# I. STATEMENT OF THE CASE

## A. Nature of the Proceedings

Petitioners Carol Chesarek and Cherry Amabisca ("Petitioners") seek judicial review of the Land Conservation and Development Commission's (LCDC) final order, In the Matter of the Review of the Designation of Urban Reserves by Metro and Rural Reserves by Clackamas County, Multnomah County and Washington County, Compliance Acknowledgment Order 12-ACK-001819. (JER-1-156).[1]

## B. Nature of the Judgment Sought to Be Reviewed

LCDC's order acknowledged amendments to the Metro Regional Framework Plan, the Urban Growth Management Functional Plan, and the Clackamas, Multnomah, and Washington County comprehensive plans to designate urban and rural reserves throughout the metropolitan area. Among other things the Order approved Metro's redesignation of the 129–acre Peterkort property as an urban reserve area and rejected multiple objections to that designation. LCDC Order (JER-147-150).

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[1] This brief's document reference scheme is as follows:

Documents in the Joint Excerpt of Record are cited as "JER-," followed by the page number. Documents in the Record are cited as "R-", followed by the Attachment letter or Item number, file number, and then page number. For example, R-(D)(15)(9299) refers to Record Attachment D (Washington County), File 15, Page 9299, or R-12(77), which refers to Record Item 12, Page 77.

### C. Statutory Basis of Appellate Jurisdiction

Pursuant to ORS 197.651(2) and ORS 197.626(2) this court has appellate jurisdiction over LCDC orders concerning the designation of urban and rural reserves. LCDC's decision is a final order pursuant to ORS 197.626(2). Petitioners have standing because they appeared multiple times in person or in writing in Washington County (hereinafter "County"), Metro and LCDC proceedings.

### D. Dates of Final Order and Petition for Review

LCDC's Final Order was entered August 14, 2012. (JER-156). Petitioners' Petition for Judicial Review was timely filed on September 4, 2012 pursuant to ORS 197.651(3).

### E. Nature of and Jurisdictional Basis for Agency Action

LCDC has jurisdiction under ORS 197.626(1)(c) and (f), and OAR 660-027-0080(2) to review decisions designating urban and rural reserves "in the manner provided for periodic review."

### F. Questions Presented On Appeal

1. Is LCDC's approval of Metro's designation of the Peterkort property as an Urban Reserve inconsistent with the factors of OAR 660-027-0050, violates Goal 2, in that it lacks an adequate factual basis, and is not supported by substantial evidence?

2. Does LCDC's approval of Metro's designation of the Peterkort property

as an Urban Reserve fail to satisfy the OAR 660-027-0040(10) requirement that both the urban and rural reserve factors be applied "concurrently and in coordination with one another," violate Goal 2, in that it lacks an adequate factual basis, and is the decision not supported by substantial evidence?

3. Did LCDC approve an amount of urban reserves that exceeds the statutory 30-year limit, violating ORS 197.145(4) and OAR 660-027-0040(2)?

**G. Summary of Arguments**

LCDC's holding that Metro may merely "consider" the urban reserve factors, and find that the urban reserve factors alone were met is defective because: (1) Metro's and Washington County's justification, approved by LCDC, was based primarily on the Peterkort family's offer to donate easements to local governments for a road and sewer line and to cooperate in land use proceedings, on the condition that Metro redesignate the property from rural to urban reserve; and (2) the claim that the urban reserve factors had been met was not supported by substantial evidence.

In approving the redesignation of the Peterkort property from rural reserve to urban reserve, LCDC rejected any concurrency and coordination obligation, notwithstanding the requirement set forth in OAR 660-027-0040(10).

LCDC failed to apply the factors concurrently and in coordination with each other in part because it claimed the rule was not "intended to require that

both urban and reserve factors must be considered simultaneously for each individual property." However, in redesignating the Peterkort property from its initial rural reserve designation to an urban reserve designation, the county, Metro, and LCDC did just that: considered Peterkort as an "individual property." Moreover, claiming that it cannot evaluate the Peterkort property as a stand-alone reserve area is without substantial reason, given the large Rock Creek riparian, floodway and natural habitat areas that separate the small developable acreage on Peterkort from the urbanized lands already inside the urban growth boundary (UGB) to the east, making Peterkort both a logical and intact buffer area. In approving Metro's determination that the "concurrency and coordination" requirement does not require that both the urban and rural reserve factors be applied and balanced with one another when choosing designations, LCDC misapplied the law. Neither LCDC nor Metro and Washington County met the evidentiary standard to justify designating the Peterkort property as an urban reserve.

Metro's urban reserves designation exceeds the 30-year time period in two ways: Metro underestimated the UGB capacity, and Metro built an unneeded "vacancy" factor into its land need determination.

**H. Summary of Material Facts**

The first two assignments of error concern designation of the 129–acre Peterkort parcel as an urban reserve. The property is located in Washington

County north of Highway 26 and east of 185th Ave. R-21(154), R-D(14)(8591). It is zoned Exclusive Farm Use (EFU) R-21(115) and is bordered on the west and north by EFU zoned farmlands designated rural reserves. R-21(123). The Peterkort property is classified as "important farmland" in the 2007 ODA Report . R-12(77). The Rock Creek 100–year floodplain, riparian corridor, and adjoining wetlands are a large part of the Peterkort property. R-21(154, 182). The area along Rock Creek as it passes through Peterkort is a significant wildlife corridor. R-D(15)(9299). The roads to the west and north (185th Ave, NW Germantown, and NW Cornelius Pass Road) are rural roads, without bike lanes or sidewalks. R-21(123).

In December 2009 the Core 4 recommended using the Peterkort floodplains as a buffer and designating most of the lands north of Highway 26, including Peterkort, as rural reserve. (Peterkort Section of Metro Ord 10-1238A, Exhibit E). (JER-371), R-21(182). In doing so, the Core 4 rejected Washington County's initial recommendation. Metro explained why:

> "Core 4 deliberation in December 2009 resulted in the conversion of most of the urban reserve lands north of Highway 26 to rural reserve. This property (Peterkort) was among those changed to a rural reserve designation. A part of the Core 4 determination was based upon a recommendation embodied in the Bragdon/Hosticka map distributed in December 2009. **That map illustrated a policy recommendation that floodplains be utilized to provide a buffer and/or boundary between urban and rural reserve areas."** (emphasis added). R-21(182).

