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` CA A152351 **EXPEDITED PROCEEDING UNDER ORS 197.651**

RESPONDENT LAND CONSERVATION AND DEVELOPMENT COMMISSION'S ANSWERING BRIEF

Continued...

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

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RESPONDENT LAND CONSERVATION AND DEVELOPMENT COMMISSION'S ANSWERING BRIEF[1]

STATEMENT OF THE CASE

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

Nature of the Proceeding and Relief Sought

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

Nature of the Judgment

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

Jurisdiction

This court has jurisdiction under ORS 197.651.

---

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

Dates of Order and Petitions for Review

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

Nature of and Jurisdictional Basis for Agency Action

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

Summary of Arguments

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

1.

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

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

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

2.

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

3.

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

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

4.

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

such a concurrent and coordinated process be applied to areas, not individual parcels.

In any event, the challenge is purely procedural. Chesarek and Amabisca only allege in this assignment of error that the analysis did not occur simultaneously. LCDC and this court may not reverse on the grounds of procedural errors unless the substantial rights of a party are affected. Chesarek and Amabisca do not make that showing here.

5.

Chesarek and Amabisca also contend that LCDC erred in approving Metro's projections of the amount of acres needed for urban reserves. But while others raised objections relating to those arguments below, Chesarek and Amabisca did not. Although LUBA has specific statutory authority to review issues raised by one person that were raised by another person below, that statute does not apply to this court. Under well-settled principles of administrative exhaustion and preservation, this court should not review the claim.

In any event, as LCDC noted, the rules do not prescribe any particular method of estimating housing and employment needs over a 50-year period. While Chesarek and Amabisca question Metro's method of accounting for small variables, they did not demonstrate that LCDC erred in concluding that Metro's methods were reasonable.

Supplemental Statement of Facts

The designation of urban and rural reserves is a cooperative process, in which Metro designates urban reserves and the counties in the Portland metropolitan area designate rural reserves. (JER 6; ORS 195.143). The purpose of designating urban and rural reserves is to provide long-term planning for the protection of agricultural and forest land and to provide greater certainty to commerce, industry, and landowners by determining the more and less likely locations of future expansion of an urban growth boundary (UGB). ORS 195.139. Rural reserves are lands reserved to provide long-term protection for agriculture, forestry, or important landscape features that limit urban development. ORS 195.137(1). Urban reserves are lands outside an existing UGB that will provide for future expansion of the UGB and cost-effective provision of public services when included within the UGB. ORS 195.137(2). Urban reserves are planned to accommodate urban growth for 20 to 30 years beyond the 20-year planning period of the existing UGB. ORS 195.145(4).

The Metro Urban and Rural Reserves Submittal before LCDC on periodic review was first submitted to LCDC for acknowledgment in June 2010 (JER 4). The Department of Land Conservation and Development (DLCD) issued a staff report and objectors filed exceptions to the report. (JER 4-5). Following extensive hearings on objections, LCDC approved designation of

urban and rural reserves in Clackamas and Multnomah Counties, but reversed one Washington county urban reserves designation, remanded another, and remanded all of Washington County's rural reserves designations for further findings. (JER 5).

Metro and Washington County revised their designations and Metro submitted the re-designation submittal in May 2011. (JER 5). DLCD issued a staff report and objectors filed further exceptions to the staff report. (JER 5). After further hearings, LCDC approved the submittal and issued the Order that is the subject of this review on August 14, 2012.

ANSWER TO MALETIS'S FIRST ASSIGNMENT OF ERROR

LCDC adopts respondent Metro's answer to this assignment of error.

ANSWER TO MALETIS'S SECOND ASSIGNMENT OF ERROR

OAR 660-027-0060(4), the "safe harbor rule," does not conflict with ORS 195.141(3) as applied to Maletis's property.

Preservation

Maletis's argument is preserved.

Standard of review

On review of a claim that a rule exceeds an agency's statutory authority, this court reviews the rule to determine whether it falls within the range of delegated discretion or, instead, departs from the statutory policy directive.

Meltebeke v. Bureau of Labor and Industries, 322 Or 132, 142, 903 P2d 351 (1995).

ARGUMENT

Maletis challenges the "safe harbor rule," which permits a county to designate as rural reserve certain lands that the Department of Agriculture (ODA) has designated as Foundation or Important Agricultural Lands. Maletis claims that, as applied, the rule impermissibly relieved Clackamas County of its obligation to consider a list of statutory factors in designating rural reserves. (Maletis Br 16). But the rule simply provides that a county may rely on the ODA's consideration of the same factors in deciding whether to designate a rural reserve. The record reflects that that is what occurred here.

A. Statutory Framework

ORS 195.141(3) provides that a local government considering a rural reserve designation "shall base the designation on consideration of factors including but not limited to" a list of enumerated factors, including whether the land:

> (a) Is situated in an area that is otherwise potentially subject to urbanization * * * 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;

> (d) Is suitable to sustain long-term agricultural operations, taking into account:
>
> (A) The existence of a large block of agricultural or other resource land with a concentration or cluster of farms;
>
> (B) 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;
>
> (C) The agricultural land use pattern, including parcelization, tenure and ownership patterns;
>
> (D) The sufficiency of agricultural infrastructure in the area.

ORS 195.141(4), in turn, directs LCDC, after consultation with the DOA, to "adopt by goal or by rule a process and criteria for designating rural reserves" under the statute.

B. The rules implementing the statute

The rules LCDC adopted under ORS 195.141(4) are codified at OAR 660-027-0060(2). That rule contains the same list of factors enumerated in ORS 195.141(2). OAR 660-027-0060(2)(a)-(d). In addition, OAR 660-027-0060(4), known as the "safe harbor rule," provides that a county need not explain how it considered those factors for lands within three miles of a UGB that the ODA has already determined to be Foundation Agricultural Lands or Important Agricultural Lands:

> (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).

OAR 660-027-0010(1) and (2) define Foundation Agricultural Lands and Important Agricultural Lands as those lands mapped as such "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.'" As explained below, the analysis in that report encompasses all of the factors listed in ORS 195.141(3).

C. The rules do not exceed LCDC's authority.

The gist of Maletis's argument is that ORS 195.141(3) mandates that the counties must consider the enumerated factors and that OAR 660-027-0060(4) excuses the counties from that mandate. (Maletis Br 17-19). But as a matter of textual analysis, Maletis's argument fails. The statue requires that the counties "shall base the designation on consideration of factors[.]" ORS 195.141(3). Contrary to Maletis's argument, the statute does not specify *who* must consider the factors, only that the designation be based on a consideration of the factors. Had the legislature intended to require that the consideration only be conducted by the counties or Metro, it could have said that by, for example, providing that only "Metro and the counties shall consider" the factors, rather than that the designation be based on a "consideration" of the factors. It did not do so.

Accordingly, nothing the statute precludes Metro or the counties from adopting the ODA's analysis in which it considered the same factors.

A brief review of OAR 660-027-0060(4) and the ODA report demonstrates that all of the ORS 195.141(3) factors were considered before Clackamas County designated rural reserves under the rule.

1. The "subject to urbanization" factor

ORS 195.141(3)(a), requires consideration of whether lands are "subject to urbanization" given their proximity to the urban growth boundary. LCDC considered that factor in promulgating OAR 660-027-0060(4) by requiring that the "safe harbor" provision only can be applied to lands within three miles of a UGB. As LCDC explained in the Final Order, the three-mile limitation "represents a policy choice by this Commission that such lands are under threat of urbanization." (JER 89). LCDC has broad authority to "adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197." ORS 197.040(1)(b). *See Jones v. Douglas County*, 247 Or App 81, 91, 270 P3d 278 (2011) (so recognizing). In particular, as the order notes, LCDC has broad authority to adopt rules for the protection of farm and forest land. *Lane County v. LCDC*, 325 Or 569, 581, 942 P2d 278 (1997)).

Maletis argues that LCDC's reliance on *Lane County* is misplaced. (Maletis Br 22-23). But *Lane County* is significant here because the court recognized that the legislature has provided LCDC a broad "mandate under

ORS chapter 197 to protect agricultural lands generally, and high value farmland in particular." *Id.* The policy choice that Foundation Agricultural Lands within three miles of an urban growth boundary are "potentially subject to urbanization * * * as indicated by proximity to the urban growth boundary" under ORS 197.040(1)(b) is consistent with LCDC's broad authority to "adopt rules it considers necessary to implement" the statute and its mandate to protect high value farmland. LCDC did not act outside of the broad authority granted to it by the legislature.

2. The agricultural factors

The remaining factors for consideration are all reflected in the ODA report. Specifically, the report sets forth a list of "Analysis Factors" ODA considered in conducting its classification of Foundation and Important Agricultural Lands. (ER 2-8 (ODA Report)).[2] All of the factors listed in ORS 195.141(3) are also included in the ODA's list of factors it considered in making the classifications.

