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July 14, 2010

**VIA HAND DELIVERY**

Urban and Rural Reserves Specialist  
Department of Land Conservation and Development  
635 Capitol Street NE, Suite 150  
Salem OR 97301

**Re: Objections to Adoption of Urban and Rural Reserves in Metropolitan Portland (Metro Ord. No. 10-1238A, Clackamas County Ord. No. ZDO-233, Multnomah County Ord. No. 2010-1161, and Washington County Ord. No. 733-A)**

Dear Urban and Rural Reserves Specialist:

This office represents Tim O'Callaghan ("Owner"), owner of approximately 58.34 acres of property located at 6955 and 7235 NW 185th Avenue ("Property") in Washington County. The purpose of this letter is to file written objections with the Department of Land Conservation and Development ("DLCD") to the adoption of urban and rural reserve designations in metropolitan Portland by the Metro Council ("Metro") and the Counties of Clackamas, Multnomah, and Washington (together, the "Counties") as referenced in the joint and concurrent submittal by these government agencies to DLCD dated June 23, 2010 ("Decision"). Please place this letter in the official record for this matter before DLCD and, if assigned, the Land Conservation and Development Commission ("LCDC").

**A. Executive Summary**

The Owner requests that DLCD remand the Decision to Metro and the Counties to remove the "rural reserve" designation from the Property, replace it with an "urban reserve" designation, and otherwise address the legal deficiencies identified herein. As detailed in this letter, the reasons for this request are the following:

- Substantial evidence in the record supports designating the Property as an "urban reserve."

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- Metro and the Counties misconstrued applicable law and made a decision not supported by substantial evidence in designating the Property as a "rural reserve."
- The Decision violates Statewide Planning Goal ("Goal") 2 because it relies upon an unacknowledged extraneous report to formulate 50-year land needs.
- The Decision further violates Goal 2 because there is no adequate factual base to support the conclusion that all lands within three (3) miles of the UGB are necessarily "subject to urbanization" for purposes of OAR 660-027-0060(2)(a).
- The Decision violates Goal 12 because it does not include findings regarding the Oregon Transportation Planning Rule ("TPR").
- The enforcement of OAR 660-027-0060(4) by Metro and the Counties violates ORS 195.141(3) and (4).

## **B. Applicable Law**

### **1. SB 1011**

In 2007, the Oregon Legislative Assembly adopted, and the Governor signed, SB 1011, which authorized Metro and the Counties to jointly and concurrently designate urban and rural reserves in the Portland metropolitan area after consideration of specific review standards through a public process. SB 1011 is codified at ORS 195.137 through ORS 195.145. By its terms, SB 1011 was designed to facilitate long-range planning for population and employment growth, which would, in turn, provide greater certainty to agriculture, forest, and other industries; property owners; and public service providers. ORS 195.139. LCDC adopted administrative rules, now set forth in OAR Chapter 660 Division 27, to implement the new statutes. These rules, together with the provisions of ORS 195.137 *et seq.* and the Goals serve as the core legal standards at issue in this matter. These provisions authorize designation of two types of reserves—urban and rural, which are each described below.

### **2. Urban Reserves**

Urban reserves are lands located outside the Metropolitan Portland Urban Growth Boundary ("UGB") that are intended to provide for future UGB expansion over an extended period of time. ORS 195.137(2); OAR 660-027-0010(11). They are the highest priority for inclusion in any UGB expansion. OAR 660-027-0070(1).

OAR Chapter 660 Division 21 already provides Metro the authority to designate urban reserves. In lieu of exercising this authority, Metro may designate urban reserves in conjunction with designating rural reserves by entering an intergovernmental agreement with area counties and by

adopting corresponding amendments to the regional framework plan. OAR 660-027-0020(1). Metro and the Counties must designate urban reserves after determining whether the land under consideration, either on its own or in combination with land already inside the UGB:

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

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

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

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

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

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

ORS 195.145(5). OAR 660-027-0050 requires consideration of these same factors and also requires consideration of whether the land can be served with a well-connected system of bikeways, recreation trails, and public transit; whether it can be developed in a manner that preserves important natural landscape features included in urban reserves; and whether it can be designed to avoid or minimize adverse effects on farm and forest practices and important natural landscape features on nearby rural reserves. OAR 660-027-0050(4), (7), and (8).

