

THE JAMES

LAWGROUP

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ATTORNEYS

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LAND CONSERVATION
AND DEVELOPMENT

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ATTORNEYS:

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October 8, 2010

HAND DELIVERED

Land Conservation and Development Commission
635 Capitol Street NE, Suite 150
Salem, Oregon 97301

Re: Written Exception to DLCDC Report and Recommendation issued
September 28, 2010, Specifically With Respect to Area 9B (East Bethany)

Dear Commissioners,

This letter is a written exception to the Department of Land Conservation and Development's ("Department") report and recommendation issued September 28, 2010 regarding the consolidated submittal of urban and rural reserves by Clackamas, Multnomah and Washington counties and Metro (hereinafter referred to as "Report"). This exception is submitted on behalf of the East Bethany Owners Collaboration by Robert Burnham and his counsel, Christopher James, and on behalf of the group of undersigned property owners representing approximately four hundred (400) acres in Multnomah County, abutting or neighboring the North Bethany UGB addition, specifically objecting to the designation of Area 9B as "rural reserve," rather than as "urban reserve."

We submit the decision of the Department erred in (1) failing to consider or apply the controlling equitable standard of ORS 197.010, (2) failing to recognize the applicable standards would require urban reserve designation as a matter of fact, and (3) failing to have an adequate factual record to justify area 9B as rural reserve.

The standard of review enunciated in the Report is “whether the county considered the rural reserve factors in deciding to include a particular area, explained why the areas should be rural reserve using the factors listed in the statute and rules, and whether there is evidence in the record that a reasonable person would rely upon to decide a the county did.” (Report, at pp.105-106.)

By adopting this narrow standard of review, the Department has failed to consider the overarching and controlling equity in fact requirement, which are expressly made controlling under ORS 197.010 (2) (a). Equity requires that Metro weigh the benefit to property from a rural reserve designation against the harm occasioned to such property by that designation and that Metro consider whether the same or similar benefits can be achieved by the application of a less harmful designation. Measured by these standards, the designation of area 9B as rural reserve is lacking in equity, fairness and due process.

Because Metro’s decision was based on the value of preserving landscape features , and because those can be preserved under the urban reserve designation with far less harm, equity requires adoption of the least oppressive standard.

Moreover, the facts do not support the County’s recommendation of a rural reserve designation, because any reasonable person could and would determine from the facts that Area 9B is an undistinguished grass and brush land already dotted with major power lines and other developmental infrastructure, which does not meet any of the factors for a rural reserve.

1. Since the County concedes that Area 9B meets the criteria for urban reserve, the equities require that it be designated as such.

Oregon Revised Statute Section 197.010(2)(a) states that “[t]he overarching principles guiding the land use program in the State of Oregon are to: . . . (a) Provide a healthy environment; (b) Sustain a prosperous economy; (c) Ensure a desirable quality of life; and (d) Equitably allocate the benefits and burdens of land use planning.” (Emphasis added.) None of these objectives¹ are satisfied by the designation of the Area 9B property as rural reserve.

There is no indication that Multnomah County even considered the standards of ORS 197.010 (2) (a). Equitable allocation of the benefits and burdens of land use planning is meaningless unless it operates on land in fact to prevent injustice. Applying bare legal doctrines does not always reach the fair and “right” result, and the courts of equity were

¹ The individual exceptions and previous objections submitted by the East Bethany landowners demonstrate that, if Area 9B is designated rural reserve, the economic reality will be that the land cannot be commercially viable, will fall into a state of disuse and deterioration, and will become an environmental and developmental blight. The surrounding area is highly urbanized and, thus, is not compatible with essentially stripped and abandoned property. Such inevitable disrepair and resulting hazardous conditions will be the antithesis of a “healthy environment,” “prosperous economy,” and “desirable quality of life.”

founded to fix that shortfall in the law². Through ORS 197.010, the Oregon Legislature understood and incorporated this principle into the public policy guiding the land use program. When the Department contends that its decision may be supported merely based upon a “reasonable person” standard, it is wrong because such a decision could completely fail to consider or weigh equitable factors. What then are the benefits and burdens from designation of land as urban reserve or rural reserve? The latter requires land be “frozen” in use and application, except for agriculture. The second requires that until changes in external factors are evident at a five year review, the land remains without development. Preservation of landscape features of land is accomplished under both designations.