In April 2010 representatives of the Peterkort family appeared before the

Washington County Board of Commissioners to request that the Peterkort property be shifted from rural reserve to urban reserve, stating that only if the land was re-designated would the family agree to provide easements for a county road and a sewer line and not contest the development of the area in land use proceedings. R-21(181), R-D(14)(8541). The County then redesignated the property as urban reserve by Ordinance 733 on June 15, 2010. R-D(14)(8543), (JER-715). On June 23, 2010 Metro and the counties submitted a joint decision proposing various urban and rural reserve designation, including Peterkort as an urban reserve, to DLCD seeking acknowledgment.

After an unrelated proceeding remand, on August 14, 2012, LCDC issued its final written acknowledgment order approving, *inter alia*, the designation of the Peterkort property as urban reserve.

## II. PETITIONERS' STANDING

Petitioners participated orally and in writing at each stage of the proceedings at the county, Metro and LCDC levels.

## III. ASSIGNMENTS OF ERROR

### Introduction

**Designation of Reserves**

ORS 195.137-145 sets forth the purpose of the urban and rural reserves program and establishes the elements to be used to determine the suitability of lands for designation as either urban or rural reserves.

In authorizing rulemaking authority to LCDC, the legislature directed LCDC to consult with the Oregon Department of Agriculture (ODA) in adopting the rural reserve "process and criteria." ORS 195.141(4) LCDC adopted rules amplifying the statute's purpose and requiring the use of "criteria and factors" to implement this purpose in two ways: to evaluate individual "lands" and to determine if the resulting decision "in its entirety best achieves" the purpose of the law. OAR 660-027-0005(1)-(2).

LCDC's rule states that the purpose of urban reserves is to support both urban and rural objectives:

> "Urban reserves. . . are intended to facilitate long-term planning for urbanization in the Portland metropolitan area and to provide greater certainty to the agricultural and forest industries, to other industries and commerce, to private landowners and to. . . service providers, about the locations of future expansion of the Metro Urban Growth Boundary."

OAR 660-027-0005(2).

In contrast, rural reserves are intended to support certain rural objectives while limiting urban development. They are to:

> "[P]rovide long-term protection for large blocks of agricultural land and forest land, and for important natural landscape features that limit urban development or define natural boundaries of urbanization."

OAR 660-027-0050(2).

The rules repeat the statutory rural and urban reserve factors and require that Metro and the counties "shall apply" them, "concurrently and in

coordination with one another," when evaluating land and designating urban or rural reserves status. OAR 660-027-0040(10).

Metro and any county entering into a reserves agreement with Metro must "adopt a single joint set of findings of fact, statement of reasons, and conclusions explaining why areas were chosen as urban or rural reserves, how these designations achieve the objective stated in OAR 660-027-0005(2), and the factual and policy basis for the estimated land supply determined under section (2) of this rule." OAR 660-027-0040(10). Metro must demonstrate how, using the factors, the designation of each area as rural or urban reserves meets the purpose of the reserves and how the decision "best achieves" the purpose of the reserves.

Finally, the decision must demonstrate compliance with "this division, the statewide planning goals, and other applicable administrative rules." OAR 660-027-0080(4), ORS 197.628 and ORS 197.633.

The reserve factors are a "special type of 'criteria'" to be applied like the Goal 14 locational factors. In *1000 Friends of Oregon v. Metro (Ryland Homes)* 174 Or App 406 (2001), the court explained Metro's obligations when applying the Goal 14 locational factors. Evidence that a factor was "considered" is insufficient alone; the findings must also explain how the balance of the factors leads to the particular result:

> "[T]he locations factors are not independent approval criteria. It is not necessary that a designated level of satisfaction of the

> objectives of each of the factors must always be met before a local government can justify a change in a UGB. Rather, the local government must show the factors were "considered" and balanced by the local government in determining if a change in the UGB for a particular area is justified."
>
> * * * * *
>
> "If the local government has not specifically articulated its findings regarding a particular factor and explained how it balanced that factor in making a decision regarding a change in a UGB, it is not properly within our scope of review to make assumptions and draw inferences from other portions of the local government's findings in order to surmise what the local government's decision really was."

*Ryland*, 174 Or App at 409, 411.

This court also clarified that the factors cannot be weighed against each other. Rather, "local governments 'must apply each Goal 14 [locational] factor equally and include lands in urban reserves only where all of the factors justify that inclusion'." *Parklane Development v. Metro*, 165 Or App 1, 24, 994 P.2d 1205, 1218 (2000).

LCDC did not apply the reserves law as described above. Rather, LCDC interpreted Metro's authority in applying the reserve statute and rule to be so discretionary that neither LCDC nor this court can determine if the law has been met.

Although LCDC cites the *Ryland* decision as the legal basis for application of the factors,[2] LCDC did not follow this. LCDC claims the reserve

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[2] The Order itself states: "[F]actors under SB 1011 are intended to be

statute and rule are only a "guide" and that they "replaced the familiar standards-based planning process with one based fundamentally on political checks and balances." (JER-7). Nothing in the statute or rule provides a basis for this "political" theory and LCDC points to no statutory language supporting this. Rather, the statute explicitly requires "criteria" and "factors." ORS 195.141(4)–195.145(6).

LCDC also argues that evaluating whether the decision "in its entirety best achieves" the statute's purpose, "requires less scrutiny . . . than the requirements for locational decisions involved in urban growth boundary decisions (to consider and apply factors to alternative candidate areas)." (JER-23). No basis in statute supports exerting a lower level of scrutiny; that would be contrary to the Goal 14 and *Ryland* standards.

## FIRST ASSIGNMENT OF ERROR

LCDC's order approving Metro's designation of the Peterkort property as an urban reserve misapplies the urban reserve factors of OAR 660-027-0050, violates Goal 2, Adequate Factual Base, and is not supported by substantial evidence in the whole record.

### A. Preservation of Error

Petitioners raised this issue in oral and written testimony to Washington County, Metro, and LCDC. R-D(14)(8656-8670), R-D(15)(9421-9480), R-21(112-185), R-18(65-90), R-A(4)(2434).

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employed and interpreted in the same manner as the UGB factors in Goal 14. * * * [T]he . . . factors are a type of 'criteria' …" (JER-28).

## B. Standard of Review

This court reviews an LCDC order made pursuant to ORS 195.137–195.145 to determine if the order is "unlawful in substance or procedure," is unconstitutional, or "not supported by substantial evidence as to facts found by the Commission." ORS 197.651(10).

