

HAND DELIVERED

ORIGINAL

Wendie L. Kellington
Attorney at Law, P.C.
Licensed in Oregon and Washington

P.O. Box 1930
Lake Oswego Or
97035

Phone (503) 624-7790
Mobile (503) 804-0535
Facsimile (503) 620-5562
Email: wk@wkellington.com

October 7, 2010

Via Electronic Mail (on October 7, 2010)
Via Hand Delivery (on October 8, 2010)
Members of the Land Conservation and Development Commission
c/o Urban and Rural Reserve Specialist
Department of Land Conservation and Development
635 Capitol St. NE, STE 150
Salem, Or 97301

DEPT OF

OCT 08 2010

LAND CONSERVATION
AND DEVELOPMENT

Re: Exceptions to Director's Recommendation Regarding LCDC Consideration of
Metro Urban and Rural Reserves

Dear Members of the Commission:

This firm represents Steve and Kelli Bobosky concerning their 9.76 acre property, zoned for residential use, located in a residential subdivision, subject to a Goal 3 exception, containing no designated natural resources, but inexplicably designated by Washington County and Metro as "rural reserve." Please include this exception to the Director's recommendation in the record of LCDC's review of the Washington County and Metro urban and rural reserves decision.

Steve and Kelli Bobosky stand on their July 7, 2010 OBJECTIONS to the Washington County and Metro urban reserves decision. We do not waive any of the OBJECTIONS by not repeating them here. Moreover, while the Bobosky's plan to appear at and present their positions to LCDC at the upcoming hearings, to the extent the Bobosky's decide to preserve resources and not attend all three hearing days, should not be construed as waiving to conceding any of their points.

I. **Generally**

The Director's recommendation should not be followed. With all due respect, it parades the commission down a path that (1) ignores relevant standards, (2) improperly rewrites relevant standards to make them meaningless, (3) interprets relevant standards in a manner well beyond DLCDC's and LCDC's authority: viz., to have a meaning that ignores applicable statewide planning goals (*City of West Linn v. LCDC*, 200 Or App 269, 275 (2005)), (4) claims an "intent" for the urban and rural reserves rules that is not expressed in statute or rule (asserted "intent" of rural reserves to protect "rural lands from urbanization" -- director's recommendation p 70), (5) reinvents the Metro/Counties decision to contain a rationale it does not have, and one which is wholly different from that explained in the challenged Metro and Counties decision (director's claim that urban and rural reserve factors, statewide planning goals and statutes have no

applicability to the decision to apply urban and rural reserve designations to parcels or exception areas, but rather these laws apply vaguely to arbitrarily constituted “areas” which were established without reference to any standard and without any consistent methodology), and (6) asks the commission to ignore objector arguments that the challenged decision is inconsistent, irrational and a collateral attack on previous land use decisions that have already determined land is not subject to Goal 3 or capable of sustaining agriculture.

Worse, the director’s recommendation attempts to convince the commission that a 9.76 acre residentially zoned, residential lot, developed with a residence, in a 130+ acre residential subdivision, all of which are subject to a long acknowledged Goal 3 exception, is suitable “Agricultural Land” to be preserved for long-term agriculture.

Buying these arguments may be good for litigants because it ensures lengthy litigation; but it is lousy planning and a stunning abandonment of Oregon’s land use planning program. It is also a shameful waste of public and private resources. If the governing goals, rules and statutes have any meaning, and we should presume that they do, it would be nearly impossible for the court of appeals to accept the approach the director’s recommendation asks the commission to adopt; to the effect that the governing laws are substantively meaningless. *See 1000 Friends of Oregon v. LCDC*, 237 Or App 213 (2010) (remanding to LCDC for failure to apply the goals, making up a standard that did not exist, and failing to make a reviewable decision); *City of West Linn v. LCDC*, 200 Or App 269 (2005) (LCDC proposed rules rejected for failing to properly apply Goal 14); *Thompson v. LCDC*, 227 Or App 120 (2009) (court of appeals rejecting Director’s crabbed view of an Objector’s objections “readily” concluding that an issue had been adequately placed before LCDC and “has been preserved” for judicial review; *Manning v. LCDC*, 198 Or App 488, 496 (2005) (among other things rejecting as error, LCDC’s refusal to consider an objector’s arguments that they did not “identify any goal or rule provision that the county has violated”).