ORS 195.141(3)'s factor (b), requiring consideration of long-term agricultural capability is reflected in the ODA report because its analysis

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[2] Relevant portions of the January 2007 ODA report to Metro titled *Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands* are attached at SER 1-11. The complete report can be found at Record Item 12, Vol 1, pages 57-127.

included the evaluation of the "long-term" viability of lands for agricultural, including an examination of the "capability of any given tract of land to be utilized for farm use." (SER 2). Similarly, factor (c), regarding soils and water, is reflected in the ODA's analysis of the lands' capability for long-term agricultural use that includes a detailed consideration of soil quality and water availability. (SER 2-4).

The ODA also considered factor (d), regarding suitability of the land for long-term agricultural operations. (SER 5-7). Specifically, the ODA considered factor (d)(A), the existence of a large block of agricultural land and farm clusters, within its analysis of agricultural land use patterns, agricultural infrastructure, and existence of concentrations and clusters of farms. (SER 6-7). Factor (d)(B), requiring consideration of adjacent land use patterns and buffers between farm and nonfarm uses is reflected in the ODA consideration of lands' "[l]ocation in relationship to adjacent lands zoned for nonresource development," and the availability of edges and buffers between farm and nonfarm uses. (SER 6). Factor (d)(C), requiring consideration of agricultural land use pattern, was included in ODA's consideration of "agricultural land use patterns," and "parcelization." (SER 6). In addition, factor (d)(D), requiring consideration of sufficiency of agricultural infrastructure is mirrored in the ODA's analysis factor requiring consideration of "agriculture infrastructure." (SER 6).

Finally, as LCDC noted in the Order, the ODA considered the factors in the classification of the French Prairie area as Foundation Agricultural Land, which includes area 4J, where Maletis's property is located. (JER 118-19; SER 9-11).

In sum, ORS 195.141(3) requires that a rural reserves designation include consideration of the factors enumerated in the statute. OAR 660-027-0060(4), in turn, allows counties to base its rural reserves designation on the ODA's consideration of those same factors in its designation of Foundation and Important Agricultural Lands. That is entirely consistent with the ORS 195.141(3) requirement that a county "shall base" a rural reserves designation "on consideration of" the enumerated factors. LCDC did not exceed its statutory authority by promulgating OAR 660-027-0060(4). It follows that the county, by effectively adopting the ODA's analysis under OAR 660-027-0060(4), based its rural reserves designation of the area including Maletis's property on a consideration of the factors as required by ORS 195.141(3).

3. Maletis did not establish that LCDC's reliance on the ODA report was misplaced.

Maletis also contends that LCDC failed to respond to a brief argument in its last objection that the ODA report applied too generalized and "not vetted." But Maletis's argument was perfunctory and did not provide a basis for LCDC

to respond. In any event, as LCDC stated in its order, the rules require applying the factors to broad areas, not individual parcels. The rules do not specify any particular size area to be evaluated. The ODA identified the French Prairie area, which includes the Maletis property, as Foundation Agricultural Land based on a thorough analysis under the rural reserves factors. (SER 9-11). Maletis has not demonstrated that reliance on the report amounted to a failure to apply the rural reserves factors in the manner described in ORS 195.141(3) and OAR 666-027-0060(4). Nor do the rules require that the ODA report needed to be "publicly vetted." Moreover, the application of the rule was publicly vetted through the designation and periodic review process. Maletis could—and did—take advantage of that process.

ANSWER TO MALETIS'S THIRD ASSIGNMENT OF ERROR

LCDC adopts respondent Metro's answer to this assignment of error.

ANSWER TO MALETIS'S FOURTH ASSIGNMENT OF ERROR

LCDC adopts respondent Metro's answer to this assignment of error.

ANSWER TO MALETIS'S FIFTH ASSIGNMENT OF ERROR

LCDC adopts respondent Clackamas County's answer to this assignment of error.

ANSWER TO BARKERS FIVE'S FIRST ASSIGNMENT OF ERROR

LCDC adopts respondent Multnomah County's answer to this assignment of error.

ANSWER TO BARKERS FIVE'S SECOND ASSIGNMENT OF ERROR

Barkers Five's argument is unpreserved. In any event, the "safe harbor" rule is valid.

Preservation

Barkers' Five's challenge to the "safe harbor" rule of OAR 660-027-0060(4) and the ODA report on which it relies is unpreserved. A review of the string of citations Barkers Five cite in their preservation section does not reveal any instances in which Barkers Five made any reference to OAR 660-027-0060(4). Indeed, most of Barkers' Five's citations do not include any reference to the either the rule or the ODA report. In those instances where a part does make the objection, they only challenge the rule and the use of the ODA report as applied to them. For example, Barkers Five's cites include Maletis's objection to the rule as applied to the Maletis property.

Barkers Five admits that the rule was not applied to their property but challenges the rule on the ground that "there is a possibility [p]etitioner's property will be designated on a 'per se' basis." (Barker Five Br 44). Even assuming that one party can raise on review another's objection, one party's challenge to a rule as applied to one particular area cannot be broadened into another party's assignment of error challenging it in an entirely different context. Thus, Barkers Five has failed to demonstrate that its argument is preserved.

Standard of review

The standard of review is the same as for the answer to Maletis's second assignment error, above.

ARGUMENT

Although framed differently than Maletis's second assignment of error, Barkers Five's argument boils down to another challenge to the validity of OAR 660-027-0060(4). (Barkers Five Br 45). Accordingly, LCDC relies on the argument in response to Maletis's Second Assignment of Error, above.

ANSWER TO SPRINGVILLE INVESTORS' FIRST ASSIGNMENT OF ERROR

Petitioner Springville Investors' (Springville) procedural objection to the OAR chapter 660, division 27 rulemaking is not cognizable in this proceeding and is untimely.

Preservation

LCDC agrees with Springville that no preservation requirements apply in a rule challenge brought under ORS 183.400.

Standard of review

This court's review of the facial validity of rules is governed by ORS 183.400, which provides, in part:

> (3) Judicial review of a rule shall be limited to an examination of:
>
> (a) The rule under review;

(b) The statutory provisions authorizing the rule; and

(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.

(4) The court shall declare the rule invalid only if it finds that the rule:

(a) Violates constitutional provisions;

(b) Exceeds the statutory authority of the agency; or

(c) Was adopted without compliance with applicable rulemaking procedures.

ORS 183.400.

ARGUMENT

Springville objects to LCDC's assessment of the fiscal impact of OAR chapter 660, division 27. Springville contends that the assessment failed to comply with statutory procedures and, as a result, this court should declare division 27 invalid in its entirety. (App Br 16). In particular, Springville claims that LCDC failed to adequately assess the economic impact of the division 27 rules as required by ORS 197.040(1)(b).[3] Yet that challenge is not cognizable

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[3] ORS 197.040(1)(b) provides in part:

(1) The Land Conservation and Development Commission shall:

* * * *

(b) In accordance with the provisions of ORS chapter 183, adopt rules that it considers necessary to carry out ORS chapters

Footnote continued...

in this case because the LCDC rulemaking record is not before this court. The challenge is also untimely.

A. Springville's claim that the agency violated rulemaking procedures is not cognizable because the rulemaking record is not before this court.

This court's review of the Order is limited to the LCDC record. ORS 197.651(9)(a). That record does not include the rulemaking record for the division 27 rules. Although this court may hear a rule challenge on this court's review of the LCDC order, without a rulemaking record it is impossible to tell whether LCDC complied with applicable rulemaking requirements. This court thus cannot review Springville's claim that LCDC's assessment of the economic impact of the division 27 rules was insufficient.

(...continued)

> 195, 196 and 197. Except as provided in subsection (3) of this section, in designing its administrative requirements, the commission shall:
>
> * * * *
>
> (C) Assess what economic and property interests will be, or likely to be, affected by the proposed rule;
>
> (D) Assess the likely degree of economic impact on identified property and economic interests; and
>
> (E) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.

A challenge to the validity of a rule may be heard on this court's review of an order in which the challenged rule is implemented. ORS 183.400(2) ("The validity of any applicable rule may also be determined by a court, upon review of an order in any manner provided by law[.]"). When a party argues that a rule exceeds the agency's statutory authority, this court can easily review the rule's validity on a review of an order like LCDC's order here because the record on review in such a challenge consists only of the wording of the rule and the statutory provisions authorizing it. ORS 183.400(3)(a), (b). *See Wolf v. Oregon Lottery Com.*, 344 Or 345, 355, 182 P3d 180 (2008) (so holding).

