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.

Land Conservation and Development Commission Case No. 12ACK001819

Court of Appeals No. A152351

METRO'S ANSWERING BRIEF AND APPENDIX

EXPEDITED PROCEEDING UNDER ORS 197.651

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I. STATEMENT OF THE CASE

Respondent Metro accepts the statement of the case in the opening brief filed by petitioners City of Tualatin and City of West Linn. For the court's reference, a table is attached to this brief identifying the location of responses to each of the petitioners' 25 assignments of error. Metro App 1.

II. COMMON RESPONSES TO ASSIGNMENTS OF ERROR

There are several common issues that arise in petitioners' briefs that are based on incorrect application of: (1) the "factors" for designating urban and rural reserves; (2) the "best achieves" standard under LCDC's reserve rules; and (3) LCDC's standard of review for substantial evidence under ORS 197.633(3). This portion of Metro's brief provides an explanation of these three fundamental issues and general responses to common errors made by petitioners in their arguments. The first two issues require some background regarding the legislative history of Senate Bill 1011 and LCDC's implementing rules in OAR chapter 660, division 27.

There is a fourth issue of general applicability. Under the judicial review standard created by ORS 197.651(10) for LCDC reserve decisions on appeal, there is no basis for the court to apply the so-called "rule of substantial reason" test in its review of LCDC's order. This issue is addressed in section II.D below.

A. Application of the "factors" for designating urban and rural reserves

1. Senate Bill 1011

In 2007 the Oregon Legislature enacted Senate Bill 1011, authorizing Metro and the three counties to designate urban and rural reserves through a process set forth in ORS 195.137 *et seq*. Senate Bill 1011 was adopted in response to widespread frustration regarding the existing process for Metro-area UGB expansions. In particular, two statutory requirements for UGB decisions often fostered inefficient and inflexible decision-making: (a) the recurring five-year cycle for Metro's evaluation of UGB expansions based on a 20-year need, and (b) the statutory priorities of ORS 197.298, which require Metro to first expand the UGB onto the lowest quality agricultural lands regardless of whether those lands could be cost-effectively developed. In other words, ORS 197.298 requires Metro to include land in the UGB not because it would be good for urban use but because it is bad for farming.[1]

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[1] The unclear relationship between the priorities under ORS 197.298 and the requirements of Goal 14 in UGB expansions has been a significant source of frustration and inefficiency for local governments. This court recently wrestled with the complicated state of the law on this issue: "So, which scheme ultimately controls the choice of where to expand a UGB–the flexible Goal 14 or the more rigid ORS 197.298? Our case law–in a very imprecise way–suggests that the answer may be both." *1000 Friends of Oregon v. LCDC*, 244 Or App 239, 259, 259 P3d 1021 (2011) (*McMinnville*).

Senate Bill 1011 addressed these problems by allowing Metro and the counties significant discretion to identify "urban reserves" and "rural reserves" outside of the existing UGB as the areas where future UGB expansion will or will not occur over the next 40 to 50 years. Areas mapped as urban reserves become the first priority for future UGB expansions under ORS 197.298, while rural reserves are natural resource areas that obtain long-term protection from development.

A primary goal of Senate Bill 1011 was to provide more flexibility to allow UGB expansions onto areas that local governments agreed would be the most appropriate for urbanization. Metro App 2-7. To accomplish that goal, the legislature authorized Metro and the counties to designate urban and rural reserve areas based on discretionary "consideration" of several nonexclusive "factors" designed to help determine whether particular areas are appropriate for development or for long-term protection. ORS 195.141(3)[2]; ORS 195.145(5)[3]. The legislation also directs LCDC to adopt implementing rules. ORS 195.141(4); ORS 195.145(7).

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[2] The rural reserve factors are set forth at ORS 195.141(3), which provides:

"(3) When designating a rural reserve under this section to provide long-term protection to the agricultural industry, a county and [Metro] shall base the designation on consideration of factors including, but not limited to, whether land proposed for designation as a rural reserve:

"(a) Is situated in an area that is otherwise potentially subject to urbanization during the period described in subsection (2)(b) of this section, as indicated by proximity to the urban growth boundary and to properties with fair market values that significantly exceed agricultural values;

"(b) Is capable of sustaining long-term agricultural operations;

"(c) Has suitable soils and available water where needed to sustain long-term agricultural operations; and

"(d) Is suitable to sustain long-term agricultural operations * * * ."

[3] The urban reserve factors are set forth at ORS 195.145(5), which provides:

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

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

"(b) Includes sufficient development capacity to support a healthy urban economy;

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

"(d) Can be designed to be walkable and served by a well-connected system of streets by appropriate service providers;

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

"(f) Includes sufficient land suitable for a range of housing types.

Senate Bill 1011 creates the legal foundation on which much of the decision on appeal must stand or fall. It is therefore critical to recognize that the legislature created a process that is guided by a list of nonexclusive factors to be "considered" by Metro and the counties. The legislature purposely did *not* create a list of mandatory approval criteria requiring findings that each standard must be satisfied. Rather, ORS 195.141(3) and ORS 195.145(5) allow the designating body to consider and weigh each factor in order to reach an overall conclusion regarding whether a reserve designation is appropriate. All factors must be considered, but no single factor is dispositive.

Several petitioners contend that a process that merely allows consideration of factors results in a "standardless" decision that is improper, or "deeply unfair," because it does not require application of clear criteria and therefore might result in a "political" decision. *See* Metropolitan Land Group's first assignment of error, Barkers Five LLC's first assignment of error, Maletis first assignment of error. However, if the legislature had intended to require the application of mandatory criteria in making reserve designations, it would have done so. The Oregon legislature is well aware of the difference between factors to be considered and mandatory criteria. *See O'Donnell-Lamont & Lamont*, 337 Or 86, 107-109, 91 P3d 721 (2004)

(analyzing intent of statute directing court to "consider" a nonexclusive list of factors regarding child custody). This court has previously explained the difference between factors and criteria as it relates to land use legislation:

> "ORS 199.462(1) enumerates general factors that must be given consideration before a decision is made; it does not articulate specific criteria that a boundary commission is 'bound to apply' as substantive tests in reaching a decision."

McGowan v. Lane County Local Government Boundary Com., 102 Or App 381, 385, 795 P2d 560 (1990); *see also Hutchinson v. City of Corvallis*, 134 Or App 519, 895 P2d 797 (1995) (ordinance requiring "consideration" of listed factors does not establish mandatory approval criteria).

In enacting Senate Bill 1011, the legislature identified a nonexclusive list of factors to be considered in making reserve designations. It also directed LCDC to adopt implementing rules for designating urban and rural reserves. Most of the petitioners' arguments are focused on LCDC's application of the rules; therefore, some explanation regarding the adoption of those rules is warranted.

2. LCDC's adoption of Division 27 rules

In August 2007, LCDC appointed a rulemaking workgroup of 20 individuals representing local governments, state agencies, interest groups, and affected parties to assist in drafting rules to implement Senate Bill 1011. The workgroup met seven times and was able to reach consensus regarding