IN THE COURT OF APPEALS OF THE STATE OF OREGON

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

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

Land Conservation and Development Commission Case No. 12ACK001819

Court of Appeals No. A152351

METRO'S ANSWERING BRIEF AND APPENDIX

EXPEDITED PROCEEDING UNDER ORS 197.651

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I. STATEMENT OF THE CASE

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

II. COMMON RESPONSES TO ASSIGNMENTS OF ERROR

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

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

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

1. Senate Bill 1011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. LCDC's adoption of Division 27 rules

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

the proposed rules that were ultimately submitted to LCDC for adoption. JER 280. In January 2008, LCDC adopted OAR chapter 660, division 27, which establishes procedures for the designation of urban and rural reserves and "prescribes criteria and factors that a county and Metro must apply when choosing lands for designation as urban or rural reserves." OAR 660-027-0005(1). Notably, LCDC added several additional factors to the lists created by the legislature regarding what should be "considered" by Metro and the counties in designating both urban and rural reserve areas. OAR 660-027-0050; OAR 660-027-0060.

The staff report to LCDC dated January 11, 2008 provides a detailed description of the workgroup's decisions and the intent behind the language that was ultimately included in the division 27 rules. JER 279. In particular, the staff report includes a thorough explanation of the intended application of the term "consideration of factors" and the difference between factors and criteria. JER 293. This portion of the staff report was incorporated in its entirety by LCDC in its final order at page 27, footnote 16, including the following statement of legislative intent:

> "The workgroup discussed the term 'consideration of factors.' The proposed rules are based on the understanding that 'factors' are a special type of 'criteria' similar to the 'factors' proscribed for UGB location under Goal 14. As such, a general principle for Goal 14 factors applies here: factors are not 'independent criteria' – every parcel or area considered for urban or rural

> reserves would not be required to meet each and every factor. Instead, the factors are applied, weighed and balanced to select and evaluate areas for designation as urban or rural reserves. Metro and the counties must apply all the factors, not merely 'consider' them, and must use the factors to compare alternative locations for the reserves. The group decided that the requirement to 'consider' the factors in the statute is not meant to imply that any factor may be simply 'considered but then disregarded' – all the factors must be considered, applied together (which also implies they must be 'balanced' in the manner of Goal 14), and Metro and counties must demonstrate that they have done this."

JER 27.

Thus, the stated legislative intent regarding the designation of reserve areas under the division 27 rules is consistent with the approach directed by the legislature in Senate Bill 1011. Designations by Metro and the counties are guided by consideration of the listed factors, which are not intended to be mandatory or dispositive criteria, but must be considered and applied in reaching conclusions regarding which areas would be best designated as urban or rural reserves.

Several petitioners rely on cases applying the Goal 14 factors in UGB expansions to argue that there is special meaning in the term "balance" as used in those cases and as referenced in LCDC's order (JER 27), and that special meaning was not adhered to by the local governments and LCDC in applying the reserve factors. Specifically, petitioners Save Helvetia (pages 13, 16), 1000 Friends (pages 10-11), and Chesarek (pages 8-9) cite *1000*

Friends of Oregon v. Metro (*Ryland Homes),* 174 Or App 406, 26 P3d 151 (2001), as authority for their argument that mere "consideration" of each factor is not enough, and Metro and the counties failed to demonstrate that they adequately "balanced" the factors as required under *Ryland Homes*. At least one petitioner contends that, under *Ryland Homes*, the word "balance" includes a requirement to compare the factors against alternative areas. Save Helvetia Brief at 16.

Petitioners are correct that LCDC's order indicates an intent to apply the reserve factors in a manner similar to the Goal 14 factors, "which also implies they must be 'balanced' in the manner of Goal 14.'" JER 27, n 16. However, the LCDC order also reveals that there is no magic in the word "balance," other than as a synonym for the word "weighed," and the primary intent was to ensure that no single factor is determinative, but all factors must be applied and weighed together "and not merely considered." *Id.* This intent was summarized by LCDC at the close of the relevant section of its order: "In other words, as to any one area, the designating governmental body does not have to determine that the area complies with or meets every factor. The designating body considers the factors together, and weighs and balances the factors as a whole." JER 27.

The *Ryland Homes* case does not advance petitioners' argument that there is special meaning in the word "balance." The issue before the court in *Ryland Homes* was the fact that Metro failed to adopt findings regarding three of the five "locational" factors under Goal 14 in approving a UGB expansion. LUBA remanded on this basis, and Ryland Homes appealed, arguing that even though Metro did not adopt findings addressing every factor, the record indicated that "each factor has been considered and balanced as part of the locational analysis." *Id.* at 409. Thus, the term "balance" was actually introduced into the case by the petitioner, essentially as a synonym for the word "weighed," and the court agreed with petitioner that in expanding a UGB, Goal 14 requires that local governments "must show that the factors were 'considered' and balanced by the local government * * * ," but the court disagreed that Metro had fulfilled that responsibility. *Id.* at 409-410.

Thus, neither *Ryland Homes* nor the intent of LCDC as stated in its order would require a comparative analysis among reserve areas or among individual factors in order to achieve "balance." The "balancing" exercise under division 27 is not about achieving a balance among the factors or between particular reserve areas; it is about selecting from the application of the factors the results that are most important to the governing body in

making a designation. There is no difference, in this regard, between application of the factors under division 27 and Goal 14, which is really a "weighing" exercise. Metro must "apply" the factors to each study area and then "balance/weigh" the results of the application by explaining how the analysis leads to a designation. This may mean giving greater weight to how a study area rates under one or more factors than under other factors (*e.g.*, the efficiency of service factor vs. the protection of ecosystems factor).

B. Application of the "best achieves" standard

In addition to the expanded list of factors identified for consideration, LCDC also included one mandatory criterion, which is linked to the statement of the overall objective for the division 27 rules at OAR 660-027-005(2). That subsection provides, in relevant part:

> "The objective of this division is a balance in the designation of urban and rural reserves that, in its entirety, *best achieves* livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents." (Emphasis added.)

This "best achieves" objective is specifically identified as a standard under OAR 660-027-0040, which requires Metro and the counties to adopt findings and conclusions explaining why areas were chosen as urban or rural reserves and "how these designations achieve the objective stated in OAR 660-027-0005(2)."

In its order, LCDC recognized that the requirement to adopt findings addressing compliance with the "best achieves" objective is one of two exceptions to a process that is otherwise governed by a highly discretionary consideration of factors. JER 7. However, LCDC was also very careful to explain that the intent behind the "best achieves" standard was not to require a detailed alternatives analysis of the relative merits of including one particular area as opposed to another as urban or rural reserve. Rather, the standard merely requires findings that the overall region-wide designation achieves the correct balance between urban and rural reserves that best achieves the stated goals.

> "In adopting division 27, the Commission intended that this 'best achieves' standard would require less scrutiny for the reserves decision than the requirements for locational decisions involved in urban growth boundary expansions (to consider and apply factors to alternative candidate areas – discussed below). The standard applies to the designation 'in its entirety,' it does not require Metro or a county to rank alternative areas."

JER 25. Footnote 15 of the commission's order also includes a portion of the transcript from the adoption of the division 27 rules that provides a detailed summary of the legislative intent behind this standard. *Id.*

Several petitioners attempt to contort the "best achieves" standard into something different than what was intended by LCDC. *See* Save Helvetia's first assignment of error (page 15) and second assignment of error (page 38),

1000 Friends' first assignment of error (page 17), Cities of Tualatin and West Linn's first assignment of error (page 10), Barkers Five LLC's first assignment of error (page 18). These arguments will be addressed individually and in more detail in the responses below, based in part on the explanation provided in this section.

C. Standard of review for "substantial evidence"

Several petitioners challenge LCDC's conclusion that the Metro and county decisions are supported by substantial evidence in the record. These arguments take myriad forms, but there are two legal precepts that should guide the court's consideration of substantial evidence issues in this appeal. These two issues are as follows, and are separately addressed in the subsections below:

(1) The court does not review LCDC's order for substantial evidence. The court reviews LCDC's order to ensure that LCDC correctly applied the substantial evidence test in reviewing the Metro and county decisions.

(2) LCDC's primary evidentiary role under the division 27 rules was to review the record for evidence that Metro and the counties considered and applied all of the factors; LCDC's role was *not* to review the record for evidence that any particular factor was met, or that any particular urban or

rural designation was correct or better than another designation that could have been made.

1. Standard of review by LCDC and the Court of Appeals

Senate Bill 1011 requires that LCDC's review of decisions on urban and rural reserves shall be submitted to LCDC "in the manner provided for periodic review under ORS 197.628 to 197.650." ORS 197.626. LCDC's standard of review is set forth in ORS 197.633(3), which provides, in relevant part:

> "(3) * * * The commission shall confine its review of evidence to the local record. The commission'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."

Thus, LCDC's evidentiary review is expressly limited to the record below and does not involve consideration of new evidence or independent findings of fact.

The portion of Senate Bill 1011 governing judicial review of LCDC's order on urban and rural reserves was copied directly from the statute governing judicial review of LUBA decisions. ORS 197.651(10)(c) provides that the Court of Appeals shall reverse or remand the LCDC order if the court finds the order is "not supported by substantial evidence in the whole record as to facts found by the commission." Judicial review of

LUBA decisions is governed by ORS 197.850(9), which similarly provides that the court shall reverse or remand LUBA if it finds that "the order is not supported by substantial evidence in the whole record as to facts found by the board under ORS 197.835(2)." Since this appeal involves the first judicial application of ORS 197.651, it is appropriate to apply case law regarding this court's standard of review for LUBA decisions.[4]

This court's role regarding substantial evidence review is a review for errors of law – judicial review is limited to determining whether LUBA, or in this case LCDC, applied the correct legal test in deciding whether the local decision is supported by substantial evidence. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 21, 38 P3d 956 (2002). This approach was recently amplified in *Gunderson v. City of Portland*, 243 Or App 612, 636, 259 P3d 1007 (2011) where the court explained:

> "Thus, if LUBA properly articulates the 'substantial evidence' standard of review, we will affirm unless there is no evidence to support the city's finding or the evidence in the case is 'so at odds with LUBA's evaluation that a reviewing court could infer

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[4] As noted by LCDC in footnote 10 of its order, most if not all of this court's prior decisions involving review of LCDC decisions on UGB expansions applied a different judicial review statute under the Oregon Administrative Procedures Act (APA). JER 20. Prior to amendment in 2011, ORS 197.650 provided that all LCDC decisions (other than urban and rural reserves governed by ORS 197.651) were subject to review under ORS 183.482. *See, e.g., 1000 Friends of Oregon v. LCDC*, 244 Or App 239, 266-267, 259 P3d 1021 (2011) (*McMinnville*).

> that LUBA had misunderstood or misapplied its scope of review[.]' *Devin Oil Co., Inc. v. Morrow County*, 236 Or App 164, 167, 235 P3d 705 (2010) (quoting *Younger v. City of Portland*, 305 Or 346, 359, 752 P2d 262 (1988)."

Several petitioners mistakenly assert that the court should remand LCDC's order because it is not supported by substantial evidence in the record. *See* Chesarek's first assignment of error (page 10), Springville Investors' third assignment of error (page 24), Cities of Tualatin and West Linn's second assignment of error (page 20). Some of these petitioners appear to be confused by the language of ORS 197.610(10)(c), which does provide that the court may remand LCDC's order if it is not supported by substantial evidence; however, such review is expressly limited "to facts found by the commission." Where, as here, the LCDC proceeding is based on the record of the proceedings below under ORS 197.633(3), there are no evidentiary facts found by the commission and no basis for independent evidentiary review of LCDC's decision. This point was noted in *1000 Friends of Oregon v. LCDC* where the court explained: "[s]ubstantial evidence review of an LCDC periodic review order may directly occur when the commission requests and obtains new evidence for the periodic review submission and then makes factual findings on that enhanced record." *1000 Friends (McMinnville)*, 244 Or App at 268, n 11.