Once designated, urban reserves must be planned to accommodate estimated urban population and employment growth in the Metro area for between 20 and 30 years beyond 2029, as more specifically identified by Metro. ORS 195.145(4); OAR 660-027-0040(2). A county may not allow uses not allowed, or smaller lots than were allowed, at the time of designation as urban reserves until the land within the reserves are added to the UGB. OAR 660-027-0070(3).

### **3. Rural Reserves**

Rural reserves are lands located outside an Urban Growth Boundary that are designed to provide long-term protection for agriculture, forestry, or important natural landscape features. ORS 195.137(1); OAR 660-027-0010(9). Each county is charged with designating rural reserves

within its boundaries by entering an intergovernmental agreement with Metro and by adopting corresponding amendments to comprehensive plan policies and comprehensive plan and zone maps. OAR 660-027-0020(2); OAR 660-027-0040(7). Metro and the Counties must designate rural reserves after determining whether the land under consideration:

- "(a) Is situated in an area that is otherwise potentially subject to urbanization during the period described in subsection (2)(b) of this section, as indicated by proximity to the urban growth boundary and to properties with fair market values that significantly exceed agricultural values;
- (b) Is capable of sustaining long-term agricultural operations;
- (c) Has suitable soils and available water where needed to sustain long-term agricultural operations; and
- (d) Is suitable to sustain long-term agricultural operations, taking into account:
  - (A) The existence of a large block of agricultural or other resource land with a concentration or cluster of farms;
  - (B) The adjacent land use pattern, including its location in relation to adjacent nonfarm uses and the existence of buffers between agricultural operations and nonfarm uses;
  - (C) The agricultural land use pattern, including parcelization, tenure and ownership patterns; and
  - (D) The sufficiency of agricultural infrastructure in the area."

ORS 195.141(3). OAR 660-027-0060(2) delineates the same factors for designation as rural reserves intended to provide long-term protection to the agricultural industry. Notwithstanding the requirement to apply these factors, a county may designate Foundation Agricultural Lands or Important Agricultural Lands within three miles of an Urban Growth Boundary as rural reserve without additional explanation. OAR 660-027-0060(4).

OAR 660-027-0060(2) provides factors for consideration of lands for designation as rural reserves intended to provide long-term protection to the forestry industry. These factors are analogous to the factors applicable to lands under consideration for designation as rural reserves intended to provide long-term protection to the agriculture industry.

OAR 660-027-0060(3) provides additional factors for consideration of lands for designation as rural reserves intended to protect important natural landscape features as follows:

- "(a) Are situated in an area that is otherwise potentially subject to urbanization during the applicable period described OAR 660-027-0040(2) or (3);
- (b) Are subject to natural disasters or hazards, such as floodplains, steep slopes and areas subject to landslides;
- (c) Are important fish, plant or wildlife habitat;
- (d) Are necessary to protect water quality or water quantity, such as streams, wetlands and riparian areas;
- (e) Provide a sense of place for the region, such as buttes, bluffs, islands and extensive wetlands;
- (f) Can serve as a boundary or buffer, such as rivers, cliffs and floodplains, to reduce conflicts between urban uses and rural uses, or conflicts between urban uses and natural resource uses
- (g) Provide for separation between cities; and
- (h) Provide easy access to recreational opportunities in rural areas, such as rural trails and parks."

Once a rural reserve is designated, it cannot be redesignated as an urban reserve or annexed into an Urban Growth Boundary for a period between 20 and 30 years after 2029, as more specifically identified by Metro. ORS 195.141(2); OAR 660-027-0040(4), (5). A county may not permit uses not allowed, or smaller lots than were allowed, at the time of designation as rural reserves unless the lands are designated as other than rural reserves. OAR 660-027-0070(3).

## **C. Facts Common to All Objections**

### **1. Implementation of SB 1011 by Metro and the Counties**

This is the first time that Metro and the counties have adopted reserves designations under ORS 195.137 *et seq.* and OAR Chapter 660 Division 27. Thus, there has been no precedent to guide these agencies.

To implement the reserves designations process, each County formed its own reserves committee, which provided recommendations to a regional stakeholders group formed by Metro and the Counties, the Reserves Steering Committee ("RSC"). The RSC, in turn, provided a recommendation to the governing bodies regarding reserves designations. The RSC made its

final recommendations on reserves designations in February 2010. By February 25, 2010, Metro and the counties approved and executed respective intergovernmental agreements ("IGA's") identifying preliminary reserves designations throughout the region. After accepting additional testimony on these preliminary decisions, each agency adopted an ordinance to implement the final designations.

