the following for the heart of the Silicon Forest in Hillsboro to maximize competitiveness:

- A total buildable supply of no less than 1,214 acres consistent with 20-year estimated demand by the West Washington County clusters.
- Rapid pursuit of site certification or "development-ready" status for as many sites as possible.
- Potential "clustering" of site supply in 300+ acre areas or flexible "supersites" to allow greater flexibility and competitiveness with the markets identified above, as well as Tennessee and other solar competitors.
- Pursuit of large sites in West Washington County that have as many of the following qualities as possible:
  1. High-Capacity, Continuous Electrical Power at Competitive Rates;
  2. High-Capacity, High-Quality Water Supply;
  3. Highly-Skilled/Educated Workforce with Existing High-Tech Cluster Investment;
  4. Flat, Seismically Stable Land without Brownfield Costs & Risks;
  5. Proximate, Diverse Transportation Infrastructure (Freeway, Air, Rail);
  6. Specialized, Existing Industrial Material Supply Infrastructure (Chemicals, Gases);
  7. Unique Expertise and Experience of the City of Hillsboro in large site development review.

II. WEST WASHINGTON COUNTY LARGE SITE IDENTIFICATION AND EVALUATION

CH2M HILL SCOPE

Based on the foregoing description and evaluation, the long-term growth and viability of the traded sector high tech, solar energy manufacturing and bio-pharma/bio-medical clusters in West Washington County/Hillsboro requires an steady inventory of large sites (50-100 acres) to remain as a nationally competitive location for new companies investing in high technology electronics, solar manufacturing and bio-pharmaceuticals. Previous studies by the City and Johnson Reid have indicated there are currently a limited number of readily developable large sites greater than 50 acres in the region and specifically in Hillsboro.

As discussed in the previous sections compared to competitive markets, the area has fewer large sites (50 + acres) which places West WashCo/Hillsboro and the Portland Region at a competitive disadvantage. Companies prefer to have multiple sites to consider based on company specific criteria and in negotiating the purchase of a selected site.

As part of the City's ongoing planning and economic development efforts, CH2M HILL was retained to identify and review potential large industrial sites (50 to 100 acres) within the proposed Urban Reserve and Undesignated areas in North Hillsboro that could be competitive nationally for new high tech, solar energy manufacturing and bio-pharma/medical anchor businesses based on their site characteristics and other site suitability features.

APPROACH

CH2M HILL identified and reviewed/evaluated potential large industrial sites (50-100-acres in size) in the North Hillsboro Area utilizing the following review parameters:

- Evaluation was based on industry requirements within the 3 target clusters and site selection criteria developed through CH2M experience in working with these industries to find suitable sites for new companies
- Review was conducted at a high level using existing data and information
- Evaluation focused mainly on site characteristics, and not on other site selection criteria such as operating costs, labor, incentives etc.
- Sites were evaluated using CH2M acquired knowledge of, and experience nationally and internationally with industry requirements and knowledge of the North Hillsboro area
- Sites were identified in the proposed Urban Reserve and Undesignated areas in proximity to Highway 26 between Shute Road and Jackson School Road interchanges

SITE IDENTIFICATION

To identify potential large industrial sites CH2M HILL:

- Reviewed maps of the area including
    1. Ownership
    2. Topography
    3. Environmental restrictions and other encumbrances
    4. Utilities
    5. Transportation
- Reviewed city plans for economic development, utilities, and transportation improvements
- Conducted a windshield survey of the area and all the potential sites identified

EVALUATION CRITERIA

Based on the site requirements for the 3 target clusters described in the past by new companies in these clusters that have inquired into possible sites in the North Hillsboro area, CH2M HILL developed the high level site evaluation criteria below:

Site Suitability for development

- *Topography*—relatively flat or gently sloping site is desirable
- *Configuration*—square or rectangular site is the most desireable for most efficient utililization of land
- *Sites size*---Minimum of 50 contiguous usable acres
- *Site constraints*---Free of environmental restrictions, easements or other encumbrances
- *Visibility*—easily visible site from highway or major street.

Deliverability

- Minimal Number of property owners—affects ability to assemble suitable sites
- Proximity to existing Urban Growth Boundary
- Indication of support for development from owners in the area

Services

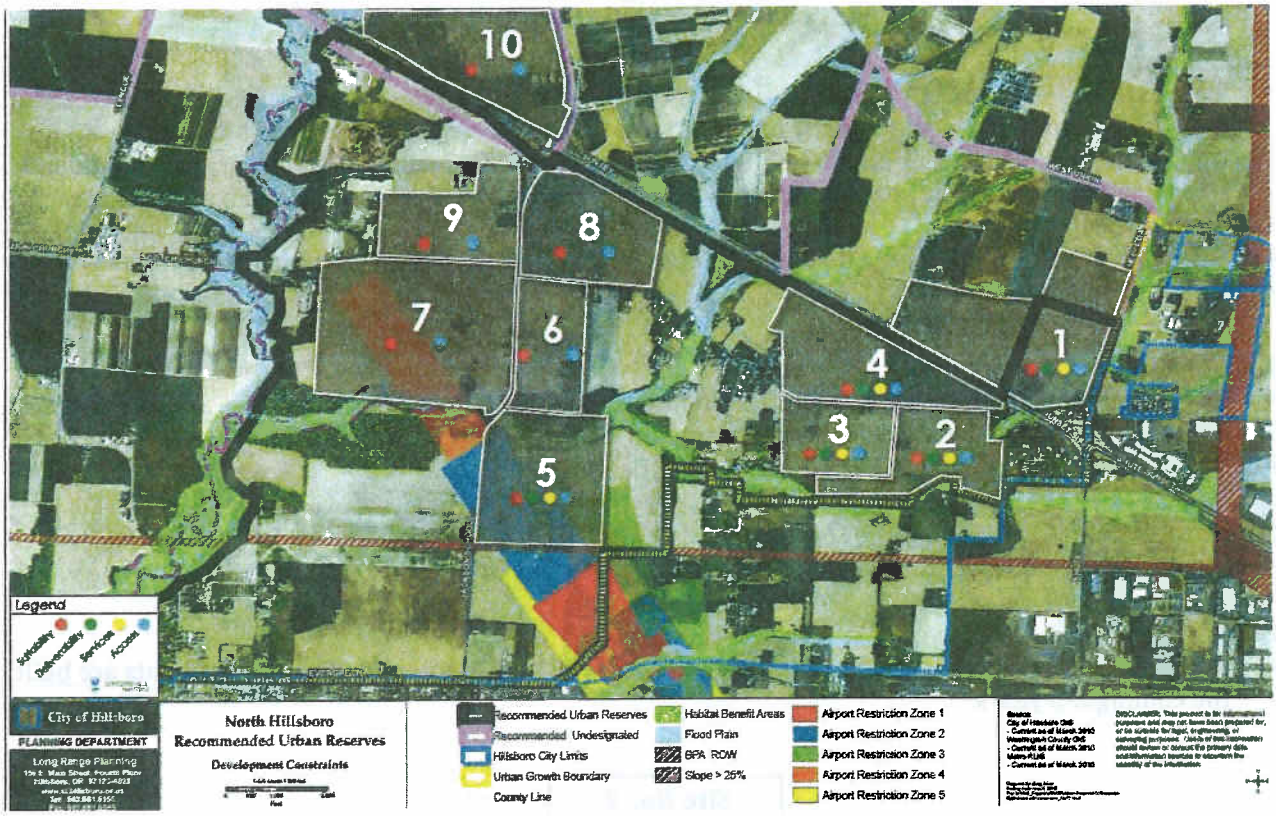
- Proximity to existing infrastructure (roads, utilities)
- Infrastructure expansion plans that could affect development of property
- Reasonable cost and timing to deliver services

Access

- Good Highway access
- Efficient Local street access
- Understanding of planned access improvements

IDENTIFIED SITES AND DISCUSSION

CH2M HILL identified and evaluation 10 potential large industrial sites within the proposed Urban Reserve and Undesignated Area's of the North Hillsboro Industrial Area (See Attached Map). The sites were reviewed using the evaluation criteria and are discussed below.



Site No. 1

Size: 200+/- acres
Description: This site is a combination of proposed Urban Reserve and Undesignated properties located adjacent to, and at the northwest quadrant of the Hwy 26/Brookwood Parkway Interchange. The site includes 2 (Jim Standing-owned) lots that are within the Urban Reserve combined with 1 lot north in Undesignated area along Helvetia Rd and 2 lots west along Hwy 26 also in the Undesignated area.

- Suitability:
  - To create a contiguous 50+ acre site requires the combination of the lots described above because the Southeast corner of the site directly adjacent to the Interchange is significantly impacted by environmental restrictions and the potential realignment of Groveland Road (to provide continued property access to public roadways and to support area traffic circulation) could bisect the site.
  - Slope <10%
  - Rectangular site or sites could be created depending upon Groveland Road realignment
  - Good site visibility from Hwy 26
- Deliverability:
  - The 2 owners along Helvetia have indicated interest in Urban Reserve designation. Interest by the owners of property to the west in being designated Urban Reserve is mixed (support and oppose)
  - Site is adjacent to current UGB boundary along Helvetia Road
- Services:
  - Public sewer and water infrastructure are available across Helvetia Rd to the east
- Access:
  - Good site access would further improve when planned Hwy 26 interchange improvements are built in the coming 2-3 years

Site No. 2

Size: 100 acres approx.
Description: Property owned by Erdman Living Trust west of the Meek Road rural residential area

- Suitability:
  - Total site configuration is not ideal but approx 60-70 acres create a relatively square, large site
  - Site is impacted and divided by 100 year flood plain
  - Site could be impacted and divided by potential Meek Rd Realignment
- Deliverability:
  - Single owner that has expressed interest in being included in the Urban Reserve
  - Site adjacent to the UGB
- Services:
  - Infrastructure services could be extended from future Evergreen area development
- Access:
  - Site access from Meek Rd to Brookswood Parkway and Hwy 26 interchange
  - Meek Road will require improvements to accommodate significant development

Oregon State Archives
800 Summer St NE Salem OR 97310
503 373 0701 | Mon-Fri: 8am-4:45pm

The Oregon Administrative Rules contain OARs filed through September 14, 2012

QUESTIONS ABOUT THE CONTENT OR MEANING OF THIS AGENCY'S RULES?
CLICK HERE TO ACCESS RULES COORDINATOR CONTACT INFORMATION

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

DIVISION 27

URBAN AND RURAL RESERVES IN THE PORTLAND METROPOLITAN AREA

660-027-0005

Purpose and Objective

(1) This division is intended to implement the provisions of Oregon Laws 2007, chapter 723 regarding the designation of urban reserves and rural reserves in the Portland metropolitan area. This division provides an alternative to the urban reserve designation process described in OAR chapter 660, division 21. This division establishes procedures for the designation of urban and rural reserves in the metropolitan area by agreement between and among local governments in the area and by amendments to the applicable regional framework plan and comprehensive plans. This division also prescribes criteria and factors that a county and Metro must apply when choosing lands for designation as urban or rural reserves.