In this case, however, Springville claims that the division 27 rules are invalid because LCDC failed to assess the economic impact as required by ORS 197.040(b)(C)-(E). (App Br 17-20). That is a procedural challenge. *See Independent Contractors Research Institute v. DAS*, 207 Or App 78, 82-83, 139 P3d 8995, *rev den*, 341 Or 579 (2006) (identifying a rule challenge alleging that agency filed an inadequate economic impact statement as asserting a procedural flaw). In the case of procedural challenges, unlike challenges to rules on the basis that they exceed the agency's statutory authority, the record on review includes not only the text of the rule and the authorizing statute but also "[c]opies of all documents necessary to demonstrate compliance with applicable rulemaking procedures." ORS 183.400(3)(c). *See, e.g., AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 79, 843 P2d 409 (1992) (observing that in

the case of a review of challenges to "the process of adopting a rule" judicial review is not "limited to the face of the rule and the law pertinent to it"). Such records are necessary because, obviously, a court cannot ascertain whether an agency complied with rulemaking procedures unless it can review the documents pertaining to its efforts to do so. *See Smith v. Dep't of Corrections*, 219 Or App 192, 197, 182 P3d 250 (2008) (noting that court assesses procedural validity of rule by considering "copies of documents necessary to ascertain compliance with rulemaking procedures").

That aspect of this court's review of challenges to rules based on claims that the agency violated rulemaking procedures precludes review of such claims in this context. On review of an order like the LCDC order here, the documents necessary to demonstrate compliance (or noncompliance) with the rulemaking procedures are not part of the record. This case illustrates the problem. The record of the alleged procedural defects in LCDC's rulemaking is not part of the record before this court. Springville refers to a "Statement of Need and Fiscal Impact" but does not cite anywhere in the LCDC record on review that such a document exists. (Springville Br 18). Nor does Springville identify any other documents in the LCDC record pertaining to the agency's assessment of division 27's economic impact. Without a rulemaking record to review this court cannot exercise its review function. Springville's claim fails for that reason alone.

B. Springville's procedural challenge is untimely.

This court also cannot decide whether the agency failed to comply with the rulemaking procedures set forth in ORS 197.040(1)(b) because over two years have passed since the division 27 rules were promulgated. ORS 183.400 provides that "[t]he court shall not declare a rule invalid solely because it was adopted without compliance with applicable rulemaking procedures after a period of two years after the date the rule was filed in the Office of the Secretary of State, if the agency attempted to comply with those procedures and its failure to do so did not substantially prejudice the interests of the parties." ORS 183.400(6).

Here, LCDC promulgated the division 27 rules on February 13, 2008, over four years ago. OAR 660-027-0005. Springville does not allege that the two-year limitation of ORS 183.400(6) is inapplicable because the agency did not attempt to comply with the proper rulemaking procedure. Nor does Springville allege that the two-year limitation does not apply because any procedural failure substantially prejudiced its interests. This court therefore cannot declare the division 27 rules invalid. *See Weyerhaeuser v. Employment Division*, 105 Or App 233, 236-37, 804 P2d 1183 (1991) (declining to reach the merits employer's procedural challenge to rule because it was untimely under ORS 183.400(6)). Even if Springville had attempted to argue that the two-year limitation did not apply here, without the rulemaking record to review, this

court cannot determine whether the agency attempted to comply with applicable rulemaking procedures, or whether Springville was prejudiced by any deficiency.

Absent evidence that the two-year limitation of ORS 183.400(6) does not apply, Springville's challenge to the agency's rulemaking procedures does not provide a basis for invalidating the division 27 rules.

ANSWER TO SPRINGVILLE INVESTORS' SECOND ASSIGNMENT OF ERROR

LCDC adopts respondent Metro's answer to this assignment of error.

ANSWER TO SPRINGVILLE INVESTORS' THIRD ASSIGNMENT OF ERROR

LCDC adopts respondent Multnomah County's answer to this assignment of error.

ANSWER TO METROPOLITAN LAND GROUP'S FIRST ASSIGNMENT OF ERROR

Petitioner Metropolitan Land Group's (MLG) first assignment of error is unreviewable because it is unexhausted. In all events, MLG's arguments fail on their merits.

Preservation

As explained below, MLG did not exhaust its arguments.

Standard of review

If exhausted , this court reviews MLG's claims to determine whether LCDC's order is "unlawful in substance or procedure," "unconstitutional," or "not supported by substantial evidence in the whole record as to facts found by the commission." ORS 197.651(10).

ARGUMENT

MLG argues that Metro and the counties misinterpreted the law to allow them too much discretion in their consideration of the urban and rural reserves factors, and that LCDC should not have allowed them to do so. (MLG Br 11). According to MLG, LCDC should have engaged in additional rulemaking to establish approval criteria for designation of urban and rural reserves. (MLG Br 13-15). MLG also contends that LCDC failed to apply its standard of review. MLG admits that it did not raise any of its arguments before LCDC but asks this court to review their arguments as plain error under ORAP 5.45(1). (MLG Br 9-10). But MLG's arguments are unreviewable because they are unexhausted. In any event, the arguments fail on their merits.

A. MLG's arguments are not reviewable because they are unexhausted.

In this context, "[a] party's claim of error by LCDC in its periodic review order * * * is limited to the commission's resolution of objections raised in the periodic review proceedings." *1000 Friends of Oregon v. LCDC (McMinnville)*, 244 Or App 239, 268-69, 259 P3d 1021 (2011). MLG does not

identify an objection that it claims LCDC erroneously resolved. Accordingly, under time-worn principles of exhaustion, MLG's arguments are not reviewable.

ORS 197.633(2) provides that LCDC shall "adopt rules for conducting periodic review, including rules for "citizen participation" in periodic review proceedings including those that involve "[t]he designation of, or withdrawal of territory from, urban reserves or rural reserves." Those rules may include, among other things, "requirements to raise issues before the local government as a precondition to commission review." ORS 197.633(3). Pursuant to that authority, LCDC developed rules that provide that a person who participated in the local process that is the subject of the review may object. OAR 660-025-0140(2). An objection must identify with specificity what issues the objector is raising. OAR 660-025-0140(2). Further, only those who filed valid objections to the local decision may file exceptions and participate in hearings before LCDC. OAR 660-025-0160(5); OAR 660-025-0085(5)(c).[4]

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[4] OAR 660-025-0085(5)(c) provides that participation in commission hearings is limited to local governments and "[p]ersons who filed a valid objection to the local decision in the case of commission hearing on a referral[.]" OAR 660-025-0085(5)(c)(B). OAR 660-025-0160(5), in turn, provides that "[t]he persons specified in OAR 660-025-0085(5)(c) may file written exceptions to the director's report within 10 days of the date the report is mailed."

OAR 660-025-0085(5)(c), providing for the filing of exceptions to the directors report, is particularly significant here. To the extent that MLG argues that LCDC misinterpreted its scope of review, this provision provided MLG an opportunity to do so by excepting to the director's report on that ground, but it did not.[5]

This court should hold that the issues are not exhausted and, thus, not reviewable. It is a "general principle of administrative law that to matters within the jurisdiction of an administrative agency, judicial review is only available after the procedure for relief within the administrative body itself has been followed without success." *Mullenaux v. Dept. of Revenue*, 293 Or 536, 539, 651 P2d 724 (1982) (internal citation omitted). *See also Trujillo v. Pacific Safety Supply*, 336 Or 349, 367-68, 84 P3d 119 (2004) (judicial review of issue is precluded where party seeking review did not timely and properly raise issue before agency in compliance with applicable statutes and rules); *Miles v. City of Florence*, 190 Or App 500, 506-507, 79 P3d 382 (2003) (explaining that to obtain judicial review of issue arising out of agency order, petitioner must "'timely and adequately'" raise issue in administrative process; quoting *Mullenaux*). To hold otherwise would undermine the legislature's mandate that

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[5] Notably, petitioners cities of Tualatin and West Linn, who also challenged LCDC on its scope of review, preserved their objection in their exceptions to the director's report. *See* Cities' Brief at 6.

the periodic review process be conducted in compliance with LCDC rules, and would effectively eviscerate LCDC's rules governing that process. The process would be a meaningless expenditure of resources if a petitioner is permitted to go through a periodic review proceeding, and then raise new issues to the court on judicial review.

B. MLG's arguments fail on their merits.

In all events, MLG's arguments fail on their merits. First, MLG claims that LCDC applied an improperly discretionary standard of review and should have adopted criteria for Metro and the counties to use when making urban and rural reserves designations, as required by statute. Second, MLG claims that LCDC approved an application of the factors inconsistent with its rulemaking history. MLG's arguments fail.

1. LCDC properly applied its standard of review.

MLG contends that LCDC employed an overly discretionary standard of review. According to MLG, LCDC erred by determining that the reserves factors listed in ORS 195.141(3) were not "thresholds" that must be met, rather than considerations that must be applied. (MLG Br 11-12, 15). But as this court has explained, factors applied in the land use context "are not independent approval criteria." *1000 Friends of Oregon v. Metro (Ryland Homes)*, 174 Or App 406, 409, 26 P3d 151 (2001). Nor does a standard of review that does not treat the reserves factors as individual thresholds mean that, as MLG claims, the

local government's decisions are not subject to meaningful review. (App Br 13).