As a culmination of these processes, Metro and the three counties adopted ordinances in June 2010. On June 10, 2010, the Metro Council adopted Ordinance No. 10-1238A, which designated 28,615 gross acres of urban reserves and approved related amendments to Metro's Urban Growth Management Functional Plan. On June 15, 2010, the Washington County Board of Commissioners adopted Ordinance No. 733, which designated 151,536 acres of rural reserves in Washington County and approved related amendments to Washington County's Functional Plan. On June 17, 2010, the Clackamas County Board of Commissioners adopted Ordinance No. ZDO-233, which designated 68,713 acres as rural reserves in Clackamas County and approved related amendments to the Clackamas County Comprehensive Plan. Also on June 17, 2010, the Multnomah County Board of Commissioners adopted Ordinance No. 2010-1161, which designated 46,706 acres as rural reserves in Multnomah County and approved related amendments to the Multnomah County Comprehensive Plan.

## **2. The O'Callaghan Property**

The Property is approximately 58.34 acres in size and is located at 1N2 13, Tax Lots 1100 and 1201 (6955 and 7235 NW 185th Avenue) in Washington County. The Property is outside the Metro Portland UGB and the boundaries of the Metropolitan Service District in an urbanizing corridor immediately west of the North Bethany neighborhood and north of the intersection of NW 185th Avenue and NW West Union Road. The Property is generally flat in topography and rectangular in shape. A map of the Property is included in Exhibit A.

Washington County staff analyzed the Property and recommended that it be designated as an "urban reserve." The City of Beaverton conducted an independent analysis of the Property through a Prequalifying Concept Plan ("PQCP") and also found that the Property was highly suitable for an "urban reserve" designation. Washington County's local reserves committee, the Washington County Reserves Coordinating Committee ("WCRCC") made the same recommendation to the RSC. The RSC accepted this recommendation up until December 9, 2009, when the designation was abruptly and without notice or substantial evidence changed to "rural reserve." The final decision identified the Property with the "rural reserve" designation.

## **D. Review by DLCDC/LCDC**

### **1. Requirements of All Objections**

According to the Notice of Decision, each written objection must satisfy the following minimum requirements to be considered by DLCD (and LCDC if assigned):

**"1. Show that you participated in the process leading to one of the decisions by speaking or submitting written testimony at a public hearing held by one of the four governments or submitting written comment at one of the workshops or open houses held by one of the governments."**

As explained in Section E of this letter, the Owner participated in the local processes leading up to the Decision. This standard is satisfied.

**"2. Explain your objection to one of the decisions, being as specific as possible, including the statewide planning goal, the LCDC rule or the land use statute that you believe was violated by the decision."**

In Sections F and G of this letter, the Owner explains the numerous general programmatic and Property-specific objections to the substance of the Decision and the procedure utilized by Metro and the Counties in adopting it. These objections are specific and identify the Goals, rules, and statutes that have been violated. This standard is satisfied.

**"3. Recommend a specific change that would resolve your objection."**

In Section H of this letter, the Owner recommends that LCDC remand the Decision to Metro and the Counties to correct the identified errors and designate the Property as "urban reserve." This standard is satisfied.

**"The Department must receive your objection no later than 21 days from the date the notice was mailed (see postmark on envelope or date of e-mail)."**

Metro and the Counties mailed the Notice of Decision on June 23, 2010. The deadline for DLCD to receive written objections is July 14, 2010. This letter will be hand-delivered to DLCD on July 14, 2010. This standard is satisfied.

## **2. DLCD/LCDC Review Standards; Available Remedies**

Pursuant to OAR 660-027-0080, DLCD (or LCDC if assigned) must review the joint submittal for: (1) compliance with the Goals; (2) compliance with the applicable administrative rules; and (3) consideration of the factors for designation of land as urban or rural reserves described above. For purposes of this review, "compliance with the Goals" means that the submittal must conform with the purposes of the Goals and that not satisfying individual Goal requirements must only be technical in nature. In order to satisfy Goal 2's requirement for an adequate factual base, each finding of fact of the submittal must be supported by substantial evidence. "[S]ubstantial

evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." OAR 660-027-0080(4)(a). DLCD (or LCDC) must remand the Decision to Metro and the Counties if it finds that these standards are not satisfied.