II. “Invalid Objections”

The director’s recommendation claims two of the Bobosky OBJECTIONS can be ignored by LCDC because they include “no citation.” This is wrong. The two objections the director’s recommendation asks the commission to ignore may not be ignored as a matter of law. Both are subsets of broader arguments exhaustively briefed in the OBJECTIONS. These two OBJECTIONS the director asks be ignored, are explained below.

First, the director’s recommendation asks that LCDC ignore the OBJECTION that:

“The challenged decision errs in making the subject 9.76 acre developed residential lot a “rural reserve” on the idea doing so protects long term agriculture, is an unlawful collateral attack on the final 1981 county land use decision taking an exception to Goal 3 on the subject property based on the fact that it is physically developed and committed to nonfarm uses.”

This is the subset of arguments expressed in other of the Bobosky OBJECTIONS, primarily in OBJECTION 2 that the subject 9.76 acre residential subdivision lot and the residential subdivision within which it is located, cannot be considered “Agricultural Land” or available to protect “Agriculture” because both the residential lot and residential subdivision are subject to a Goal 3 exception. The reasons this is unlawful are abundant in the OBJECTIONS. This particular subset expressed in Bobosky OBJECTION 4 is that to claim otherwise is an unlawful collateral attack on the long standing acknowledged land use decision that this lot and subdivision cannot as a matter of law be “Agricultural Land” or considered to be suitable for “Agriculture.”

To the extent this concept requires a brighter light:

(1) The components of what constitutes agriculture are expressed in Goal 3. ORS 197.180(1)(a) requires state agencies including DLCD and LCDC to carry out their planning duties, powers and responsibilities in compliance with the goals and rules implementing the goals. This includes Goal 3. The touchstone of Goal 3 is that land is suitable for farm use. *Wetherell v. Douglas County*, 235 Or App 246, 248 (2010). Land subject to an acknowledged exception to Goal 3 as a matter of law is unsuitable for Goal 3 uses. Therefore, the Bobosky property cannot as a matter of law qualify for a rural reserve under ORS 195.141(3)(d) or OAR 660-027-0060(2)(c) and (d). This is also explained at Bobosky OBJECTION, p 18, 20, 22.

(2) Aside from caselaw on the subject that a final acknowledged land use decision is effective and enforceable, ORS 197.180(1)(b) requires state agencies including LCDC and DLCD to take their planning actions in a manner that is consistent with Washington County’s acknowledged county plan and land use standards. The subject residential lot and the residential subdivision within which it is located is subject to an acknowledged Goal 3 exception which is expressed, reflected and contained in the county’s acknowledged plan and land use regulations. Therefore to make the subject property a rural reserve on the idea of protecting agriculture is contrary to the acknowledged local plan and regulations.

Second, Bobosky OBJECTION 5 which the director’s recommendation suggests be ignored is “The challenged decision inconsistently applies the rural reserve factors in an irrational and improper manner.”

The “rural reserve factors” are not unfamiliar to DLCD and they are found in OAR 660-027-0060. It is noted that the Bobosky OBJECTION as well as the director’s recommendation refer to the urban and rural reserve factors both by name and citation, including throughout the director’s recommendation. This basis to ignore the Bobosky OBJECTION is with all due respect disingenuous.

Further, Metro and the Counties as well as all state agencies, even DLCD, when required to apply the law must do so consistently and rationally. Failing to do is tautologically the failure

to apply the law. Here, the inconsistent and irrational application of the rural reserve factors means those factors, expressed in OAR 660-027-0060, were improperly applied. See *1000 Friends of Oregon v. LCDC*, 237 Or App 213, “Further, we noted that our holding in that regard “simply extends to LCDC orders a rule that has long applied to the orders of other administrative agencies”-that is, the rule of substantial reason. *Id.* at 237 n. 10, 668 P.2d 406. See *Freeman v. Employment Dept.*, 195 Or.App. 417, 421, 98 P.3d 402 (2004) (providing that, 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”); see also *Drew v. PSRB*, 322 Or. 491, 500, 909 P.2d 1211 (1996) (“[A]gencies also are required to demonstrate in their opinions the *reasoning* that leads the agency from the *facts* that it has found to the *conclusions* that it draws from those facts.” (Emphasis in original.))”

III. Director’s Recommendation

The director’s recommendation contains three key, fundamental errors.