Thus, the correct test is not whether LCDC's order is supported by substantial evidence, but whether LCDC applied the proper substantial evidence standard in reviewing the decisions of Metro and the counties. If so, the court "will affirm unless there is no evidence to support the city's finding or the evidence in the case is 'so at odds with LUBA's evaluation that a reviewing court could infer that LUBA had misunderstood or misapplied its scope of review.'" *Gunderson*, 243 Or App at 636.

2. Application of LCDC's review for substantial evidence

The primary obligations of Metro and the counties in designating reserves are set forth at OAR 660-027-0040(10). That rule requires Metro and the counties to do two things: (1) apply all of the factors for an urban or rural reserve designation to each area; and (2) adopt findings "explaining why areas were chosen as urban or rural reserves." OAR 660-027-0040(10). Thus, from an evidentiary perspective, LCDC's role was to review the record for: (1) evidence to support a finding that all of the factors were applied, and (2) evidence to support the explanation regarding why each area was designated as an urban or rural reserve, under whichever factors Metro and the counties gave the most weight.

Unlike most land use decisions, the reserve designation process does not require findings of compliance with mandatory criteria in support of a

decision. Rather, Senate Bill 1011 and division 27 require Metro and the counties to consider and apply a list of "factors," and then make designations based on those factors. Thus, contrary to many of petitioners' arguments, the evidentiary issue before LCDC was *not* whether there was evidence in the record to support a decision that any particular factor was met, or that any particular urban or rural designation was better than a different designation that could have been made. Rather, applying this court's standard of review as stated in *Citizens Against Irresponsible Growth*, the court can find that LCDC "applied the correct legal test in deciding whether Metro's decision is supported by substantial evidence" so long as LCDC's order (1) identifies substantial evidence in the record that all factors were considered and applied as to each area designated, and (2) identifies substantial evidence to support the explanation regarding why an area was designated as urban or rural reserve under whichever factors Metro and the counties gave the most weight.

D. The "rule of substantial reason" standard for judicial review does not apply under ORS 197.615(10)

The substantial evidence analysis addressed above is separate from the question of whether LCDC's decision is supported by "substantial reason" in that the order demonstrates "the reasoning that leads the agency from the facts that it has found to the conclusions that it draws from those

facts." *1000 Friends v. LCDC* (*McMinnville*), 244 Or App at 267. This "rule of substantial reason" flows from the standard of judicial review that is applicable to agency orders under the APA as set forth in ORS 183.482(8). In *1000 Friends of Oregon v. LCDC*, 237 Or App 213, 224-225, 239 P3d 272 (2010) (*Woodburn*), this court noted that the rule of substantial reason was first applied to LCDC in *Marion County v. Federation For Sound Planning*, 64 Or App 226, 237, 668 P2d 406 (1983), and that the rule stems from the court's review under the APA: "pursuant to ORS 183.482(8)(a) to (c), '[w]e review the challenged finding for substantial evidence in the record and the legal conclusion for substantial reason and errors of law.'" *1000 Friends v. LCDC* (*Woodburn*), 237 Or App at 224-225 (quoting *Freeman v. Employment Dept.*, 195 Or App 417, 421, 98 P3d 402 (2004)).

However, Senate Bill 1011 exempted LCDC decisions on urban and rural reserves from the APA judicial review requirements and instead created a new standard that is identical to the standard of judicial of review for LUBA opinions in ORS 197.850(9). Or Laws 2007, ch 723 § 9. Unlike ORS 183.482(8), the applicable standard in ORS 197.651(10) allows for remand of an LCDC order on substantial evidence grounds only "as to facts found by the commission." In 2011, the legislature amended LCDC's standard of review under ORS 197.633(3) to require that "[t]he commission

shall confine its review of evidence to the local record." Or Laws 2011, ch 469 § 2. As part of the same bill, the legislature also amended ORS 197.650 and ORS 197.651 to change the standard of judicial review applicable to *all* LCDC orders (not just reserves) from the APA standard to the ORS 197.651(10) standard. Or Laws 2011, ch 469 § 5-6.

Thus, in 2007 for reserve decisions and in 2011 for all other LCDC orders, the legislature changed the standard of judicial review to match the standard applicable to LUBA. This court has never applied the "rule of substantial reason" to its review of LUBA opinions. That is because the rule of substantial reason flows from the nature of APA review, which contemplates an agency that is taking evidence and making "findings of fact." As directed by the 2011 amendment to ORS 197.633(3), LCDC does not take evidence and, like LUBA, does not make evidentiary "findings of fact" to which the APA-based "rule of substantial reason" should apply.

This court may reject all arguments raised by petitioners regarding application of the "rule of substantial reason" because this case is not subject to review under the APA, and the cases applying ORS 183.482(8) therefore do not apply. As correctly noted by LCDC in footnote 10 of its order, all of the cases relied upon by petitioners on this issue involve judicial review of

LCDC decisions under ORS 183.482(8) rather than ORS 197.651(10). JER 20.

III. RESPONSES TO MALETIS ASSIGNMENTS OF ERROR

This section provides Metro's responses to assignments of error presented in the brief filed by Chris Maletis, Tom Maletis, Exit 282A Development Co., LLC, and LFGC, LLC (collectively referred to as "Maletis").

A. Response to Maletis First Assignment of Error

In the first assignment of error, Maletis contends that LCDC improperly applied the substantial evidence test and violated the rule of substantial reason.

1. Substantial evidence

Maletis presents three arguments in support of its claim that LCDC misconstrued the substantial evidence test. First, Maletis asserts that LCDC failed to identify the applicable legal standard, but fails to explain why that would be an error requiring remand. Regardless, Maletis is incorrect because the LCDC order includes a detailed description of the applicable standard of review including the substantial evidence requirement under ORS 197.633(3)(a). JER 19-20.

Second, Maletis presents a four-sentence statement that LCDC "wrongfully permitted" Metro and the counties to designate reserves based on "political checks and balances," which Maletis claims is inconsistent with the legislative intent of Senate Bill 1011 and the administrative rules. Maletis Brief at 13. However, Maletis does not explain what it believes the legislative intent to be, does not clearly explain what this argument has to do with substantial evidence review, and does not explain how whatever it is arguing would require remand for the specific purposes Maletis identifies. This sub-argument is not sufficiently developed for review.

Finally, Maletis contends that, in affirming Metro's decision to designate Area 4J in Clackamas County as a rural reserve area, LCDC failed to consider certain evidence provided by Maletis that the area was also consistent with the urban reserve factors. However, under the process created by Senate Bill 1011, evidence that Area 4J might also have been designated as an urban reserve under those separate factors is not "conflicting evidence" regarding its designation as a rural reserve. This issue was directly addressed by LCDC in its order:

> "Any one area may be, and many areas could have been, designated either as an urban or a rural reserve. After considering both sets of factors under OAR 660-027-0050 and OAR 660-027-0060, many areas have characteristics such that Metro could have designated them as urban or a county designated them as rural reserve. The Commission reviews

> whether Metro considered the urban reserve factors in deciding to include particular areas, explained why the areas should be urban reserves using the factors listed in the statute and rules, and whether there is evidence in the record as a whole that a reasonable person would rely upon to decide as Metro did.
>
> "In most instances, with one important exception, the Commission does not review the decision to determine whether an area would be better as a rural reserve than as an urban reserve, or even whether Metro was right in its designations. The question is a narrow one: whether Metro considered what the statue and rules require it to consider, and whether Metro's findings explain its reasoning, and whether there is substantial evidence in the record to support Metro's decision."

JER 29. LCDC's obligation was to consider whether there was substantial evidence in support of the decision made by Metro after weighing the urban reserve factors, not whether there would have been evidence to support a different decision based on application of a different set of factors.

The first assignment of error should be denied.

B. Response to Maletis Second Assignment of Error

Metro adopts and incorporates by reference the arguments contained in the brief of respondents LCDC and Clackamas County regarding this assignment of error.

C. Response to Maletis Third Assignment of Error

In the third assignment of error, Maletis contends that LCDC incorrectly concluded that Metro has the authority to designate reserves outside of the Metropolitan Service District boundary.

This argument is nonsensical. The entire purpose of Senate Bill 1011 was to confer authority on Metro to designate areas outside of the existing UGB as urban and rural reserve areas. *See* ORS 195.141; ORS 195.145. Under ORS 195.137(2), the term "urban reserve" is defined to mean "lands outside an urban growth boundary." Similarly, ORS 195.141(2)(a) provides that land designated as a rural reserve "must be outside an urban growth boundary." Maletis is apparently arguing that the Oregon legislature does not have the authority to authorize Metro to designate urban and rural reserves outside of the UGB. Maletis does not attempt to explain why the legislature would not have such authority.

Maletis presents two equally flimsy bases for this argument. First, Maletis relies on a portion of a statute that describes Metro's powers as including the ability to coordinate land use planning for those portions of cities and counties that lie "within the district." ORS 268.380(1)(c). Second, Maletis quotes a provision of the Metro charter that describes the area of Metro governance as including "all territory within the boundaries of the Metropolitan Service District." Maletis believes that these two general provisions somehow prevent the legislature from authorizing Metro to designate reserve areas outside of the district boundary. Each is addressed below.

1. ORS 268.380(1)(c) does not prohibit the legislature from authorizing the creation of urban and rural reserves

This statute provides a general grant of authority for metropolitan service districts to "coordinate the land use planning activities of that portion of the cities and counties within the district." ORS 268.380(1)(c). There is nothing in this statute that prohibits the legislature from adopting a separate statute as part of Senate Bill 1011 authorizing Metro to coordinate with counties on more specific land use planning activities outside of the district, such as identifying urban and rural reserves. In fact, in granting such authority in Senate Bill 1011, the legislature specifically references ORS chapter 268:

> "A county and a metropolitan service district established under ORS chapter 268 may enter into an intergovernmental agreement pursuant to ORS 190.003 to 190.130 ... to designate rural reserves pursuant to this section and urban reserves pursuant to ORS 195.145(1)(b)."

ORS 195.141(1). In other words, the legislature allowed that, in addition to Metro's typical land use planning activities to be coordinated within the district, Metro may also coordinate with counties on the adoption of urban and rural reserve areas outside of the existing UGB. This of course is the entire point of the legislation authorizing creation of reserve areas.

This issue was addressed by LCDC in its final order:

> "To construe the ORS 268.380(1) authorization to engage in coordinated land use planning within the district as prohibiting Metro from designating urban reserve outside the district boundaries would require the Commission to ignore at least two maxims of statutory construction. First, ORS 195.137 through 195.145 specifically authorize Metro and a county to designate urban and rural reserves as part of their general authorities to engage in land use planning under ORS 268.380 and ORS 215.050. Even assuming there was any inconsistency between those provisions, the specific authorization of ORS 195.137 through 195.145 would control. ORS 174.020(2) provides '[w]hen a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.'"

JER 42. Further, LCDC also correctly notes that this construction is consistent with ORS 174.010, which requires that in construing separate statutory provisions together, such provisions should be construed to "give effect to all." JER 43.

Maletis presents an interesting argument that there is no inconsistency between the statutes, and therefore no basis to apply the statutory construction maxims cited above, because Senate Bill 1011 must be read to authorize Metro only to designate urban reserves *within* the existing Metro boundary. Maletis Brief at 25. Maletis ignores the entire purpose of Senate Bill 1011, not to mention the statutory definitions quoted above regarding urban reserves, which are defined to be areas "outside an urban growth boundary." ORS 195.137(2).