**E. Owner's Standing to Object**

The Owner has standing to file these objections with DLCD. Pursuant to OAR 660-027-0080(2), the State is to review and act upon the joint reserves decisions in accordance with the procedures applicable to periodic review under ORS 197.628 to 197.650. These statutes are, in turn, implemented, in part, by OAR 660-025-0100(2)(d), which states that a prerequisite to filing objections with DLCD is that a party must have participated either orally or in writing during the local process. The Owner participated in the local process in the following ways:

- February 16, 2010 letter to Washington County Board of Commissioners
- April 21, 2010 letter and oral testimony to Washington County Planning Commission, a copy of which is attached as Exhibit A
- April 27, 2010 letter and oral testimony to Washington County Board of Commissioners
- May 5, 2010 letter to Metro Councilor Carlotta Colette, a copy of which is attached as Exhibit B
- May 10, 2010 letter to Washington County Board of Commissioners
- May 24, 2010 letter to Metro Councilors

Therefore, the Owner has standing to file these written objections with DLCD.

**F. Property-Specific Objections**

**1. Substantial evidence in the record supports designating the Property as an "urban reserve."**

**a. The Property satisfies each of the factors for designation as an "urban reserve."**

As determined by the WCRCC, the Washington County Planning Commission, Washington County staff, and the City of Beaverton in its PQCP, the Property satisfies the factors for, and should be designated as, an urban reserve.

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

The Property is ideally located to make efficient use of existing and planned public and private infrastructure investments. It is located immediately north of the Jin Park property, which is designated as an "urban reserve." Moreover, it is located immediately west of the UGB and developed properties, including North Bethany and the Portland Community College ("PCC") Rock Creek campus. The Property is also located within four (4) blocks of an existing Albertson's grocery store and a Key Bank. Development of the Property with urban uses will complement the existing urban development in the area, potentially by providing neighborhood-serving commercial uses or by providing additional residences that can support area businesses. The Property's ability to serve this function buttresses the region's significant planning in North Bethany and PCC's significant investment in the Rock Creek campus. This result is far preferable to designating the Property as a rural reserve, which will isolate North Bethany and PCC on the frontier of urban development for the next 50 years, perhaps preventing their optimal development.

The Property is currently served by all utilities and fronts on NW 185th Avenue, which is a designated arterial road with four (4) lanes of traffic (with an additional lane planned between NW Springville and NW West Union Roads). Moreover, the Owner has agreed to provide an easement across the Property to allow installation, operation, and maintenance of a sanitary sewer line to serve the North Bethany area, provided the Property is designated as an urban reserve. This sewer project is at the "90% design" stage, is funded, and is scheduled for construction as a capital improvement project beginning in 2010. Clean Water Services ("CWS") staff have advised that routing the sewer line across the Property is both cost-effective and the preferred alignment; however, a rural reserve designation could jeopardize this opportunity and increase both the capital and operating costs of this project. Moreover, according to CWS staff, the primary alternative to constructing the sewer line across the Owner's property could delay construction of sanitary sewer services to the North Bethany area by at least three (3) years.

This factor is satisfied.

**(2) Includes sufficient development capacity to support a healthy economy;**

Together with other designated urban reserves, the Property includes sufficient development capacity to support a healthy economy. In its PQCP, the City of Beaverton found that the Property and surrounding areas would primarily develop with residential uses to support industries and employment areas developing in Hillsboro directly to the south and west and existing industries within the City of Beaverton to the southeast. In this way, development of the Property would help sustain existing and planned developments in the area. This factor is satisfied.

**(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;**

Public facilities and services are available to serve the Property. The Beaverton School District ("BSD") has committed to providing needed educational facilities in the area. Furthermore, the BSD has considered growth impacts associated with urban reserves in its update of its Long Range Facilities Plan. The PCC campus abuts the Property to the east.

The County, private developers, and recognized public service providers such as Clean Water Services and Tualatin Hills Parks District are expending significant sums to plan and extend facilities and services to the North Bethany community. The Property is adjacent to North Bethany and can easily connect into these services. Moreover, development of the Property will raise additional revenues to support extension of these services, which will make them more efficient and cost-effective. This factor is satisfied.

**(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;**

The Property can be readily served by a comprehensive transportation network, including streets, sidewalks, bikeways, trails, and public transit. In its PQCP, the City of Beaverton found that existing natural resource corridors, such as the Rock Creek riparian corridor, could accommodate recreational trails and bikeways. These trails can be linked into the broader Bethany area to establish a more substantial pedestrian network. Moreover, the Property directly fronts on NW 185th Avenue, a four-lane arterial road (with an additional lane planned between NW Springville and NW West Union Roads). Public transit service is available immediately south of the Property with multiple lines providing connections to Westside Light Rail transit. Thus, this factor is satisfied.