(2) Urban reserves designated under this division are intended to facilitate long-term planning for urbanization in the Portland metropolitan area and to provide greater certainty to the agricultural and forest industries, to other industries and commerce, to private landowners and to public and private service providers, about the locations of future expansion of the Metro Urban Growth Boundary. Rural reserves under this division 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. The objective of this division is a balance in the designation of urban and rural reserves that, 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 that define the region for its residents.

Stat. Auth.: ORS 195.141, 197.040
Stats. Implemented: ORS 195.137 - 195.145
Hist.: LCDD 1-2008, f. & cert. ef. 2-13-08

660-027-0010

Definitions

The definitions contained in ORS chapters 195 and 197 and the Statewide Planning Goals (OAR chapter 660, division 15) apply to this division, unless the context requires otherwise. In addition, the following definitions apply:

(1) "Foundation Agricultural Lands" means those lands mapped as Foundation Agricultural Lands in the January 2007 Oregon Department of Agriculture report to Metro entitled "Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands."

(2) "Important Agricultural Lands" means those lands mapped as Important Agricultural Lands in the January 2007 Oregon Department of Agriculture report to Metro entitled "Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands."

(3) "Intergovernmental agreement" means an agreement between Metro and a county pursuant to applicable requirements for such agreements in ORS 190.003 to 190.130, 195.025 or 197.652 to 197.658, and in accordance with the requirements in

this division regarding the designation of urban and rural reserves and the performance of related land use planning and other activities pursuant to such designation.

(4) "Livable communities" means communities with development patterns, public services and infrastructure that make them safe, healthy, affordable, sustainable and attractive places to live and work.

(5) "Metro" means a metropolitan service district organized under ORS chapter 268.

(6) "Important natural landscape features" means landscape features that limit urban development or help define appropriate natural boundaries of urbanization, and that thereby provide for the long-term protection and enhancement of the region's natural resources, public health and safety, and unique sense of place. These features include, but are not limited to, plant, fish and wildlife habitat; corridors important for ecological, scenic and recreational connectivity; steep slopes, floodplains and other natural hazard lands; areas critical to the region's air and water quality; historic and cultural areas; and other landscape features that define and distinguish the region.

(7) "Public facilities and services" means sanitary sewer, water, transportation, storm water management facilities and public parks.

(8) "Regional framework plan" means the plan adopted by Metro pursuant to ORS 197.015(17).

(9) "Rural reserve" means lands outside the Metro UGB, and outside any other UGB in a county with which Metro has an agreement pursuant to this division, reserved to provide long-term protection for agriculture, forestry or important natural landscape features.

(10) "UGB" means an acknowledged urban growth boundary established under Goal 14 and as defined in ORS 195.060(2).

(11) "Urban reserve" means lands outside an urban growth boundary designated to provide for future expansion of the UGB over a long-term period and to facilitate planning for the cost-effective provision of public facilities and services when the lands are included within the urban growth boundary.

(12) "Walkable" describes a community in which land uses are mixed, built compactly, and designed to provide residents, employees and others safe and convenient pedestrian access to schools, offices, businesses, parks and recreation facilities, libraries and other places that provide goods and services used on a regular basis.

Stat. Auth.: ORS 195.141, 197.040
Stats. Implemented: ORS 195.137 - 195.145
Hist.: LCDD 1-2008, f. & cert. ef. 2-13-08

660-027-0020

Authority to Designate Urban and Rural Reserves

(1) As an alternative to the authority to designate urban reserve areas granted by OAR chapter 660, division 21, Metro may designate urban reserves through intergovernmental agreements with counties and by amendment of the regional framework plan to implement such agreements in accordance with the requirements of this division.

(2) A county may designate rural reserves through intergovernmental agreement with Metro and by amendment of its comprehensive plan to implement such agreement in accordance with the requirements of this division.

(3) A county and Metro may not enter into an intergovernmental agreement under this division to designate urban reserves in the county unless the county and Metro simultaneously enter into an agreement to designate rural reserves in the county.

Stat. Auth.: ORS 195.141, 197.040
Stats. Implemented: ORS 195.137 - 195.145
Hist.: LCDD 1-2008, f. & cert. ef. 2-13-08

660-027-0030

Urban and Rural Reserve Intergovernmental Agreements

(1) An intergovernmental agreement between Metro and a county to establish urban reserves and rural reserves under this division shall provide for a coordinated and concurrent process for Metro to adopt regional framework plan provisions, and for the county to adopt comprehensive plan and zoning provisions, to implement the agreement. The agreement shall provide for Metro and the county to concurrently designate urban reserves and rural reserves, as specified in OAR 660-027-0040.

(2) In the development of an intergovernmental agreement described in this division, Metro and a county shall follow a coordinated citizen involvement process that provides for broad public notice and opportunities for public comment regarding lands proposed for designation as urban and rural reserves under the agreement. Metro and the county shall provide the State Citizen Involvement Advisory Committee an opportunity to review and comment on the proposed citizen involvement process.

(3) An intergovernmental agreement made under this division shall be deemed a preliminary decision that is a prerequisite to the designation of reserves by amendments to Metro's regional framework plan and amendments to a county's comprehensive plan pursuant to OAR 660-027-0040. Any intergovernmental agreement made under this division shall be submitted to the Commission with amendments to the regional framework plan and county comprehensive plans as provided in OAR 660-027-0080(2) through (4).

Stat. Auth.: ORS 195.141, 197.040
Stats. Implemented: ORS 195.137 - 195.145
Hist.: LCDD 1-2008, f. & cert. ef. 2-13-08

660-027-0040

Designation of Urban and Rural Reserves

(1) Metro may not designate urban reserves under this division in a county until Metro and applicable counties have entered into an intergovernmental agreement that identifies the lands to be designated by Metro as urban reserves. A county may not designate rural reserves under this division until the county and Metro have entered into an agreement that identifies the lands to be designated by the county as rural reserves.

(2) Urban reserves designated under this division shall be planned to accommodate estimated urban population and employment growth in the Metro area for at least 20 years, and not more than 30 years, beyond the 20-year period for which Metro has demonstrated a buildable land supply inside the UGB in the most recent inventory, determination and analysis performed under ORS 197.296. Metro shall specify the particular number of years for which the urban reserves are intended to provide a supply of land, based on the estimated land supply necessary for urban population and employment growth in the Metro area for that number of years. The 20 to 30-year supply of land specified in this rule shall consist of the combined total supply provided by all lands designated for urban reserves in all counties that have executed an intergovernmental agreement with Metro in accordance with OAR 660-027-0030.

(3) If Metro designates urban reserves under this division prior to December 31, 2009, it shall plan the reserves to accommodate population and employment growth for at least 20 years, and not more than 30 years, beyond 2029. Metro shall specify the particular number of years for which the urban reserves are intended to provide a supply of land.

(4) Neither Metro nor a local government may amend a UGB to include land designated as rural reserves during the period described in section (2) or (3) of this rule, whichever is applicable.

(5) Metro shall not re-designate rural reserves as urban reserves, and a county shall not re-designate land in rural reserves to another use, except as provided in OAR 660-027-0070, during the period described in section (2) or (3) of this rule, whichever is applicable.

(6) If Metro designates urban reserves under this division it shall adopt policies to implement the reserves and must show the reserves on its regional framework plan map. A county in which urban reserves are designated shall adopt policies to implement the reserves and must show the reserves on its comprehensive plan and zone maps.

(7) If a county designates rural reserves under this division it shall adopt policies to implement the reserves and must show the reserves on its comprehensive plan and zone maps. Metro shall adopt policies to implement the rural reserves and show the reserves on its regional framework plan maps.

(8) When evaluating and designating land for urban reserves, Metro and a county shall apply the factors of OAR 660-027-0050 and shall coordinate with cities, special districts and school districts that might be expected to provide urban services to these reserves when they are added to the UGB, and with state agencies.

(9) When evaluating and designating land for rural reserves, Metro and a county shall apply the factors of OAR 660-027-0060 and shall coordinate with cities, special districts and school districts in the county, and with state agencies.

(10) Metro and any county that enters into an agreement with Metro under this division shall apply the factors in OAR 660-027-0050 and 660-027-0060 concurrently and in coordination with one another. Metro and those counties that lie partially within Metro with which Metro enters into an agreement shall adopt a single, joint set of findings of fact, statements 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 factual and policy basis for the estimated land supply determined under section (2) of this rule.

(11) Because the January 2007 Oregon Department of Agriculture report entitled "Identification and Assessment of the Long-Term Commercial viability of Metro Region Agricultural Lands" 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 Agricultural Land for designation as urban reserves rather than other land considered under this division.

Stat. Auth.: ORS 195.141, 197.040.
Stats. Implemented: ORS 195.137 - 195.145
Hist.: LCDD 1-2008, f. & cert. ef. 2-13-08; LCDD 10-2010, f. & cert. ef. 10-20-10

660-027-0050

Factors for Designation of Lands as Urban Reserves

Urban Reserve Factors: When identifying and selecting lands for designation as urban reserves under this division, Metro shall base its decision on consideration of whether land proposed for designation as urban reserves, alone or in conjunction with land inside the UGB:

(1) Can be developed at urban densities in a way that makes efficient use of existing and future public and private infrastructure investments;

(2) Includes sufficient development capacity to support a healthy economy;

(3) Can be efficiently and cost-effectively served with public schools and other urban-level public facilities and services by appropriate and financially capable service providers;

(4) Can be designed to be walkable and served with a well-connected system of streets, bikeways, recreation trails and public transit by appropriate service providers;

(5) Can be designed to preserve and enhance natural ecological systems;

(6) Includes sufficient land suitable for a range of needed housing types;

(7) Can be developed in a way that preserves important natural landscape features included in urban reserves; and

(8) Can be designed to avoid or minimize adverse effects on farm and forest practices, and adverse effects on important natural landscape features, on nearby land including land designated as rural reserves.

Stat. Auth.: ORS 195.141, 197.040
Stats. Implemented: ORS 195.137 - 195.145
Hist.: LCDD 1-2008, f. & cert. ef. 2-13-08

660-027-0060

Factors for Designation of Lands as Rural Reserves

(1) When identifying and selecting lands for designation as rural reserves under this division, a county shall indicate which land was considered and designated in order to provide long-term protection to the agriculture and forest industries and which land was considered and designated to provide long-term protection of important natural landscape features, or both. Based on this choice, the county shall apply the appropriate factors in either section (2) or (3) of this rule, or both.

(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.