2. Metro Charter chapter 1, section 3

This portion of the Metro Charter provides, in relevant part: "[t]he Metro Area of governance includes all territory within the boundaries of the Metropolitan Service District ... *and any territory later* annexed or *subjected to Metro governance under state law*." (Emphasis added.) LCDC correctly concluded that the emphasized portion of the charter provision controls, because the legislature has specifically authorized Metro to enter into agreements with the counties to designate reserve areas outside of the existing UGB. JER 43.

Maletis argues this provision should not control, based on its arguments above that Senate Bill 1011 cannot be read to authorize designation of reserve areas outside of the UGB due to ORS 268.380(1)(c). For the reasons explained above, and by LCDC in its order, Maletis is mistaken. The third assignment of error should be denied.

D. Response to Maletis Fourth Assignment of Error

In the fourth assignment of error, Maletis contends that LCDC incorrectly concluded that Goal 9 does not directly apply to the reserve designations because Goal 9 does not apply outside of urban growth boundaries. LCDC adopted the following findings on this issue:

> "Goal 9 is '[t]o provide adequate opportunities throughout the state for a variety of economic activities vital to the health,

> welfare, and prosperity of Oregon's citizens.' The implementing rule 'does not require or restrict planning for industrial or other employment uses outside of urban growth boundaries.' OAR 660-009-0010. Generally, Goal 9 does not establish planning requirements for local governments outside of urban growth boundaries. OAR 660-009-0020. All urban and rural reserves lie outside the Metro regional UGB.
>
> "Maletis does not cite any authority that requires independent findings by Metro to demonstrate compliance with Goal 9 on a regional basis. * * * . "

JER 55. In the event that Goal 9 does directly apply to the reserve designations, the LCDC order goes on to identify locations in the record where Metro adopted findings addressing Goal 9. JER 56.

There is no dispute that the rules implementing Goal 9 apply exclusively to urban areas, and not to rural areas, and therefore do not apply to LCDC's order. OAR 660-009-0010. The threshold question here is whether there is any basis to directly apply Goal 9 to this decision, which only affects rural areas outside of the existing UGB. The next question is whether Maletis has identified any portions of Goal 9 itself that *could* actually be applied to the reserve designations.

The only language in Goal 9 cited by Maletis to support its argument is the introductory statement that the purpose of Goal 9 is to "provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens."

While it is true that this statement calls for economic opportunities "throughout the state," it is also true that nothing else in Goal 9 can be read to apply to rural areas. This point has been recognized by LUBA:

> "We agree with intervenors that Goal 9 itself applies throughout the state, including rural areas outside urban growth boundaries. The county is required, at least, to 'provide adequate opportunities * * * for a variety of economic activities[.]' It is true, however, that most if not all of the more specific requirements of Goal 9, and all of the requirements of the Goal 9 rule, apply only with respect to comprehensive plans governing lands within urban growth boundaries. Goal 9 itself includes no particular requirements aimed at rural or resource lands, and the Goal 9 rule explicitly states that comprehensive plans for rural areas are not 'required' to plan for industrial or employment uses, although counties are presumably free to do so."

VinCEP v. Yamhill County, 55 Or LUBA 433, 446-447 (2007), *aff'd* 215 Or App 414, 171 P3d 368 (2007).

The only direct requirements set forth in Goal 9 are matters that must be addressed in "comprehensive plans for urban areas." The only requirement cited by Maletis that it contends was not met by Metro is Goal 9, paragraph 3. Maletis Brief at 32. However, paragraph 3 is one of the provisions that expressly only apply to "comprehensive plans for urban areas." None of the reserve designations are in urban areas. Also, Metro does not have a comprehensive plan, it has a regional framework plan, which is expressly defined by statute to *not* be a comprehensive plan:

"[n]either the regional framework plan nor its individual components constitute a comprehensive plan." ORS 197.015(16). For these reasons, LCDC has previously concluded in a 2005 final order that Goal 9 does not apply to Metro:

> "The Commission concludes that Goal 9 does not apply to Metro. In reviewing Metro's prior Task 2 submittal for compliance with the goals, the Commission concluded 'Goal 9 assigns no direct responsibility to Metro.'
>
> " * * * * *
>
> "Metro's exception and oral argument present a cogent analysis of the applicability of Goal 9 to a metropolitan service district. Metro argues:
>
> > "'A careful reading of Goal 9, the Goal 9 rule, and state statute discloses that: (1) there is no mention of Metro in the goal or rule; (2) the goal and rule assign responsibilities to cities and counties, not to Metro or a regional government; (3) the goal and the rule specify that they are to be implemented by "comprehensive plans"; (4) Metro does not have a "comprehensive plan" as defined in ORS 197.015(5); (5) Metro has a "regional framework plan," a term used in statute when the legislature intends a law to apply to Metro; and (6) ORS 197.015(16) expressly states that Metro's regional framework plan is not a "comprehensive plan." The Court of Appeals held that ORS 197.712, the legislature's analogue to Goal 9, does not apply to Metro because the statute, like Goal 9, assigns responsibilities to cities and counties, not to Metro. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 468, 472 (2002).'
>
> "* * * * *

> "* * * Although Goal 2 requires Metro to coordinate its decision-making with local governments in the region, Goal 2 does not make Goal 9 apply 'indirectly' to Metro because Goal 9, by [its] own terms, does not apply to Metro."

Metro App 8-11 (LCDC Order 05-WKTASK-001673).

The court may conclude that Maletis has failed to identify any applicable provisions of Goal 9 that were not addressed by Metro or LCDC in its order. Further, Metro adopted the following findings regarding Goal 9, which are quoted in the LCDC order at footnote 47:

> "The designation of urban and rural reserves does not change or affect comprehensive plan designations or land regulations for lands subject to Goal 9. All urban and rural reserves lie outside the UGB. No land planned and zoned for rural employment was designated rural reserve. Designation of land as urban reserve helps achieve the objectives of Goal 9. Much urban reserve is suitable for industrial and other employment uses; designation of land suitable for employment as urban reserve increases the likelihood that it will become available for employment uses over time. The designation of reserves is consistent with Goal 9."

JER 56. Even if Metro had any obligation to address Goal 9, which has not been established, the above-quoted findings are more than sufficient to demonstrate compliance with the goal.

The fourth assignment of error should be denied.

E. Response to Maletis Fifth Assignment of Error

Metro adopts and incorporates by reference the arguments contained in the brief of respondent Clackamas County regarding this assignment of error.

IV. RESPONSES TO METROPOLITAN LAND GROUP'S ASSIGNMENTS OF ERROR

This section provides Metro's responses to assignments of error presented in the brief filed by Metropolitan Land Group ("MLG").

A. Response to MLG's First Assignment of Error

Metro adopts and incorporates by reference the arguments contained in the brief of respondent LCDC regarding this assignment of error.

B. Response to MLG's Second Assignment of Error

MLG challenges the evidentiary support for LCDC's conclusion that Multnomah County properly designated Area 9B as a rural reserve area. MLG repeats the same error made in Maletis's first assignment of error by arguing that LCDC failed to conduct a "whole record" review of the evidence because LCDC did not consider evidence submitted by MLG to support designation of Area 9B as an urban reserve area. MLG Brief at 22. As described above in Section III.A.1 of this brief, LCDC's obligation was to consider whether there was substantial evidence in support of the decision

made by Metro, not whether there would have been evidence to support a different decision based on application of a different set of factors.

This issue was addressed in an introductory portion of LCDC's order:

> "In most instances, with one important exception, the Commission does not review the decision to determine whether an area would be better as a rural reserve than as an urban reserve, or even whether Metro was right in its designations. The question is a narrow one: whether Metro considered what the statue and rules require it to consider, and whether Metro's findings explain its reasoning, and whether there is substantial evidence in the record to support Metro's decision."

JER 29. Specifically regarding Area 9B, LCDC adopted the following findings:

> "The common objection is that the area does not satisfy the factors in OAR 660-027-0060 for designation as rural reserve, but does satisfy the factors for designation as urban reserve under OAR 660-027-0050. The objectors also generally assert that while substantial evidence in the record supports an urban reserve designation, Multnomah County's findings designating the area as rural reserve are not based upon substantial evidence in the record.
>
> "* * * Generally the issue here is whether the county considered the rural reserve factors in deciding to include Area 9B, explained why the areas 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. The Commission finds that Multnomah County considered the required factors, based on substantial evidence in the record, to support the designation of Area 9B as rural reserve."

JER 121-122. Thus, as described above in section II.C of this brief, LCDC "applied the correct legal test" in deciding that the county's decision was

supported by substantial evidence, and identified the specific evidence in the record upon which the county relied. The nature of that evidence is addressed in detail in section III.B.3.d of the brief submitted by respondent Multnomah County, which is adopted and incorporated as part of Metro's brief.

For these reasons, and the reasons stated in section III.B of Multnomah County's brief, the second assignment of error should be denied.

C. Response to MLG's Third Assignment of Error

MLG contends the reserves decision violates statewide planning Goals 2 and 14 because it was based upon "an informal study that was not part of the acknowledged Urban Growth Management Functional Plan." MLG Brief at 25, citing *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 994 P2d 1205 (2000). MLG misapprehends the goals and the cases it cites.

The basis for MLG's claim is Goal 2, which requires a factual basis for planning decisions and calls for consistency between a local government's plans and its implementing measures:

> "All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The required information shall be contained *in the plan*

> *document or in supporting documents*. The plans, supporting documents and implementation ordinances shall be filed in a public office or other place easily accessible to the public. The plans shall be the basis for specific implementation measures. These measures shall be consistent with and adequate to carry out the plans. Each plan and related implementation measure shall be coordinated with the plans of affected governmental units." (Emphasis added.)

Metro did precisely what Goal 2 contemplates because Metro adopted the required information in supporting documents, first by resolution in 2009, and then by ordinance in 2010. During the analysis leading to designation of reserves under Senate Bill 1011, the Metro Council adopted Resolution No. 09-4094 (2009) accepting a population forecast and analysis and assumptions as the basis for its need and capacity determinations under ORS 197.296(3). *See* JER 67. The forecast and the capacity analysis (contained in a document entitled "Urban Growth Report" (UGR)) determined the region's needs to 2030 and to 2060, to support both impending UGB and reserves decisions. Once the Metro Council completed its UGB capacity analysis, it adopted the UGR on December 16, 2010 via Ordinance No. 10-1244B in order to satisfy its obligations under ORS 197.299(1) and 197.296(3). Metro App 12. That ordinance formally adopted the population forecast and the final UGR; it also amended Metro's Regional Framework Plan (RFP) to take formal actions to use land inside the existing UGB more efficiently. *Id.*

When the Metro Council adopted Ordinance No. 10-1244B, including the population forecast and the assumptions regarding land needs and capacity for jobs and housing units, (*i.e*, the Urban Growth Report), that action had the following legal effects: (1) the UGR moved from being a "draft" to a "final" document; (2) the UGR became a "supporting document" under Goal 2 for both the UGB and reserves decisions; and (3) the Ordinance and the UGR replaced the assumptions and analysis that had supported earlier UGB expansions. Metro's reliance upon this factual information and analysis for the designation of urban and rural reserves was entirely consistent with Goal 2.