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

According to the Washington County Findings at page 28, there are limited opportunities for wetland mitigation available in the area surrounding and including the Property. Designating the Property as an urban reserve would help rectify this imbalance, because Rock Creek and its associated wetlands traverse the Property. As a result, the Property already provides a solid foundation of wetlands that can foster development of additional wetlands through mitigation. Furthermore, as a part of Urban Reserve Area 8C, the Property would be subject to Special Concept Plan Area C under Policy 29 of the Washington County Comprehensive Plan, which incorporates and applies Metro's "Integrating Habitats" approach to all properties. This approach, which would be implemented at the concept and community planning stage, is intended to protect and enhance important natural ecological systems by improving water quality and providing wildlife habitat. This factor is satisfied.

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

The Property is ideal for meeting local and regional housing needs. It is generally rectangular in shape and includes about 23 acres of flat, buildable land. It is also proximate to major employment centers in Beaverton and Hillsboro and is immediately adjacent to the PCC campus and a proposed elementary school in North Bethany. According to the City of Beaverton's PQCP for the area, the Property could develop with a mixed use designation, which would allow for high density residential housing types. In the alternative, the City of Beaverton concluded that the Property would develop at an average of 10 dwelling units per acre, which would allow for low to medium density housing types. The Washington County Findings at page 28 concluded that housing demand in the area immediately surrounding the Property "will continue to grow." For these reasons, the Property includes sufficient land suitable for a range of needed housing types. This factor is satisfied.

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

The Property includes Rock Creek and its associated wetlands. The Washington County Findings at page 28 find that these natural features "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." The Property can be developed in a manner that preserves these important features. If designated as an urban reserve, the Property would be included in the adjacent Urban Reserve Area 8C. Pursuant to Washington County Ordinance No. 733, all lands within Urban Reserve Area 8C are subject to a special planning overlay that requires "progressive and environmentally sensitive development practices" designed to protect and enhance this riparian corridor. To the extent that this overlay adequately protects the Rock Creek corridor on other lands in the area, it should be equally effective on the Property. This factor is satisfied.

**(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.**

The Property can be designed to avoid or minimize adverse effects on resource uses on nearby lands for three reasons. First, the Property is surrounded on two (2) sides by developed or developing properties (to the south, lands within Urban Reserve Area 8C and to the east, lands within the existing UGB including North Bethany and the PCC Rock Creek campus) and on a third side by a public street (to the north, Green Lane). Finally, although property to the west is designated EFU, it can be buffered from any development planned for the Property through concept and community level planning in conformance with established Washington County plan policies. Therefore, there will be few instances when the Property will actually interface with resource uses.

However, even in the limited event where development on the Property could impact farm or forest practices or important natural landscape features, the Property will be subject to the special planning overlay described above, which is designed to protect and enhance the Rock Creek riparian and habitat corridor. Moreover, the Washington County Findings at page 29 state that even in the absence of this overlay, "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 developing surrounding lands." To the extent that the overlay and the existing Washington County regulatory framework adequately minimizes adverse effects on the Rock Creek corridor on other lands in the area, it should be equally effective on the Property. This factor is satisfied.

For these reasons, the Property satisfies each of the factors for designation as an urban reserve. Metro and the Counties erred when they reached a contrary conclusion in the final decision.

**b. There is no reasonable basis to treat the Property differently than the Peterkort property.**

In the IGA, Metro and the Counties designated the adjacent property owned by the Peterkort family ("Peterkort Property") as a "rural reserve." After entering the IGA and accepting public testimony, Metro and the Counties modified this decision and designated the Property as an "urban reserve." The Property is virtually identical to the Peterkort Property. All of the reasons that favor designating the Peterkort Property as an urban reserve are equally applicable to the Property. For example, both properties were deemed suitable for designation as either an "urban reserve" or "rural reserve." Both were also deemed suitable for urbanization by the City of Beaverton in the PQCP. Further, both were recommended for "urban reserve" designation by the Washington County Planning Commission. Both properties are critical to providing urban services, including land for a proposed sanitary sewer line necessary to serve the North Bethany community. Moreover, both lands are suitable sites for wetland mitigation which is needed in the area (and the record reflects that the Peterkort Property alone cannot accommodate all necessary mitigation). Finally, both the Property and the Peterkort Property, when subject to Special Concept Plan Area C under Policy 29 of the Washington County Comprehensive Plan, can adequately protect natural ecological systems and important natural landscape features. Based upon these facts, it is simply unreasonableness for Metro and the Counties to treat the Property differently than the Peterkort Property. To the extent that the Peterkort Property qualifies as an "urban reserve," the Property should as well. DLCD should find that Metro and the Counties have erred in concluding otherwise.