In reviewing Metro's reserves decision, "LCDC must demonstrate in [its] opinion the *reasoning* that leads the agency from the *facts* that it has found to the *conclusions* that it draws from those facts'." *1000 Friends v. LCDC (McMinnville),* 244 Or App 239, 267, 259 P3d 1021 (2011)(quoting *1000 Friends v. LCDC (Woodburn)*, 237 Or App 213, 225, 239 P3d 272 (2010)). The court has described the importance of this:

> "If there is to be any meaningful judicial scrutiny of the activities of an administrative agency–not for the purpose of substituting judicial judgment for administrative judgment but for the purpose of requiring the administrative agency to demonstrate that is has applied the criteria prescribed by statute and by its own regulations and has not acted arbitrarily or on an ad hoc basis–we must require that its order clearly and precisely state what it found to be the facts and fully explain why those facts lead it to the decision it makes. Brevity is not always a virtue."

*Home Plate v. OLCC*, 20 Or App188, 190, 530 P2d 862 (1975).

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

> "[w]hat is needed for adequate judicial review is a clear statement of what specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient."

*Sunnyside Neighborhood v. Clackamas County Commission* 280 Or 3, 21, 569 P2d 1063 (1977).

An unreasoned order substantially affects a party's statutory right to meaningful judicial review, and is therefore not harmless error. *Salosha, Inc. v. Lane County,* 201 Or App 138, 144-45, 117 P3d 1047 (2005).

**C. Argument**

Washington County staff found that Peterkort qualified as both urban and rural reserve. (JER-485). In April 2010 the Peterkort family requested the Washington County Board of Commissioners redesignate the property as an urban reserve in exchange for easements for a road, a sewer line, and for the use of approximately 50 acres of the property for wetlands mitigation. R-21(181). The Washington County Board of Commissioners determined that:

> "Inclusion of the Peterkort property in an urban reserve provides multiple public benefits to the development of North Bethany in particular, and the larger community in general. **The Peterkort family has entered into a written agreement with Clean Water Services to donate the necessary easements for 3,600 feet of sewer trunk line and the use of approximately 50 acres of Rock Creek flood-plain for wetland mitigation in return for the property's designation as an urban reserve. According to their testimony the Peterkort family is willing to provide a similar easement for the construction of Road A, connecting North Bethany to 185th Avenue, and to cooperate in the land use permitting process for construction of the sewer line. A rural reserve designation would negate most of these opportunities.**

> **For these reasons, staff finds that adding this property to an urban reserve is a necessary and appropriate action."** (emphasis added). R-21(181)

The Washington County Board adopted the proposal to redesignate the Peterkort property as an urban reserve, based on the cost savings for the easements that the Peterkort family agreed to donate, if the property were redesignated from rural reserve to urban reserve. R-D(14)(8543).

**Metro's Four "Key Points"**

The Washington County and Metro decisions set forth the following "four key points" as the main rationale for redesignating the Peterkort property as urban reserve. All lack substantial reason based on substantial evidence:

> "1. Transportation: Provides urban land for public ROW and supports the development of a key transportation system link serving the future development of the North Bethany Community."[3]
>
> "2. Sewer system connectivity: The optimal alignment for a primary gravity flow sewer trunk line to serve North Bethany crosses the Peterkort property. NOTE: construction of a pump station-based option could delay construction of sanitary sewer services to the North Bethany area by at least three years." (JER-485).

There are multiple defects with these findings. First, urban reserve designation is not necessary to support this road or the sewer easement. The County completed the goal exception necessary to accommodate a road across the Peterkort property and this road is identified in the County's acknowledged

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[3] North Bethany is a partly developed area east of the Peterkort property and inside the Metro UGB.

Transportation Plan. R-D(14)(8539-8540), R-21(183).

Similarly, the construction of a sewer line across the Peterkort property does not depend on Peterkort being designated an urban reserve. There are no legal or policy barriers to constructing a sewer trunk line through a rural reserve or undesignated lands. Utility facilities such as sewer lines or pump stations are allowed outright on lands zoned Exclusive Farm Use (EFU) under ORS 215.283(1)(c). R-21(115). Designating Peterkort an urban reserve is in no way necessary for the road or sewer and as such, the decision lacks substantial reason.

Second, urban development of the Peterkort property will trigger additional road and infrastructure needs. These costs have not been estimated and weighed against possible funding benefits before concluding that development of the Peterkort property would support a net funding benefit. The rationale is not based on substantial evidence.

Third, designating Peterkort as an urban reserve to provide a hypothetical financial benefit to North Bethany development is not a criterion for designating an area an urban reserve.

And fourth, LCDC held that the urban reserve designation factors in OAR 660-027-0050 do "not require that Metro compare the cost of installing facilities for both urban and rural reserve designations, or that Metro demonstrate how local governments will finance future road and infrastructure

improvements." (JER-148). Thus, designating Peterkort an urban reserve based on the financial advantage of the Peterkort family's offer of free easements is outside the scope of the proper criteria.

The third "key point" relates to wetland mitigation:

> "3. Wetlands mitigation: The sewer plan identifies roughly 46 acres of valuable opportunities on the Peterkort property which can be used to mitigate wetland impacts caused by public infrastructure development in North Bethany." (JER-485).

While it might be true that the Peterkort property has areas that could be used for wetland mitigation, LCDC's Order provides no indication as to why this justifies an urban reserve designation. A rural reserve designation would be more consistent with wetland mitigation, because an urban designation potentially leads to urbanization of the property and a much greater level of urban impingement on the wetland areas. Wetland mitigation is not restricted to urban land (OAR 141-085-0680), and there are many nearby properties where mitigation can be done. The argument lacks substantial reason.

The fourth "key point" is:

> "4. Enhancement of Natural Areas Program Target Area: Lands in the Peterkort site will support connections to important regional natural areas. " (JER-485).

Wildlife connections identified by the County exist today because a large portion of the Peterkort property is in the Rock Creek riparian area, floodplain and wetlands. R-21(154). Metro's own "Natural Landscape Features Inventory" for area #22, the Rock Creek Headwaters, says: "These headwaters

also provide wildlife habitat and trail connectivity from the Tualatin Valley to the Tualatin Mountains that includes Forest Park." R-C(1)(11), R-D(15)(9299). The ODFW opposes the sewer trunk line through the Peterkort property due to adverse impacts on "sensitive priority habitat," including wildlife habitat fragmentation and harm due to additional human intrusion into the area. R-21(148-151). Development of the Peterkort property would greatly increase the human intrusion into this sensitive habitat area. R-21(117-118). Metro's apparent reliance on its "Integrating Habitats" approach (JER- 373, 396) as a justification for an urban reserve designation is irrelevant because it would not add any new protections for natural features. Metro sponsored the Integrating Habitats design competition. R-21(151). It did not provide any new measurable or enforceable standards for habitat protection; rather, it relies on Metro Title 13, a title with which any development in this area must already comply. Washington County has its own Goal 5 implementation program, incorporated into Metro Title 13, called the Tualatin Basin Program. Requiring use of the "Integrating Habitats" approach is not a substantive new requirement for Area 8C as it does not add any new protection for natural resources, water quality, or fish and wildlife habitats. R-21(119).