MLG claims that the "logical extension" of LCDC's standard of review "is that Metro and the local governments may 'consider' the factors for a rural reserve designation, determine that none are satisfied, and yet, exercise their 'substantial discretion' to designate an area as rural reserve anyway[.]" (MLG Br 12). But the rules provide that the designation shall be based on a consideration of the factors. Under substantial evidence review, the local government must demonstrate that it considered and weighed the factors, and show how the evidence in the record supported its analysis. As explained below, they also must explain how the designations achieved the "best achieves" standard set forth in the rules' purpose statement. A local government would not be able to demonstrate that a designation was supported by substantial evidence if it determined that none of the rural reserves factors fit an area, yet designated it as rural reserve anyway.

2. Contrary to MLG's assertion, adopted criteria for designating urban and rural reserves.

MLG also contends that LCDC failed to adopt criteria as required by statute. ORS 195.141(4) provides that LCDC "shall, after consultation with State Department of Agriculture, adopt by goal or by rule a process and criteria for designating rural reserves." Similarly, ORS 195.145(7) provides that LCDC

"shall adopt by goal or by rule a process and criteria for designating urban reserves[.]" But that argument fails for the simple reason that LCDC *did* adopt criteria.

As MLG notes, criteria that an agency is bound to apply are different than factors that must be given consideration. (MLG Br 14). Here, LCDC adopted rules establishing factors that Metro or the counties must consider in designating urban and rural reserves. *See* OAR 660-027-0050; OAR 660-027-0060. LCDC also adopted criteria that must be satisfied. Examples of such criteria abound throughout the division 27 rules. For instance, OAR 660-027-0040(2) provides that urban reserves "shall be planned to accommodate" population and employment growth for at least 20 years; OAR 660-027-0040(1) provides that Metro and the counties may not designate urban or rural reserves until they have entered into an agreement that identifies the lands to be designated as urban or rural reserves; and OAR 660-027-0040(4) requires that rural reserves not be included within the urban growth boundary during the planning period.

More broadly, LCDC also included the overall objective of the division 27 rules as an additional criterion that must be met. OAR 660-027-0005(2) provides that "[t]he objective of this division is a balance of in the designation of urban and rural reserves that, in its entirety, best achieves livable communities, the viability of and vitality of the agricultural and forest industries

and protection of the important natural landscape features that define the region for its residents." In turn, under OAR 660-027-0040(10), Metro and the counties must demonstrate that the urban and rural designations meet the "best achieves" objective, by explaining "how those designation achieve the objective stated in OAR 660-027-0005(2)."

MLG either ignores such examples or presumes that they do not count. Instead, MLG appears to contend that the statutory mandate to establish criteria as requires the adoption of specific approval criteria. That is, according to MLG, LCDC was required to adopt specific criteria to apply to each area's characteristics that would determine whether each area qualifies as urban or rural reserve. (App Br 13). But the statutes do not say or suggest that. Instead, the statutes require LCDC to adopt "a process and criteria for designating" urban or rural reserves. ORS 195.141(4); ORS 195.145(7). As the above examples demonstrate, LCDC has done exactly that.

Nor would the statutory scheme make any sense if the statutes were interpreted as MLG suggests. The legislature set forth detailed lists of factors for Metro and the counties to consider in designating urban and rural reserves. ORS 195.141(3); ORS 195.145(5). If the legislature also meant LCDC to establish characteristic-specific criteria that must be met with regard to each area, then those criteria—which unlike factors, must be satisfied—would render the factors analysis superfluous. Such rules would directly conflict with the

mandate of ORS 195.141(3) and ORS 195.145(5), which require that the counties and Metro "shall base the designation" of reserves "on consideration of" a list of factors.

3. LCDC applied the factors in a manner consistent with its rulemaking history.

MLG also argues, alternatively, that even if LCDC is correct that the factors are not approval criteria, LCDC failed to apply its interpretation of the requirement that the urban and rural reserves factors be considered. LCDC interpreted the requirement to mean that when applying the factors Metro and the counties must consider and balance them. (JER 27-28). MLG contends that LCDC articulated that standard but then failed to evaluate whether Metro and Multnomah County had complied with it with regard to Area 9B, in which MLG's property sits. (MLG Br 16-18). But MLG reads the Order far too narrowly.

As an initial matter, MLG appears to believe that every time LCDC uses the phrase "considered the factors," it necessarily omitted an evaluation of whether the local government considered and balanced the factors. (MLG Br 17-18). But "considered" is the statutory term, which LCDC has interpreted to require a consideration and balancing of the factors. In context, it is readily apparent that when LCDC determines that Metro or the county has

"considered" the factors it has determined that they have "considered and balanced" them as required.

Here, LCDC concluded that with regard to Area 9B, the county "considered" the factors and "explained why the area should be rural reserve using the factors listed in the statute and rules, and relied on evidence in the record that a reasonable person would rely upon to decide as the county did." (JER 122). LCDC also noted that the county had explained "why the area is not apt for urban reserve designation due primarily to efficient use of infrastructure and efficient and cost-effective provision of services." (JER 122). Further, LCDC cited with approval the county's findings in which the county exhaustively explained how the area faired under both urban and rural reserves factors. (JER 122, citing Mult Cty Ordinance 11-1255 at 46-47, available at JER 467-68). The findings further explain, with reference to both sets of factors, why the area was chosen as rural reserve rather than urban reserve. (JER 468). In other words, LCDC reasonably concluded that the county, in its application of the factors, considered and balanced them in designating Area 9B as rural reserve. LCDC properly articulated and applied its standard of review.

ANSWER TO METROPOLITAN LAND GROUP'S SECOND ASSIGNMENT OF ERROR

LCDC adopts respondents Metro and Multnomah County's answers to this assignment of error.

ANSWER TO METROPOLITAN LAND GROUP'S THIRD ASSIGNMENT OF ERROR

LCDC adopts respondent Metro's answer to this assignment of error.

ANSWER TO METROPOLITAN LAND GROUP'S FOURTH ASSIGNMENT OF ERROR

LCDC adopts respondent Clackamas County's answer to this assignment of error.

ANSWER TO CHESAREK'S FIRST ASSIGNMENT OF ERROR

LCDC adopts respondent Washington County's answer to this assignment of error.

ANSWER TO CHESAREK'S SECOND ASSIGNMENT OF ERROR

LCDC reasonably concluded that OAR 660-027-0040(10) did not require simultaneous consideration of urban and rural reserves factors with regard the Peterkort property.

Preservation

Rather than set out the portions of the record where a challenged ruling was made and LCDC's response to it, as required by ORAP 5.45(4), Chesarek and Amabisca (Chesarek) provide a string of cites to large blocks of the record. (Chesarek Br 32). This court can affirm for that reason alone. ORAP 5.45(4)(c). That said, counsel has combed the record and has determined that Chesarek's argument is preserved. In an objection letter dated October 8, 2010, Chesarek raises the issue that is the subject of this assignment of error. (Rec

Item 18 at 79-80). LCDC response to Chesarek's objection is set forth in the Order at JER 147-50.

Standard of review

A decision to designate urban or rural reserve is subject to review by LCDC "in the manner provided for review of a work task under ORS 197.633." ORS 197.626(1). Under ORS 197.633, LCDC's standard of review:

> (a) For evidentiary issues, is whether there is substantial evidence in the record as a whole to support the local government's decision.
>
> (b) For procedural issues, is whether the local government failed to follow the procedures applicable to the matter before the local government in a manner that prejudiced the substantial rights of a party to the proceeding.
>
> (c) For issues concerning compliance with applicable laws, is whether the local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations. * * * For purposes of this paragraph, "complies" has the meaning given the term "compliance" in the phrase "compliance with the goals" in ORS 197.747.

Substantial evidence is "the evidence that, after reviewing the whole record, a reasonable person would find adequate to support a finding." *City of West Linn v. LCDC*, 201 Or App 419, 431, 119 P3d 285 (2005). On review of LCDC's Order, the Court of Appeals may affirm, reverse or remand if the Order is:

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

ORS 197.651(10).

Further, the court shall limit its review to the record and may not substitute its judgment for that of LCDC as to an issue of fact. ORS 197.651(9). The court's role "is to determine whether [LCDC] applied the correct legal test in deciding whether Metro's decision is supported by substantial evidence." *West Linn*, 201 Or App at 429, *citing Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 21, 38 P3d 956, 961 (2002). 431.

ARGUMENT

Chesarek contends that LCDC erred by approving the designation of the Peterkort property a urban reserve. Specifically, she argues that OAR 660-027-0040(10) requires that for property that qualifies as both urban and rural reserve, the urban and rural reserve factors must be applied "concurrently and in coordination with each other" to lands that qualify as both urban and rural reserve. (Chesarek Br 32). According to Chesarek, because the counties and Metro failed to do that with regard to the Peterkort property, LCDC erred by

approving the designation of the property as urban reserve. But Chesarek misreads the rule.

OAR 660-027-0040(10) provides, in part: "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." That does not mean that, as Chesarek contends, each set of factors must be applied simultaneously to property that qualifies as both. Chesarek appears to conclude that the phrase "one another" refers to each set of factors, when instead that phrase refers to Metro and a county. In other words, the rule is only saying that *the process*, writ large, of designating lands must involve a concurrent coordination between Metro and the counties.