MLG's reliance on *Parklane* is mired in a past no longer relevant. MLG insists that *Parklane* requires Metro to adopt the UGR's growth projections as part of Metro's Urban Growth Management Functional Plan (UGMFP). MLG Brief at 26. There is language in *Parklane* to that effect, which made sense at the time; however, the UGMFP is no longer a document that has any relevance to the UGR. *Parklane* arose out of Metro's adoption of urban reserves in 1997. At that time Metro had not yet adopted the Regional Framework Plan (RFP), which is Metro's rough equivalent of a

local comprehensive plan.[5] In 1997, Metro included job and housing unit capacity requirements in its UGMFP. Metro adopted its RFP on December 11, 1997, shortly after the 1997 urban reserves decision. After passage of the UGB need and capacity statutes in 1995 (ORS 197.295 *et seq.*), Metro permanently removed the jobs and housing unit requirements from the UGMFP. At that point, Metro began its current process of adopting a population and employment forecast and gathering the factual information and assumptions for UGB decisions into an "Urban Growth Report." In every UGB expansion decision beginning in 2002, the Metro Council has adopted the forecast and the UGR by ordinance as "supporting documents" for the UGB expansions, which is entirely consistent with Goal 2.

Petitioners also insist Metro must adopt the need and capacity assumptions and analysis in the UGR as part of the RFP. MLG Brief at 29. But neither Goal 2 nor Goal 14 actually require that. Both Goal 2 and the Goal 14 rule (OAR 660-024-0030(1)) say Metro can adopt that information in the plan document "or in supporting documents." Metro does this because its RFP is a map and general policy document, not an analysis

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[5] *But see* ORS 197.015(16), which defines the RFP and states that it is not a comprehensive plan.

document. The UGR analysis typically contains hundreds of pages of data and analysis, which would not be appropriate to include as part of the RFP.

It is important to note that MLG cites no language in Goal 14 to support its position. The setting that lay before the *Parklane* court has changed in other relevant ways. LCDC amended Goal 14 in 2007. Before that amendment, a local government expanding its UGB was required to take a Goal 2 exception and put the exception analysis into its plan. Among other things, LCDC's 2007 amendments severed the tie between Goal 14 and the Goal 2 exceptions process. Goal 14 no longer requires a local government to put its UGB "exception" analysis into its plan.

In short, Metro's need and capacity assumptions document (the UGR) is not a draft. It is not "informal." It is "final" and was adopted on December 16, 2010 by Ordinance No. 10-1244B. The UGR replaced prior assumptions about needs and capacity. It has none of the flaws identified by the *Parklane* court. It is, in the words of a court interpreting *Parklane*, "a plan or planning document of the kind that Goal 2 contemplates." *1000 Friends of Oregon v. City of Dundee,* 203 Or App 207, 216, 124 P3d 1249 (2005).

The third assignment of error should be denied.

D. Response to MLG's Fourth Assignment of Error

Metro adopts and incorporates by reference the arguments contained in respondent Clackamas County's brief regarding MLG's fourth assignment of error.

V. RESPONSES TO SPRINGVILLE'S ASSIGNMENTS OF ERROR

This section provides Metro's responses to assignments of error presented in the brief filed by Springville Investors, LLC, Katherine Blumenkron and David Blumenkron (collectively referred to as "Springville").

A. Response to Springville's First Assignment of Error

Metro adopts and incorporates by reference the arguments contained in respondent LCDC's brief regarding Springville's first assignment of error.

B. Response to Springville's Second Assignment of Error

Springville's second assignment of error adopts the arguments presented in MLG's third assignment of error regarding Metro's reliance on the UGR. Metro relies upon its responses in section IV.C of this brief.

C. Response to Springville's Third Assignment of Error

Metro adopts and incorporates by reference the arguments contained in respondent Multnomah County's brief regarding Springville's third assignment of error.

VI. RESPONSES TO CITY OF TUALATIN AND CITY OF WEST LINN'S ASSIGNMENTS OF ERROR

This section provides Metro's responses to assignments of error in the brief filed by the City of Tualatin and the City of West Linn (collectively referred to as the "cities"). The cities object to designation of the Stafford area as an urban reserve.

A. Response to Cities' First Assignment of Error

The cities' first assignment of error presents three very general arguments regarding alleged legal errors made by LCDC. These arguments are often conceptual, and not always tied to allegations of specific error. Most often they simply provide previews of more focused "as applied" arguments that are directly raised in the cities' second assignment of error. As such, responses to several of the legal theories stated in the first assignment of error are more directly addressed through responses to the cities' second assignment of error.

1. Undue deference to Metro's interpretation

The cities present a very general argument that is not clearly tied to any distinct finding or conclusion by LCDC, so it is difficult to discern what they are assigning error to. The cities indicate general disagreement with an introductory statement included by LCDC in its order quoting a portion of a DLCD memo explaining that "the Department believes that the statute and

the rules that guide this effort replaced the familiar standards-based planning process with one based fundamentally on political checks and balances, together with factors that local governments are required to consider in making their decisions." JER 7.

Like several other petitioners, the cities seize on the phrase "political checks and balances" in an attempt to claim that this introductory description of the process was somehow elevated by LCDC to a standard of review. The cities, like other petitioners, argue that this simple descriptive statement actually constitutes LCDC's announcement of a review standard that improperly provides too much discretion to Metro and the counties and essentially allows for standardless review. The cities contend that the text and context of Senate Bill 1011 indicate an intent to require the same analysis established under Goal 14. Cities' Brief at 9. However, the cities fail to identify exactly where the LCDC order on review differs from that analysis in any specific way that would require remand.

The cities attempt to distinguish LCDC's order from their preferred Goal 14 process by noting that "LCDC and the courts have concluded that under Goal 14, a local government must consider all the factors, that it must balance those factors when determining the location of the UGB, and that no one factor controls." Cities' Brief at 9. However, this is no different from

LCDC's explanation of its application of the reserve factors in the challenged order:

> "This evaluation * * * does require the county and Metro to show that they evaluated alternative areas in terms of each of the factors * * * and that their findings explain why each area's designation as an urban or rural reserve is appropriate. * * * In other words, as to any one area, the designating governmental body does not have to determine that the area complies with or meets every factor. The designating body considers the factors together, and weights and balances the factors as a whole." (Citations and footnote omitted).

JER 27. Further, LCDC's order expressly states that the reserve factors "are intended to be employed and interpreted in the same manner as the UGB factors in Goal 14." JER 28, n 16. Thus, in the absence of a more specific argument from the cities regarding how LCDC's order differs from the cities' preferred process, it is difficult to discern precisely what they are complaining about.

The cities' first argument appears to be an attempt to make a "facial" challenge to LCDC's application of the reserve rules based primarily on an introductory statement in the order describing the discretionary nature of the process as involving "political checks and balances." This argument presents no clear basis for remand, particularly given that LCDC's order enunciates essentially the same standard that the cities argue should have been applied under Goal 14. A potentially more viable "as applied"

approach is presented in the cities' second assignment of error, which challenges specific findings made by LCDC regarding application of the factors to individual study areas and evidence.

2. Application of the "best achieves" standard

In their second argument, the cities contend that LCDC misconstrues the "best achieves" standard of OAR 660-027-0005(2) by not requiring a comparative analysis of alternative areas that were not designated or that were designated for a different purpose. Similar to the first argument addressed above, the cities do not challenge any specific portion of LCDC's order regarding the failure of particular Metro or LCDC findings to apply the rule. Rather, the cities argue generally that LCDC's statement of its own legislative intent (*i.e.*, that there is no requirement for a comparative analysis of specific alternative study areas) is contrary to the express text of the rule.

The application of the "best achieves" standard is discussed above in section II.B of this brief. In its order, LCDC clearly explains its legislative intent in adopting the "best achieves" standard: "[t]he standard applies to the designation 'in its entirety,' it does not require Metro or a county to rank alternative areas." JER 25. LCDC also quotes the intent as stated by the chair of the reserve rules workgroup: "instead of being a process that would require exactitude found in like a parcel to parcel comparison that this best

concept is supposed to focus on the collective overall regional process. It would be looking for the best fundamental balance between the competing areas." *Id.* at n 15.

The cities focus exclusively on the dictionary definition of the word "best" to contend that if something is going to be identified as the "best" it necessarily must be ranked in quality against others. Cities' Brief at 9-10. However, the cities ignore the context of the entire sentence, in which the phrase "best achieves" is applied to the overall "balance" of reserve designations region-wide. The rule requires a finding that there is a "*balance* in the designation of urban and rural reserves that, *in its entirety, best achieves*" the listed general objectives. OAR 660-027-0005(2) (emphasis added). Correctly read, this language requires LCDC to review the entire region-wide balance of reserve areas, and then to consider whether that *balance* "in its entirety best achieves" the listed goals. Contrary to the cities' arguments, the text of the rule itself does not require LCDC to rank or compare specific designations against other alternative designations to see which designations are "best." Further, the cities' proposed interpretation is directly contrary to the intent behind the standard as stated by LCDC.

3. Application of substantial evidence standard

The cities argue that LCDC misapplied the substantial evidence test in two ways. First, the cities make another blanket assertion, not tied to any specific findings or evidence, that LCDC approved the decision so long as it "cited some evidence in support of its decision," rather than reviewing evidence in the whole record. Cities' Brief at 12. This statement is too general to warrant a direct response but, as the cities note, the argument is actually developed and applied in the cities' second assignment of error.

Second, the cities contend that LCDC improperly assumed that it could affirm a local decision even on the basis of evidence not cited in the local government's findings if, on review, the local government identifies evidence in the record that "clearly supports" its decision. Cities' Brief at 12. According to the cities, LUBA has express statutory authority to do that under ORS 197.835(11)(b), but LCDC does not. Cities' Brief at 13.

The fact that a statute happens to state that LUBA can affirm based on evidence not included in a local government's findings does not require a conclusion that LCDC is barred from doing so in the course of conducting its substantial evidence review under ORS 197.633(3). Substantial evidence review includes a review of the "whole record" to determine whether a decision is supported by substantial evidence. *Younger v. City of Portland*,

305 Or 346, 356,752 P2d 262 (1988). Of course, that does not mean it is proper to "divine [a local government's] unexpressed reasoning." *1000 Friends of Oregon v. Metro (Ryland Homes)*, 174 Or App 406, 410-411, 26 P3d 151 (2001). It is not properly within the scope of review to "make assumptions and draw inferences from other portions of the local government's findings in order to surmise what the local government's decision really was." *Id.* at 411. But LCDC's interpretation of its review function does not violate that principle. Rather, LCDC stated that its review of identified evidence not included in the findings is, like LUBA's, limited to evidence that "makes obvious" or "inevitable" the local government's decision. In other words, it does not allow LCDC to "assume the responsibilities of local government's such as the weighing of evidence." JER 20. LCDC did not misinterpret its standard of review under the substantial evidence test.

For these reasons, and the reasons stated in the brief submitted by respondent Clackamas County, the cities' first assignment of error should be denied.

B. Response to Cities' Second Assignment of Error

The fundamental flaw inherent to the cities' second assignment of error is their misunderstanding of the difference between "factors" and

"criteria" under the unique system established for designating urban and rural reserves. Four of the five subheadings in this assignment allege that LCDC's order "does not demonstrate compliance with" the factors. Cities' Brief at 15, 23, 27, 31.

The cities fail to recognize that Senate Bill 1011 and division 27 created a system where Metro was not required to demonstrate "compliance" with a set of mandatory criteria in order to designate the Stafford area as an urban reserve area. As explained above in section II.A of this brief, Metro's decision is guided by "consideration" of the listed factors. As described in LCDC's statement of intent behind the rules, the factors "are not 'independent criteria' – every parcel or area considered for urban or rural reserves would not be required to meet each and every factor." JER 27.

The cities miss this critical point. Their brief marches through the list of urban reserve factors as if they were conditional use permit criteria, arguing that each factor was not satisfied for one reason or another, most often because the cities allege that Metro relied upon the wrong evidence. Regarding application of the factors, OAR 660-027-0040(10) required Metro to do two things: (1) consider and apply all of the factors, and (2) adopt findings explaining why areas were chosen as urban or rural reserves.