In sum, Washington County's and Metro's reliance on the "4 Key Points" to justify converting the Peterkort property from rural reserve to urban reserve lacks an adequate factual basis and is not supported by substantial evidence or

substantial reason, and has no clear relation to the urban reserve factors set forth in OAR 660-027-0050. In the case of Washington County it appears the "4 Key Points" were adopted as an after-the-fact justification for a decision based on a desire by the county to obtain the various easements being offered by the property owners. This provides no basis for LCDC to approve Metro's designation of the Peterkort property as urban reserve.

**The Urban Reserve Factors**

Metro also determined, and LCDC approved, designating the Peterkort property as urban reserve based on the eight urban reserve factors in OAR 660-027-0050. LCDC's findings lack substantial reason.

> **OAR 660-027-0050(1): Can be developed at urban densities in a way that makes efficient use of existing and future public and private infrastructure investments.**
>
> **"Finding**: As noted above, the Peterkort site provides the only practicable location for siting a gravity flow sewer line for the provision of sanitary sewer services to a portion of the North Bethany planning area. This site also provides the only reasonable route for an alternative transportation system link between the community and surrounding areas. Future development of this site would not only utilize the public and private investments currently being made in North Bethany, but would ultimately aid in funding long-term infrastructure construction and maintenance." (JER-486).
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> "It is expected that future development of the Peterkort site would be designed to complement the North Bethany Community at urban densities that optimize both public and private infrastructure investments. The developable portion of the Peterkort property would be designed to connect to the North Bethany community and surrounding areas via a future road connection (Road A) and could be served by the planned sewer line." (JER-486).

The "developable portion" of the Peterkort property is small and isolated, consisting of a 77-acre island of developable land in the northwest corner, outside the riparian areas and floodplain. This area borders rural reserve foundation and important farmland to the west, and is isolated from the North Bethany UGB areas to the east and south by the riparian and floodplain areas on the eastern and southern sides of Peterkort. The necessity of crossing Rock Creek and its wide floodplain will make transportation connections to the North Bethany area expensive and inefficient compared to the costs to serve the same amount of development in other urban reserves that do not require crossing steelhead-bearing streams and broad floodplains. R-21(121). There is no evidence in the record that the remaining area of Peterkort is capable of providing financing for the provision of the infrastructure to support the development of the North Bethany area.

Metro's first finding lacks an adequate factual basis to demonstrate that the County can efficiently finance road and other infrastructure needed to serve the Peterkort property. The language of the second paragraph of the finding is vague and precatory ("It is expected that . . ."), and thus is too vague to qualify as a finding and is not supported by substantial evidence.

> **(2) Includes sufficient development capacity to support a healthy economy;**
>
> **"Finding**: Together with remaining buildable lands within the UGB and other reserve lands throughout the region there will be

> sufficient development capacity to support a healthy economy. The addition of the Peterkort property adds approximately 80 acres of developable lands to Urban Reserve Area 8C. The area could likely be developed as the sixth neighborhood of North Bethany, featuring a walkable community centered around parks and mixed use areas." (JER-486).

Other than the second sentence setting forth the size of the developable portion of the property, the finding lacks a basis in substantial evidence and is too vague ("could likely be developed") to support a finding of fact.

> **(3) Can be efficiently and cost effectively served with public schools and other urban level public facilities and services by appropriate and financially capable service providers.**
>
> **"Finding:** This site has been included in facilities planning discussions during development of the North Bethany Plan. The Beaverton School District has made commitments for needed facilities in this area and has included discussion and consideration of potential urban reserves based on growth impacts in the recent development of the 2010 update of their Long Range Facilities Plan. The Rock Creek Campus of PCC is immediately adjacent to the southern boundary of this site. Other well established facilities and services being extended to the North Bethany Community would also be expected to serve this site." (JER-486).

It is not clear whether a 77-acre island of developable land could support a new elementary school. The Metro findings do not consider that about two–thirds of the Peterkort property is in the Hillsboro School District and only about one–third in the Beaverton School District that serves North Bethany. R-D(8)(3063). Again, the finding is vague, simply referring to "discussions" and noting that the Beaverton School District has made "commitments" but failing to note that most of Peterkort is not in that school district. Moreover,

OAR 660-027-0050(3) requires a finding as to whether the area can be "efficiently and cost effectively served" not just whether it "can be served." The location of the developable portion of the property across the riparian and floodplain areas from the North Bethany UGB area makes the provision of infrastructure and services more difficult and expensive and more subject to regulatory limitations compared to alternative urban reserve possibilities. None of this is reflected in the finding.

In sum, the finding is too vague, does not make the required comparison with alternative sites, doesn't address the "efficiently and cost effectively served" part of the factor which implicitly requires a comparison with some economic standard, and is not supported by substantial evidence.

> **(4) Can be designed to be walkable and served with a well-connected system of streets, bikeways, recreation trails and public transit by appropriate service providers.**
>
> **"Finding**: The Peterkort site will be served by a collector road (Road A) extending along the northern portion of the site to connect the North Bethany community to SW 185th Avenue to the west. The northeastern edge of this property directly abuts planned connections to both on and off-street pedestrian facilities linking to planned neighborhood parks in North Bethany. This site offers a major opportunity to link trails in the broader Bethany area along the Rock Creek corridor. Public transit service is currently available immediately south of the site with multiple lines providing connections to Westside Light Rail Transit." (JER-486-7).

The "can be designed" language of this factor must be taken in the context of the requirement that to qualify as an urban reserve, all 8 urban

reserve factors must be applied. If meeting one factor reviewed in isolation could only be done at the expense of being unable to meet one or more other factors, then this impact must be explicitly reflected in Metro's analysis. At a minimum, for LCDC to approve its decision, Metro must explain how an area qualifies as an urban reserve if not all the factors are met.