Even if a particular area's performance under each urban and rural reserve factor must be considered simultaneously as Chesarek contends, that does not mean that an individual *property*'s characteristics must be considered in that fashion. The Peterkort property is a 129-acre parcel within a much larger area—area 8C—designated as urban reserve. (JER 147). The entire statutory and regulatory scheme addresses the designation of particular areas, not individual parcels. For example, the sentence in OAR 660-027-0040(10) that immediately follows the disputed sentence reads: "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[.]" As LCDC stated in its response to Chesarek's objection:

> There is no indication in the text or context of the rule that the Commission intended to require that both urban and rural reserves factors be considered simultaneously for each individual property. Metro and Washington County have provided findings addressing the eight factors under OAR 660-027-0050.

(JER 149).

Chesarek concedes that the rules refer to areas, not specific parcels, but argues that the Peterkort property is different. According to Chesarek, because the property has a series of unique characteristics Metro and Washington County should have considered and balanced the urban and rural reserves factors together with regard. (Chesarek Br 35-36).[6] She does not cite any statute or rule to support that argument. LCDC reasonably concluded that Metro and the county properly considered the urban and rural reserves factors with regard to the area. LCDC's did not err.

Finally, assuming for the sake of argument that Chesarek's interpretation of the rule is correct and that LCDC erroneously concluded that Metro and the

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[6] Chesarek also repeatedly refers to Peterkort family's offer to donate a right-of-way and a sewer line on the property if the county would designate the property urban reserve. But LCDC's review was limited to reviewing whether the factors were applied and whether Metro and the counties findings were supported by substantial evidence. And this court's review is focused on whether LCDC applied the correct legal test.

county had complied with OAR 660-027-0040(10), any error was purely procedural. That is, Chesarek does not point to any error in the actual analysis of the factors with regard to the designation of the property, or that the designation was not supported by substantial evidence. Rather, she only contends that the application of the factors did not occur in a "concurrent and coordinated" fashion. Neither LCDC nor this court may reverse on the basis of a procedural error "unless the substantial rights of the petitioner were prejudiced." ORS 197.333(3)(b); ORS 197.651(10)(a). Chesarek has not made that showing here.

ANSWER TO CHESAREK'S THIRD ASSIGNMENT OF ERROR

Chesarek did not preserve her claim that LCDC's order approves an amount of land for urban reserves that exceeds the statutory 30-year limit. In any event, LCDC reasonably concluded that Metro's calculations were reasonable.

Preservation

To demonstrate that her third assignment of error is preserved, Chesarek includes a footnote that cites various portions of the record. (Chesarek Br 37). Review of those citations reveals that somewhat similar arguments were made before LCDC, but not by Chesarek. Chesarek apparently presumes that an objection made by one party serves to preserve the objection for anyone else.

But it is a well-settled principle of appellate law that a party must at least join in an objection to raise the issue on appeal.

Moreover, Chesarek's failure to raise the objection to LCDC means that she failed to exhaust her claim. As discussed in the answer to MLG's second assignment of error, above, a person can only pursue judicial review after exhausting his or her administrative remedies. *Mullenaux*, 293 Or at 539. Here, the administrative procedures require that only those who filed valid objections to the local decision may file exceptions before LCDC. OAR 660-025; OAR 660-025-0085(5)(c). And at the hearing before LCDC, those objectors may only address issues that they raised in their objections. OAR 660-025-0085(5)(f). The rules thus make clear that the objection follows the objector. To now allow anyone to raise anyone else's objections would make the rules governing the administrative process effectively meaningless.

Finally, LCDC is aware that a statute allows a petitioner at LUBA to "not have personally raised the issue below to preserve his or her right to raise the issue in an appeal at LUBA, as long as someone adequately raises the issue." *Wasserburg v. City of Dunes City*, 52 Or LUBA 70, 84 (2006). The relevant statute provides that issues before LUBA "shall be limited to those raised by *any* participant before the local hearings body[.]" ORS 197.835(3) (emphasis added). Needless to say, that statute does not apply to this court's review of LCDC orders in periodic review proceedings. In the absence of such statutory

authority, fundamental principles of preservation and administrative exhaustion hold sway. Chesarek's third assignment of error is unpreserved and unexhausted.

Standard of review

The standard of review is the same as for LCDC's response to Chesarek's second assignment of error, above.

ARGUMENT

Chesarek contends that LCDC erred in concluding that Metro's analysis of the needed landed supply is supported by substantial evidence. First, Chesarek contends that Metro underestimated the capacity of the existing UGB. Second, she contends that Metro improperly built in an unneeded "vacancy factor" into its calculation of land needs. Nothing, however, suggests that Metro's analysis was unreasonable; LCDC did not err in approving it.

A. LCDC did not err in concluding that Metro's estimation of the capacity of the existing UGB was reasonable.

The rules require that "[u]rban reserves designated under this section 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[.]" OAR-660-027-0040. *See also* ORS 195.145(4). Consistent with that requirement, Metro based its

urban reserves planning period on the current 20-year UGB planning period from 2010-2030, as analyzed in the urban growth report (UGR), and then designated another 30 years of urban reserves to provide for future urban expansion and development from 2030-2060. (JER 30-31). Chesarek contends that Metro improperly discounted some of the maximum zoned capacity in the existing UGB, and thus overestimated the amount of land need for the 30-year period beyond the 20-year supply of the existing UGB. (Chesarek Br 38).

Although not entirely clear, it appears that Chesarek is arguing that Metro's analysis violates ORS 197.296 and Goals 14, 11 and 9 (Chesarek Br 39), and that LCDC misconstrued the law by rejecting Chesarek's arguments below. First, as noted above, Chesarek did not raise any of these arguments below. Two of the arguments were raised below, but by different parties. As explained in the LCDC order, 1000 Friends and the City of Wilsonville argued that Metro's projections "do not meet the requirements of ORS 197.296 and Goal 14." (JER 66). Because no party argued for the applicability of Goal 11 and Goal 9, those claims were not preserved by anyone.

Regarding ORS 197.296 and Goal 14, LCDC explained that those requirements do not apply to the reserve designations:

> However, the objectors have not established how those authorities apply to the urban reserves submittal, and the Commission finds that, by their terms, they do not. The need factors of Goal 14, and the requirements of ORS 197.296 relate to urban growth boundaries, not to urban reserve designations. Further, even if

> those requirements were applicable, Metro's use of current zoned capacity is consistent with ORS 197.296 and this Commission's Goal 14 rules, which require communities to first use current zoned capacity in determining what proportion of future projected land needs can be met within the existing UGB (looking to up zoning as a possible efficiency measure once current capacity is determined). There is no legal inconsistency between Metro's projections and ORS 197.296 or Goal 14.

(JER 66).

Chesarek does not mention LCDC's analysis, or otherwise attempt to explain why it is flawed regarding the non-applicability of ORS 197.296 and Goal 14 to this proceeding. Instead, Chesarek's third assignment of error merely restates the argument that was raised below by 1000 Friends of Oregon and rejected by LCDC. In the absence of some explanation from Chesarek identifying error in LCDC's analysis, there is no basis for this court to reverse or remand the order on these issues.

Specifically regarding Metro's projections in the UGR about development of zoned capacity within the existing UGB in the next 20 years, LCDC concluded:

> 1000 Friends specifically argues that Metro should rely on full zoned capacity, with no projected underbuild, because the cities all have acknowledged public facilities plans. Metro's findings explain that it did not project higher density because it had not yet adopted measures to increase the capacity of the current UGB. * * * 1000 Friends' preference that Metro *should* have employed different assumptions does not establish that Metro's projections are either inconsistent with OAR 660-027-0040 or unsupported by substantial evidence.

(JER 66) (emphasis in original). Again, Chesarek does not challenge LCDC's analysis rejecting 1000 Friends' claims, but merely provides a conclusory statement that "no legal basis exists to conclude the plans are not valid." (Chesarek Br 39). Chesarek fails to identity where in the Order LCDC failed in its review of Metro's decision, and does not contend that LCDC's order is inconsistent with the division 27 reserve rules in any way.

B. LCDC did not err in concluding that Metro's inclusion of a vacancy factor was reasonable.

Chesarek contends that by including a vacancy factor in its calculation of land need to accommodate vacancy, Metro "effectively extended the urban reserve period beyond 30 years." (Chesarek Br 40). But as LCDC explained, the use of a vacancy factor recognizes the reality that "land markets require some level of vacancy to function." (JER 63). Further, as Chesarek notes, Metro explained that the vacancy factor "is the percent of dwelling units that need to be vacant at any given moment to allow people to move from residence to residence." (Record Attachment A, Vol 2 at 715).

Chesarek challenges the use of a vacancy factor on several grounds but none of her arguments amount to anything more than disagreements with Metro's reasons for including it in its calculations. She does not establish that Metro's reliance on the vacancy factor was unreasonable. For example, she contends that use of the vacancy factor does not solve the problem it is designed

to address because it only serves to add more land, not housing units. But the calculation of how much land to add as urban reserves is calculated based on how much housing will be needed. Simply put, for purposes of calculating future land needs, housing needs equal land needs.