Metro's compliance with these obligations regarding the urban reserve designation for the Stafford area was summarized by LCDC in its Order:

> "Metro adequately considered the urban reserve factors in OAR 660-027-0050, and documented that consideration with sufficient evidence and findings. Metro and Clackamas County have made findings relative to each of the factors, alone and in relation to the others, explaining the designation of the Stafford [area] as urban reserves. Metro Record at 19-23; Exhibit B to Ordinance No. 1255 at 26-31. While the cities disagree with the findings and decision, in fact Metro and the county did evaluate each of the factors. As discussed above, contrary to the cities' implication, the factors are not criteria with which Metro must show compliance. Thus, the rules did not require Metro and the county to conduct the type of analytical exercise urged by the cities to establish how to 'achieve' the purposes of each of the individual factors. While the cities disagree with the findings and decision, the findings reflect that Metro weighed and evaluated the factors in making the reserves decision, and the findings and conclusions adopted by Clackamas County and Metro adequately explain how all the factors were balanced in reaching the decision."

JER 116.

With that background in mind, the cities' more detailed arguments regarding application of the factors are addressed in the brief filed by Clackamas County. Metro adopts and incorporates the arguments in respondent Clackamas County's brief regarding the cities' second assignment of error.

VII. RESPONSES TO 1000 FRIENDS ASSIGNMENTS OF ERROR

This section provides Metro's responses to assignments of error presented in the brief filed by 1000 Friends of Oregon, David Vanasche, Bob Vanderzen and Larry Duyck (collectively referred to as "Friends"). Metro also adopts and incorporates the arguments presented in the briefs filed by respondents City of Hillsboro and Washington County regarding Friends' first assignment of error.

A. Response to Friends' First Assignment of Error

At no point in the first assignment of error is the actual assignment of error precisely identified as required by ORAP 5.45(3). After several reads, it appears that the assignment might be expressed as follows: "LCDC misconstrued the requirement for designating Foundation Agricultural Land under OAR 660-027-0040 (11) when it rejected petitioners' objections regarding designating Areas 8A and 8B as urban reserves." However, prior to landing on this argument, Friends' brief meanders through a number of unconnected general complaints about LCDC's decision, including an unsupportable statement that Metro failed to adopt *any* findings addressing the "best achieves" standard. Friends' Brief at 17-18. Ultimately, at page 19, Friends settles on a relatively specific argument challenging LCDC's

interpretation of the rule regarding designating "Foundation" farmland in Areas 8A and 8B as urban reserve at OAR 660-027-0040(11).

Foundation Agricultural Lands are defined in the reserve rules as lands identified and mapped by the Oregon Department of Agriculture (ODA) as the region's most valuable farmland. OAR 660-027-0010(1). In enacting the division 27 rules, LCDC included a separate section regarding urban reserve designations on those lands:

> "If Metro designates such land as urban reserves, the findings and statement of reasons shall explain, by reference to the factors in OAR 660-027-0050 and 660-027-0060(2), why Metro chose the Foundation Agricultural Land for designation as urban reserves rather than other land considered under this division."

OAR 660-0027-0040(11). The correct interpretation of the phrase "rather than other land considered under this division" appears to be the heart of Friends' argument.

At LCDC, Friends argued that prior to designating any foundation farmland area as an urban reserve, the above-quoted rule required Metro to undertake a separate area-by-area comparative analysis of all non-foundation farmland and explain, as to each particular area, why the foundation land was selected instead under the urban reserve factors. As described by LCDC in its order:

> "1000 Friends argues this provision imposes an extra obligation of identifying what it is about this land that satisfies the urban reserves factors and why that obligation cannot be satisfied by other non-Foundation Lands. 1000 Friends argues that Metro's decision lacks this necessary alternative lands analysis. 1000 Friends, June 2, 2011 at 14-15." (Emphasis added.)

JER 141. Thus, it was Friends' contention below, as here, that the rule requires Metro to provide additional findings (a) comparing the urban reserve factors for the foundation land being designated against each individual study area containing non-foundation farmland and (b) explaining why the foundation land was selected instead of each other individual area.

LCDC adopted detailed findings explaining its interpretation of the rule and the basis for its rejection of Friends' argument. Despite the fact that LCDC's interpretation is the crux of this assignment of error, Friends does not quote that portion of the order except to contort a couple of selected phrases out of context. *See, e.g.*, Friends' Brief at 15, n 20 and related text. LCDC adopted the following findings rejecting Friends' argument and relying on specific findings and evidence and adopted by Metro and Washington County:

> "1000 Friends' interpretation of OAR 660-027-0040 (11) either overstates or constrains the explanation required by the text of the rule to an analysis of 'why that obligation cannot be satisfied by other non-Foundation Lands.' Although Metro certainly could, and in fact did, include such an analysis in providing the explanation required by OAR 660-027-0040(11), 1000 Friends does not establish that Metro was required to

> include such an explanation in its findings and statement of reasons. The Commission interprets OAR 660-027-0040(11) to require Metro to explain why it chose Foundation Agriculture Lands, including those in Area 8B, 'rather than other lands considered under this division.' Metro has done so in its findings. For the modified Area 8B, Metro and Washington County applied the OAR 660-027-0050 urban reserve factors, followed by an application of OAR 660-027-0060 rural reserve factors. Exhibit B to Ordinance 11-1255 at 154 to 169. [JER 575-590.] Metro and Washington County also made express 'Findings and Statement of Reasons for Foundation Agricultural Lands as Urban Reserves.' *Id* at 175-178. [JER 596-601.] Metro made general findings as to why the region designated any Foundation Agricultural Land as urban reserve as well. *Id.* at 4-10. [JER 425-431.] The Commission rejects this objection because Metro and Washington County explained in the findings and statement of reasons why it chose the Foundation Agricultural Lands in Area 8B rather than other lands considered under division 27 as required by OAR 660-027-0040(11)." (Citations to JER added.)

JER 141. Each of the specific Metro and county findings referenced by LCDC is described below. LCDC also adopted separate findings addressing this issue at JER 84-88.

First, specifically regarding Area 8B, LCDC correctly notes that Metro and the county directly applied all of the urban and rural reserve factors, as required by the rule. JER 575-590. Contrary to Friends' argument regarding a failure to apply all of the factors to Area 8A, the order also identifies locations in the record where the factors are applied to Area 8A. JER 134-136.

Next, LCDC identifies the location in the record where Metro and the county provide "findings and reasons" summarizing how particular non-foundation areas fared under application of both the urban and rural reserve factors. JER 596-601. As noted in those findings, the vast majority of land in the Washington County study areas is foundation farmland, and much smaller areas are identified as "important" or "conflicted" farmland. JER 596. A map of all the non-foundation farmland areas (*i.e.*, "important" and "conflicted" areas) is included at JER 597. The findings discuss the application of the factors and generally explain how each area was designated and why an urban or rural designation was selected. Consistent with the purpose of OAR 660-027-0040 (11), these findings conclude that the county attempted to designate the non-foundation areas as urban reserves "where possible." JER 599.

Finally, the LCDC order identifies findings adopted by Metro explaining how specific urban reserve factors apply to foundation farmland in general and why foundation farmland had to be designated as urban reserve. JER 425-431. These findings provide, in relevant part:

> "Why did the region designate any Foundation Agricultural Land as urban reserve? The explanation lies in the geography and topography of the region, the growing cost of urban services and the declining sources of revenues to pay for them, and the fundamental relationships among geography, topography and the cost of services. The region aspires to build

> 'great communities.' * * * The urban reserves factors in the reserves rules derive from work done by the region to identify the characteristics of great communities. Urban reserve factors (1), (3), (4), and (6) especially aim at lands that can be developed in a compact, mixed-use, walkable and transit-supportive pattern, supported by efficient and cost-effective services. Cost of services studies tell us that the best geography, both natural and political, for compact, mixed-use communities is relatively flat, undeveloped land. * * *."
>
> "The region also aspires to provide family-wage jobs to its residents. Urban reserve factor (2) directs attention to capacity for a healthy economy. Certain industries the region wants to attract prefer large parcels of flat land. Metro Rec. 172-178. Water, sewer and transportation costs rise as slope increases. [Cites omitted.] Converting existing low-density rural residential development into compact, mixed-use communities through infill and re-development is not only very expensive, it is politically difficult. Metro Rec. 289-300.
>
> "Mapping of slopes, parcel sizes, and Foundation Agricultural Land revealed that most flat land in large parcels without a rural settlement pattern at the perimeter of the UGB lies in Washington County, immediately adjacent to Hillsboro, Cornelius, Forest Grove, Beaverton, and Sherwood. * * * Almost all of it is Foundation Agricultural Land. * * * Had Metro not designated some Foundation Land as urban reserve in Washington County, it would not have been possible for the region to achieve the 'livable communities' purpose of reserves in LCDC rules [OAR 660-027-0005(2)]."

JER 425-426.

The rule at issue requires findings that "explain, by reference to the factors, why Metro chose the Foundation Agricultural Land for designation as urban reserves rather than other land considered under this division." OAR 660-027-0040(11). The above-quoted findings provide a clear

explanation regarding how the urban reserve factors apply to foundation farmland in Washington County, and a clear explanation regarding why such land had to be chosen "rather than other land." Therefore, the rule is satisfied.

The first assignment of error includes an argument that LCDC failed to address the standard requiring findings that the region-wide balance in the designation of both urban and rural reserves "best achieves" the desired objectives. OAR 660-027-0005(2). Friends contends that Metro "made no such finding." Friends' Brief at 18.

Friends' assertion that Metro made no findings addressing OAR 660-027-0005(2) is puzzling. In fact, as specifically noted in the LCDC order, Metro adopted findings that Metro and the three counties agreed that:

> "this adopted system of urban and rural reserves, in its entirety, achieves the region's long-range goals and a balance among the objectives of reserves: to accommodate growth in population and employment in sustainable and prosperous communities and neighborhoods, to preserve the vitality of the farms and forests of the region, and to protect defining natural landscape features."

JER 69; JER 431. Regardless, the decision on review is LCDC's order, which includes detailed findings responding to arguments below from 1000 Friends, Save Helvetia and ODA regarding the application of OAR 660-027-0005(2) and its requirement for a "balance" in the region-wide designations

that "best achieves" the identified objectives. *See* JER 68-74; JER 91-92. LCDC specifically noted:

> "the purpose of OAR chapter 660, division 27 is to achieve a balance in the designation of urban and rural reserves to apply to the entirety of the region and not to the individual counties. The large amount of rural reserve land within Washington County reflects a region-wide balance, and neither Metro nor Washington County relied on the amount of rural reserve in that county to increase the amount of urban reserves."

JER 92.

Friends attempts to fault LCDC for "only" considering the *amount* of land included as urban or rural reserves, rather than the qualitative balance required under OAR 660-027-0005(2). Friends' Brief at 18. In making this argument, Friends conveniently cites only to those portions of LCDC's order where the agency was directly responding to arguments raised below – by Friends and other objectors – that the Metro and county decisions included "too much" or "too little" urban or rural reserve area to achieve the required balance. *See, e.g.*, JER 68, 71, 91. LCDC responded to those arguments by citing to quantitative facts to the contrary regarding acreage and percentages of urban vs. rural reserves. Friends now disingenuously relies only on those portions of the order to claim that LCDC's decision was based exclusively on acreage and percentages. Rather, LCDC expressly rejected arguments below that OAR 660-027-0005(2) required a quantitative exercise. JER 71.

As described above, LCDC also adopted findings addressing the qualitative nature of the "best achieve balance" requirement. JER 68-69.

For these reasons, and the reasons stated in the briefs filed by Washington County and the City of Hillsboro, the first assignment of error should be denied.