Therefore, while LCDC's approval of Metro's factor 4 finding might be plausible if taken in isolation, it must be evaluated in the context of urban reserve factors (5), (7), and (8). Those factors require consideration of whether the transportation system described in factor 4 can be designed: (5) "to preserve and enhance natural ecological systems," (7) "in a way that preserves natural landscape features," and (8) "to avoid or minimize adverse effects on farm and forest practices, and adverse effects on important natural landscape features, on nearby land including land designated as rural reserves." LCDC's factor 4 finding is inadequate for the following reasons.

First, LCDC claims factor 4 is met because a collector road will be built to connect not only the proposed residential island on Peterkort to SW 185$^{th}$ Avenue but also to the larger Bethany urban area. If so, the road will have to be designed to handle urban levels of traffic as it passes through the Rock Creek riparian and wildlife areas. The factor 4 findings do not explain how the road and the traffic it will attract can be designed to "**preserve and enhance** natural ecological systems." (Emphasis added). The joint state agency letter says:

> "As a general matter, the state agencies believe that larger floodplain areas that are on the periphery of the urban area should *not* be included in urban reserves and that, instead they should be used as a natural boundary between urban and rural areas to the extent possible. Although some development in floodplains may be possible, the overall amount of development likely to occur in floodplains does not justify their inclusion in urban reserves."

R-A(3)(1379).

Metro then argues that urban reserve designation is justified because the Peterkort property offers opportunities for trail connections:

> "[T]he northeastern edge of this property directly abuts planned connections to both on and off-street pedestrian facilities linking to planned neighborhood parks in North Bethany. This site offers a major opportunity to link trails in the broader Bethany area along the Rock Creek corridor." (JER-486).

These trails are intended for use by the greater population of the Bethany urban area, so they will be heavily used. Neither Metro in its findings, nor LCDC in its approval, explains how compliance with factor 4 can be accomplished within the requirements of factor 7 that the development "preserves natural landscape features." R-21(123), R-21(117-118).

Second, Metro's findings do not explain how the proposed system of "streets, bikeways, recreational trails and public transportation" "can be designed" within the constraint of the factor 8 requirement to avoid or minimize the traffic impacts on the bordering foundation farmlands to the immediate north and west of Peterkort. Designating Peterkort as urban reserve would eliminate the Rock Creek buffer protecting the nearby farmlands from urban

levels of traffic on the roads serving the farmlands.

This finding is not supported by substantial evidence.

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

> **"Finding**: Limited opportunities for wetlands mitigation are available in this area of the county. Therefore, a key focus of adding the Peterkort site to the urban area is the opportunity to improve and enhance the currently degraded wetlands along Rock Creek. The entirety of Urban Reserve Area 8C would be subject to certain requirements identified in the County's Rural/Natural Resource Plan Policy 29. This area, called out as Special Concept Plan Area C, would require the implementation of Metro's 'Integrating Habitats' program in the concept and community planning of the reserve area. The "Integrating Habitats" program utilizes design principles to improve water quality and provide wildlife habitat." (JER-487).

The fundamental premise of this finding is flawed, because the Peterkort property does not have to be designated urban reserve in order to provide areas for wetland mitigation. Undesignated lands and rural reserve lands are equally usable for wetland mitigation. Nor, given the evidence that the real reason for Washington County's and Metro's redesignation of Peterkort from rural to urban reserve was the offer of the Peterkort family to donate utility easements if and only if the property was redesignated, is it creditable that "a **key focus** of adding the Peterkort site to the urban area is the opportunity to improve and enhance the currently degraded wetlands along Rock Creek." (emphasis added). (JER-487).

Metro's claim that "a key focus of adding the Peterkort site to the urban

area is the opportunity to improve and enhance the currently degraded wetlands along Rock Creek." A "key focus . . . is the opportunity" is a public relations argument; it is not in the law.

No evidence supports the conclusory statement that there are limited opportunities for wetland mitigation in the area.

This finding is directed at only one aspect of the "natural ecological systems," i.e., "degraded wetlands." Metro made no findings and provides no evidence about impacts on or the ability to "improve and enhance" other "natural ecological systems" and habitats in the Rock Creek riparian corridor. In addition, Metro makes no showing that urbanization of the Peterkort property would produce a net positive impact (i.e. "preserve and enhance") on the Rock Creek ecosystem and wildlife. Metro's findings fail the *Ryland* standard. In fact, substantial evidence in the record shows the following:

a. The Rock Creek wildlife corridor, crossing the Peterkort property, is a high-value resource for a larger ecological system. R-D(15)(9299), R-21(118,150). According to Audubon Society of Portland (ASoP):

> "The Rock Creek corridor and floodplain is designated on several regional inventories and maps used to develop Metro's Inventory of Natural Landscape Features. The primary reason for its designation in natural resource inventories is in providing a *critical* wildlife corridor connecting the Tualatin River to Forest Park and in helping maintain

> water quality and quantity within the Tualatin basin." R-21(403).

The ODFW "has documented Rock Creek as critical for a number of wildlife and fish species, including those of special conservation concern." R-21(149).

b. The Rock Creek riparian area and floodplain, which lies between the developable portion of the Peterkort property and the Rock Creek PCC campus to the south and North Bethany to the east, provide valuable habitat for the local elk herd, Northern Red-legged frogs (a Federal Species of Concern), steelhead (federally listed threatened species), and other habitat sensitive wildlife. "ODFW supports the analysis that Rock Creek is a sensitive natural resource that is highly threatened by current and future development and that management goals for this riparian corridor should remain water quality and natural resource preservation." R-21(149-150), R-D(12)(5780), R-D(15)(9434-9435)

c. Urban development on the Peterkort property will harm both the Rock Creek wildlife corridor and the habitat. ASoP notes that "Extensive scientific literature suggests the integrity of this wildlife corridor would be severely jeopardized by allowing it to

be surrounded by urban development..."[4] R-21(403). Development of the Peterkort property would limit wildlife movement between Forest Park and important habitat in the Tualatin Basin. The harmful effects of roads and residential development on wildlife, including habitat fragmentation, are well documented. R-21(144-146). Elk are sensitive to roads and human presence. R-21(147). Northern red-legged frogs are particularly vulnerable to road effects and urbanization since they are highly terrestrial and can move up to 300 yards away from wetlands after breeding. R-21(157-158). ODFW opposes the sewer line across the Peterkort property and documented harm that will result. R-21(148-151). Full scale urban development will be much more intrusive and harmful than a sewer line. Habitat fragmentation and harm to these natural ecological systems are unavoidable if the Peterkort property is developed.