In addition, Chesarek argues that the use of a vacancy factor is analogous to the Woodburn's use of "market choice" that this court rejected in *1000 Friends of Oregon v. LCDC (Woodburn)*, 237 Or App 213, 225, 226, 239 P3d 272 (2010). But Chesarek reads *Woodburn* too broadly. There, the court dismissed LCDC's reliance on the term "market choice" as a basis for approval because the term was "infinitely pliable and elastic," such that a local government could designate hundreds of acres for inclusion in its UGB on the ground that wanted to "provide optimally attractive 'market choice,'" 237 Or App at 226. That is not analogous to Metro's use of the vacancy factor here. Providing for "market choice" allows for businesses to choose among sites available in the market. By contrast, providing for a vacancy factor is designed to ensure that there at least some units available. Metro also explained the basis for the vacancy factor and the small percentage of land needed to account for it. The term thus was not "infinitely pliable and elastic" and without any reasoning to support it.

Finally, a little perspective is in order. The projection of land needs 50 years in the future is not a precise exercise. Metro calculated a "dwelling unit

demand" range from 405,400 units to 531,600 units. (Record Attachment A, Vol 2 at 599). The precise formulas used to adjust for various small factors within that range are always going to be subject to debate. In the UGB expansion context, OAR 660-024-0040, provides that 20-year land need determinations "are estimates which * * * should not be held to an unreasonably high level of precision." Here, the land need determination is necessarily going to be even less precise because the determinations are based on projections for 50 years rather than 20 years. As LCDC noted, neither OAR-660-027-0040 nor ORS 195.145(4) prescribe "any particular method for estimating housing and employment needs over a fifty-year period." (JER 66). LCDC appropriately found that Metro's planning projections and assumptions were reasonable and consistent with the rules and statutes.

ANSWER TO 1000 FRIENDS OF OREGON'S FIRST ASSIGNMENT OF ERROR

LCDC adopts the answers to this assignment of error by respondents City of Hillsboro, Metro, and Washington County.

ANSWER TO 1000 FRIENDS OF OREGON'S SECOND ASSIGNMENT OF ERROR

LCDC adopts the answers to this assignment of error by respondents City of Hillsboro and Washington County.

ANSWER TO SAVE HELVETIA'S FIRST ASSIGNMENT OF ERROR

LCDC adopts the answers to this assignment of error by respondents City of Hillsboro, Metro, and Washington County.

ANSWER TO SAVE HELVETIA'S SECOND ASSIGNMENT OF ERROR

LCDC adopts the answers to this assignment of error by respondents City of Hillsboro, Metro, and Washington County.

ANSWER TO GRASER-LINDSEY'S FIRST ASSIGNMENT OF ERROR

LCDC adopts respondent Clackamas County's answer to this assignment of error.

ANSWER TO GRASER-LINDSEY'S SECOND ASSIGNMENT OF ERROR

LCDC adopts respondent Clackamas County's answer to this assignment of error.

ANSWER TO FIRST ASSIGNMENT OF ERROR OF CITIES OF TUALITIN AND WEST LINN

LCDC adopts the answers to this assignment of error by Metro and Clackamas County.

ANSWER TO SECOND ASSIGNMENT OF ERROR OF CITIES OF TUALITIN AND WEST LINN

LCDC adopts the answers to this assignment of error by respondents Clackamas County and Metro.

CONCLUSION

LCDC's Order should be affirmed.

Respectfully submitted,

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SUPPLEMENTAL EXCERPT OF RECORD

SUPPLEMENTAL EXCERPT OF RECORD

Pursuant to ORAP 5.50, respondent submits the following, as indexed below.

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Document	SER #
ODA Report	1-11

Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands

January 2007

Submitted to METRO
by the
Oregon Department of Agriculture
Katy Coba, Director

Oregon Department of Agriculture

Agricultural Subregions of the Northern Willamette Valley

1. East of Sandy River
2. Clackanomah
3. Eagle Creek
4. Springwater Ridge
5. Clackamas Heights
6. Southeast Clackamas
7. East Canby
8. Clackamas Prairies
9. French Prairie
10. Stafford Triangle
11. East Wilsonville
12. West Wilsonville
13. Parrett Mountain
14. Newberg Flats
15. Chehalem Mountain
16. Tualatin Valley
17. Dairy/McKay Creeks
18. Bethany/West Multnomah
19. Sauvie Island
20. Scappoose Flats

Analysis of each of these subregions involved field investigation, consultation with local planning agencies, soil and water conservation districts and farmers, and review of technical data from Metro and ODA geographic information systems. Data fields included:

Soils
Topography (slope and aspect)
Zoning
Existing land use and vegetation inventory
Parcelization and ownership
Water rights, irrigation districts, ground water restricted areas
Existing land use (aerial photography)

Analysis factors

The assessment provided in this report is best described as an analysis of the site and the situation of a subject area. Analysis of site and situation is best understood as an examination of both the capability (ability of the land to produce an agricultural product) and the suitability (ability to conduct viable farm use) of any given tract of land to be utilized for farm use. The key factors employed to identify significant and intact agricultural lands are discussed below.

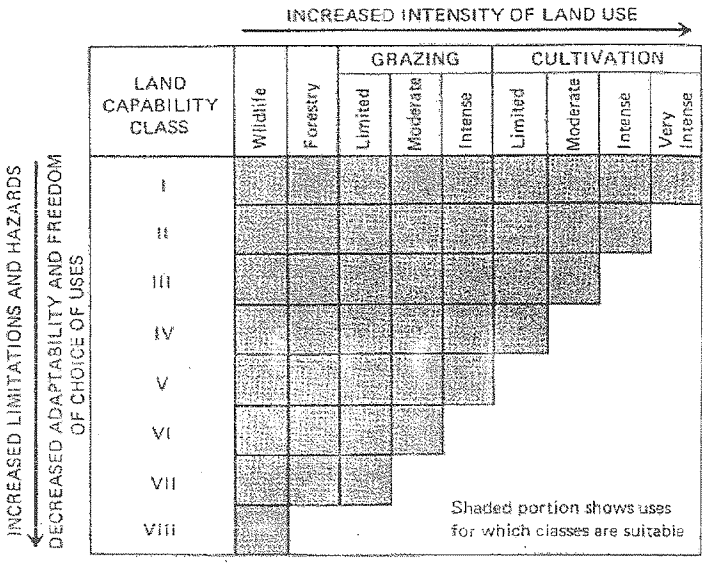
Capability factors

The physical ability of land to produce an agricultural product is a key and dominant factor in any assessment. Quantity and quality of soils and water play a significant role in the viability of agricultural production.

- Soils: USDA NRCS agricultural capability class and importance (prime, unique, important farmlands). Overall, soils are a major asset for Metro agriculture. Because soils play a key role in this analysis and Oregon land use issues, a more detailed discussion is provided below.

Soils surveys are based on all the characteristics of soils, including climate, that influence their use and management. Interpretations are provided within soil surveys for various land uses, including agriculture. Among these interpretations is the grouping of soils into agricultural capability classes. This classification system places soils in eight capability classes. The better the agricultural capability (decreasing from I-VIII), the less management (input) is required by the operator to produce a crop. Soil quality is also a key to the production options available to a grower.

The soils in the first four classes (I-IV), under typical/good management practices, are considered arable and are capable of producing adapted plants and common cultivated field crops and pasture plants. Some soils in classes V-VII are capable of producing specialized crops and even field and vegetable crops under special management.



Soils can also be designated as prime, unique, or high-value farmland:

Prime Farmland is land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber and oilseed crops. It must be available for these uses. It has the soil quality, growing season, and moisture supply needed to produce economically sustained high yields of crops when treated and managed according to acceptable farming methods, including water management. In general, prime farmlands have an adequate and dependable water supply from precipitation or irrigation, a favorable temperature and growing season, acceptable acidity or alkalinity, acceptable salt and sodium content, and few or no rocks. They are permeable to water and air. Prime farmlands are not exclusively erodible or saturated with water for a long period of time, and they either do not flood frequently or are protected from flooding.

Unique farmland is land other than prime farmland that is used for the production of specific high value food and fiber crops. It has the special combination of soil quality, location, growing season and moisture supply needed to produce economically sustained high quality and/or high yields of a specific crop when treated and managed according to acceptable farming methods. Some examples of crops are tree nuts, cranberries, wine grapes, and tree fruits.[6]

High Value Farmland is defined in ORS 215.710(1), (3) and (4) and OAR 660-033-0020(8)(a), (c), (d) and (e). "High Value Farmland" is land in a tract composed predominantly (50.1%) of certain specified soils commonly referred to as "High Value Farmland Soils." These soils (alone or in combination) are the following:

1. Those soils classified by the Natural Resource Conservation Service (NRCS) as:
    a. Prime, Unique, Capability Class 1 or Capability Class 2 not irrigated; or
    b. Prime, Unique, Capability Class 1 or Capability Class 2 if irrigated; and

2. Certain specifically listed Capability Class 3 and 4 soils for the:
    a. Willamette Valley; and
    b. Oregon Coast west of the summit of the Coast Range if used in conjunction with a dairy operation on January 1, 1993; and

High-value farmland also includes other lands planted in specified perennials based on the 1993 Farm Service Agency air photos.