(3) Rural Reserve Factors: When identifying and selecting lands for designation as rural reserves intended to protect important natural landscape features, a county must consider those areas identified in Metro's February 2007 "Natural Landscape Features Inventory" and other pertinent information, and 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 OAR 660-027-0040(2) or (3);

(b) Are subject to natural disasters or hazards, such as floodplains, steep slopes and areas subject to landslides;

(c) Are important fish, plant or wildlife habitat;

(d) Are necessary to protect water quality or water quantity, such as streams, wetlands and riparian areas;

(e) Provide a sense of place for the region, such as buttes, bluffs, islands and extensive wetlands;

(f) Can serve as a boundary or buffer, such as rivers, cliffs and floodplains, to reduce conflicts between urban uses and rural uses, or conflicts between urban uses and natural resource uses

(g) Provide for separation between cities; and

(h) Provide easy access to recreational opportunities in rural areas, such as rural trails and parks.

(4) Notwithstanding requirements for applying factors in OAR 660-027-0040(9) and section (2) of this rule, a county may deem that Foundation Agricultural Lands or Important Agricultural Lands within three miles of a UGB qualify for designation as rural reserves under section (2) without further explanation under OAR 660-027-0040(10).

Stat. Auth.: ORS 195.141, 197.040
Stats. Implemented: ORS 195.137 - 195.145
Hist.: LCDD 1-2008, f. & cert. ef. 2-13-08

660-027-0070

Planning of Urban and Rural Reserves

(1) Urban reserves are the highest priority for inclusion in the urban growth boundary when Metro expands the UGB, as specified in Goal 14, OAR chapter 660, division 24, and in ORS 197.298.

(2) In order to maintain opportunities for orderly and efficient development of urban uses and provision of urban services when urban reserves are added to the UGB, counties shall not amend comprehensive plan provisions or land use regulations for urban reserves designated under this division to allow uses that were not allowed, or smaller lots or parcels than were allowed, at the time of designation as urban reserves until the reserves are added to the UGB, except as specified in sections (4) through (6) of this rule.

(3) Counties that designate rural reserves under this division shall not amend comprehensive plan provisions or land use regulations to allow uses that were not allowed, or smaller lots or parcels than were allowed, at the time of designation as rural reserves unless and until the reserves are re-designated, consistent with this division, as land other than rural reserves, except as specified in sections (4) through (6) of this rule.

(4) Notwithstanding the prohibitions in sections (2) and (3) of these rules, counties may adopt or amend comprehensive plan provisions or land use regulations as they apply to lands in urban reserves, rural reserves or both, unless an exception to Goals 3, 4, 11 or 14 is required, in order to allow:

(a) Uses that the county inventories as significant Goal 5 resources, including programs to protect inventoried resources as provided under OAR chapter 660, division 23, or inventoried cultural resources as provided under OAR chapter 660, division 16;

(b) Public park uses, subject to the adoption or amendment of a park master plan as provided in OAR chapter 660, division 34;

(c) Roads, highways and other transportation and public facilities and improvements, as provided in ORS 215.213 and 215.283, OAR 660-012-0065, and 660-033-0130 (agricultural land) or OAR chapter 660, division 6 (forest lands);

(d) Other uses and land divisions that a county could have allowed under ORS 215.130(5)–(11) or as an outright permitted use or as a conditional use under 215.213 and 215.283 or Goal 4 if the county had amended its comprehensive plan to conform to the applicable state statute or administrative rule prior to its designation of rural reserves;

(5) Notwithstanding the prohibition in sections (2) through (4) of this rule a county may amend its comprehensive plan or land use regulations as they apply to land in an urban or rural reserve that is subject to an exception to Goals 3 or 4, or both, acknowledged prior to designation of the subject property as urban or rural reserves, in order to authorize an alteration or expansion of uses allowed on the land under the exception provided:

(a) The alteration or expansion would comply with the requirements described in ORS 215.296, applied whether the land is zoned for farm use, forest use, or mixed farm and forest use;

(b) The alteration or expansion conforms to applicable requirements for exceptions and amendments to exceptions under OAR chapter 660, division 4, and all other applicable laws; and

(c) The alteration or expansion would not expand the boundaries of the exception area unless such alteration or expansion is necessary in response to a failing on-site wastewater disposal system.

(6) Notwithstanding the prohibitions in sections (2) through (5) of this rule, a county may amend its comprehensive plan or land use regulations as they apply to lands in urban reserves or rural reserves or both in order to allow establishment of a new sewer system or the extension of a sewer system provided the exception meets the requirements under OAR 660-011-0060(9)(a).

(7) Notwithstanding the prohibition in sections (2) and (4) of this rule, a county may take an exception to a statewide land use planning goal in order to allow the establishment of a transportation facility in an area designated as urban reserve.

(8) Counties, cities and Metro may adopt and amend conceptual plans for the eventual urbanization of urban reserves designated under this division, including plans for eventual provision of public facilities and services, roads, highways and other transportation facilities, and may enter into urban service agreements among cities, counties and special districts serving or projected to serve the designated urban reserve area.

(9) Metro shall ensure that lands designated as urban reserves, considered alone or in conjunction with lands already inside the UGB, are ultimately planned to be developed in a manner that is consistent with the factors in OAR 660-027-0050.

Stat. Auth.: ORS 195.141 & 197.040
Stats. Implemented: ORS 195.137 - 195.145
Hist.: LCDD 1-2008, f. & cert. ef. 2-13-08; LCDD 3-2010, f. 4-29-10, cert. ef. 4-30-10; LCDD 10-2010, f. & cert. ef. 10-20-10; LCDD 5-2012, f. & cert. ef. 2-14-12

660-027-0080

Local Adoption and Commission Review of Urban and Rural Reserves

(1) Metro and county adoption or amendment of plans, policies and other implementing measures to designate urban and rural reserves shall be in accordance with the applicable procedures and requirements of ORS 197.610 to 197.650.

(2) After designation of urban and rural reserves, Metro and applicable counties shall jointly and concurrently submit their adopted or amended plans, policies and land use regulations implementing the designations to the Commission for review and action in the manner provided for periodic review under ORS 197.628 to 197.650.

(3) Metro and applicable counties shall:

(a) Transmit the intergovernmental agreements and the submittal described in section (2) in one or more suitable binders showing on the outside a title indicating the nature of the submittal and identifying the submitting jurisdictions.

(b) Prepare and include an index of the contents of the submittal. Each document comprising the submittal shall be separately indexed, and

(c) Consecutively number pages of the submittal at the bottom of the page, commencing with the first page of the submittal.

(4) The joint and concurrent submittal to the Commission shall 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. The Commission shall review the submittal for:

(a) Compliance with the applicable statewide planning goals. Under ORS 197.747 "compliance with the goals" means the submittal on the whole conforms with the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature. To determine compliance with the Goal 2 requirement for an adequate factual base, the Commission shall consider whether the submittal is supported by substantial evidence. Under ORS 183.482(8)(c), substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding;

(b) Compliance with applicable administrative rules, including but not limited to the objective provided in OAR 660-027-0005 (2) and the urban and rural reserve designation standards provided in OAR 660-027-0040; and

(c) Consideration of the factors in OAR 660-027-0050 or 660-027-0060, whichever are applicable.

Stat. Auth.: ORS 195.141, 197.040
Stats. Implemented: ORS 195.137 - 195.145
Hist.: LCDD 1-2008, f. & cert. ef. 2-13-08

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January 11, 2008

TO: Land Conservation and Development Commission

FROM: Bob Rindy, Policy Analyst

SUBJECT: Agenda Items 1 and 6; January 23-25, 2008, LCDC Meeting.

Public Hearing, Work Session, and Possible Adoption of Proposed New and Amended Administrative Rules Regarding Metro Area Urban and Rural Reserves

This report pertains to two agenda items: Item 1is intended for public comment on proposed administrative rules establishing a process and criteria for designation of urban and rural reserves in the Portland Metro region, and Item 6 is intended for the Land Conservation and Development Commission (LCDC) to consider and possibly adopt the proposed new and amended administrative rules. The proposed new rules are Attachment A to this report, and the proposed conforming amendments (and related "housekeeping" amendments") to other existing LCDC rules are Attachment B to this report.

Senate Bill 1011, enacted by the 2007 legislature (see Attachment C, especially sections 3, 6, and 11) requires that LCDC adopt rules to establish a process and criteria for designating Metro area urban and rural reserves. SB 1011, codified as Oregon Laws 2007, chapter 723, took effect immediately upon the Governor's signature last July, and specifies that LCDC must adopt the implementing administrative rules by January 31, 2008.

Under item 1 (scheduled for 1:30 PM on January 23rd) the Commission will receive public testimony regarding the proposed new and amended rules, and may close or continue the public hearing at the conclusion of testimony. Under agenda item 6, scheduled for January 24th (and, if necessary, January 25th), LCDC will consider the oral and written testimony and other information received, deliberate regarding the proposed new and amended rules, and may formally adopt the proposed new and amended rules. If adopted, the new and amended rules will take affect upon filing with the Secretary of State's office.

For additional information on these agenda items, please contact Bob Rindy at 503-373-0050 ext. 229, or by email bob.rindy@state.or.us. Information on these items, including background materials, rule notices, and agendas and minutes from the rulemaking workgroup meetings, are also posted on DLCD's website at http://www.lcd.state.or.us/LCD/metro_urban_and_rural_reserves.shtml.

Advisory Rulemaking Workgroup

LCDC appointed a rule advisory workgroup in August 2007 to assist the department and the Commission in drafting the proposed rules (see Attachment D regarding the membership of the workgroup). The workgroup has met seven times since it was appointed by LCDC in August 2007, including two meetings subsequent to LCDC's first public hearing on the draft rules last November 29, 2007. The workgroup has reached a consensus in recommending the revised draft rules attached for the Commission's consideration. However, it is understood that not all workgroup members necessarily favor all the provisions in these rule proposals, and the workgroup members have been invited to submit testimony to the Commission about the rules.

Background

Urban Reserve Areas were a relatively late addition to the Oregon Land Use Program. This planning tool was created in 1992 through LCDC rules (OAR 660, division 21), several years after the state's initial acknowledgement of all land use plans and urban growth boundaries (UGBs) under the statewide planning goals. Unlike UGBs, designation of urban reserves is optional for local governments.[1]

An "Urban Reserve Area" (SB 1011 shortened this term to "Urban Reserve") is land outside of – but contiguous to – an existing urban growth boundary; it must be shown on a city and county comprehensive plan map and is designated for ultimate urbanization as the city (or region) expands its urban area. LCDC's division 21 rules specified that urban reserves must "include an amount of land estimated to be at least a 10-year supply and no more than a 30-year supply of developable land beyond the 20-year time frame used to establish the urban growth boundary.[2] In other words, by adopting an urban reserve area in conjunction with the 20-year UGB, local governments (including Metro) may designate and plan for a 50-year supply of land for urbanization. However, it is important to note that land in an urban reserve is outside the UGB, and must remain planned and zoned as "rural land" under farm, forest or other rural zoning requirements until such time as it is brought in to the UGB. The designation of urban reserves does not change the rules for UGB expansion except on one vital point: Urban reserves are defined (by statute) as the highest priority for inclusion in the urban growth boundary when the boundary is expanded, regardless of whether the land in the urban reserve is farm or forest resource land.