First, it ignores the applicable law and rewrites it in the guise of interpretation. The effect of the director’s recommendation is then, under the guise of interpretation, to improperly amend relevant standards. See *DLCD v. Tillamook County*, 157 Or App 11, 14 (1998); *Goose Hollow Foothills League v. City of Portland*, 117 Or.App. 211, 218 (1992). Essentially the director’s recommendation claims the urban and rural reserve factors have no substantive meaning. Further, it claims the statewide planning goals including Goal 3 have no meaning. It essentially claims that so long as the counties and Metro say they considered the OAR 660-027-0050 and 0060 factors, it does not matter if those factors were in fact applied, were improperly applied, or whether there is an adequate or substantial evidentiary basis for a conclusion that they were properly applied. Relatedly, the director’s report recommends that the statewide planning goals be substantively ignored, especially Goal 3, so long as there is unsubstantiated lip service that the goals were considered.

Second, the director’s recommendation ignores the rural reserve rules and ORS 195.141 by reinventing the purpose the statute and rules serve. While the rules and statute authorize just two bases for designating land rural reserve (agriculture and significant natural resources), the director’s recommendation erroneously concludes it is good enough to designate rural reserves in order to serve a newly minted so-called “purpose” being to protect “rural lands from urbanization.” Director’s Recommendation p 70. There is no such purpose and to create one by interpretation is error. See also *DLCD v. Jackson County*, 151 Or App 210, 220 (1997) (DLCD’s “postulations” about the meaning of a rule, are of little use and not the proper way to interpret a rule).

Third, the director’s recommendation creates the idea that the standards expressed in statute and rule regarding urban and rural reserves do not apply to the determination of which land to designate as urban and rural reserves. Rather, so long as at the end of the process there are “areas” of whatever size for which there is some lip service that the rural and urban reserve factors were considered, it does not matter that particular parcels or areas cannot as a matter of

law meet the statutory and rule requirements for rural reserve. This is a serious error. The director's recommendation essentially and erroneously concludes that it does not matter that the subject 9.76 acre Bobosky developed residential subdivision lot and the 130+ acre residential subdivision within which it is located do not qualify as a rural reserve under either OAR 660-027-0060 or ORS 195.141. Rather, the director's recommendation asserts with no legal support that it is good enough that the arbitrarily established 21,446 acre area within which the Bobosky lot and subdivision is located "meets the objective set forth at OAR 660-027-005(2)" (which there is no substantial evidence it does in any event).

The regional decision makers did not even anticipate such a basis could support the challenged decision. There is no consistent method in the challenged decision for establishing rural reserve study areas. Any 21,000 acre area could be gerrymandered to reach any result and that is exactly what the director's recommendation improperly blesses. For example the Peterkort property (Area 8 C) is 129 acres and has its own parcel specific issue paper. *See* Decision p 50 and 63; Area 4B is 162 acres; Area 4D is 78 acres; Area 5A is 123 acres, Area 5G is 203 acres; Area 5H is 63 acres; Area 7E is 38 acres; Area 8B is 88 acres. The rural and urban reserves areas are of sizes, shapes and composition having no theme, no standards that guided them, and especially as it relates to the designated rural reserves, are wholly arbitrary. Creating such areas cannot excuse evaluating whether the Bobosky property and the residential subdivision within which it is located are properly designated rural reserve.

The Bobosky property in fact as a matter of law cannot be designated rural reserve because it is neither agricultural land nor contains any significant natural resources. It does not meet the required standards for designation as rural reserves.

The statute and rules that govern designating urban and rural reserves require an evaluation of whether property meets the rural reserve factors and whether property meets the urban reserve factors. It also requires that these designations be applied in the context of compliance with other statewide planning goals like Goal 3. However, under the director's recommendation, the rural reserve and urban reserve factors (OAR 660-027-0050 and 0060) are erroneously applied in a way that renders those factors meaningless, the goals irrelevant and ORS 195.141 surplussage. In fact, under the director's interpretation, there are no standards that guide what land is included in "areas" considered for designation as rural or urban reserves. Under the director's interpretation, any area can be drawn, to justify any result, including to designate a residential subdivision as "rural reserve," and the best farmland zoned EFU in active farm use, can be tied up as an urban reserve land just based on how the "area" is gerrymandered. Any 21,000 acre area located anywhere in the Metro region will have some EFU land and some natural resources. Take any of the best farmland in the region and lump it in with 21,000 acres and one easily comes up with urban reserves under the director's analysis. There can be little question but that the fact that the subject residential lot and residential subdivision were lumped into a 21,000 acre area does not automatically legitimize Metro and Washington County pretending this exception area serves agriculture.