B. Response to Friends' Second Assignment of Error

Metro adopts and incorporates by reference the arguments contained in the briefs filed by respondents Washington County and City of Hillsboro regarding Friends' second assignment of error.

VIII. RESPONSES TO SAVE HELVETIA ASSIGNMENTS OF ERROR

This section provides Metro's responses to assignments of error presented in the brief filed by Save Helvetia and Robert Bailey (collectively referred to as "Helvetia").

A. Response to Helvetia's First Assignment of Error

1. Consistency with ORS 197.298 and application of rules

This argument reveals that Helvetia is simply in denial regarding the enactment of Senate Bill 1011 and LCDC's division 27 rules. Helvetia argues that the reserve process, as enacted, "turns the priority scheme of ORS 197.298 and Goal 14 entirely upside down," and "cannot be interpreted so broadly." Helvetia's Brief at 9. In response to these points, Metro directs

the court to the plain language of the statute and rules. As described above in section II.A of this brief, the inherent purpose of the statute and rules creating the urban and rural reserve process was to create a more flexible and efficient process for identifying urban reserve areas, which will then become the first priority for future UGB expansions under ORS 197.298. The flexibility was provided, in part, by providing a list of discretionary factors for consideration by Metro and the counties designed to guide the selection of reserve areas.

Focusing only a little, Helvetia next asserts that Metro and LCDC "failed to properly analyze how they considered the factors," thereby "undermining the existing land use system." Helvetia's Brief at 11. In the decision on review, LCDC did not consider the factors – LCDC reviewed whether Metro and the counties considered the factors. The heart of this argument appears to be Helvetia's challenge of LCDC's general description of the reserves process, particularly the statement that the statutes and rules:

> "grant substantial discretion to Metro and the counties in deciding which lands to designate as urban and rural reserves and * * * there is no requirement for Metro to show that an area is better suited as an urban reserve than as a rural reserve before it designates any land as urban reserves."

JER 29-30. LCDC's description is an entirely correct application of the statute and rules, which Helvetia condemns as allowing LCDC to engage in

"the type of conclusory reasoning" that was rejected in an unrelated case for which Helvetia provides no actual analysis. Helvetia's Brief at 13.

Helvetia's point appears to be that they do not like the new statutory scheme for designating urban and rural reserves. However that is not grounds for remand. Helvetia fails to clearly identify any basis on which this court could remand LCDC's order under ORS 197.651(10).

2. Application of the "best achieves" standard

Helvetia argues that LCDC misconstrued the "best achieves" standard of OAR 660-027-0005(2) by failing to adopt findings providing an alternatives analysis to justify the selection of one area over another. Helvetia contends that "[d]etermining what solution is 'best' requires the consideration of alternatives and an explanation of how the factors and decisions were balanced against each other to achieve the 'best' result." Helvetia's Brief at 17. This argument is directly addressed above in section VI.A of this brief responding to the Cities of Tualatin and West Linn's first assignment of error.

3. "Substantial reason" for designation of Area 8B as urban

As described above in section II.D of this brief, there is no basis for the court to apply the "rule of substantial reason" to urban and rural reserve decisions under the standard of review established in ORS 197.651(10).

Metro otherwise adopts and incorporates the arguments presented by Washington County and the City of Hillsboro in response to Helvetia's first assignment of error.

B. Response to Helvetia's Second Assignment of Error

Metro adopts and incorporates the arguments presented in the briefs filed by respondents Washington County and City of Hillsboro regarding Helvetia's second assignment of error.

IX. RESPONSES TO CHESAREK ASSIGNMENTS OF ERROR

Regarding the opening brief filed by petitioners Carol Chesarek and Cherry Amabisca (collectively "Chesarek"), Metro adopts and incorporates the arguments presented in respondent Washington County's brief regarding Chesarek's first assignment of error, and the arguments presented in respondent LCDC's brief regarding Chesarek's second and third assignments of error.

X. RESPONSES TO BARKERS FIVE AND SANDY BAKER'S ASSIGNMENTS OF ERROR

Metro adopts and incorporates the arguments presented in respondent Clackamas County's brief regarding the first and second assignments of error in the brief filed by petitioners Barkers Five, LLC and Sandy Baker.

XI. RESPONSES TO GRASER-LINDSEY AND MCKENNA ASSIGNMENTS OF ERROR

Metro adopts and incorporates the arguments presented in respondent Clackamas County's brief in response to the first and second assignments of error in the brief filed by Elizabeth Graser-Lindsey and Susan McKenna.

XII. CONCLUSION

For all of the reasons described above, and the reasons described in the briefs submitted by the other respondents and adopted and incorporated herein, petitioners' assignments of error should be denied.

Dated this 11th day of December, 2012.

Roger A. Alfred, OSB No. 935009
Alison Kean Campbell, OSB No. 930114
Office of Metro Attorney

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

APP 2

MEASURE: SB 1011
EXHIBIT: C
Energy and the Environment
DATE: 5-21-07 PAGES: 28
SUBMITTED BY: Randy Tucker

Vote Yes on Senate Bill 1011

Creates Collaborative Process to Manage Growth of Portland Metropolitan Region

METRO

The Metro Council strongly urges you to vote YES on Senate Bill 1011, which offers the prospect of significant improvements to the long-range planning process in the Portland metropolitan region. SB 1011 is supported by a broad range of public and private interests concerned with growth management in the region (see back of sheet).

The Problem

Virtually no one is happy with the current system for managing the Portland region's urban growth boundary. The system is dominated by two arbitrary numbers (20-year land supply requirement, Metro-only five-year UGB evaluation cycle) rather than by rules that are more responsive to the aspirations of the region. Today's system requires perpetual UGB expansions, but the "low-hanging fruit" of obvious and easy expansion areas is gone. The current system offers no way to protect critical farmland or natural resources over the long term, yet it also fails to consider factors related to efficient and effective urbanization when deciding where to expand the UGB. The existing "land hierarchy," which directs UGB expansions based on the quality of agricultural land, may be too narrow; more criteria than soil type may be needed to decide what farmland is truly worth protecting and what areas are more logical to urbanize.

As a result, current rules lead to UGB expansions where they are not wanted (especially for industrial use) and prevent expansions where they might be appropriate and desirable. For this reason and others, the current system, which requires Metro to start from scratch every five years, leads to conflict, uncertainty, and frustration for local governments, farmers, businesses, and individual citizens.

The "Ag/Urban Study"

In order to inform the region's approach to future urban expansion, Metro joined the three counties of the region, as well as the Department of Land Conservation and Development and the Department of Agriculture, to conduct the so-called "ag-urban study." This project examined land outside Metro's UGB and asked three questions:

- What lands are functionally critical to the **agricultural** economy (irrespective of soil type)?
- What lands are critical in terms of **ecological** function (protecting water quality, plant and wildlife habitat, and key landscape features like steep slopes)?
- What lands can most efficiently and effectively be integrated into the **urban** fabric of the region to create sustainable and complete communities?

The answers do not always correspond with the land priorities in current statute or in the urban reserve rule. SB 1011 is an attempt to align the law with the region's goals both for urbanization and for protection of areas that should not be urbanized.

What does SB 1011 do?

SB 1011 authorizes the creation of rural reserves, or areas that shall not be urbanized in the immediate future. There is currently no legal authorization to protect these lands over the long term.

The bill also provides a new pathway for the creation of urban reserves, or areas that should be first in line for urbanization, in the Portland metropolitan area. These modifications should make it easier to designate urban reserves by providing a pathway based on urban factors as an alternative to the "land hierarchy" in the existing urban reserve administrative rule, which is similar to the statutory UGB hierarchy.

Because it is important that urban and rural reserves be addressed concurrently, SB 1011 creates a process for designating them simultaneously through agreements between Metro and counties.

(For a more detailed summary of SB 1011's provisions, see the attached "road map.")

Why should you support SB 1011?

- The governments of the Portland area have done extensive research through the ag/urban study to lay the groundwork for this legislation. The research identifies the problem; provides substantial data and findings to point to answers; and offers developers and farmers a shared solution.

- Metro and its partners have built a strong coalition around acting now. The concept has widespread support: it received the unanimous endorsement of the Metro Policy Advisory Committee, which includes local elected officials from throughout the region.

- Other supporters include: Home Builders Association of Metropolitan Portland; Portland Association of Realtors; Associated General Contractors; 1000 Friends of Oregon; Association of Nurseries; Oregon Winegrowers Association; American Institute of Architects Oregon; Washington, Clackamas, and Multnomah Counties; cities throughout the region, including Hillsboro, Wilsonville, Sandy, and Portland; the Oregon Department of Agriculture; and the Oregon Department of Land Conservation and Development.

- SB 1011 would provide a way to comprehensively address the region's urban and rural needs (housing, jobs, agriculture, etc.), not just the needs of a given interest group, landowner, or geographic area.

- SB 1011 is part of a broad-based, multi pronged regional strategy to improve the way we grow, develop, and protect our agricultural and natural resource base. Metro is committed to making the next two years of this effort productive. With the population pressure the region faces, we cannot afford to wait until the conclusion of the "Big Look" in 2009 to reform the growth management process.

- Our work (both the LCDC rulemaking and its application on the ground) will help inform the state's Big Look task force, which is grappling with similar issues as they play out throughout the state.

SB 1011 is the only proposal before the 2007 Legislature that offers a realistic prospect of providing both more flexibility and more predictability to the growth management process in the Portland metropolitan area. The changes embodied in this bill support great communities, a viable agricultural industry, a strong urban economy, and a healthy environment.

Please support SB 1011.

Questions? Contact Randy Tucker, Legislative Affairs Manager, (503) 481-9455.

APP 4

Board of County Commissioners
MULTNOMAH COUNTY OREGON

501 SE Hawthorne Blvd., Ste. 600
Portland, Oregon 97214
(503) 988-6800

MEASURE: SB 1011
EXHIBIT: BB
Sen. Environment & Natural Resources
DATE: 04/16/07 PAGES: 1
SUBMITTED BY: Randy Tucker

Dear Sen. Avakian and
Members of the Senate Environment and Natural Resources Committee:

Multnomah County supports **SB 1011 Relating to Land Reserves** as amended.

This bill would enable Multnomah, Clackamas, and Washington Counties and Metro to work with the Land Conservation and Development Commission to develop rules that improve management of the Portland metro region Urban Growth Boundary. Senate Bill 1011 does this by providing for rural reserves and by amending urban reserve rules to include consideration of the most desirable urban form in the process of deciding what land to urbanize.

Provision for urban and rural reserves allows for longer-term planning by farm land managers and by those involved in planning for urban development. Senate Bill 1011 also allows important natural areas to be designated as rural reserve, thereby protecting them from urbanization. Extending the planning horizon through urban reserves should result in more efficient provision of urban services. In addition, consideration of the elements needed to create great communities will help integrate new areas with existing communities.

Thank you for the opportunity to provide this information. If you have questions or desire additional information, please contact Chuck Beasley, Senior Planner, Multnomah County Land Use Planning, at 503-988-3042 ext 22610 or the Multnomah County Public Affairs office at 503-988-6800.

Sincerely,

TED WHEELER
Ted Wheeler, Chair

Maria Rojo de Steffey
Commissioner, District 1

Jeff Cogen
Commissioner, District 2

Lisa Naito
Commissioner, District 3

Lonnie Roberts
Commissioner, District 4

MEASURE: SB 1011
EXHIBIT: H
Energy and the Environment
DATE: 5-21-07 PAGES: 2
SUBMITTED BY: Tom Hughes

CITY OF HILLSBORO

CITY OF HILLSBORO TESTIMONY Re: SB 1011 A-Engrossed
BEFORE THE HOUSE ENERGY & ENVIRONMENT COMMITTEE
May 21, 2007

Hon. Chair Dingfelder & Committee Members:

Hillsboro has been an active participant from the start in the preparation of SB 1011 and a strong supporter of the long-term future "economic certainty" for the Portland Region's agricultural and urban industries being sought by the Bill's "rural reserves" and "urban reserves" concepts. We support the Bill as recommended to you today by a broad-based, public-private SB 1011 work group. We ask your Committee to recommend its passage by the House of Representatives .