- Water: Availability of water for irrigation of agricultural crops and livestock watering. Water is key to the production of many high-value crops. However, many crops, including high-value crops, can be produced using dryland agricultural practices. Dryland production is most feasible where precipitation is adequate to allow economic return on a nonirrigated crop. New technologies in delivery and storage can compensate for limited availability.

  Water availability is both an asset and a threat to regional agricultural. Current availability is overall good throughout the region. Expansion in some areas, especially where groundwater is the major source, is severely limited by ground water limitations. Such limitations do not impair the use of existing water rights. It is especially important to recognize existing agricultural irrigation in groundwater restricteds areas because new irrigation rights currently are difficult to obtain. The development of valid Measure 37 claims may compromise the availability of ground water to existing water rights.

[6] Soil Survey Manual, USDA Handbook No. 18, issued October 1993, USDA Soil Survey Division Staff.

Metro Region Water Restrictions

Chehalem Mountain Ground Water Limited Area:
Classified for exempt uses, irrigation and rural residential fire protection systems only. New permits may be issued for a period not exceeding five (5) years, for fire protection and for drip or equally efficient systems only if it is determined that the proposed use and amount would not pose a threat to the groundwater resource or existing permit holders. The amount of water permitted for irrigation is limited to one acre-foot (v. 2.5) per acre per year. Permits may be extended for additional five-year periods.

Parrett Mountain Ground Water Limited Area:
Ground water from the basalt aquifers in this area is classified for exempt users only.

Sherwood-Dammasch-Wilsonville Ground Water Limited Area:
Ground water from the basalt aquifers in this area is classified for exempt users only.

Damascus Ground Water Limited Area:
Ground water from the basalt aquifers in this area is classified for exempt users only.

Sandy-Boring Ground Water Limited Area:
Ground water from the shallow Troutdale aquifer and the specially designated portion of the deep Troutdale aquifer is classified for exempt uses only.

Cooper Mountain – Bull Mountain Critical Ground Water Area:
Limited to exempt uses only on parcels 10 acres or greater in size.

Ground water-surface water hydraulic connection:
Ground water within unconfined alluvium within 1/4 mile of the banks of a stream or surface water source is presumed to be in hydraulic connection within the surface water source and shall be classified the same as the surface source.[7]

Suitability factors

Most of the suitability factors can be related to the position of farming operations as part of a large block of agricultural land or other resource lands. Protecting and maintaining large blocks of agricultural land is key to maintaining the integrity of working lands. Integrity involves many issues including the ability to operate with limited conflicts,

[7] The Oregon Department of Water Resources should be contacted for more detailed information about water restrictions.

curtail speculative land values and maintain a critical mass of land sufficient to leverage the infrastructure needs of the industry.

- Land use pattern: Adjacent and area land use pattern (nonfarm uses, exception areas). Includes analysis of edges that provide workable buffers between agricultural lands and nonfarm uses.

- Agricultural land use pattern within the subject agricultural area: The types of crops grown and the ability of farming operations/practices associated with the producing these crops to co-exist with other land uses in the area can be an important factor.

- Parcelization (number and size), tenure and ownership pattern: In analyzing suitability, parcelization is important, but not always as a stand-alone factor. All other factors being equal, smaller parcels under multiple ownerships are less favorable for long-term commercial farm use. The practice of renting or leasing smaller (and larger) parcels is very common in the region and needs to be taken into account. Long term, if the smaller parcels are protected for farm use, they frequently become available for rent, lease or acquisition for farm use, especially if they do not contain dwellings. See discussion of trends in agriculture below.

- Agriculture infrastructure: Elements such as transportation, irrigation delivery, labor availability, processing and other service needs, agricultural special districts, drainage facilities, etc., can be important factors in the long-term viability of an area. It is important to note that, unlike the infrastructure needs for new urban development, the agricultural infrastructure is in most cases already in place and has been and is being maintained and updated on an ongoing basis.

- Zoning, within subject agricultural area: Many lands currently employed in farm use within the Metro region are not zoned for exclusive farm use. The long-term suitability of such areas is impacted by the nonfarm uses that may be permitted and by the ability to further partition or subdivide the area.

- Location in relationship to adjacent lands zoned for nonresource development:
  - The number, size and length of edges with urban and other nonfarm development impact the efficiency and effectiveness of agricultural practices and can impact land values.
  - The scale, shape and size of protrusions of nonresource lands into agricultural lands also impact efficient and effective agricultural operations.
  - Certain nonfarm uses are more compatible with agricultural operations than others.
  - The ability to further partition or subdivide.

- Location/availability of edges and buffers that help insulate and protect agricultural operations from nearby nonfarm use.

Other factors

- Concentration/clusters of farms:
  - The dependence between farms: ability for sharing of labor, housing, equipment and other needed services can be critical to the bottom line.
  - The ability to leverage agriculture's infrastructure needs by maintaining economies of scale.
  - A cluster of farms can also have marketing value. Customers like to make one trip to obtain berries, fruits, vegetables and other products in one area. Agri-tourism can also benefit from clusters. Examples include winery tours, marketing by the Tri County Farm Fresh Food Guide, and the Hood River Valley "Fruit Loop."

- **Trends** in regional agriculture create different needs, opportunities and abilities for the industry. Consumer trends are increasingly dynamic and segmented, creating new markets; markets that are rapidly changing and demanding more specialty products. Specifically:
  - Global trade opportunities and concerns.
  - Demand for organic, sustainable, high quality foods both in the home and at restaurants.
  - Farmers markets, direct marketing opportunities, development of specialty and niche crops.
  - "Agri-tourism".
  - Increasing demand for biofuels/energy development. Agricultural practices associated with the production of commodities used in the production of biofuels tend to be more extensive in nature, usually do not require irrigation and tend to require the use of larger machinery.
  - Growing recognition of food security issues and demand for products from the local food shed.
  - Federal Farm Bill. New conservation incentives and other programs related to renewable energy and farmland protection could help region farms cope.
  - Measure 37: We have opted to not attempt to base much on analysis on the potential impacts from Measure 37 claims because there is so much uncertainty as to how much development will actually result from claims determined to be valid. Having said this, review of the data currently available from Portland State University does show a great deal of the Measure 37 claims in the region to be located within high-value, exclusive farm use-zoned agricultural lands.

Location within and near a major metropolitan region can be a major asset in light of the trends outlined above. Many of the intensive, high-value, niche and specialty crops in increasing demand can be produced under circumstances not otherwise conducive to more recognized agricultural production in the region.

Analysis and Conclusions

The department would emphasize that it found little land currently zoned for agricultural use that it considers to be miszoned. Local governments have done an excellent job identifying and providing protection for the region's agricultural lands.

The inventory and analysis did identify varying intensities, scale and suitability situations within the regions agricultural lands. That led to the development of an agricultural lands hierarchy that recognizes three levels of agricultural lands found in the region. These are:

Foundation Agricultural Lands are agricultural lands that provide the core support to the regions agricultural base. These lands anchor the region's larger agricultural base. They incubate and support the larger agricultural industry and are vital to its long-term viability. They have the attributes necessary to sustain current agricultural operations and to adapt to changing technologies and consumer demands.

Important Agricultural Lands are agricultural lands that are suited to agricultural production and contribute to or have the capacity to contribute to the commercial agricultural economy. These lands maintain the ability to remain viable over the long-term. They have the potential to be Foundation Agricultural Lands, but tend to be not utilized to their full potential. Trends in regional agricultural could lead to a greater development of the agricultural capacity of these areas.

Conflicted Agricultural Lands are agricultural lands whose agricultural capability (soils/water) is more times than not considered excellent but whose suitability is questionable primarily due to questions of integrity and ability to operate. These questions lead to issues of long-term viability. These lands are influenced by factors that diminish long-term certainty, which in turn tends to limit investment in agricultural operations by area farmers. These lands could become Important Agricultural Lands with changes in circumstances and trends in the industry. There may be individual or multiple operations within these areas that are conducting efficient, effective and viable operations.

A list and map of subregions/areas within each category is found below. A detailed discussion and analysis of each subregion follows. It is important to review the detailed discussion for each subregion. Many times the discussion includes important conditions that need to be implemented or that affect the final conclusion at which level a subregion or area has been categorized.

developed providing excellent access to area agricultural operations. There are some issues with moving farm machinery on the heavier traveled main routes. This generally is not a major limitation.

Conclusion

This subregion contains some of the best soils within the entire region and operates as a part of the larger prairie block of agricultural land that dominates the Willamette Valley south of the metro area. The overall integrity of the subregion is excellent with no major issues impacting the ability of farms to operate efficiently and effectively. Current infrastructure needs are well met.