LCDC authorized local governments to plan for urban reserves for several reasons. First, cities expressed a wish to plan for a longer-term horizon than the 20-year period provided inside a UGB, in part because many public facilities and transportation facilities are typically designed and built to last significantly longer than 20 years. By designating urban reserves, a city gains more certainty with regard to the direction of long-term growth and, for example, may therefore size and position sewer and water lines to ultimately serve a 50-

[1] LCDC's 1992 urban reserve rules authorized LCDC to require some local governments to adopt urban reserves. After modification of the rules by subsequent legislation, only the cities of Sandy and Newberg were required to designate reserves.
[2] Rather than a 10-30 year horizon, SB 1011 specifies a 20-30 year urban reserve horizon.

year growth area beyond the UGB. Second, urban reserves are intended as a tool to manage the parcelization of residential "exception areas" adjacent to many UGBs, areas that would be anticipated to be high priority for eventual expansion of the UGB. The piecemeal division of this potentially urbanizable land would impede efficient urbanization and, in many cases, prevent efficient provision of roads and other facilities within and beyond these areas. The original urban reserve rules required some cities to adopt reserves because of a substantial amount of exception areas surrounding those UGBs.[3] Finally, designation of urban reserves streamlines UGB expansion, since it identifies areas that must be first priority for UGB expansion, and as such may save time and costs for local governments performing the "locational" analysis required for UGB expansion.

As a side note, LCDC's urban reserve rules provided a "hierarchy" for choosing land for the reserves, in order to ensure that non-resource land, exception land and the "least-important" farm or forest resource land is considered first in designating reserves. Shortly after the adoption of these rules, the legislature "barrowed" the hierarchy (almost word-for-word, but not exactly) and placed it in legislation (ORS 197.298) so as to require the hierarchy to UGB amendments, with one significant change: the legislation specifies that the highest priority land (i.e., first considered) for UGB expansion must be land designated as urban reserves. At the same time, the legislature enacted new urban reserve provisions in statute (ORS 195.145) in order to modify LCDC's urban reserve rules (especially to reduce the number of cities required to adopt urban reserves; however, having urban reserves specified in legislation provides a more solid foundation for these rules). As one probably unintended consequence of the new UGB hierarchy, urban reserves include farm and forest land and provide a method to more easily include that land in a UGB. This land might otherwise be unavailable under the statutory UGB hierarchy.

Very few local governments have designated urban reserves. Newberg and Sandy successfully completed this task in the mid-1990's.[4] Metro designated urban reserves about 1998, but these were struck down on appeal (LCDC and ODOT joined in bringing that appeal, arguing that the designation was not in accord with the urban reserve rules). Following that, there was little interest in designating urban reserves statewide, and local governments frequently suggested that LCDC revisit and modify these requirements. However, there has been a recent resurgence in local interest in urban reserves; Redmond, Ontario and Pendleton recently designated reserves[5] and other cities are underway with urban reserve planning, including Newberg (a revision of their current reserve) and all the Rogue Valley RPS jurisdictions.

Senate Bill 1011

Senate Bill 1011, enacted by the 2007 legislature (codified as Chapter 723, Oregon Laws

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[3] Some of the proposed amendments to current rules under OAR 660, division 21 (see Attachment B) propose that the Commission repeal provisions that were intended only for cities required to designate urban reserves – because these cities have completed that task and the requirements are no longer pertinent.

[4] Also, some cities (Bend, Eugene, Salem-Keizer) designated "priority expansion areas beyond the UGB" prior to LCDC's urban reserve rules, but these areas are not "acknowledged" as urban reserves, even though they may function as such, and may not be valid since they probably violate the ORS 107.298 hierarchy.

[5] Redmond officials have praised this process and suggest that other local governments take this step.

2007), authorizes Metro and Metro area counties to designate urban and rural reserves through a new process and criteria to be established by LCDC rules. SB 1011 was supported by a broad coalition of interests in the region, and was based on research conducted under Metro's 2007 "Shape of the Region" study (see Attachment E). Metro joined with Washington, Multnomah, and Clackamas counties, DLCD and the Oregon Department of Agriculture (ODA), to conduct the "Shape of the Region" study "in order to better inform the region's approach to growth management and future urban expansion." The study examined land outside Metro's UGB and asked three broad questions:

- What lands are functionally critical to the region's agricultural economy?
- What natural landscape features are important in terms of ecological function and defining a sense of place for residents of the region?
- What attributes allow lands to most efficiently and effectively be integrated into the urban fabric of the region to create sustainable and complete communities?

The "Shape of the Region" report, "symposium" and related studies are available on Metro's website at the following link:
http://www.metro-region.org/index.cfm/go/by.web/id=25147

A section-by section explanation or "legislative history" of Senate Bill 1011 is provided in Attachment C to this report. In summary, the bill establishes a system under which the region may designate lands outside the regional UGB on which urban expansion will and will not occur over a 40-50-year period. The bill has three main elements:

- Section 3 authorizes the establishment of rural reserves that will be off-limits to urban expansion during the 40-50-year planning period. These lands would be selected based upon their importance to the agriculture and forestry industries and for the protection of natural systems and landscape features.

- Section 6 provides a new pathway for the creation of urban reserves – areas that would be first in line for addition to the UGB – in the Portland metropolitan area. This new pathway would authorize the designation of urban reserves that, in conjunction with land already in the UGB, would provide 40-50 years of "capacity" for urban growth. Designation of these areas would be based upon a set of "factors" that emphasizes suitability for urban development (more explanation of "factors" is provided later in this report).

- Because it is important that urban and rural reserves be addressed as part of an integrated planning process, Section 4 of the statute stipulates that they must be considered concurrently and may be designated only through "intergovernmental agreements" between Metro and participating counties.

There are two fundamental principles regarding the new process for designation of urban and rural reserves: (1) Intergovernmental agreements are a prerequisite to formal designation, and (2) the identification and selection of reserves is requires the consideration of "factors." These issues are discussed in more detail below, in the description of the proposed rules.

Urban reserves authorized under SB 1011 will have the same effect as urban reserves authorized by current LCDC rules at OAR 660, div 21, adopted in 1992 (See attachment F). Urban reserves are also authorized by previous statutes (ORS 195.145 enacted in 1993 and amended by SB 1011). Urban reserves are defined in this statute (the definition was also amended by SB 1011) as "lands outside an urban growth boundary that will provide for (a) future expansion over a long-term period; and (b) the cost-effective provision of public facilities and service within the area when the lands are included within the urban growth boundary." As mentioned above, urban reserves are also declared to be "the highest priority for inclusion in the urban growth boundary when the boundary is expanded." It is important to note that the new SB 1011 urban reserve designation process for Metro is intended as an alternative to the urban reserve designation process provided under current LCDC rules at OAR 660, division 21. However, once designated, urban reserves for Metro designated through division 27 would be functionally equivalent to urban reserves designated under division 21.

SB 1011 provides "factors"[6] for determining urban reserves as follows:

> "... a county and a metropolitan service district shall base the designation on 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:
> (a) Can be developed at urban densities in a way that makes efficient use of existing and future public infrastructure investments;
> (a) Includes sufficient development capacity to support a healthy urban economy;
> (b) 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;
> (c) Can be designed to be walkable and served by a well-connected system of streets by appropriate service providers;
> (d) Can be designed to preserve and enhance natural ecological systems; and
> (e) Includes sufficient land suitable for a range of housing types."

These statutory factors for urban reserves are not a closed list; the statute indicates the factors "include, but are not limited to" those specified above. Based on this, the workgroup has recommended that that the rules include additional factors.

Rural reserves authorized under SB 1011 are a new category of rural lands not previously mentioned or authorized in Oregon land use laws. Rural reserves are "rural land" that, once designated, cannot be included within a UGB or re-designated as urban reserves for a period of at least 20 years, but not more than 30 years, beyond "the 20-year period for which the district has demonstrated a buildable land supply in the most recent inventory, determination and analysis" for the Metro UGB. In other words, once designated, rural reserves are required to remain designated as rural reserves for a 40 to 50 year time period. The zoning of land in rural reserves would remain rural; designation of rural reserves does

[6] See pages 15 and 16 of this report for a detailed discussion of factors.

not require a rezoning of the land in the reserves, and prevents the rezoning of such land for certain uses. Also, the statute specifies that designation as rural reserves "does not impair the rights and immunities provided under ORS 30.930 to 30.947" (Oregon's "right to farm" laws).

The statute also provides that designation and protection of these reserves is not a basis for a claim for compensation under Measure 37 "unless the designation and protection of rural reserves or urban reserves imposes a new restriction on the use of private real property." As there would be no change in the zoning of rural reserves, it does not appear that their designation would trigger Measure 49 claims.

Throughout the history of the statewide land use program, Goals 3 and 4 and urban growth boundaries (UGBs) have been the primary tool to protect farm and forest land. UGB expansion, over time, generally consumes (i.e., leads to development of) farm and forest land, especially in the Metro region where, over the next 20 to 30 years, Metro has few options for UGB expansion that would not encroach on farm land. Rural reserves therefore represent an improved farm and forest land protection mechanism, and also protect other natural features. Under SB 1011, "Rural reserves" are defined as "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 of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains."

SB 1011 provides that rural reserves may be designated (i.e., reserves are not required) through an intergovernmental agreement between a county and Metro. However, as indicated above, if Metro and counties agree to designate urban reserves under the new statute, those counties must also agree to designate rural reserves. At the same time, although not explicitly stated, the statute appears to allow a county to designate rural reserves even if no urban reserves are designated in that county. The statute provides that "A county and a metropolitan service district may not enter into an intergovernmental agreement to designate urban reserves in the county … unless the county and the district also agree to designate rural reserves in the county." However, the statute does not include the converse of this requirement.

When designating rural reserves, a county and Metro are required to select land based on consideration of "factors." For rural reserves for the purpose of protecting the agricultural industry, the statutory factors include:

"…whether land proposed for rural reserves is:

(a) Land situated in an area that is "potentially subject to urbanization" during the urban reserve planning period described above, as indicated by proximity to the urban growth boundary, and as indicated by proximity to "properties with fair market values that significantly exceed agricultural values;"
(b) Land "capable of sustaining long-term agricultural operations;"
(c) Land that "has suitable soils and available water where needed to sustain long-term agricultural operations;
(d) Land suitable to sustain long-term agricultural operations, taking into account:

- The existence of a large block of agricultural or other resource land with a concentration or cluster of farms;
- The adjacent land use pattern, including its location in relation to adjacent nonfarm uses and the existence of buffers between agricultural operations and nonfarm uses;
- The agricultural land use pattern, including parcelization, tenure and ownership patterns; and
- The sufficiency of agricultural infrastructure in the area."