In sum, for land to qualify as urban reserve under factor (5), Metro's findings must have an adequate factual basis, be supported by substantial evidence, and show that an urban reserve is possible while complying with the other seven factors. Metro has made no such

4. Metro, "Wildlife Corridors and Permeability, A Literature Review," April 2010.

evidentiary showing; in fact, the expert testimony in the record demonstrates the lack of ability to urbanize Peterkort in a way that will "preserve and enhance natural ecological systems." Thus, LCDC's approval should be remanded.

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

> **"Finding**: The Peterkort site will provide added opportunities to meet local housing needs. The 80 acres of buildable land on the site can be developed with a variety of housing types which would be expected to complement those already planned in the North Bethany area. (JER-487).
>
> "Considering that employment growth in Washington County has been historically very strong, and that the area remains attractive to new business and holds potential for significant growth, housing demand in this area will continue to grow." (JER-487).

Metro's finding is vague and speculative ("would be expected to"); makes no effort to address the "range of needed housing" element of the factor, e.g. low income housing; and does not present the reasoning that leads the agency from the facts that it has found to the conclusions that it draws from those facts. *McMinnville,* 244 Or App at 267.

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

> **"Finding**: As previously noted, this site is traversed by Rock Creek and its associated floodplain which is included on the Metro Regional Natural Landscape Features Map, Rock Creek and its associated wetlands are considered an important target area for long-term water quality improvements in the Tualatin River basin and provide vital habitat linkage for sensitive species. Together with the other lands in Urban Reserve Area 8C, this site will be

> subject to a special planning overlay (Special Concept Plan Area C) designed to address the important values of this riparian corridor by requiring appropriate protection and enhancement through the use of protective and environmentally sensitive development practices." (JER-487).

Metro's findings on Urban Reserve Factors 5 through 8 elaborate on the attributes of this Special Concept Plan Area C:

> "The natural ecological systems within the segments of Rock Creek and associated floodplain on this site will be protected **and potentially enhanced** under the existing regulatory framework in Washington County, as well as through the application of Special Concept Plan Area requirements. These requirements state that future concept and community planning of the area must take into account Metro's 'Integrating Habitats' program to ensure that future development protects natural features."

(JER-396) (emphasis added).

As explained above, the "Integrating Habitats" was a design competition and does not add any greater protection. R-21(151).

Contrary evidence included the Core 4 Technical Team's[5] finding that a large portion of the Peterkort property is unsuitable for an urban transportation system. R-A(3)(1181-1187). In addition, ODFW opposed the North Bethany sewer trunk line through the Peterkort property due to adverse impacts on "sensitive priority habitat," including wildlife habitat fragmentation and harm due to additional human intrusion into the area, far beyond intrusions due to a sewer trunk line. R-21(149-150). *See also* the detailed evidence at R-

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[5] The Technical Team consisted of expert state and local agency staff.

D(15)(9424-9428).

The lack of a reasonable evidentiary basis on factor 7 is of particular importance given the earlier assertions that there will be substantial urban development on the North Bethany side of the riparian areas and floodplain and a major connection across Peterkort for urban traffic levels from the five neighborhoods of North Bethany to 185th Avenue. R-21(183). Yet Metro presents no substantial evidence that all this can be done while meeting the requirements of factor 7 (as well as the "preserve and enhance" requirement of factor 5) that the natural landscape features of the Rock Creek riparian and floodplain areas as set forth in Metro's Feb 2007 "Natural Landscape Features Inventory" be preserved. R-C(1)(11).

> **(8) Can be designed to avoid or minimize adverse effects on farm and forest practices, and adverse effects on important natural landscape features, on nearby land including land designated as rural reserves.**
>
> **"Finding**: Concept and community level planning in conformance with established county plan policies can establish a site design which will avoid or minimize adverse impacts on farm practices and natural landscape features in the area. As noted above, Urban Reserve Area 8C will include a planning overlay specifically targeting special protection for the identified natural landscape features in the area. It is important to note that even without this special plan policy, the existing regulatory framework in urban Washington County would require significant levels of protection and enhancement of the Rock Creek Corridor at the time of development of surrounding lands." (JER-487).

Metro's findings fail to provide an adequate factual basis to demonstrate that development at urban density on the Peterkort property can be designed to

avoid or minimize the adverse effects that will result from substantially more urban traffic on rural roads through nearby agricultural lands categorized by ODA as "foundation" or "important," and through important natural features, even though the harm of such roads and traffic is well documented.[6] R-D(15)(9426-9427,9433-9434,9437-9438).

The Oregon Department of Agriculture report, "*Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands*," documents that urban traffic is already a problem for agricultural practices in this area. R-12(1)(117).

**LCDC's Reliance on the Beaverton PQCP**

LCDC also relies upon the City of Beaverton's Pre-Qualifying Concept Plan (PQCP), which is for a larger area of which the Peterkort property is only a small part. R-21(182). These PQCP urban reserve factor findings have three major evidentiary flaws when proffered as justifications for the separate and specific urban reserve designation of the Peterkort property:

First, the area analyzed to arrive at the PQCP's findings is much larger and more diverse than the Peterkort property. The Beaverton plan area in general is not dominated by the same set of characteristics as Peterkort (Rock Creek riparian area, floodplain, ecological habitats etc.). Thus, this larger area

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[6] Metro, "Wildlife Crossings, Rethinking Road Design to Improve Safety and Reconnect Habitat". R-D(15)(9473-9480).

may well appear to qualify on average under the factors when Peterkort analyzed specifically would not. R-21(154,182), R-18(86).

DLCD stated that the urban reserve factors "are dependent on natural and economic geography, just as the rural reserve factors are."[7] Thus the application of the factors to Peterkort, dominated by its riparian, floodplain, and habitat features, must deal specifically with those site characteristics.

Second, the PQCP findings are generally conclusory. While the findings provide some infrastructure costs, there is no finding or factual basis as to whether infrastructure would be economically viable.

Third, in relying on the PQCP findings to reject Petitioners' first objection, LCDC failed to consider the contrary evidence in the record as to whether the Peterkort property complies with the urban reserve factors.

For all these reasons the Beaverton PQCP does not constitute substantial evidence on which LCDC could rely as to whether the Peterkort property meets the urban reserve factor requirements.

**Conclusion**

LCDC's decision on the first assignment of error should be remanded.