The Department concedes that Area 9B meets the criteria for urban reserve. (Report, at 105, referencing the analysis of “areas that qualify as both urban and rural reserve.”)³ Even assuming *arguendo* that Area 9B meets the criteria for rural reserve, which we deny, the fact that it could be urban reserve requires that it be designated as such. Equity requires that when two outcomes achieve the same result, but one is demonstrably less harmful, fairness requires it be adopted. Here, that equitable maxim means that the area should be urban reserve, the least harmful outcome of the two, and in fact the one meeting most of the ORS197.010 goals.

² “Though equity customarily follows the law,” it may diverge from the law where necessary to correct a variance or preserve fairness. Hack v. Concrete Wall Co., 85 N.W.2d 109, 114, 350 Mich. 118 (Mich., 1957).

³ The CAC rated Area 9B as “medium” suitability for urban reserve. (It appears that the Department penalized Area 9B based upon Area 9A’s ranking of “low.”) (Exhibit 2 to Ordinance 1165, at p. 6.) Because of these concessions, the Collaboration will not reiterate its previous factual submissions regarding the appropriateness of the designation of urban reserve.

Designating Area 9B as rural reserve is punitive in nature. The burden placed upon the property owners in Area 9B if the designation of rural reserve is approved, thus mandating that the property will be unusable for any purpose⁴ for fifty years, is enormous. The land will be commercially virtually valueless, unsaleable, and essentially nothing but an expense and a liability hazard for the property owners, thus forcing them to expend resources in maintaining properties from which any benefit has been deprived.

In this instance, the East Bethany Collaboration has demonstrated that significant harm will be caused by the designation of Area 9B as rural reserve, thus precluding any use of the property for at least fifty years, at which time the property will most likely be so degraded that development would be infeasible or impossible. Multnomah County has shown no benefit to designating it as rural reserve and has not even contested the showing of significant harm.

It appears that Multnomah County is relying on the purported difficulty of providing infrastructure to the area as a purported benefit of a rural reserve designation. (Ordinance No. 1165, at page 6, heading entitled “*Why This Area Was Designated Rural Reserve.*”) However, such an argument ignores the facts and the purpose of an urban reserve. Area 9B is literally next door to the already thriving community of North Bethany, and already has main power lines and some other infrastructure; thus, providing infrastructure does not present the difficulties the County would have the Commission believe.⁵ More

⁴ Multnomah County does not seem to have contested the property owners’ demonstration that the land at issue is inappropriate for agriculture, timber, or other purposes. (Report, at 106.)

⁵ Because “the four governments” of Multnomah, Washington, and Clackamas Counties and Metro “have declared their mutual interest in long-term planning for three-county area (sic) for which they share land

importantly, because an urban reserve is expressly precluded from immediate development, the avoidance of any current uncertainty about the provision of additional infrastructure is irrelevant and does not bestow any benefit on anyone.⁶

To the extent that the County may argue that the designation as rural reserve may provide a benefit by protecting the purported, yet unidentified, “natural landscape features,” this argument is spurious and unsupported. Requiring an area to become an untended wilderness of bramble and brush for the lifetimes of the current owners and their progeny is not beneficial stewardship of the land. As demonstrated by the property owners’ many previous submissions, their aspirations for future development include environmental preservation. It appears that the Department concedes this point in its acknowledgement that Area 9B qualifies as urban reserve, since one of the factors for qualification is that the property “[c]an be developed in a way that preserves important natural landscape features. . . and [c]an be designed to avoid or minimize adverse effects on important natural landscape features. . . .” (OAR 660-027-0050(7) and (8), cited by Department at Report, p. 105 and 18.)

use planning authority” and the Oregon Legislature has codified a statutory authorization for the four governments to work together and coordinate efforts to designate reserves and make the best use of Oregon land for efficient development (Ordinance No. 10-1238A, page 1), the arbitrary boundary created by the county line should not be utilized as a political basis to deny the otherwise efficient extension of infrastructure from North Bethany to East Bethany. In any event, as discussed further herein, the decision regarding the source of additional infrastructure need not be addressed at this time, since no development would be authorized by an urban reserve designation.

⁶ The County’s comparison of this situation to Metro’s 2002 consideration of lands on the west slope of Tualatin is inapplicable, since there Metro was considering adding that land to the Urban Growth Boundary, not an urban reserve. (Exhibit 2 to Ordinance 1165, p. 6.)

In contrast, designating the area as rural reserve does not provide for any type of plan or resources to be committed to the environment. That designation does not support the stated goal.

Designating the property as urban reserve actually benefits the County. The designation of urban reserve will not allow immediate development of the property; it only allows for evaluation of the use of the property every five years, to meet the needs for urbanizable land as the community grows and changes. Allowing for periodic reevaluations of the land use preserves flexible planning options for the County, the land owners, and the growing population of the area. Given the existing development across the street from Area 9B and the plans for expansion in the immediate vicinity, it is likely that in the future a requirement that Area 9B remain as a wilderness will be an obstacle to efficient and attractive urban planning. Simply put, scrub land in the middle of suburban communities is neither attractive nor useful.