According to Metro and others involved in drafting the legislation, these factors derive from the "Shape of the Region" studies, including studies of agricultural land by the Oregon Department of Agriculture, which were part of the "Shape of the Region" Project (See Attachment E). As such, the rural reserve factors in the statute primarily focus on protection of the agricultural industry. However, the statute also indicates that rural reserves are intended "to provide long-term protection for agriculture, forestry or important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains." Also, as discussed above regarding urban reserves, this list of factors is not a "closed list" for LCDC rulemaking. Therefore, the rules recommended by the workgroup also include additional rural reserve factors, i.e., in addition to those in the statute, concerning forest land and important natural landscape features.

The overall statutory intent and general requirements regarding designation of Metro urban and rural reserves are included in this statute. The preamble to SB 1011 provides the reasons and general policy direction underlying the authorization for a new urban and rural reserve process. It declares in part that "Long-range planning for population and employment growth by local governments can offer greater certainty for ... the agricultural and forest industries, by offering long-term protection of large blocks of land with the characteristics necessary to maintain their viability; and for ... 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."

This preamble also declares that "State planning laws must support and facilitate long-range planning to provide this greater certainty." To this end (as noted above) Section 11 of the legislation directs that the Land Conservation and Development Commission shall adopt the goals or rules required by section 3 and section 6 of the Act "not later than January 31, 2008." Those sections of the act specifically require LCDC to adopt new goals or rules regarding the "process and criteria" for designation of Metro area urban reserves and rural reserves.

Because Section 3 of SB 1011 provides that Metro's and counties' designation of urban and rural reserves is not mandatory, as discussed above, Metro and Metro area county governments are authorized to choose whether or not to declare these reserves, and by implication, may also choose instead to follow the current urban reserve process in OAR 660, division 21, which does not require the simultaneous designation of rural reserves. Again, if a county and Metro choose to designate urban reserves under this statute, the

county and Metro must designate rural reserves simultaneously. The statute indicates that urban and rural reserves must be designated in accordance with an intergovernmental agreement between Metro and a county, and "such agreement must provide for a coordinated and concurrent process for adoption by the county of comprehensive plan provisions and by the district of regional framework plan provisions to implement the agreement."

LCDC Approval and Judicial Review: The statute amends current statutory provisions under ORS 197 so as to reference the new urban and rural reserve process, and to require LCDC review and approval of a Metro amendment of "the district's regional framework plan or land use regulations implementing the plan to establish urban reserves …", and simultaneous LCDC review and approval regarding "amendment of the county's [or counties'] comprehensive plan or land use regulations implementing the plan to establish rural reserves …".

Related to this, the statute provides an expedited process for judicial review of a Land Conservation and Development Commission order concerning the designation of urban reserves or rural reserves under the new process provided in SB 1011. Jurisdiction for judicial review is conferred upon the Court of Appeals, notwithstanding other laws regarding LUBA review of land use decisions (ORS 197.650). SB 1011 provides timelines for LUBA and Court review, and indicates that review of the Commission's order is confined to the record. Furthermore, the court "may not substitute its judgment for that of the Land Conservation and Development Commission as to an issue of fact." The Court of Appeals may affirm, reverse or remand" the Commission's order, but may reverse or remand the order only if the court finds the order is:

> "(a) Unlawful in substance or procedure. However, error in procedure is not cause for reversal or remand unless the Court of Appeals determines that substantial rights of the petitioner were prejudiced.
> (b) Unconstitutional. [or,]
> (c) Not supported by substantial evidence in the whole record as to facts found by the commission."

Furthermore, the statute provides that "the Court of Appeals shall issue a final order on the petition for judicial review with the greatest possible expediency. … If the order of the commission is remanded by the Court of Appeals or the Supreme Court, the commission shall respond to the court's appellate judgment within 30 days."

Summary and Explanation of Proposed Rules

After seven meetings, the workgroup has recommended that the Commission consider the attached new rules providing criteria and procedures for adoption of both Urban Reserves and Rural Reserves (Attachment A). The new rules would be codified in OAR 660 as a new "division 27." The department has also recommended conforming amendments and related

"housekeeping amendments" to several existing rules (Attachment B).[7]

The proposed new division 27 under OAR 660 is organized as nine different sets of rules, as follows:

660-027-0005 Purpose

The proposed introduction to the new rules does two things. First, it generally describes the intent of the rules, not only by indicating that they implement SB 1011 (2007 Oregon Laws Chapter 723) and paraphrasing the statutory intent, but also by announcing that they prescribe "criteria and factors" that counties and Metro must apply when choosing lands for designation as urban or rural reserves. Second, the purpose section, and especially the "objective" declared at the end of section (2), anchors the "findings" that local governments must make in designating urban and rural reserves (see OAR 660-027-0080(10)). In that regard, this purpose statement also provides a yardstick that the Commission will use in evaluating the designation once it is submitted by Metro and counties for Commission review (see OAR 660-027-0080).

The proposed purpose statement clarifies that the urban reserve process described by these rules is intended to provide Metro with "an alternative process" to LCDC's current urban reserve designation process under OAR 660, division 21. Metro and counties have the opportunity to designate urban reserves under these new rules, but may instead choose instead to designate urban reserves through the existing process under division 21, or may choose to NOT designate any reserves.

Section (2) of the purpose statement was the subject of a great deal of workgroup discussion, including a "subgroup" appointed by the workgroup after the first LCDC hearing in order to consider and propose alternative language to resolve disagreement among the workgroup. The final sentence in that section is somewhat different than the wording provided in the November 8 draft, and now indicates that "The objective of this division is a balance in the designation of urban and rural reserves that, 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 that define the region for its residents."[8] The workgroup spent a substantial amount of time on this provision, since it was agreed that the words "best achieve" and "balance" are intended to "raise the bar" with respect to the rule's standards – the required "factors" – for designating reserves. It was also agreed that the "best" standard applies to the designation "in its entirety," rather than to individual areas or parcels. The workgroup also agreed that the addition of this objective is not intended to necessitate a numeric "ranking" of alternatives for reserve designation in order to determine the highest ranked, and therefore "the best," alternative.

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[7] The department provided the proposed amendments to existing rules to the workgroup, but while there was no particular objection raised, there was little discussion of these proposals. As such, it may not be accurate to describe the amendments to other rules as "recommended by the workgroup."

[8] It has been suggested that the grammar of this provision could be improved if changed to "The objective of this division is a balanced designation …"

660-027-0010 Definitions

The proposal includes definitions for terms used throughout the division. Definitions currently in state land use laws (ORS 195 and 197) and definitions adopted as part of the Statewide Planning Goals also apply to terms used in the proposed new rules (there are a number of terms in the proposed new rules that are already defined by law or by the Commission, and the workgroup agreed we do not need to repeat each of these definitions for purposes of this rule. However, there are probably some terms in the proposed rules that are not defined here or elsewhere.) Also, there are some terms considered so basic to these rules that, even though they are defined elsewhere, they are also defined here in order to make the rules more user friendly (e.g., UGB). Finally, there is at least one term – "public facilities" – that is intentionally defined more narrowly than in other rules or goals. Although most of the definitions are straightforward, it may be helpful to further explain the intent of some definitions:

Definitions (1) and (2) refer to two categories of land mapped in the 2007 Department of Agriculture (ODA) report to Metro entitled "*Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands.*" That report (provided to LCDC for its November 2007 meeting) mapped land throughout the region in three categories, and was an important basis of the region's proposal for the enactment of SB 1011. According to Metro and others who proposed SB 1011, the criteria that ODA used in mapping agricultural lands in the region are reflected in that SB 1011 "factors" for the selection of rural reserves. Two of the mapped categories of farmland are specifically mentioned in the proposed rules, as discussed below, and as such those terms are by referring to the ODA report (the ODA report itself is available online at Metro's website and through a link on DLCD's website). The reference in the rule intends to refer to the 2007 report; any later amendments to the report or mapping in that report would not replace the report referred to in this definition. There is more discussion about this term under rules at 0040, below.

Definition (3) concerns the "intergovernmental agreements," between Metro and each participating county, that are a prerequisite to adopting urban and rural reserves in the metro area. SB 1011 defines these agreements by citing some general statutes about agreements (such as the statute describing intergovernmental agreements for Regional Problem Solving). The department notes that many provisions of the particular statutes referenced in SB 1011 appear unrelated to the agreements contemplated with respect to Metro reserves. Furthermore, the statute definition for agreements does not include citizen involvement requirements for an intergovernmental agreement process. Because the agreement process is central and is the first step with regard designating urban and rural reserves, and because the agreements are expected to include maps of the reserves, the workgroup decided to add requirements that are not in statute regarding citizen involvement, discussed under Rule 0030, below. As such, the definition indicates that an agreement must also meet "requirements in this division," in recognition that the referenced statutes referenced in SB 1011 do not include all the requirements that the workgroup believes are necessary for these particular agreements. We noted that Metro and counties have indicated they anticipate that the agreements will also include a map of the areas to be

designated as urban or rural reserves. This statutory and rule definition does not require that an intergovernmental agreement include a map of the proposed reserve areas, but it does not preclude such a map.

Definition (4) regarding "livable communities" is provided because that term is used as part of the intent statement (see discussion under Rules 0005, above). There is no precedent in LCDC rules for this term. As such, Metro proposed the definition to the workgroup and it is included in the recommended rules.

Definition (6) regarding "important natural landscape features" is provided because this term occurs in several of the proposed rules in the division; by providing a definition we avoid the statute's expanded explanation of the term each time it is used. However, members of the workgroup discussed a preference to further expand and clarify the statutory "definition" of the term (actually, the statute does not define "important natural landscape features," but does define "rural reserves" as "land reserved to provide long-term protection for ... important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains."). The expanded definition in the rule provides that rural reserves, by "limiting"[9] urban development, "provide long-term protection and enhancement of the region's natural resources, public health and safety, and unique sense of place." This wording may also serve as an expanded "purpose statement" regarding the protection of important natural landscape features addressed later in the rule.