## SECOND ASSIGNMENT OF ERROR

LCDC's approval of the Peterkort property as an Urban Reserve fails to satisfy the OAR 660-027-0040(10) requirement that both the urban and rural

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[7] Department's Report on the Objections to Portland Metro Area Urban and Rural Reserve Designations, September 28, 2010, p.52. R-19(55).

reserve factors must be applied "concurrently and in coordination with one another," violates Goal 2 in that it lacks an adequate factual basis, and lacks support by substantial evidence.

**A. Preservation of Error**

Petitioners raised this issue in written and oral testimony. R-21(112-185), R-18(65-90), R-D(15)(9421-9480).

**B. Standard of Review**

This court reviews an LCDC order made pursuant to ORS 195.137–195.145 to determine if the order is "unlawful in substance or procedure," is unconstitutional, or "not supported by substantial evidence as to facts found by the Commission." ORS 197.651(10).

In reviewing Metro's reserves decision, "LCDC must demonstrate in [its] opinion the *reasoning* that leads the agency from the *facts* that it has found to the *conclusions* that it draws from those facts." *McMinnville,* 244 Or App at 267.

To provide meaningful review of an agency action, the Oregon appellate courts require that agency orders include a clear articulation between the facts and the legal conclusions upon which decisions are based or substantial reasons. As the Supreme Court has explained,

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

An unreasoned order substantially affects a party's statutory right to meaningful judicial review, and is therefore not harmless error. *Salosha,* 201 Or App at 144-45.

**C. Argument**

The reserves rules require Metro and each county to apply the rural reserve and urban reserve factors concurrently and in coordination by explaining, with substantial evidence, why an area that qualifies for both urban and rural reserve designation should be designated as one or the other. OAR 660-027- 0040(10). However, LCDC approved Metro's designation of Peterkort without this concurrent and coordinated application. Its Order states:

> "The factors for the designation for rural reserves in OAR 660-027-0060 provide that, when identifying and selecting lands for a given designation, a county shall 'indicate which land was considered.' There is no indication in the text or context of the rule that the Commission intended to require that both urban and reserve factors must be considered simultaneously for each individual property. Metro and Washington County have provided findings addressing the eight factors under OAR 660-027-0050. The objectors disagree with the findings and conclusions, but Metro and the county complied with the rule with respect to the Peterkort property." (JER-149).

> "The question is a narrow one: whether Metro considered what the statute and rules require it to consider, and whether Metro's findings explain its reasoning, and whether there is substantial evidence in the record to support Metro's decision. * * * **[A]s long as Metro can demonstrate that it considered the factors, there is no requirement for Metro to show that an area is better suited as an urban reserve than as a rural reserve before it designates any land as urban reserves.**" (emphasis added). (JER-29-30).

However, OAR 660-027-0040(10) requires an integrated application and explanation of the factors when Metro and a county choose which lands to designate as urban reserves and which as rural reserves:

> "(10) Metro and any county that enters into an agreement with Metro under this division **shall apply the factors in OAR 660-027-0050 and 660-027-0060 concurrently and in coordination with one another.** Metro and those counties that lie partially within Metro and with which Metro enters into an agreement **shall adopt a single, joint set of findings of fact, statements of reasons and conclusions explaining why areas were chosen as urban or rural reserves**, how these designations achieve the objective stated in OAR 660-027-0005(2) . . ."

OAR 660-027-0040(10) (emphasis added).

The concurrent and coordinated application of the reserve factors is reinforced by OAR 660-027-0005(2), in relevant part:

> "… Rural reserves under this division are intended to provide long-term protection for large blocks of agricultural land and forest lands, and for important natural landscape features that limit urban development or define natural boundaries of urbanization. The objective of this division is a balance in the designation of urban and rural reserves that, in its entirety, best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents."

Given its previous determination that the Peterkort property is suitable for rural reserve designation, Metro and the county cannot simply refuse to apply the "concurrency and coordination" requirement, and designate the property urban reserve based primarily on financial incentives offered by the owner of the property to local government entities. Nor does a mere sequential

application of the two sets of factors comply. "Coordinated" means the particular area's performance under each urban and rural reserve factor must be considered and balanced together in determining how to designate land that qualifies for both urban and rural.

It appears that the only reason Metro and Washington County re-designated the Peterkort property as an urban reserve is because the property owners offered free or inexpensive easements and other incentives. LCDC seems to justify this because it "believes that the statutes and rules that guide this effort replaced the familiar standards-based planning process with one based fundamentally on political checks and balances." R-19(6). This is not a legal basis on which LCDC can affirm Metro's decision.

As part of its justification, LCDC seems to approve Metro's argument that the urban and rural reserve factors are not required to be applied to each separate parcel of land, and thus that Metro was not required to evaluate Peterkort separately for rural reserve designation. LCDC's argument is mis-placed. Petitioners are not arguing that in every situation the urban and rural reserve factors must be applied to every separate parcel. Where all the parcels in an area under consideration have the same economic and geographic characteristics, a separate parcel-by-parcel analysis might not be necessary.

That is not the case, however, with the Peterkort property. First, the Peterkort property is geographically significant since it forms a large (129-acre)

boundary between the rural reserve Foundation farmlands to the west and the UGB lands in the North Bethany area to the east. Second, the Peterkort parcel contains the "important natural landscape features" of the Rock Creek riparian, floodplain and habitat areas. Designating Peterkort as urban reserve would surround these resources with urban reserve and UGB lands. Third, as noted in the first assignment of error, Metro itself recognized the integrity of the Peterkort property and evaluated it as a stand-alone area. (JER-371). In fact, the individual Peterkort property was singled out for specific treatment by the county when the Peterkort family offered to donate road, sewer line, and wetland mitigation on the property if the county would redesignate this particular property from rural reserve to urban reserve. R-21(181). LCDC's approval of Metro's after-the-fact rationale for rejecting the petitioners' objections lacks substantial reason.

Metro and the county did not concurrently and in coordination apply the urban and rural reserve factors and make a decision based on those factors as to why Peterkort should now be an urban reserve when Metro and the county had previously concluded it should be a rural reserve. (JER-485). The only reason for the reversal of the designation was the Peterkort offer–and that is not an urban reserve factor.

For all these reasons LCDC's decision with respect to this assignment should be remanded.

