

**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  
No. 12ACK001819  
Court of Appeals No. A152351

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**RESPONDENT WASHINGTON COUNTY'S  
ANSWERING BRIEF**

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EXPEDITED PROCEEDING UNDER ORS 197.651

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## STATEMENT OF THE CASE

### I. Nature of the Proceedings and Relief Sought

Petitioners<sup>1</sup> seek judicial review of the Land Conservation and Development Commission's ("LCDC") final Order in the Matter of Review of the Designation of Urban Reserves by Metro and Rural Reserves by Clackamas County, Multnomah County and Washington County, Compliance Acknowledgment Order 12-ACK-001819. JER-1-156. Petitioners seek remand or reversal of the Order.

This Answering Brief (Answer) addresses the assignments of error raised by the three petitioners with interests Washington County: 1000 Friends of Oregon, Dave Vanasche, Bob Vanderzanden and Larry Duyck (1000 Friends); Save Helvetia and Robert Bailey (Save Helvetia); and the First Assignment of Error by Carol Chesarek and Cherry Amabisca (Chesarek).

For answer to all other assignments of error presented in this appeal, Washington County adopts the Answering Briefs of all other respondents in this appeal. ORAP 5.77. Appendix 1.

### II. Nature of the Judgment

Respondent Washington County ("County") accepts petitioner 1000 Friends of Oregon's statement of the nature of the judgment.



### **III. Date of Final Order and Timeliness of Appeal**

DLCD issued its Order on August 14, 2012. Petitioners filed timely petitions for review under ORS 197.651(3).

### **IV. Appellate Jurisdiction**

This Court has jurisdiction pursuant to ORS 197.651.

### **V. Questions Presented on Appeal**

Did LCDC apply the proper standard of review to determine whether the County and Metro's reserve designations complied with their obligations under the law?

Did LCDC apply the correct legal standard when it determined that the County and Metro's designations are supported by substantial evidence?

### **VI. Summary of Argument<sup>2</sup>**

LCDC's Order demonstrates that the agency properly reviewed the County and Metro's reserve designations to determine 1) whether the County and Metro considered and applied the rules and 2) whether the County and Metro adopted findings which explain the reasoning supporting the designations. LCDC's standard of review is not a reconsideration or reweighing of evidence to arrive at a particular designation for the areas under

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<sup>1</sup> The County's response brief refers to petitioners collectively unless otherwise indicated.

<sup>2</sup> County adopts the answering briefs of respondents LCDC, Metro, Clackamas County, Multnomah County, and City of Hillsboro, pursuant to ORAP 5.77.

consideration. The record as a whole supports the conclusion that LCDC applied the correct legal standards.

## VII. Statement of Facts

The County accepts the Summary of Facts set forth in the opening brief filed by petitioner 1000 Friends. In addition, the County submits the following additional facts.

In 2009, Metro and the three counties – Clackamas, Multnomah, and Washington – began work to identify suitable candidates for its urban and rural study area, an area that totaled 404,000 acres. R-D(8)(2953)<sup>3</sup>. The work of half a dozen committees, many of them comprised of representatives from Metro, the three county jurisdictions, interest groups, and community members, resulted in initially proposed designations of 28,256 urban and 266,628 rural acres of reserves across the region. R-D(8)(2953, 2988, 2990); JER-317. Of the Foundation Agricultural Lands (FAL) identified in the Washington County study area, approximately 7.4% were designated urban reserves while 92.6% were designated rural reserves. JER-317. Following re-designation, the amount of urban reserves was reduced by an additional 299 acres. JER-92.

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<sup>3</sup> References throughout this brief are as follows: “JER-“ refers to the Joint Excerpt of Record; “SER-“ refers to the Supplemental Excerpt of Record; “R-“ refers to documents contained in the Record. Except for references to the Record, page numbers immediately follow behind the dashed mark. For references to the Record, the “R-“ is followed by the Attachment letter, volume number, and page number(s). R-D(8)(2949-2950) refers to Record Attachment D, volume 8, pages 2949-2950.

## VIII. Statutory Scheme, Legal Standard, and Standard of Review

### A. Statutory Scheme

ORS 195.137 - .145 sets forth the law concerning urban and rural reserves. For purposes of addressing the assignments of error, the relevant administrative rules under consideration are in OAR 660-027-0005 *et seq.*

### B. Legal Standard

The reserve statutes require local governments to strike a balance between urban development and protection of agricultural/forestry industries and natural landscape features. ORS 195.139. The rules implementing the reserves statute identify a myriad of considerations with the overall goal of a balance between the two diametrically opposed sides in a manner 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.” OAR 660-027-0005(2). No single factor is determinative, but the local governments must demonstrate that they considered each factor. *JER-25, 27, 29-30; 1000 Friends of Oregon v. Metro (Ryland Homes)*, 174 Or App 406, 409-410, 26 P.3d 151 (2001) (factors not independent approval criteria); *City of West Linn v. Land Conservation and Development Commission (West Linn)*, 201 Or App 419, 434; 119 P3d 285, (2005).