Long-term a potential threat could relate to the character of any future expansion of the Canby UGB. Because Canby is not part of the Metro planning region, planning decisions are not required to be coordinated with other jurisdictions located in the region.

French Prairie

This agricultural subregion is located west of the Pudding River and south and east of the Willamette River extending south to the Woodburn and St. Paul areas. The subregion is characterized by large flat terraces and plains bisected by moderately sloped creek canyons. It is also bisected by Interstate 5 and Highway 99E. The agricultural sector includes large amounts of grass seed, annual grasses, grass sod productions, nurseries (in ground, container and greenhouses), orchards (filberts and tree fruits), row crops, berry crops, and Christmas trees. There are also a significant number of dairy and livestock operations, poultry and egg farms.

Analysis

Capability

The soils within this subregion can generally be described as deep silt loams with mucky soils in creek and rivers bottoms. Drainage can be a problem in these soils if not managed and maintained properly. This is especially true for areas tiled in the 1940s and 1950s and in need of repair or replacement. Agricultural capability is predominantly Class II. Wetter soils are Class III and IV. The vast majority of the soils within the subregion are designated as prime farmland.

The subregion is blessed with abundant water from both surface and ground water. The majority of lands located within this subregion maintain the right to be irrigated. The major surface sources are the Willamette and Pudding rivers. There are large numbers of ground water withdrawals. No ground water limitations are in place within the area. Limitations on new withdrawals from the surface streams in the area do not implicate existing irrigators.

Suitability
This subregion maintains excellent integrity for large-scale, intensive industrial agricultural operations. It is, in effect, a large block of agricultural land containing large parcels and larger farms with several inclusions of urban development. It is not uncommon for farms to operate on several parcels located within and, in many cases, outside the subregion. While some localized conflicts with nonfarm uses exist, they are not, overall, beyond what is considered common.

The subregion shares an edge with the Wilsonville/Metro UGB, including the Charbonneau area that is located south of the Willamette River. The Willamette River provides an effective buffer for most of the edge. Residential and commercial development at Charbonneau has remained contained and isolated from surrounding agricultural lands. Location near I-5 and the fact that access to this development is, in effect, a dead-end has helped to limit impacts to area agricultural operations.

Just south of Charbonneau are located two large nonfarm use areas. The first is a golf course. Zoned EFU, this facility was approved only after Clackamas County determined that it would not significantly increase the cost of accepted farm and forest practices on surrounding lands devoted to farm and forest use and that its development and operation would not force a significant change in accepted farm and forest practices on surrounding lands [see ORS 215.296(1)]. EFU zoning also insures that any development associated with a golf course is also compatible with area farms. Many of the management practices conducted on-site are similar to agronomic practices conducted by area farms. The golf course in effect provides a buffer between the commercial and residential uses located at the Charbonneau interchange.

Approximately one-half mile south of the golf course is located the Aurora State Airport and associated commercial uses. With a few exceptions, agricultural and airport operations are considered compatible. Development at the airport is related to airport operations and future development is limited to uses that are dependent on air services and operations.

Several cities and their urban growth areas are located within this large agricultural block. These include Woodburn, Hubbard, Aurora, Donald and St. Paul. For the most part the associated UGB of each of these cities has remained compact and has maintained well-defined edges with few major protrusions into farmland. The Fargo interchange and the Aurora State Airport are two exception areas that contain substantial development. Few rural residential exceptions areas exist within the subregion and those that do are small in area.

The subregion agricultural block is zoned EFU. Because the soils in this area are high-value few, if any, new nonfarm dwellings or land divisions are allowed by the current zoning. The EFU zone also precludes several nonfarm uses, such as private parks, schools, golf courses and destination resorts on high-value farmland.

Other Considerations

The OSU North Willamette Research and Extension Center is located just south of Charbonneau. This facility provides many key services to Oregon's largest agricultural industry, nursery and greenhouse production, and to the small fruit industry. Irrigation, drainage and transportation infrastructure are well established. Major agricultural service centers in the region include Woodburn, Hubbard, Donald, St. Paul and Canby. There are numerous smaller service sites that cater to specific industry needs. Irrigation and drainage infrastructure is well developed and maintained throughout the subregion. Transportation routes are well-developed providing excellent access to area agricultural operations and outside markets. There are some issues with moving farm machinery on the heavier traveled main routes. This generally is not a major limitation.

The area is well known for berry, vegetable, flower and Christmas tree farms that increasingly take advantage of their location in the metro area and other valley urban centers by the direct marketing and promotion of their products. Easily accessible by major transportation routes and good local access routes, this area is ideally located to take advantage of the increasing demand to obtain food from the local food shed.

Conclusion

Excellent soils, available water, well established infrastructure and large parcels that block up and dominate the land use pattern. This subregion has all the elements for maintaining and expanding viable, commercial agricultural. This subregion, combined with the Clackamas Prairies and East Canby subregions, is one of the most significant agricultural areas in the state.

The Willamette River currently provides an excellent buffer and edge between urban land uses and the intensive commercial agriculture that predominates south of the river. A long-term potential threat to agriculture in this subregion relates to urbanization and expansion of the Metro UGB south of the river. This has been highlighted of late due to speculative discussions about development in, around and between the I-5 interchange at Charbonneau, the golf course and the airport. Strong consideration needs to be given to providing more certainty and long-term protection to agricultural production in this area. We believe that development of a permanent or "hard" edge at the Willamette River and coordination between Metro and north valley cities on future growth and urbanization are key considerations.

Stafford Triangle

This small subregion is best defined as the area bounded by Interstate 205 on the south, the Tualatin, Rivergrove and Lake Oswego UGBs on the northwest and the Lake Oswego and West Linn UGBs on the northeast. It is, in effect, located within a triangular notch of the urban growth boundary that is cut off from rural lands located to the south by Interstate 205. Subregion lands are moderate to steeply sloped, bisected by numerous creek canyons. The Tualatin River runs through the southeastern one-third of the area from the west to the east.

APPENDIX

APPENDIX

Pursuant to ORAP 5.50, respondent submits the following, as indexed below.

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Document	APP #
Table: Locations of Answers to Assignments of Error	1

TABLE: LOCATION OF ANSWERS TO ASSIGNMENTS OF ERROR

Petitioners	Assignments	Answering briefs with responsive arguments
1000 Friends of Oregon, Dave Vanasche, Bob Vanderzanden and Larry Duyck	First	Washington County, Hillsboro, Metro
	Second	Washington County, Hillsboro
Barkers Five, LLC and Sandy Baker	First	Multnomah County
	Second	LCDC
Carol Chesarek and Cherry Amabisca	First	Washington County
	Second	LCDC
	Third	LCDC
City of Tualatin and City of West Linn	First	Metro, Clackamas County
	Second	Metro, Clackamas County
Elizabeth Graser-Lindsey and Susan McKenna	First	Clackamas County
	Second	Clackamas County
Chris Maletis, Tom Maletis, Exit 282 A Dev. Co., LLC and LFGC, LLC	First	Metro
	Second	Clackamas County, LCDC
	Third	Metro
	Fourth	Metro
	Fifth	Clackamas County
Metropolitan Land Group	First	LCDC
	Second	Metro, Multnomah County
	Third	Metro
	Fourth	Clackamas County
Save Helvetia and Robert Bailey	First	Hillsboro, Metro, Washington County
	Second	Hillsboro, Washington County
Springville Investors, LLC and Katherine and David Blumenkron	First	LCDC
	Second	Metro
	Third	Multnomah County

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 11, 2012, I directed the original Respondent's Answering Brief to be filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Wendie L. Kellington and Kristian Spencer Roggendorf, attorneys for Sandy Baker and Barkers Five, LLC; Jeffrey G. Condit, attorney for City of Tualatin and City of West Linn; Alan Andrew Rappleyea, attorney for Washington County; Carrie A. Richter, attorney for Robert Bailey and Save Helvetia; Pamela J. Beery and Christopher D. Crean, attorneys for City of Hillsboro; Jed Tomkins, attorney for Multnomah County; Roger A. Alfred, attorney for Metro; Rhett C. Tatum, attorney for Clackamas County, by using the courts electronic filing system.

I further certify that on December 11, 2012, I directed the Respondent's Answering Brief to be served upon Matthew D Lowe, attorney for Sandy Baker and Barkers Five, LLC; Michael F Sheehan, attorney for Cherrie Amabisca and Carol Chesarek; Mary Kyle McCurdy, attorney for 1000 Friends of Oregon, Larry Duyck, David A. Vanasche and Bob Vanderzanden; Christopher James, attorney for David Blumenkron, Katherine Blumenkron, and Springville Investors, LLC.; Steven L. Pfeiffer, attorney for Exit 282A Development Company LLC, LFGC LLC, Chris Maletis, Tom Maletis, and Metropolitan Land Group; Alison Kean Campbell, attorney for Metro, Jacquilyn Saito-Moore, attorney for Washington County; Elizabeth A. Graser-Lindsey and

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9,770 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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