The expanded definition of "important natural landscape features" further provides that "these features include, but are not limited to, plant, fish and wildlife habitat; corridors important for ecological, scenic and recreational connectivity; steep slopes, floodplains and other natural hazard lands; areas critical to the region's air and water quality; historic and cultural areas; and other geographic features that define and distinguish the region." The individuals who proposed this definition, including at least one workgroup member (Jim Labbe), the Department of Fish and Wildlife, and other interested parties such as Audubon, based the expanded definition on the SB1011 wording and "work that was the basis of the statute itself performed by 'The Greenspaces Policy Advisory Committee' and an associated 'Ecological Elements Charette' used in developing a 'Natural Landscape Features Inventory' for Metro's 'Shape of the Region Project'." [10]

The intent of the expanded definition "is to be inclusive enough in the specific examples listed to capture the component elements of the Natural Features Inventory." (NOTE: DLCD's website for this rulemaking includes a link to Metro's "Shape the Region Symposium," which links to several studies, including the "Natural Features Inventory" mentioned here. The department believes the additional words in this definition would not

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[9] The workgroup discussed the word "limit" and expressed some concern as to which of at least two possible meanings may have been intended by the statute. For example, the word may mean something that bounds or confines, i.e., by setting a line or boundary, but it may instead connote something that restricts or hampers development within boundaries. Discussion among staff and workgroup members seemed to conclude that the former meaning is the intent here.

[10] According to an October 30 email from Jim Labbe to the Department, forwarded to workgroup members.

conflict with the statute because, by prefacing the examples with the word "including," the statute does not intend to provide a closed set of examples.

However, the department also notes that workgroup member Jim Labbe has suggested one further refinement to this definition, in an email exchange with the department and some other workgroup members after the workgroup concluded its work. Jim suggests that we simply drop the word "geographic" because "this would be more in keeping with the statute which repeatedly refers to 'natural boundaries' instead of specifically 'geographic boundaries'."

Finally, definition (12), for the term "walkable," was suggested by staff from DLCD and ODOT's Transportation and Growth Management Program based on several studies and sources concerning walkable neighborhoods. Staff was unable to locate a formal definition in state law or other agency rules. The term is used in Section 6(4)(d) of SB 1011, but is not defined there, and is used in 660-027-0050(1)(d) of the proposed rules.

660-027-0020 Authority to Designate Urban and Rural Reserves

This section is intended to establish which entity – Metro or counties or both – has authority to designate reserves, and to make it clear that this division is "an alternative" to the authority to designate urban reserve areas granted by LCDC's current urban reserve rules under OAR 660, division 021. As explained above, one very important difference between the SB 1011 urban reserve process and the current division 21 urban reserve process is that, under the proposed new rules, an intergovernmental agreement is a prerequisite for designating reserves.

The rules proposed under 0020 specify that Metro alone has authority to designate urban reserves provided Metro first adopts an intergovernmental agreement with each county where urban reserves are designated, and provided the agreements are implemented by amendment of the regional framework plan and the county comprehensive plan in accordance with the process and criteria in the proposed new division. The statute and proposed rule also grants counties – rather than Metro – the authority to designate rural reserves, provided there is an intergovernmental agreement concerning these reserves, between the county and metro for each county where the reserves are designated, and provided the county amends its plan and zoning to implement the agreement.

Finally, this rule makes it clear that a county and Metro may not enter into an intergovernmental agreement to designate urban reserves in the county under the SB 1011 process unless the county and Metro simultaneously agree to designate rural reserves in the county.

660-027-0030 Urban and Rural Reserve Intergovernmental Agreements

This rule is intended to provide criteria for the intergovernmental agreements that are prerequisite to urban and rural reserve designation. First, this rule specifies that an intergovernmental agreement between Metro and a county to establish urban reserves and

rural reserves must provide for a "coordinated and concurrent process" for adoption (by Metro) of regional framework plan provisions and (by the county) of comprehensive plan and zoning provisions to implement the agreement. SB 1011 also requires that Metro and counties designate reserves in a manner that is "coordinated and concurrent." It is expected that a county and Metro would do their "considering" and "evaluating" together, in the same meeting or meetings, and Metro and each county would simultaneously adopt (or sign) the agreement. The formal "designation," however, would be the adoption of implementing plan provisions, which cannot legally or practically be done "concurrently" by a county and Metro, or by all the counties and Metro, i.e., at the identical moment in time. However, "concurrently" probably means that Metro and the local governments would schedule the formal plan and/ordinance adoptions to occur in approximately the same time frame, and in a coordinated manner. The rules under 0080 require submittal to LCDC "jointly."

The second provision of this rule provides for citizen involvement in the development of an intergovernmental agreement. For plan amendments that implement agreements, Goal 1, the acknowledged local plans and state laws provide for broad notice and citizen involvement. However, intergovernmental agreements are not necessarily covered by these laws or local plans. Because the agreements to designate reserves will probably include maps of reserve areas, the workgroup suggested that it is very important for citizen involvement and broad notice during the development of the agreements, rather than later, after the agreements have been signed, when formal amendments are proposed to implement the agreements. As such, the proposed rules require Metro and counties to follow a coordinated citizen involvement process that provides for broad public notice and opportunities for public comment regarding lands proposed for designation as urban and rural reserves under the agreement. Furthermore, the rules require that the State Citizen Involvement Advisory Committee (CIAC) be provided an opportunity to review and comment on the proposed citizen involvement process.

Finally, the proposed rules would clarify that an intergovernmental agreement made under this division is not a final land use decision under ORS 197.015(11). The department sought DOJ legal counsel advice on this provision and it was suggested that the proposed rules should clarify that "an intergovernmental agreement made under this division shall be deemed a preliminary decision that is a prerequisite to the designation of reserves by amendments to Metro's regional framework plan and to a county's comprehensive plan" (emphasis added). Because an agreement is not a final land use decision, LUBA review would not be appropriate. Rather, the Commission will be required to determine whether statutory and rule requirements have been followed with respect to such agreements, since, by law, the agreements are a prerequisite to the designation of reserves. The rule provides that an intergovernmental agreement must be submitted to LCDC, along with adopted amendments to the regional framework plan and county comprehensive plans.

660-027-0040 Designation of Urban and Rural Reserves

The new statutes pertaining to Metro reserves specify that the reserves are "designated." The department, on advice from legal counsel, believes the term "designate" means the formal "adoption" of the reserves by adoption or amendment of Metro framework plan

provisions for Urban Reserves, and by adoption or amendment of County land use plan and zoning provisions for Rural Reserves. The proposed rules under 0040 provide several requirements that pertain to the designation of urban and rural reserves. These include rules for designating urban reserves, as follows:

- Metro may not designate urban reserves until Metro and applicable counties have entered into an intergovernmental agreement that identifies the land to be designated by Metro as urban reserves.
- Urban reserves must be based on an amount of land estimated as necessary for urban population and employment growth in the Metro area for a 20 to 30 year period, and must be planned to accommodate urban population and employment growth for that time period. These amounts refer to the combined total of all the urban reserve land designated in the participating counties.
- Metro is required to specify the particular number of years (e.g., 25 years) for which the urban reserves are intended.
- If Metro designates urban reserves prior to December 31, 2009, the 20 to 30 year period is to begin on the year 2029.
- Metro must adopt policies to implement the reserves and must show the reserves on its regional framework plan map.
- A county in which urban reserves are designated must adopt policies to implement the reserves and show the reserves on its comprehensive plan and zone maps.
- Designation of urban reserves must be "coordinated" with the cities in any county where such reserves are considered, and with local governments, state agencies, special districts and school districts that may provide services to the urban reserves when they are added to the UGB.[11]

The rules under 0040 include designation requirements for Rural Reserves, as follows:

- Neither Metro nor a local government may amend a UGB to include land designated as rural reserves during the 20-30 year period described above. Since this period is in addition to the 20-year UGB period, rural reserves may not be included in any UGB (i.e., the Metro UGB as well as any other UGB in counties that have designated rural reserves) for a 40-50 year period.
- Also, Metro may not re-designate rural reserves as urban reserves, and a county may not re-designate land in rural reserves to any other land use, during the 40-50 year period.
- Metro and counties must adopt policies to implement the rural reserves. Counties must show the reserves on their comprehensive plan and zone maps, and Metro must show the reserves on its regional framework plan maps.

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[11] The term "coordinated" is defined in ORS 197.015(6) as "when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible." although in that context it refers to the coordination of a comprehensive plan, that definition seems applicable to this process since the designation of reserves involves adoption of a plan.

- Designation rural reserves must be "coordinated" with the cities in any county where such reserves are considered.

Sections (9) and (10) of the proposed designation rules specify the "factors" that must be considered in the Metro and County decisions to "simultaneously identify, select and designate both urban and rural reserves." The "factors" are specified in rules under 0050 and 0060, described below in this report, and the rule derived these factors from the factors that are included in SB 1011.

Factors: It is important to note that the intent is for the rule to include and, where necessary, clarify the factors in SB 1011, but also to expand the list of factors (as allowed by that statute) in order to address additional concerns discussed by the workgroup (see rules 0050 and 0060 below for more detailed discussion of the particular additional factors proposed as part of these rules by the workgroup).

The workgroup discussed the term "consideration of factors." The proposed rules are based on the understanding that "factors" are a special type of "criteria" similar to the "factors" proscribed for UGB location under Goal 14. As such, a general principle for Goal 14 factors applies here: factors are not "independent criteria" – every parcel or area considered for urban or rural reserves would not be required to meet each and every factor. Instead, the factors are applied, weighed and balanced to select and evaluate areas for designation as urban or rural reserves. 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. The group decided that the requirement to "consider" the factors in the statute is not meant to imply that any factor may be simply "considered but then disregarded" – all the factors must be considered, applied together (which also implies they must be "balanced" in the manner of Goal 14), and Metro and counties must demonstrate that they have done this.

The term "consideration of factors" was previously adopted by LCDC in specifying the evaluation and selection of land for a UGB under Goal 14. Thus, there is precedent set by both LCDC and the courts regarding the interpretation and employment of "factors." As indicated above, there was considerable discussion of the term "factors" by the workgroup, including advice from LCDC legal counsel, and the group has concluded that "factors" under SB 1011 are intended to be employed and interpreted in the same manner as the UGB factors in Goal 14.[12] According to legal counsel, while the courts have not been entirely consistent in their interpretation of "factors," some legal precedent is worth noting in order to clarify the intent of "factors" under the proposed reserve rules.

First, the courts have indicated "factors" are a type of "criteria" (this is important because the workgroup discussion revealed that many planners consider "criteria" to be something different than "factors," since typically a set of factors are "considered" and "weighed" in arriving at a decision).

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[12] Much of the case law on factors discussed here is derived from Goal 14 prior to its amendment by LCDC in 2004. However, although the amended goal includes fewer factors than the original, the intent and operation of factors was not intended to change under the amended goal.