**2. Metro and the Counties misconstrued applicable law and made a decision not supported by substantial evidence in designating the Property as "rural reserve."**

**a. The "rural reserve" designation improperly elevates form over substance.**

Notwithstanding the substantial evidence in support of the WCRCC and WCPC recommendations, the regional RSC chose to redesignate the Property as a "rural reserve." The Metro Council should find that the RSC erred in reaching this conclusion for two reasons. First, there is no substantial evidence in the whole record to support this conclusion. According to the minutes of the RSC meeting of December 9, 2009, the RSC rejected the County's recommended "urban reserve" designation for the Property in order "to ensure that Rock Creek becomes a boundary." There is no further explanation offered. This conclusion greatly oversimplifies the analysis and improperly elevates form over substance in the reserve designation process. Whether a boundary looks good on a map does not mean it makes sense based upon existing development patterns or underlying conditions in the field. Further, there are many other instances where the RSC chose to ignore natural boundaries when designating urban reserves, including on the adjacent Peterkort Property, which is located on the "rural" side of Rock Creek with the Property.

Secondly and more saliently, there is no substantial evidence on the record to rebut Washington County's original recommendation that the Property be designated as an urban reserve. For example, at the same December 9, 2009 meeting, according to the minutes, County Planning Manager Brent Curtis inquired about the technical basis and methodology for the new proposal. Mr. Curtis' inquiry was perhaps directed at the requirement under OAR 660-027-0040(2) that agencies designate sufficient urban reserves to accommodate estimated urban population and employment growth in the area for the next 40-50 years. According to the minutes for this meeting, Metro Councilor Hosticka responded to Mr. Curtis' question by stating "that the period of the technical analysis as the focal point for decisions on reserves is ending, and that now is when vision and values are the focus." The approval criteria of OAR 660-027 do not mention "vision and values." As explained above, the Property satisfies the approval criteria for designation as an urban reserve.

**b. The process has denied the Owner a meaningful opportunity to provide input before a *de facto* final decision was reached in this matter.**

Finally, the reserves designation process has been unfair and has precluded meaningful opportunities for public input at meaningful times by those parties, such as the Owner, actually affected by the reserves designations. Two prime examples affecting the Property illustrate this point. First, as explained above, through December 8, 2009, nearly two (2) years into the reserves analysis and designation process, Washington County staff, the WCRCC, the City of Beaverton (through its designation of an area of interest), and the consensus support of the Core Four Reserves Team all identified the Property as an "urban reserve." Then, the RSC, at the very last minute, without notice to the Owner, and based only upon the "vision and values" stated above, redesignated the Property as a "rural reserve." This designation was quickly memorialized in the Intergovernmental Agreement ("IGA") entered between the Counties and Metro.

Second, contrary to the applicable OAR provision and the plain language of the IGA, Metro has apparently attempted to prevent changes to the reserves designations set forth in the IGA. Although the RSC's extensive efforts to establish consensus regional support for the reserves map are laudable, the process never contemplated that the RSC would have the final word on the issue. In fact, OAR 660-027-0030(3) provides that adoption of an IGA (including the attached reserves map) is "deemed a preliminary decision," not a final one. Moreover, Section C of the IGA authorizes the Metro Council and the County to approve amendments to the reserve designations set forth in the IGA, based upon testimony received during the public hearing process. Thus, the Metro Council is clearly empowered to adopt changes, such as the one proposed by the Owner, where it is demonstrated that the proposed map designation is not supported by substantial evidence.

Toward this end, the undersigned on behalf of the Owner submitted testimony to the Washington County Board explaining how the Property satisfies applicable approval criteria for designation as an urban reserve. Under apparent pressure from Metro, the County Board felt powerless to move forward with the change. In short, the "preliminary decision" set forth in the IGA became a *de facto* final decision. Thus, ironically, at the time the Owner could actually provide input into the reserve designation for the Property under the applicable OAR, it was already too late to affect the outcome. Given that the reserves designations affect development rights on the Property and throughout the region for the next half-century, the Owner deserves a meaningful opportunity to testify before a *de facto* final decision is reached in this matter. Metro's attempts to protect the RSC work product misconstrue the applicable law.