C. Standard of Review

LCDC's Order may be upheld if this court is satisfied that 1) LCDC identified substantial evidence in the record that demonstrates Washington County and Metro considered and applied the factors and criteria to the lands within the reserves study, adopting findings explaining the reasons behind the designations, and 2) LCDC's acceptance of the local governments' designations is supported by substantial reasoning based on the record as a whole.

**RESPONSES TO ASSIGNMENTS OF ERROR**

I. Response to Petitioner 1000 Friends Assignments of Error<sup>4</sup>

A. First Assignment of Error

Substantial Evidence in the Record Demonstrates that the County and Metro Satisfied the Requirement to Consider the Reserve Factors

Friends' main thrust is directed at the analysis and findings that resulted in urban designation for Foundation Agricultural Land (FAL)<sup>5</sup> in County's reserve study area. Friends highlights the reserves process regarding Area 8A and 8B as an example of overall deficiencies. (Friends at 19, 21, 39, 44). Friends complains about the political nature of the process, the lack of so-called

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<sup>4</sup> This section provides the County's response to assignments of error presented in the brief filed by 1000 Friends of Oregon, David Vanasche, Bob Vanderzanden and Larry Duyck (collectively "Friends").

<sup>5</sup> "Foundation Agricultural Lands" means those lands mapped as Foundation Agricultural Lands in the January 2007 Oregon Department of Agriculture report entitled "Identification and Assessment of the Long-Term Viability of Metro Region Agricultural Lands." OAR 660-027-0010.

qualitative analysis based on the physical characteristics of urban designated FAL, and unfettered discretion to designate land. These issues are not listed as reserve factors so have no direct bearing on whether LCDC's Order is correct.

Friends' only argument of substance is whether the County's reserve designations satisfied the law in terms of substantial evidence demonstrating its treatment of the reserves factors and whether the designations are supported by substantial reasoning. Contrary to Friends' contention, the record is replete with examples of where the County fully considered and applied the factors.

The County presented its reserves analysis in "Urban and Rural Reserves Planning in Washington County", Washington County Reserves Coordinating Committee Urban and Rural Reserves Recommendations submitted to the Reserves Steering Committee, 9/23/09. (R-D(8)(2942-3819). The entire County reserves analysis was distilled into these recommendations. The report is supplemented with 37 maps illustrating the various considerations in the reserves study; Pre-Qualified Concept Plans submitted by eleven cities within the County; and eleven issue papers written by County staff to respond to the complex issues concerning the application of reserves factors. (R-D(8)(2949-2950). The County's response to objections dated August 13, 2010 also provides justifications for its designations. JER-11.

On October 29, 2010, LCDC remanded the County's designation of urban reserves for additional consideration and findings based on its rejection of

Area 7I and remand for additional findings for Area 7B. In response to the remand, additional evidence was submitted to support the County's urban reserve designations in light of specific findings made with regard to Areas 7I and 7B. This evidence consisted of correspondence from Metro identifying portions of the record responsive to objections dated June 24, 2011; this information supplemented the record from the County and Metro's previous submittal. JER-14. These records provide ample evidence of the reasons the County and Metro designated the County's lands as it did. The adopted reserves findings culminated in Washington County Ordinance No. 740 and Metro Ordinance No. 11-1255.

LCDC's record for the initial and subsequent submittals was not only based on County and Metro findings, but also LCDC staff responses to objections dated September 28, 2010 and July 28, 2011. JER-10; JER-13. The record as a whole provides support for LCDC's Order.

The County Fully Complied with the Reserve Rules Requiring  
Consideration of its Factors

OAR 660-027-0040(8) requires the County to apply the OAR 660-027-0050 factors in designating urban reserves. The urban reserves decision required the County to *consider* eight factors.<sup>6</sup> The ultimate decision is not

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<sup>6</sup> 660-027-0050 reads: Urban Reserve Factors: When identifying and selecting lands for designation as urban reserves under this division, Metro *shall base its decision on consideration...* (emphasis added).

based on an unyielding application of the factors, but requires consideration of all the factors. That is the strict construction of the two rules; Friends cannot interject words that are not in the rules. The record is clear that the County's urban and rural reserve recommendations considered all of the factors set forth by OAR 660-027-0050. JER-373-413; JER-877-927; R-D(8)(2952-3819).

By way of history, when the legislature enacted SB 1011, it created a flexible process whereby the County is required to "consider" a list of non-exclusive "factors" in designating urban and rural reserves. ORS 191.141(3); ORS 195.145(5). The applicable rules are OAR 660-027-0050 and 660-027-060. These rules are not mandatory approval criteria requiring findings that each standard must be met as Friends suggests.

The County was not required to apply the factors set out at OAR 660-027-0050 and -0060 in the same manner as OAR 660-027-0005(2), the "best achieves" criterion. The objective of OAR 660-027-0005(2) "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." This balance must be captured by Metro's findings and conclusions pursuant to OAR 660-027-0040(11) when FAL is designated as urban reserve.