October 7, 2010
Page 6

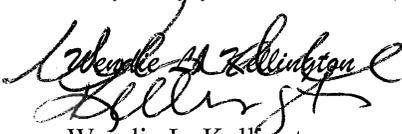
The director's recommendation determining that the rural reserve factors can be ignored in establishing the subject residential lot within a residential subdivision, subject to a Goal 3 exception as a rural reserve, is an interpretation of the law that is wrong, inconsistent with OAR 660-0027-0050 and 0060; ORS 195.141, as well as contrary to other applicable laws like Goal 3 and OAR 660-0033, the Washington County acknowledged plan, and ORS 197.180.

There are certainly other flaws in the director's recommendation. But the flaws identified above are so pervasive as to dwarf that the director ignored all of the Bobosky OBJECTIONS, which are reiterated here again by this reference.

IV. Conclusion

The director's recommendation should not be followed and the Bobosky OBJECTIONS should be sustained. Thank you for your consideration.

Very truly yours,



Wendie L. Kellington

WLK:wlk

CC: Clients

Steve Kelly, Washington County (via email and U.S. Mail)

Chuck Beasley, Multnomah County (via email and U.S. Mail)

Maggie Dickerson, Clackamas County (via email and U.S. Mail)

Laura Dawson-Bodner, Metro (via email and U.S. Mail)

Objectors of Record (via email)

DEPT OF

OCT 07 2010

LAND CONSERVATION
AND DEVELOPMENT

Wendie L. Kellington
Attorney at Law, P.C.
Licensed in Oregon and Washington

P.O. Box 1930
Lake Oswego Or
97035

Phone (503) 624-7790
Mobile (503) 804-0535
Facsimile (503) 620-5562
Email: wk@wkellington.com

October 7, 2010

Via Electronic Mail (on October 7, 2010)
Via Hand Delivery (on October 8, 2010)
Members of the Land Conservation and Development Commission
c/o Urban and Rural Reserve Specialist
Department of Land Conservation and Development
635 Capitol St. NE, STE 150
Salem, Or 97301

Re: Exceptions to Director's Recommendation Regarding LCDC Consideration of
Metro Urban and Rural Reserves

Dear Members of the Commission:

This firm represents Steve and Kelli Bobosky concerning their 9.76 acre property, zoned for residential use, located in a residential subdivision, subject to a Goal 3 exception, containing no designated natural resources, but inexplicably designated by Washington County and Metro as "rural reserve." Please include this exception to the Director's recommendation in the record of LCDC's review of the Washington County and Metro urban and rural reserves decision.

Steve and Kelli Bobosky stand on their July 7, 2010 OBJECTIONS to the Washington County and Metro urban reserves decision. We do not waive any of the OBJECTIONS by not repeating them here. Moreover, while the Bobosky's plan to appear at and present their positions to LCDC at the upcoming hearings, to the extent the Bobosky's decide to preserve resources and not attend all three hearing days, should not be construed as waiving to conceding any of their points.

I. **Generally**

The Director's recommendation should not be followed. With all due respect, it parades the commission down a path that (1) ignores relevant standards, (2) improperly rewrites relevant standards to make them meaningless, (3) interprets relevant standards in a manner well beyond DLCD's and LCDC's authority: viz., to have a meaning that ignores applicable statewide planning goals (*City of West Linn v. LCDC*, 200 Or App 269, 275 (2005)), (4) claims an "intent" for the urban and rural reserves rules that is not expressed in statute or rule (asserted "intent" of rural reserves to protect "rural lands from urbanization" -- director's recommendation p 70), (5) reinvents the Metro/Counties decision to contain a rationale it does not have, and one which is wholly different from that explained in the challenged Metro and Counties decision (director's claim that urban and rural reserve factors, statewide planning goals and statutes have no

French, Larry

From: Whitman, Richard
Sent: Thursday, October 07, 2010 8:13 PM
To: French, Larry
Cc: Hallyburton, Rob; Donnelly, Jennifer
Subject: FW: Bobosky EXCEPTION to DLCD Review and Recommendations on the Metro Urban and Rural Reserves

Importance: High

Attachments: BOBOSKY EXCEPTION to Director's Recommendation.pdf



BOBOSKY
EXCEPTION to Director

Larry: Just making sure that you receive and log this. Thanks.