## **G. General Objections**

**1. The decision violates Goal 2, because Metro and the Counties based projected population growth, employment growth, densities of development, and land needs on a new unacknowledged report rather than on Metro's acknowledged functional plan and the acknowledged comprehensive plans of the Counties.**

Goal 2 requires that land use actions be consistent with comprehensive and regional plans; moreover, the Goal requires that these plans "be the basis for all decisions and actions related to use of land." The Court of Appeals had held that Metro violated Goal 2 when it based its estimate for needed land for urban reserves on an informal study that was not a part of the acknowledged Urban Growth Management Functional Plan ("UGMFP"). *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 994 P2d 1205 (2000). In affirming LUBA's remand of Metro's decision to designate urban reserves on another occasion, the Court stated that "computation of need [for urban reserves] must be based upon the functional plan and/or Metro's other applicable planning documents." *Id.* at \_\_\_\_\_. Later, the Court of Appeals of Oregon held that the City of Dundee could not rely on a study contemplated by, but not incorporated within, a comprehensive plan when rendering a land use decision. *1000 Friends of Oregon v. City of*

*Dundee*, 203 Or App 207, 124 P3d 1249 (2005). For the same reasons expressed in *Parklane*, the Court reasoned that the City's action violated Goal 2. The Court explained its decision as follows:

"[This] is not a matter of mere abstract concern. Rather, it goes to the heart of the practical application of the land use laws: The comprehensive plan is the fundamental document that governs land use planning. Citizens must be able to rely on the fact that the acknowledged comprehensive plan and information in that plan will serve as the basis for land use decisions, rather than running the risk of being 'sandbagged' by government's reliance on new data."

*Id.* at \_\_\_\_\_. *Parklane* and *1000 Friends of Oregon* are directly applicable to the instant case, yet Metro has not complied with this precedent when estimating the region's 50-year land needs. Metro calculated estimated land needs through the year 2060 based upon assumptions regarding demand for housing and jobs in the UGB as well as on assumptions regarding development densities over time. In making these estimates, Metro apparently relied to some degree upon the growth projections set forth in the *Urban Growth Report 2009-2030*; however, it is undisputed that the Metro Council has not formally adopted this report or incorporated it within the UGMFP. Instead, on December 10, 2009, the Metro Council simply "accepted" the population and employment projections from the "draft" report when it approved Resolution No. 09-4094. Even at that, according to the body of that Resolution, the Metro Council did not accept these projections for purposes of designating urban reserves.

Moreover, Washington County's findings note that Metro modified the assumptions and trends underlying the 20-year estimate "where appropriate," yet the record does not explain when or why Metro determined that it was appropriate to do so. These modified assumptions are then set forth in Metro's "COO Recommendation, Urban Rural Reserves" in Appendix 3E-C of Metro's record. Importantly, the assumptions set forth in Appendix 3E-C are, in many cases, departures from existing policies and trends relating to development patterns, yet Metro cites to no substantial evidence or provision of the UGMFP to substantiate these assumptions. Metro has also not incorporated the "COO Recommendation, Urban Rural Reserves" into the UGMFP. Thus, in clear contravention of *Parklane* and *1000 Friends of Oregon*, Metro has relied upon unacknowledged documents extraneous to the UGMFP when estimating the region's 50-year land needs for purposes of designating urban reserves. Therefore, Metro and the Counties have erred, and the Decision should be remanded.

**2. The Decision further violates Goal 2 because there is no adequate factual base to support the conclusion that all lands within three (3) miles of the UGB are necessarily "subject to urbanization" for purposes of OAR 660-027-0060(2)(a).**

In deciding whether to designate lands as a "rural reserve," a County must consider whether the lands are "subject to urbanization" through 2060, the agreed horizon date for reserves planning. ORS 195.141(3)(a); OAR 660-027-0060(2)(a). The applicable statutes and rules do not define the term "subject to urbanization," although they do note that the term should be measured based upon proximity to a UGB or proximity to properties with fair market values that significantly exceed agricultural values for farmland, or forestry values for forest land. The term "proximity" is not defined, and there are no other criteria that explain how to apply or interpret this factor. Clackamas County determined that all lands located within three (3) miles of the Portland Metropolitan UGB and within one-half mile of an outlying city UGB are necessarily "subject to urbanization." See generally Clackamas County staff report presented to that County's Planning Commission (March 2, 2010).