## THIRD ASSIGNMENT OF ERROR

**LCDC's order approves an amount of acres for urban reserves that exceeds the statutory 30-year limit, violating ORS 197.145(4) and OAR 660-027-0040(2).**

### A. Preservation of Error

The amount of land provided for the urban reserve time period was objected to in the initial[8] and final decisions.[9]

### B. Standard of Review

This court reviews an LCDC order made pursuant to ORS 195.137-.145 to determine if the order is "unlawful in substance or procedure," unconstitutional, or "not supported by substantial evidence as to facts found by the commission." ORS 197.651(10).

### C. Argument

The reserves statute specifies that if Metro chooses to designate urban reserves, it must select a time period of "at least 20 years, and not more than 30 years, after the 20-year period for which [Metro] has demonstrated a buildable land supply in the most recent inventory." ORS 195.145(4). LCDC correctly describe this requires two assessments: the buildable land supply inside the current urban growth boundary (UGB), and the time period for which urban reserves are planned. OAR 660-027-0040(2); (JER-26,30-31). Metro

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[8] R-21(477-478); R-18(154-156); R-21(477-478).

[9] R-8(61,n.1).

designated 28,256 acres as urban reserves, which it then determined would be a 30-year time period. However, for at least two reasons, Metro's urban reserves designation exceeds the 30-year time period: Metro underestimated the UGB capacity, and Metro built an unneeded "vacancy" factor into its land determination for the 30-year urban reserve.

First, Metro underestimated the current UGB's capacity. Metro is required to establish a UGB with a 20-year urban land supply.[10] However, Metro does not actually zone land; rather, the 25 cities and three counties within Metro zone their lands within the UGB for various urban uses.

Metro determined that the zoning for the current UGB, adopted and acknowledged by each city, county, and LCDC, provides more development capacity than will be needed by the population and employment projected to locate in the Metro area in the next 20 years.[11] However, Metro then discounted this capacity, finding that absent a demonstration that public investments or policies are in place or underway, *as of the date Metro adopted the reserves decision*, this zoned capacity will not be used within the UGB's 20-year time period. Instead, as LCDC explained, it will take the entire 50 years – that is, the 20-year UGB plus the 30 years of plus urban reserves - to develop the *existing* zoned capacity inside the *existing* UGB.

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[10] ORS 268.390(3); 197.296.

[11] R-A(2)(740-742).

> "Metro's submittal explains that it based its analysis of the existing UGB capacity on a projection that development within the current UGB will occur at levels allowed by current zoning during the 50-year planning period.
>
> * **
> "Metro projects that 100 percent of the maximum zoned capacity of the existing UGB will be used during the reserves period."

(JER-65).

Deciding that existing zoning will not be developed and investments will not be made over the 20-year UGB planning period is contrary to ORS 197.296 and Goals 14, 11, and 9. Goal 14 requires Metro to "provide land for urban development needs" for the 20-year UGB period. Goal 9 requires cities to provide land inside that UGB for "an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses" for that 20 years.[12] Goal 11 requires cities to adopt public facilities plans that "describe[] the water, sewer and transportation facilities which are to support the land uses designated in the appropriate acknowledged comprehensive plans…." for the 20-year planning period. OAR 660-011-0005(1),(4). The cities approved and LCDC acknowledged these plans; no legal basis exists to conclude the plans are not valid.

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[12] *See* OAR 660-009-0020(1)(c),-0025(2).

If it will take 50 years to develop the already-zoned capacity of the 20-year UGB, then far more than a 20-year land supply exists inside the UGB, and the urban reserves far exceed the 30-year limit.

Second, Metro built a 4% "vacancy rate" into its residential land need calculation for both the UGB and urban reserves. Metro estimated the land needed to accommodate housing for the 20-year UGB and for the 30-year urban reserves. Metro then inflated each by 4% to accommodate "vacancy." [13] In doing so, Metro effectively extended the urban reserve period beyond 30 years. No legal or evidentiary basis exists to do so.

LCDC characterizes petitioners' objection as one that the 4% rate is "too high," and answers as follows:

> "Communities determining their needs for employment and residential lands for purposes of UGB management use a vacancy factor to recognize that land markets require some level of vacancy to function….[T]he process of bringing land into [a UGB] and then providing urban services…is not instantaneous. If there is no vacant land within the regional UGB in the mean time, then the region would confront difficulty complying with Goals 9 and 14 which require a long-term supply of land for housing and employment needs…." [14]

LCDC's response is flawed for several reasons. First, the objection was not that 4% was too high, but that Metro used a vacancy rate at all. No evidentiary basis exists for 4% or any other number, and LCDC points to none.

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[13] R-A(2)(597)(Metro Reserves Residential Range Methodology; Appendix3E-C, p. 3)

[14] JER-63.

LCDC's only justification is, essentially, "everyone does it," without backing up even that statement. Second, the objection was to Metro's use of a vacancy rate for the urban reserves. However, LCDC's response did not address the actual *reserves* objection, it addressed only the UGB. Third, even if LCDC's response was on point, the Metro UGB, like all UGBs, has a built-in "vacancy" factor in the form of a 20-year UGB. But unlike every other UGB, Metro is required to re-visit its UGB *every 5 years*. ORS 197.299. There is never "no vacant land within the regional UGB." At least 15 years worth of vacant lands always exists inside the UGB. Even Metro recognized this in its own *Urban Growth Report*, stating: "Maintaining a 20-year supply for housing that is updated every five years may avoid this complication." [15]

Fourth, the vacancy rate does not even cure the alleged problem. [16] A vacancy rate does not create more housing units to keep a market operating; it just adds more raw land to reserves or a UGB. Finally, a vacancy rate is nothing more than another way of saying "market factor," which this court has disallowed for UGBs: "market choice" is an "infinitely pliable and elastic term" and "without amplification is a label without reasoning." *1000 Friends of Oregon v. LCDC (Woodburn)*, 237 Or App 213, 225, 226, 239 P3d 272 (2010).

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[15] R-A(2)(715).

[16] *Id.*, Metro describes vacancy rate: "[ T]o allow for moves from one residence to another, it is assumed that a certain number of housing units would need to be vacant at any given time."

A vacancy rate makes even less common sense, and has no legal basis, when used to enlarge urban reserves, which LCDC acknowledges might not even all be needed.

LCDC designated as urban reserves a land supply that exceeds the 30-year time period for urban reserves, violating statute and rule. The decision should be remanded.

## V. CONCLUSION

The Commission's decisions with respect to:

1. The designation of the Peterkort property as an urban reserve; and
2. The designation as urban reserves of a land supply that exceeds the 30-year time period for urban reserves, violating statute and rule,

should both be remanded.

Dated: November 6, 2012

Respectfully submitted,

_____

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