Second, a Court of Appeals interpretation of the term "factors" was paraphrased in LCDC's 2006 UGB Amendment rules, OAR 660-24-0060(3), which state that: "The boundary location factors of Goal 14 are not independent criteria. When the factors are applied to compare alternative boundary locations and to determine the UGB location, a local government must show that all the factors were considered and balanced." Because the intent of the rules proposed by the Metro Reserves workgroup is for "factors" to be interpreted in the same manner as UGB factors, this previous LCDC declaration about factors is important in applying the reserve factors.

Finally, some examples are provided below regarding prior legal interpretations concerning the "consideration of factors." Although these examples concern Goal 14 factors and the selection of land for a UGB, the factors in the proposed reserve rules also concern the selection of land and use the term "consideration of factors." As such, the following examples may further clarify the intent of the proposed rules regarding "factors":[13]

- Even if one of the factors is not fully satisfied, or is less determinative, that factor must still be considered and addressed. Rosemont II, 173 Or App at 328; Baker v. Marion County, 120 Or App 50, 54, 852 P2d 254, rev den 317 Or 485 (1993).
- "Locational" factors 3 through 7 of Goal 14 are not independent approval criteria. It is not required that a designated level of satisfaction for each factor be met in order to approve a UGB amendment. Rather, a local government must show that the factors were "considered" and balanced in determining whether a UGB amendment is justified. 1000 Friends of Oregon v. Metro, 174 Or App 406, 409-10 (2001)
- The goal of the consideration under factors 3 through 7 is to determine the "best" land to add to the UGB, after considering each factor. ARLU, slip op at 13. In carrying out such consideration, each factor must be addressed. That a potential UGB expansion site failed a "test" established by the local government for compliance with one locational factor is not a sufficient basis for excluding it from consideration under the other locational factors. 1000 Friends II, 174 Or App at 414-15.

It was indicated in the department's November 15, 2007, staff report that there was a consensus to strengthen the factors by modifying 0040 (10) to require findings and a statement of reasons that explain how the adopted reserves **BEST** achieve the objectives set forth in the purpose statement. Alternatively, it was proposed that the purpose statement itself be modified to explain how the designation of urban and rural reserves **BEST** ensure livable communities, the viability and vitality of the agricultural and forest industries and protection of the natural landscape features that define the region for its residents. While there was a strong workgroup consensus to add the word "best" in one of the two places listed above, there was no consensus as to WHICH of these two places should include that word. In the November hearing it was recommended that LCDC provide further direction to the workgroup regarding whether to add the term "best" to the findings requirements, as described above, and if so, where should the term be added in the rules. LCDC did not

[13] These examples are cited in a paper provided to LCDC's 2006 UGB workgroup titled: "Urban Growth Boundary Amendments and Goal 14 – A Legal Perspective", by Corinne C. Sherton, Johnson & Sherton PC.

direct the group regarding this term, but suggested that the workgroup continue with its deliberation and attempt to resolve this issue prior to the January hearing.

As discussed under the explanation of rules under 0050, above, the workgroup did eventually agree to add the term "best" to the purpose statement under OAR 660-027-0005(2). Also, subsequent to the Commission's November hearing on these proposed rules, the wording in (10) was amended; that proposed rule now requires that Metro and participating counties shall identify, consider, evaluate and designate proposed urban and rural reserves "concurrently and in coordination with one another," and adopt a single, joint set of "findings and statement of reasons" that demonstrates how they applied the factors. Finally, "the findings and statement of reasons shall explain why the local governments selected the areas designated as urban and rural reserves and how the designated reserves achieve the objective set forth in OAR 660-027-0005(2)."

In a related matter, there was further discussion in the workgroup and at the November Commission hearing as to whether the proposed factors set a sufficiently "high bar" for determination of rural reserves with regard to protection of the most important agricultural land. Workgroup members, including members representing various agricultural land interests, ODA, the Oregon Association of Nurseries, the City of Portland, and 1000 Friends of Oregon, urged that the proposed rules should provide stronger assurance that the most important farmland will be designated as rural reserves. Several ideas to strengthen the factors were proposed, including adding additional factors, criteria, or other measures, as follows:

- Providing a "safe harbor" that deems Foundation Agricultural Land or Important Agricultural Land (mapped in the ODA report to Metro) as qualifying for designation as rural reserves under the factors without further explanation. (see discussion under 0060, below).
- Adding an additional factor that refers to the ODA mapped lands, especially the two categories Foundation Agricultural Land and Important Agricultural Land.
- Adding additional criteria that require counties to designate, as rural reserves, Foundation Agricultural Land, and possibly Important Agricultural Land also, unless the land is demonstrated to be needed for special mixed-use transit-connected development in the Metro area.
- Requiring that Metro cannot include Foundation Agricultural Land or Important Agricultural Land in urban reserves unless it demonstrates that it has first evaluated all other lands and demonstrate that these other lands are unable to serve particular purposes for urban reserves.

In all the proposals above, ODA suggested that the new criteria should refer to Foundation Agricultural Land and Important Agricultural Land within three miles of a UGB.

In discussing the above proposals, the workgroup initially agreed only to add the first bullet, the "safe harbor" (see section 0060(4)); this was provided in the November 8 draft. Subsequent to the LCDC public hearing on that draft, and in response to the testimony on this topic, the workgroup appointed a "subgroup" to propose wording for resolution of this

issue. In response, the subgroup proposed, and the workgroup agreed to, the following new section (11) under 0040:

(11) Because the January 2007 Oregon Department of Agriculture report entitled "*Identification and Assessment of the Long-Term Commercial viability of Metro Region Agricultural Lands*" 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 Agricultural Land for designation as urban reserves rather than other land considered under this rule."

The workgroup chair, Commissioner Worrix, attended the subgroup meeting and may further discuss the intent of the above wording at the Commission's January meeting.

660-027-0050 Identification, Selection and Designation of Lands for Urban Reserves

While the rules under 0040 provide a set of general rules for designation of both urban and rural reserves, the rules under 0050 provide the factors for determining which land to designate as urban reserves. According to Metro, these factors are derived from the "great communities" factors developed as part of Metro's agriculture/urban study (that study is linked to DLCD's website on this rulemaking, at http://www.metro-region.org/index.cfm/go/by.web/id=25147.

Metro's "*ad hoc* group" that met in the summer of 2007 recommended some modifications to these factors, and the Commission's workgroup also agreed to some modifications. In general, these modifications are minor edits to statute factors and additional factors not in the statute, such as factors (g) and (h).

The term "walkable" was not defined by the statute; as noted above, the department has proposed a definition. Also, "a well-connected system of streets" is not defined currently by Goal 12 or related rules. A definition of this phrase has not been provided for these rules. Metro's *ad hoc* group suggested the language referring to "pedestrian and bicycle facilities," and suggested that it be phrased consistent with the Transportation Planning rule.

Again, SB 1011 provided that the factors for urban reserves listed in that bill were "not limited to" those listed. As discussed previously, the workgroup agreed that this provision should be interpreted to mean that LCDC may add additional factors, through this rule, but that this language does not authorize Metro to add factors to those listed in the rule.

660-027-0060 Identification, Selection and Designation of Lands for Rural Reserves

These proposed rules provide factors that would be applied to designate rural reserves in order to protect farm land, forest land, and natural landscape features. The statute (SB 1011) provided only one set of factors – for farm land. However, the statute is also clear that "rural reserve" 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 of urbanization, including plant, fish and wildlife habitat, steep slopes and floodplains."

As such, the workgroup agreed to add additional factors for those rural reserves that are designated to protect forest land and natural landscape features. The factors proposed to determine whether rural reserves should be designated to protect natural features are significantly different than those in the statute for farm land, and therefore the rules provide these factors as a separate rule section (section 3). The factors for forest land are woven into the factors for farm land.

Because rural reserves are likely to be designated for all three of the purposes described above, section (1) indicates that metro shall specify which areas designated for rural reserves are intended for which purpose. This will determine which factors to apply. However, it is conceivable that some areas will be included in rural reserves for a combination of "purposes," rather than for farm, forest or natural features alone. We also note that the factors do not specifically describe how to treat land that is both farm and forest land. The workgroup had noted this, but did not provide further discussion or recommendation.

As was noted in the November report, subsection (2)(a) changes the word "and" in the statute to "or". The workgroup believes the intent of this requirement in the statute is to consider proximity to a UGB or proximity to land with fair market values that significantly exceed agricultural values – but it is not necessary that a particular property must be considered with regard to both.

Finally, subsequent to LCDC's November hearing on the proposed rules, the workgroup agreed to modify 0060(3) as follows:

(3) When identifying and selecting land for designation as rural reserves intended to protect important natural landscape features, a county must **consider those areas identified in Metro's February 2007 "*Natural Landscape Features Inventory*," and other pertinent information, and shall** base its decision on … [the factors for natural landcape features]."

This wording was added in recognition that, similar to agricultural lands discussed above, Metro had also mapped natural landscape features, and the rules should reference those maps to ensure attention to this mapping. The department also notes that the Department of Forestry has completed mapping of significant forest lands. However, this mapping was not provided to the workgroup until its final meeting, and the Department of Forestry did not suggest that the rules reference the mapping.

660-027-0070 Planning of Urban and Rural Reserves

This set of rules begins by describing one of the most significant planning ramifications in designating urban reserves: such areas are the highest priority for inclusion in the urban

growth boundary when the boundary is expanded, as specified in Goal 14, OAR 660, division 24, and ORS 197.298. That fact is not mentioned in SB 1011, but was certainly well-understood by the various interests that drafted the legislation. It should be noted that urban reserves calculated to provide a 20-30 year supply of land in the Metro area are likely to include farmland, forest land, exception areas, and other features. There are no rules or statutes that require Metro to indicate **which** land in urban reserves might be the first or highest priority land considered when the UGB is expanded. However, ORS 197.298 may bear on this question.

The second section of the 0070 rules ensures that land in urban reserves is maintained in larger parcel sizes (unless it was previously parcelized), so as to preserve opportunities for orderly and efficient development of urban uses and provision of urban services when urban reserves are added to the UGB.

The proposed rules also direct counties to maintain the zoning for uses on rural reserves allowed at the time they were designated, and to not allow smaller lots or parcels on land designated as rural reserves. This provision was recommended by Metro's *ad hoc* group that met in the Summer of 2007 prior to LCDC's workgroup meetings, but was embraced by the workgroup. It provides a powerful protection for rural reserves that is in addition to other protection already provided in statute and in 660-027-0040 (4) and (5). These provisions together carry out the primary directive of SB 1011, that rural reserves are intended to "provide long-term protection for agriculture, forestry or important natural landscape features." (Emphasis added).

Finally, the proposed urban reserve "planning" rules provide that "counties, cities and Metro may adopt conceptual plans for the eventual urbanization of urban reserves designated under this division, including plans for eventual provision of public facilities and services for these lands, and may enter into urban service agreements among cities, counties and special districts serving or projected to serve the designated urban reserve area." Part of this provision was recommended by Metro's ad hoc group, but was embraced by the workgroup, and augmented by the department, to include some of the provisions currently in rules for urban reserves under OAR 660, division 21, that clarify the ability to plan for services in urban reserves.