Any consideration of equitable doctrines clearly requires urban reserve designation for area 9B. The facts demonstrate that nothing but substantial and irreversible harm will be caused by a designation of rural reserve, while significant benefits will inure to all involved by a designation of urban reserve, keeping open the possibility of planned, controlled development in coordination with the existing communities, which promotes environmental values and honors the rights of the landowners. Thus, Metro should designate Area 9B as urban reserve, pursuant to the applicable ordinances, statutes, and basic legal principles.

2. Area 9B does not meet the criteria for rural reserve.

Multnomah County's ordinance provides that the objective of designating land as rural reserve is to provide "long-term protection of agricultural and forest land and landscape features that enhance the unique sense of place of the region." Ordinance No. 1161, Section 1. Rural reserve is a fifty-year designation, rendering no possibility of improvement, utilization, or concerted conservation of the land.

In the Report, the Department states that Multnomah County found the area "eligible for rural reserve designation under the factors for significant landscape features in OAR 660-027-0060(3)," (Report, p. 106), which is intended to protect "important natural landscape features." OAR 660-027-0060(6) defines "Important natural landscape features" as

landscape features that limit urban development or help define appropriate natural boundaries of urbanization, and that thereby provide for the long-term protection and enhancement of the region's natural resources, public health and safety, and unique sense of place. These features include, but are not limited to, plant, fish and wildlife habitat; corridors important for ecological, scenic and recreational connectivity; steep slopes, floodplains and other natural hazard lands; areas critical to the region's air and water quality; historic and cultural areas; and other landscape features that define and distinguish the region.

The County provided no explanation whatsoever for its assertion that it found Area 9B eligible for rural reserve designation under this rubric. It merely declared the area to have “medium to high suitability for providing long-term protection of important natural landscape features.” In its explanation of “*Why This Area Was Designated Rural Reserve*” (Exhibit 2 to Ordinance 1165, p. 6), it seems to rely on irrelevant arguments relating to infrastructure. As discussed above, this argument has no current application, since no development would be allowed under an urban reserve designation and, moreover, is inaccurate. Importantly, the basis cited by the County does not address at all the definition or identification of important natural landscape features purportedly existing in Area 9B.

In fact, as demonstrated in the exceptions and evidence submitted by the individual property owners, nothing about this area is particularly noteworthy, particularly in light of the significant urban development already in the area. Some of the property in Area 9B is already under massive power lines and/or literally across the street from existing dense suburban development. Although the area includes some sloping hills and a drainage creek, most of the area is flat, with sparse vegetation, low-quality trees, and little irrigation.

Despite the evidence submitted by the property owners and the Collaboration, the County has not submitted any countervailing evidence that the property has any distinguishing

natural boundaries, important habitats, or any other features set forth in the statute. It failed even to identify what purported important natural landscape features it claimed to seek to protect, because, frankly, none exist in Area 9B.⁷ The area has been developed not along natural boundaries, but rather along political divisions, most notably the county line. A county line is not a “natural boundar[y]” as contemplated in the statute. It is clear from Multnomah County’s argument regarding its reluctance to provide infrastructure through any of its city contracts, while ignoring the infrastructure readily available through Washington County’s North Bethany community, that the truth is that the political boundary is much more important to the governmental entities than the environment or natural landscape. Under these circumstances, no reasonable person could conclude that Multnomah County properly considered the required factors, and no reasonable person could come to the same conclusion.

The Department’s perfunctory dismissal of the objections to the designation of Area 9B as rural reserve ignores the reality of the topography and location of the property, as well as the grossly imbalanced and unfair burden the designation places upon the owners of the Area 9B property. Such a result does not satisfy the requirements of the Oregon Statutes or basic principles of due process and equity. We ask the Commission remand the matter for a designation of Area 9B as urban reserve.

⁷ Nonetheless, the property owners are dedicated to maintaining the “natural” aspect of the area, repeatedly assuring the County and other concerned entities that they would like to work with organizations such as Forest Park to ensure that development does not disturb the woods, Abbey Creek, and other environmental aspects of the area. Such planned and financed targeting of areas of environmental interest can provide better protection of the natural landscape than condemning the land to disuse and disinterest.

Respectfully Submitted,



Robert Burnham, For himself, and as Chair



Christopher James, esq.

On behalf of the The East Bethany Owners Collaboration

We are members of the above referenced group and support all positions in this letter.

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