Broad-based support for the Bill from agriculture, business, home building, State, regional, county and city governments speaks clearly about its substantial land use management merits. It is worthy of Legislative approval for another important reason: By providing long-term certainty about where future growth around the Region would go - and not go – the Bill can bring an end to years of UGB disagreements and litigation that has plagued the Region.

For more than a decade, the UGB process in the Portland Region has been contentious and usually resulted in litigation of hotly disputed UGB additions and rejections from both urban development and farmland advocates. We've been parties to some of the disputes. The sobering, anticipated addition of roughly 1 million more people to the Region's population by 2035 urgently calls for a new, more rational and predictable land management approach to protecting the viability of agriculture as well as managing urban growth within and around the Region's urban fringe. We believe that the long-term land resources management approach embedded in SB 1011 (as proposed to be amended by its collaborating partners) will provide that approach if enacted.

By no means is SB 1011 a Land Use System "silver bullet". In fact, it is still a work-in-progress as evidenced by some of the testimony presented to the Committee at this hearing. It will need more fine tuning and detailed attention by the LCDC (as prescribed in the Bill) and possibly by the State Big Look Task Force in its 5-years effort to comprehensively improve (top-to-bottom) all major aspects of the State

APP 6

Land Use System. However, the Bill's land management concepts are needed now, not later. They are sufficiently developed to provide a workable tool for the Regional Government and its local government partners as they face imminent decisions on how to accommodate 1 million more people in the next 20-25 years and its 5-year UGB review obligations in 2009 and every five years thereafter per ORS 197.296 and 197.299.

We respectfully urge Legislative enactment of SB 1011. Thank you for considering our remarks.

CITY OF HILLSBORO:

Tom Hughes

Mayor Tom Hughes

APP 7

MEASURE: SB 1011
EXHIBIT: A
Sen. Environment & Natural Resources
DATE: 04/10/07 PAGES: 1
SUBMITTED BY: Tom Brian

WASHI

April 10, 2007

Chairman Avakian
Environment and Natural Resources Committee

RE: HB 2051A and SB 1011

Chairman Avakian and Committee Members:

On behalf of Washington County, we urge your support of HB2051A and SB 1011.

Washington County has worked closely with Metro, Clackamas County, Multnomah County, the City of Hillsboro, the Department of Land Conservation and Development and the Department of Agriculture to explore, evaluate and ultimately recommend the state planning program be modestly adjusted to allow the utilization of a modified Urban Reserve concept and a new Rural Reserve concept.

SB 1011 enables Urban Reserves and Rural Reserves and directs LCDC to undertake rule making to fully specify the mechanics of Urban Reserves and Rural Reserves.

HB 2051A provides a one time only extension of Metro's periodic review from five years to seven years. The additional two years will allow Metro and the local governments to engage in a two-year planning process to put Urban Reserves and Rural Reserves in place for the Portland Metropolitan Area.

Washington County and its cities and services districts have worked closely with our partners in the urban economy and in the agricultural sector to seek ways to improve upon the existing growth management process. Our collective goal has been to improve urban grown boundary decision-making to ensure both our urban and agricultural sectors continue to thrive. After extensive discussion and evaluation, our collective conclusion has been the provision of greater long term certainty will benefit both our urban and agricultural communities. The concepts of Urban Reserves and Rural Reserves in SB 1011 enhance long term certainty. The concepts also fit with the existing UGB amendment hierarchy of ORS 197.298.

Along with our other partners, we recognize that valid questions and concerns have recently surfaced by others in their review of SB 1011. For the last several weeks, we have been developing amendments which enhance the clarity of the planning concepts and address issues and concerns. Along with our partners, we would like to return shortly with amendments.

Thank you for your consideration.

Sincerely,

Tom Brian

Tom Brian
Chairman

Board of County Commissioners
155 North First Avenue, Suite 300, MS 22, Hillsboro, OR 97124 3072
phone: (503) 846 8681 • fax: (503) 846 4545

APP 8

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF THE PERIODIC REVIEW OF THE METRO REGIONAL URBAN GROWTH BOUNDARY	))))	PARTIAL APPROVAL AND REMAND ORDER 05-WKTASK-001673

This matter came before the Land Conservation and Development Commission (Commission) on November 3 and 4, 2004, as a referral of Metro's re-submittal of periodic review Work Task 2, pursuant to ORS 197.633, ORS 197.644(2) and OAR chapter 660, division 025. Metro adopted the submittal in response to the Commission's Partial Approval and Remand Order 03-WKTASK-001524. The Commission fully considered Metro's submittal; oral argument and the written comments, objections, and exceptions of the parties and Metro, and the reports of the director of the Department of Land Conservation and Development (department).

History and Summary of Task 2

The Commission approved Metro's periodic review work program on July 28, 2000. LCDC Order 00-WKTASK-001243. Task 2 of the approved work program required Metro to estimate 20-year population and employment growth to the year 2022 and assess the capacity of the regional urban growth boundary (UGB) to accommodate the identified need, and, if necessary, increase the capacity of the UGB. Task 2 consisted of specified subtasks (12a, Regional Forecast; 12b, Housing Needs Analysis; 13, Land Supply Analysis; 14a, Residential Land Needs Analysis; 14b, Employment Land Need Analysis; 15, Alternative Analysis; 16, Technical Amendments to the UGB; and 17, Selection of Lands for UGB Amendment).

Metro forecasted a population increase of 525,000 people and identified a need to accommodate 355,000 jobs by 2022. Metro analyzed the capacity of land within the UGB to accommodate the determined need. Metro's Task 2 submittals have included measures both to increase the capacity of residential and employment land within the present UGB and to expand the UGB to accommodate the determined need. On March 20, 2003, the Commission granted partial approval of Task 2 to acknowledge Metro's amendment of the regional UGB to include five "Regionally Significant Industrial Areas." LCDC Order 03-WKTASK-001491. On July 7, 2003, the Commission approved an UGB expansion of 18,638 acres to accommodate Metro's identified residential and a portion of the identified employment need. LCDC Order 03-WKTASK-001524. The Commission also remanded portions of Task 2 to Metro to address three issues. *Id.* at 50. Judicial review of that order is pending before the Oregon Court of Appeals. *See City of West Linn v. LCDC* (CA 122169).

On June 24, 2004, Metro adopted Ordinance No. 04-1040B to fulfill the requirements of the Commission's remand order. Ordinance No. 04-1040B responds to LCDC Order 03-WKTASK-001524 with the following submittals:

could not accommodate the city's request to bring in Evergreen instead, even in the interest of accommodation under Goal 2.

Hillsboro also argues a "forced urban growth boundary change over the objections of an affected city is inconsistent with Goal 2." The Commission finds that Hillsboro has not established that it objected to Metro that inclusion of the Helvetia area would be inconsistent with the city's comprehensive plan. The burden of coordination lies upon both units of government. *D.S. Parklane Development, Inc. v. Metro,* 165 Or App 1, 27, 994 P2d 1205 (2000). Goal 2 requires Hillsboro to inform Metro that inclusion of Helvetia would be inconsistent with its comprehensive plan. The Commission finds that Hillsboro informed Metro that it would accept the Helvetia area, but preferred Evergreen. *See* May 5, 2004 letter attached to Hillboro's objection and quoted at 21 ("We do not oppose adding the 'Helvetia Study Area' to the UGB, but prefer the Evergreen Road Site over the Helvetia site."). As a matter of law, the Commission concludes that neither Goal 2 nor ORS 197.015(5) require Metro to successfully accommodate the interests presented in the process of coordination. *Turner Community Association*, 37 Or LUBA at 353; *see also* LCDC Order 03-WKTASK-001524 at 32 (finding Metro did not violate Goal 2 by including land to meet the identified residential need despite objections of the City of West Linn). Obviously, the Commission adds that Metro cannot accommodate legitimate concerns that are not clearly articulated by an affected governmental unit. The Commission rejects this objection both as a matter of fact and law.

The Commission concludes that Metro complied with Goal 2 in coordinating this submittal with Hillsboro. The Commission rejects the City of Hillsboro Objections 5, 6, and 7 related to compliance with Goal 2.

Goal 9

Statewide Planning Goal 9 is "[t]o provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens." OAR 660-015-0000(9). Goal 9 mandates specific requirements for comprehensive plans for urban areas.

Langdon Farms, Hillsboro, and Westside Economic Alliance stated objections and exceptions asserting various ways that Metro's submittal does not comply with Goal 9. In its staff reports, the department concluded that through the coordination requirements of Goal 2, Metro had to consider how cities and counties in the region will meet their Goal 9 responsibilities to provide short-term supplies of employment land.

The Commission concludes that Goal 9 does not apply to Metro. In reviewing Metro's prior Task 2 submittal for compliance with the goals, the Commission concluded "Goal 9 assigns no direct responsibility to Metro." LCDC Order 03-WKTASK-001524 at 48. The Commission nevertheless determined that the measures Metro took in both preparing Task 2 and the submittal itself were consistent with Goal 9:

> "Goal 9 assigns no direct responsibility to Metro. Nonetheless, as part of Task 2 of periodic review, Metro reviewed the economic development elements of the comprehensive plans of the 24 cities and three counties that comprise the metropolitan area. Metro used the review in its determination of the region's need for employment

land and for coordination with local governments of its choices to add land to the UGB for employment purposes.

"Metro also revised Title 4 (Industrial and Other Employment Areas) of its UGMFP to improve protection of the land base for industrial use and of industrial uses from conflicts with other uses. Metro also, in each of its ordinances adding land to the UGB for industrial use, placed conditions to help ensure the land's availability for that purpose. These measures comply with Goal 9." *Id.*

Metro's exception and oral argument present a cogent analysis of the applicability of Goal 9 to a metropolitan service district. Metro argues:

"A careful reading of Goal 9, the Goal 9 rule, and state statute discloses that: (1) there is no mention of Metro in the goal or rule; (2) the goal and rule assign responsibilities to cities and counties, not to Metro or a regional government; (3) the goal and the rule specify that they are to be implemented by 'comprehensive plans'; (4) Metro does not have a 'comprehensive plan' as defined in ORS 197.015(5); (5) Metro has a 'regional framework plan,' a term used in statute when the legislature intends a law to apply to Metro; and (6) ORS 197.015(16) expressly states that Metro's regional framework plans is not a "comprehensive plan." The Court of Appeals held that ORS 197.712, the legislature's analogue to Goal 9, does not apply to Metro because the statute, like Goal 9, assigns responsibilities to cities and counties, not to Metro. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 468, 472 (2002)." Metro exception at 1.

In Langdon Farms' exception, it argues that there can be no distinction between comprehensive plans and regional framework plans because there is no statutory authority for the Commission to acknowledge anything besides a comprehensive plan. The Commission disagrees. ORS 268.390(6) specifically makes regional framework plans and their implementing ordinances "subject to review under ORS 197.274." ORS 197.274(1)(a)(A) provides that the Metro regional framework plan is subject to review "in the same manner as a comprehensive plan" for acknowledgement under ORS 197.251. The Commission has statutory authority to review the regional framework plan for goal compliance, if not under ORS 197.040(2)(d), which requires the commission to review comprehensive plans for compliance with the goals, than certainly under ORS 197.040(2)(i) which requires the commission to perform other duties required by law, in this case ORS 197.274.