660-027-0080 Adoption and LCDC Review of Urban and Rural Reserves

While these proposed rules repeat statutory requirements for LCDC review of reserves, it is important to note that those requirements have been augmented. Furthermore, this section has been further amended since the Commission's November hearing, at the recommendation of the workgroup and on advice of legal counsel (Section (4) is the additional language added since the November 8 draft).

Section (1) makes it clear that plan amendments and other land use actions to implement the designation of urban reserves must be in accordance with current laws for plan amendments (ORS 197.610 to 197.650). This assures public notice requirements, among other things, and makes sure that statewide planning goals apply.

Section (3) was suggested by DOJ rather than the workgroup. This provision anticipates that the submittal to LCDC will very likely be large and complex, and will be subject to multiple comments based on LCDC's previous experience with UGB decisions in the Metro area. Furthermore, while appeals may not necessarily occur, they are a possibility, and section (3) will facilitate the department's required "records" work in responding to an appeal.

The new section (4) is intended to specify the Commission's scope and standard of review, specifically referencing the rule's purpose statement and designation standards.

Suggested Amendments to Current Rules in Other Divisions under OAR 660

The department has proposed "conforming amendments" and other "housekeeping amendments" to other LCDC rules related to urban reserves, including the repeal of some existing rules. The proposed amendments are Attachment B to this report.

Amendments to OAR 660, division 4

Only some sections of rules under OAR 660-004-0040 are proposed for amendment. These are rules adopted by LCDC in 2000 in response to the 1986 Supreme Court decision regarding 1000 Friends of Oregon v. LCDC et al. 301 Or. 447 (1986). Those rules established minimum lot sizes in rural areas that ensured rural lands did not authorize "urban uses" outside UGBs.

First, the version of the rules currently on file with the Secretary of State italicizes the words "minimum lot size" under section (7)(e)(F). This may emphasize these words, but there appears to be no reason to emphasize these words, and as such, this is probably a formatting error in the filing of a previous amendment of this rule. The amended rule would eliminate the italics.

The proposed amendment to Section (8)(b)(B) is also non-substantive; it is suggested that the word "reserve" be preceded by the word "urban", since the intent here is to refer to an urban reserve. A correction to sentence structure (adding the word "or") at the end of that paragraph is for grammatical purposes and for clarity.

Proposed amendments to subsection (8)(d) and (e) are both for clarity and substance. First, Metro's legal counsel suggested that "Metro" should be substituted for "the Portland metropolitan service district" because "Metro is a term that is defined and is more widely understood in the region." Substantively, this subsection should be amended to also reference the new division 27 urban reserve process, in addition to the division 21 process. Also, section (d) refers to a Metro "urban reserve ordinance." Metro's regional framework plan (RFP) does not apply outside the UGB, so this section should instead refer to county comprehensive plan and zoning provisions adopted to implement the reserves. The remaining proposed amendments to that subsection are for clarity and to recognize the new

statutory term "urban reserve" rather than "urban reserve area".

Proposed amendments to subsection (7)(f) are at the suggestion of Metro's legal counsel, Dick Benner, who indicated to the department that "there is no such thing as 'the Metro 2040 Plan' – there is a '2040 Growth Concept' which is not regulatory. It recommends densities for specific land use designations, but they have no legal effect. I recommend that the rule say **10 units per net developable acre** because Metro's code says that is the lowest density that can be assigned to any land inside the UGB zoned to allow residential use. It is a good minimum criterion for determining whether an area is suitable for urbanization."

Finally, amendments to paragraph (G) of subsection (7)(g) would ensure that, on land designated as urban reserve under the new division 27 rules, new parcels less than the minimums established by these rules cannot by created without a goal exception. As noted above in describing the purpose for urban reserves, parcelization of these lands would impede efficient provision of urban services and urban scale development.

Amendments to OAR 660, division 11

The department is recommending changes to rules under OAR 660-011-0060, specifically paragraph (C) of subsection (4)(b). These amendments are non-substantive and pertain to conditions under which sewer systems may be provided outside UGBs without an exception, for health hazard areas. This rule currently references urban reserves under division 21 – the proposed amendment would reference urban reserves established under the new rules in division 27 as well. The proposed amendments also intend to clarify what is meant by the current provision of that rule in limiting the "capacity" of a sewer system designed for a health hazard area. The clarifying language does not change the current intent; it clarifies that in urban reserve areas, the capacity of a sewer system could be designed to provide for the projected future level of service planned for an area within the boundaries of an urban reserve.

Amendments to OAR 660, division 21

These amendments conform division 21 urban reserve rules to the statutes for urban reserves (ORS 195,) amended by SB 1011, including:

- An amended definition to conform to the amended statutory definition
- Authorization for Metro to designate urban reserves for the Portland Metropolitan area urban growth boundary under OAR 660, division 027.
- Removal of the word "area" after "urban reserve" throughout the division.
- Correction of the word "rule" in 0020(1): this should refer to the "division" rather than the "rule."
- Elimination of "applicability provisions" that refer to previous urban reserve designations by Metro which were remanded by the courts and were not re-adopted by Metro.

Finally, as described at the beginning of this report, urban reserve rules under division 21

initially mandated that certain jurisdictions adopt urban reserves. These cities long ago completed this requirement. As such, it is suggested that the Commission repeal rules under OAR 660-021-0090 and OAR 660-021-0100 that establish specific urban reserve requirements and deadlines for these local governments to follow in meeting this mandate.

Amendments to OAR 660, division 25

The proposed amendments to the rules under OAR 660-025-0040 are in recognition of the Commission's exclusive authority to review urban reserves designated under OAR 660, division 27, in addition to reserves designated under OAR 660, division 21.

Required LCDC Rulemaking Criteria and Procedures

The Commission's procedures for rulemaking derive from ORS Chapter 183 and are specified in LCDC's procedural rules at OAR 660-001-0000. In general, prior to adoption of a rule, the Commission must hold a public hearing and provide an opportunity for interested parties to testify on the proposed rule. The Commission must deliberate in public and, if the commission makes a decision to adopt any or all of the proposals, a majority of the commission must affirm the motion to adopt.

The Commission is also guided by ORS 197.040, as follows:

> ***"197.040 Duties of commission; rules.***
> *(1) The Land Conservation and Development Commission shall:*
> ....
> *(b) In accordance with the provisions of ORS 183.310 to 183.550, 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:*
> *(A) Allow for the diverse administrative and planning capabilities of local governments;*
> *(B) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;*
> *(C) Assess the likely degree of economic impact on identified property and economic interests; and*
> *(D) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.*
> *(c)(A) Adopt by rule in accordance with ORS 183.310 to 183.550 or by goal under ORS chapters 195, 196 and 197 any statewide land use policies that it considers necessary to carry out ORS chapters 195, 196 and 19, [and]*
> *(B) Adopt by rule in accordance with ORS 183.310 to 183.550 any procedures necessary to carry out ORS 215.402 (4)(b) and 227.160 (2)(b). . .*
> ...

(3) The requirements of subsection (1)(b) of this section shall not be interpreted as requiring an assessment for each lot or parcel that could be affected by the proposed rule."

The department issued formal rulemaking notice for publication in the November 2007 Secretary of State's Bulletin, and again in the January 2008 Secretary of State's Bulletin and has mailed notices to interested parties, including legislators (See Attachment G).

The Commission has also adopted "Citizen Involvement Guidelines for Policy Development" (the "CIG") in order *"... to provide and promote clear procedures for public involvement in the development of Commission policy on land use," which LCDC has committed to follow "to the extent practicable in the development of new or amended statewide planning goals and related administrative rules."* CIAC member Ann Glaze was appointed as a member of the Metro Reserves workgroup.

The CIG recommends that the Commission *"consult with the CIAC on the scope of the proposed process or procedure to be followed in the development of any new or amended goal, rule or policy."* On October 11, 2007, workgroup member Ann Glaze gave the CIAC a general overview of the process and progress of, and handed out a paragraph of the draft rule that spoke to citizen involvement. According to the minutes of that meeting, "CIAC was pleased with the inclusion of 'citizen involvement' requirements in the rules."

The CIG recommends that, as part of a rulemaking process, the department *"shall, to the extent practicable:*

- *Prepare a schedule that clearly indicates opportunities for citizen involvement and comment, including tentative dates of meetings, public hearings and other time-related information;*
- *Post the schedule, and any subsequent meeting or notice announcements of public participation opportunities on the Department's website, and provide copies via paper mail upon request; and*
- *Send notice of the website posting via an e-mail list of interested or potentially affected parties and media outlets statewide, and via paper mail upon request;*
- *Provide background information on the policy issues under discussion via posting on the Department's website and, upon request, via paper mail. Such information may, as appropriate, include staff reports, an issue summary, statutory references, administrative rules, case law, or articles of interest relevant to the policy issue."*

The department has followed these guidelines with regard to this rulemaking. The workgroup determined its schedule at its first meeting, and announced revisions to the schedule, and the department established a website and a list of interested parties to receive notices of this workgroup, in the manner outlined by the CIG. The website includes agendas and minutes for each workgroup meeting, background information, draft rules under consideration by the workgroup, and copies of formal notices. The department has sent notice of meetings to the public and interested parties, including notice of the LCDC hearings, by electronic and regular mail.

Conclusion and Recommendation

The department recommends that the Commission receive public testimony on the proposed new and amended rules. Following testimony, the department recommends that the commission close the public hearing, consider the testimony and other information provided, and adopt the proposed new and amended rules.

Attachments

A. Proposed new rules for Urban and Rural Reserves
B. Proposed conforming amendments to other existing LCDC rules
    - OAR 660, division 4
    - OAR 660, division 11
    - OAR 660, division 21
    - OAR 660, division 25
C. Senate Bill 1011, including legislative history
D. Appointed rulemaking advisory workgroup
E. The "Shape of the Region" summary report
F. Urban Reserve Rules under OAR 660, division 21
G. Rulemaking notices
H. Written Comments received by DLCD prior to mailing of this report

CERTIFICATE OF SERVICE AND FILING

I certify that on November 5, 2012, I filed the original and 13 copies of Petitioners Save Helvetia and Robert Bailey Opening Brief with the:

State Court Administrator
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

and on the same date I caused to be delivered by first class U.S. mail, two true and correct copies of the foregoing document on:

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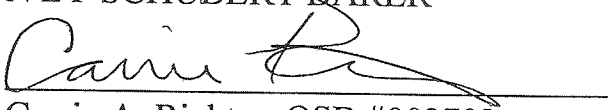
By: 

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