Richard Whitman
Director, DLCD
(503) 373-0050

From: Wendie L. Kellington [wk@wkellington.com]
Sent: Thursday, October 07, 2010 6:26 PM
To: Whitman, Richard; Donnelly, Jennifer; Hallyburton, Rob
Cc: Steve Kelley; tvz@cinifergroup.com; lkevinodonnell@gmail.com; alpacas@teleport.com; amabisca@helvetia.us; ann.culter@comcast.net; awbiscuit@helvetia.us; bcc@co.clackamas.or.us; Brent_Curtis@co.washington.or.us; brian@tualatinriverkeepers.org; burger_dr@msn.com; cao@co.washington.or.us; carlotta.collette@oregonmetro.gov; charles.beasley@co.multnomah.or.us; cherryamabisca@gmail.com; chris_gilmore@co.washington.or.us; crichter@gslaw.com; dajfirwd@peoplepc.com; dan@reevekearns.com; dave@oia.org; dchandler@co.clackamas.or.us; don@bowermandavid.com; egraserllindsey@gmail.com; foster@europa.com; gkprice@yahoo.com; gregory.malinowski57@gmail.com; jeff.cogen@co.multnomah.or.us; jeff.condit@millernash.com; jill@clfuture.org; jim@conifergroup.com; jjohnson@oda.state.or.us; jlabbe@urbanfauna.org; john.williams@oregonmetro.gov; jplatt@hlevetiawinery.com; kathryn.harrington@oregonmetro.gov; lashbrook@ci.wilsonville.or.us; laura.dawson-bodner@oregonmetro.gov; lindapeters@gmail.com; lou.ogden@juno.com; maggied@co.clackamas.or.us; mkm@friends.org; mrobinson@perkinscoie.com; mwagner@mololla.net; richard.benner@oregonmetro.gov; rishelley@qwest.net; ron@clfuture.org; sa@bhlaw.com; samadams@portlandoregon.gov; sandra.n.duffy@co.multnomah.or.us; spfeiffer@perkinscoie.com; Steve_Kelley@co.washington.or.us; thomas@hbclawyers.com; Steve Bobosky; Robert Bobosky
Subject: RE: Bobosky EXCEPTION to DLCD Review and Recommendations on the Metro Urban and Rural Reserves

Dear Mr. Whitman, Mr. Hallyburton and Ms. Donnelly:

Enclosed please find for filing and LCDC's consideration at the upcoming LCDC hearing, are the BOBOSKY EXCEPTIONS to the director's recommendation concerning the Metro urban and rural reserves. Thank you.

Wendie L. Kellington
Attorney at Law,
Licensed in Oregon and Washington

Wendie L. Kellington|Attorney at Law P.C.
P.O. Box 1930
Lake Oswego Or
97035
(503) 624-7790 office
(503) 620-5562 fax

wk@wkellington.com<mailto:chris@SRLfirm.com>
www.wkellington.com

This e-mail transmission is intended only for the use of the individual or entity to which it is addressed, and may contain information that is PRIVILEGED, CONFIDENTIAL, and exempt from disclosure by law. Any unauthorized dissemination, distribution or reproduction is strictly prohibited. If you have received this transmission in error, please immediately notify the sender and permanently delete this transmission including any attachments in their entirety.

IRS Circular 230 NOTICE:

To be sure that you do not rely on advice that may not meet the "covered opinion" test in addressing federal tax issues and that we comply with IRS Circular 230 provisions, our firm's e-mail and certain other written communications bear the following notice: IRS CIRCULAR 230 DISCLOSURE To ensure compliance with new requirements of the Internal Revenue Service, we inform you that, to the extent any advice relating to a Federal tax issue is contained in this communication, including in any attachments, it was not written or intended to be used, and cannot be used, for the purpose of (a) avoiding any tax related penalties that may be imposed on you or any other person under the Internal Revenue Code, or (b) promoting, marketing or recommending to another person any transaction or matter addressed in this communication. PLEASE BE NOTIFIED THAT OUR LETTERS AND E-MAILS TO YOU ARE NOT INTENDED TO MEET THE "COVERED OPINION" TEST. We do not provide legal advice on Federal (or any) tax issues.