Metro and the City of Portland also point out that Goal 9 is not part of Metro's approved periodic review work program; Goal 9 has never been part of a Metro periodic review work program. Metro also states that it lacks authority to undertake "economic development" planning:

"Economic development is not among the 'matters addressed' in the regional framework plan or 'other assigned functions' under Metro's charter [see Chapter II, section 5(2)(b) and section (6)]. In order to add economic development to Metro's functions, the legislature would have to make the assignment by statute, or Metro would have to assume the function by ordinance after obtaining the approval of voters in the region or of a majority of the member of the Metropolitan Policy Advisory Committee (MPAC). None of these steps has been taken." Metro Exception at 2.

The Commission concludes that Metro's responsibility to ensure a long-term supply of employment land inside the regional UGB stems from Goal 14, not Goal 9.[8] Although Goal 2 requires Metro to coordinate its decision-making with local governments in the region, Goal 2 does not make Goal 9 apply "indirectly" to Metro because Goal 9, by own terms, does not apply to Metro.[9] The Commission rejects objections that are based on an assertion that Metro is responsible for satisfying the planning requirements of Goal 9, including Westside Economic Alliance Exception 1 and Hillsboro Objections 3, 4(e), (g), and 11.

Short-term Supply of Land

Langdon Farms, Hillsboro, and Westside Economic Alliance raised objections and exceptions regarding the short-term supply of industrial land, specifically that for warehouse/distribution. The obligation to provide a short-term supply of serviceable sites comes from OAR chapter 660, division 009, which implements Goal 9 and ORS 197.712. As discussed above, Goal 9, ORS 197.712, and division 009 do not apply to Metro. OAR 660-009-0025(3), pertaining to short-term supply of serviceable sites, provides "[i]f the local government is required to prepare a public facility plan by OAR chapter 660, division 011." Because Metro is not a local government that is required prepare a public facility plan by OAR chapter 660, division 011, the rule on its face does not apply to Metro. The Commission concludes that Metro is not responsible for planning a short-term supply of industrial land.[10]

Goal 14 (Need)

Hillsboro Objection 2 contends "Metro erred in reducing the identified industrial land need acknowledged by the Commission in the absence of a goal compliance issue that necessitated further review and revision." Hillsboro objection at 14.

The Commission finds that Metro did not reduce the identified industrial land need. Metro started with an unmet industrial need of 1,968 acres, consistent with the UGR-E and LCDC Order 03-WKTASK-001524. To the extent that this and other objections contend that the Commission directed Metro to simply add 1,968 net acres to the UGB, the objections misconstrue the Commission's order and the Goal 2 and 14 requirements for expanding a UGB.

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[8] In LCDC Order 03-WKTASK-001524, the Commission stated "OAR 660-009-0025(2) requires Metro to provide an amount of land that is at least equal to the projected land needs for a 20-year supply of industrial land." *Id.* at 28. As a matter of law, it is Goal 14, and not OAR 660-009-0025(2), that imposes this requirement on Metro.

[9] To the extent that the department suggested such a responsibility, the Commission does not adopt that portion of the staff reports.

[10] The Commission notes that the department raised concerns about the short-term supply of industrial sites in the UGB. DLCD Metro UGB Staff Report at 25. To "allay these concerns," Metro

> "scoured the Task 2 record to identify vacant industrial lands that can be available for use within five years. Metro derived this information from our periodic review database using the methodology used in the Regional Industrial Land Study (RILS) (part of the Task 2 record) to identify 'Tier A industrial land' (land 'readily developable without major constraints') and from its coordination with cities and counties during more than four years of work on Task 2. This information shows that 2,897 acres (31 percent) of the approximately 9,344-acre need for vacant industrial land now in the UGB can be available for use within five years. This calculation of short-term supply does not include any of the industrial land included in June, 2004." Metro Exception at 2 (footnote omitted).

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF MAKING THE GREATEST PLACE AND PROVIDING CAPACITY FOR HOUSING AND EMPLOYMENT TO THE YEAR 2030; AMENDING THE REGIONAL FRAMEWORK PLAN AND THE METRO CODE; AND DECLARING AN EMERGENCY	))))))	Ordinance No. 10-1244B Introduced by Chief Operating Officer Michael Jordan with the Concurrence of Council President Carlotta Collette

WHEREAS, Metro, the cities and counties of the region and many other public and private partners have been joining efforts to make our communities into "the Greatest Place"; and

WHEREAS, state law requires Metro to assess the capacity of the urban growth boundary (UGB) on a periodic basis and, if necessary, increase the region's capacity for housing and employment for the next 20 years; and

WHEREAS, Metro forecasted the likely range of population and growth in the region to the year 2030; and

WHEREAS, Metro assessed the capacity of the UGB to accommodate the forecasted growth, assuming continuation of existing policies and investment strategies, and determined that the UGB did not provide sufficient and satisfactory capacity for the next 20 years; and

WHEREAS, the Metro Council, with the advice and support of the Metro Policy Advisory Committee (MPAC), established six desired outcomes to use as the basis for comparing optional amendments to policies and strategies to increase the region's capacity; and

WHEREAS, the outcomes reflect the region's desire to develop vibrant, prosperous and sustainable communities with reliable transportation choices that minimize carbon emissions and to distribute the benefits and burdens of development equitably in the region; and

WHEREAS, Metro undertook an extensive process to consult its partner local governments and the public on optional ways to increase the region's capacity and achieve the desired outcomes; and

WHEREAS, joint efforts to make the region "the Greatest Place" not only improve our communities but also increase our capacity to accommodate growth and achieve the desired outcomes; now, therefore,

THE METRO COUNCIL ORDAINS AS FOLLOWS:

1. The Regional Framework Plan (RFP) is hereby amended, as indicated by Exhibit A, attached and incorporated into this ordinance, to adopt: desired outcomes toward which the Metro Council will direct its policies and efforts; new policies on performance measurement to measure progress toward achievement of the outcomes; new policies on efficient use of land, public works and other public services; and new policies on investment in Centers, Corridors, Station Communities, Main Streets and Employment Areas.

2. Title 1 (Housing) of the UGMFP is hereby amended, as indicated in Exhibit B, attached and incorporated into this ordinance, to help ensure sufficient capacity to meet housing needs to year 2030.

3. Title 4 (Industrial and Other Employment Areas) of the UGMFP is hereby amended, as indicated in Exhibit C, attached and incorporated into this ordinance, to help ensure sufficient capacity to meet employment needs to year 2030.

4. The Title 4 Industrial and Other Employment Areas Map is hereby amended, as indicated in Exhibit D, attached and incorporated into this ordinance, to show changes to design-type designations to conform to new comprehensive plan designations by cities and counties pursuant to Title 11 of the UGMFP, to respond to needs identified in the 2009 Urban Growth Report, and to make corrections requested by local governments to reflect development on the ground.

5. Title 6 (Centers, Corridors, Station Communities and Main Streets) of the UGMFP is hereby amended, as indicated in Exhibit E, attached and incorporated into this ordinance, to implement new policies and investment strategies in those places.

6. The Title 6 Centers, Corridors, Station Communities and Main Streets Map is hereby adopted, as shown on Exhibit F, attached and incorporated into this ordinance, to implement Title 6 and other functional plan requirements.

7. Title 8 (Compliance Procedures) of the UGMFP is hereby amended, as indicated in Exhibit G, attached and incorporated into this ordinance, to reduce procedural burdens on local governments and Metro.

8. Title 9 (Performance Measures) is hereby repealed, as indicated in Exhibit H, to be consistent with new policies on performance measurement.

9. Title 10 (Functional Plan Definitions) of the UGMFP is hereby amended, as indicated in Exhibit I, attached and incorporated into this ordinance, to conform to the definitions to the use of terms in the amended UGMFP.

10. Title 11 (Planning for New Urban Areas) of the UGMFP is hereby amended, as indicated in Exhibit J, attached and incorporated into this ordinance, to provide more specific guidance on planning for affordable housing in new urban areas.

11. Metro Code Chapter 3.01 (Urban Growth Boundary and Urban Reserves Procedures) is hereby repealed, as indicated in Exhibit K, to be replaced by new Title 14 adopted by section 11 of this ordinance.

12. Title 14 (Urban Growth Boundary) is hereby adopted and added to the UGMFP, as indicated in Exhibit L, attached and incorporated into this ordinance, with amendments from Metro Code Chapter 3.01 to provide a faster process to add large sites to the UGB for industrial use.

13. The urban growth boundary (UGB), as shown on the attached Exhibit M, is hereby adopted by this ordinance as the official depiction of the UGB and part of Title 14 of the Urban Growth Management Functional Plan (UGMFP). The Council intends to amend the UGB in 2011 to add approximately 310 acres of land suitable for industrial

development in order to accommodate the demand identified in the 2009 UGR for large sites, and to add land to accommodate any remaining need for residential capacity not provided by the actions taken by the ordinance.

14. Metro Code Chapter 3.09 (Local Government Boundary Changes) is hereby amended, as indicated in Exhibit N, attached and incorporated into this ordinance, to conform to revisions to ORS 268.390 and adoption of urban and rural reserves pursuant to ORS 195.141, and to ensure newly incorporated cities have the capability to become great communities.

15. The 2040 Growth Concept Map, the non-regulatory illustration of the 2040 Growth Concept in the RFP, is hereby amended, as shown on Exhibit O, attached and incorporated into this ordinance, to show new configurations of 2040 Growth Concept design-type designations and transportation improvements.

16. The *Urban Growth Report 2009-2030* and the *20 and 50 Year Regional Population and Employment Range Forecasts,* approved by the Metro Council by Resolution No. 09-4094 on December 17, 2009, and the Staff Report dated November 19, 2010, are adopted to support the decisions made by this ordinance. The Council determines that, for the reasons set forth in the 2010 Growth Management Assessment, August, 2010, it will direct its capacity decisions to a point between the low end of the forecast range and the high end of the middle third of the forecast range.

17. The Council adopts the Community Investment Strategy recommended by the Chief Operating Officer in the 2010 Growth Management Assessment, August 10, 2010, including the investments set forth at pages 8-21 of the Introduction to Volume 1; Assessment, pages 18-20; Appendix 1 of the Assessment, pages 32-33; and Appendix 3 of the Assessment, as a component of its overall strategy to increase the capacity of land inside the UGB by using land more efficiently.

18. The Findings of Fact and Conclusions of Law in Exhibit P, attached and incorporated into this ordinance, explain how the actions taken by the Council in this ordinance provide capacity to accommodate at least 50 percent of the housing and employment forecast to the year 2030 and how they comply with state law and the Regional Framework Plan.

19. This ordinance is necessary for the immediate preservation of public health, safety and welfare because it repeals and re-adopts provisions of the Metro Code that govern changes to local government boundaries that may be under consideration during the ordinary 90-day period prior to effectiveness. An emergency is therefore declared to exist, and this ordinance shall take effect immediately, pursuant to Metro Charter section 39(1).

ADOPTED by the Metro Council this 16th day of December, 2010.

Carlotta Collette, Council President

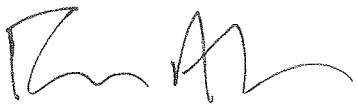
CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

I certify that the word count of this brief as described in ORAP 5.05(2)(a) is 13,776 words. The court granted Metro's motion to file an extended brief not exceeding 14,000 words on December 5, 2011.

Type Size

I certify that the size of type in this brief is 14-point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).



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CERTIFICATE OF FILING AND SERVICE

I certify that on December 11, 2012, I directed the foregoing Metro's Response Brief to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling system and to be electronically served upon the following parties by using the electronic service function of the eFiling system:

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