This appears to be a bright-line, "one size fits all" conclusion. There is no evidence in the record to support the selected distances or to explain why properties within 3 miles of a UGB, as opposed to 2.75 miles or 13 miles, were more or less subject to the varied factors that influence urbanization, such as location, surrounding development patterns, demographic trends, proximity to employment centers or transportation facilities, parcel sizes, or quality of schools. In the absence of any evidence at all to support Clackamas County's characterization of this factor, there is no adequate factual base for purposes of Goal 2 to support Clackamas County's application of this factor in the rural reserves analysis. LCDC should strike this "one size fits all" conclusion and remand these proceedings with direction that Clackamas County develop an adequate factual base for determining when lands are "subject to urbanization."

**3. The decision violates Goal 12 because Metro and the Counties have not included findings whether the respective plan amendments "significantly affect" any existing or planned transportation facilities.**

The Oregon Transportation Planning Rule ("TPR"), set forth at OAR 660-012-0060, requires that "where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation" will "significantly affect" any existing or planned transportation facility, the government agency adopting the amendment must preserve the "identified function, capacity, and performance standards" of the facility by taking one of the mitigatory actions in OAR 660-012-0060(2). OAR 660-012-0060(1), (2). The Court of Appeals of Oregon has held that a government agency must determine whether or not there is a significant effect under the TPR prior to adopting the amendment in questions even if no development is proposed at all. *Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29, 220 P3d 445 (2009). This is because the TPR is, by its terms, a "planning requirement." *Just v. City of Lebanon*, 49 Or LUBA 180 (2005) (emphasis in original).

In the instant case, Metro has adopted amendments to the UGMFP, and the Counties have each adopted amendments to their respective acknowledged comprehensive plans. Although the TPR

is applicable to each of these amendments, none of these agencies determined whether the proposed amendments would "significantly affect" any existing or proposed transportation facilities. It does not appear that Metro or Clackamas County made any independent findings regarding Goal 12 or the TPR at all; moreover, while Multnomah and Washington Counties did adopt findings regarding Goal 12, they, too, failed to address the TPR. As a result, it is entirely unclear whether any of the adopted reserves policies or designations significantly affect any existing or planned transportation facilities. Metro and the Counties are not permitted to avoid this analysis under the excuse that no development is currently proposed. Furthermore, Metro and the Counties cannot defer this analysis to a later stage of development. Accordingly, DLCDC should find that Metro and the Counties erred.

**4. As applied, the enforcement of OAR 660-027-00060(4) by Metro and the Counties violates ORS 195.141(3) and (4).**

ORS 195.141(3) requires that, when considering a rural reserve designation to provide long-term protection to the agricultural industry, Metro and each County "*shall* base the designation on consideration of factors including, but not limited to..." (emphasis added). The statute continues by enumerating review factors. The statute does not provide any exceptions when Metro and the Counties are not required to apply these review factors. Thus, based upon the plain language of the statute, Metro and the Counties must apply the enumerated factors to any proposed rural reserve designation. ORS 195.141(4) authorizes LCDC to adopt rules establishing a process and criteria for designating reserves pursuant to ORS 195.141. This grant of authority does not explicitly authorize LCDC to disregard any portion of the statute when drafting the rules.

LCDC adopted such rules in 2008, and they are codified at OAR 660-027-0060(2). These rules require consideration of enumerated factors, which mirror those set forth in ORS 195.141(3), prior to designating a rural reserve to provide long-term protection to the agricultural industry. However, LCDC adopted another provision, OAR 660-027-0060(4), which reads as follows:

"(4) Notwithstanding requirements for applying factors in OAR 660-027-0040(9) and section (2) of this rule, a county may deem that Foundation Agricultural Lands or Important Agricultural Lands within three miles of a UGB qualify for designation as rural reserves under section (2) without further explanation."

This rule permits a county to ignore the enumerated factors of OAR 660-027-0060(2) and simply focus on whether the land in question is designated a Foundation or Important Agricultural Land by the Oregon Department of Agriculture. This explicitly violates ORS 195.141. LCDC clearly exceeded its statutory authority in enacting this provision. To the extent that Metro and any of the Counties relied on OAR 660-027-0060(4) as the basis to designate any rural reserves (and it

Urban and Rural Reserves Specialist  
July 14, 2010  
Page 18

appears the Clackamas County in particular has engaged in this practice), such action misconstrues the applicable statute.

**H. Recommended Action and Conclusion**

For the reasons set forth herein, DLCD, or the LCDC if assigned, should remand this matter with direction to Metro and the three (3) Counties to remove the "rural reserve" designation from the Property, re-apply the applicable laws, identify the Property as "urban reserve," and to otherwise address the legal deficiencies identified herein. Thank you for your attention to these objections.

Very truly yours,



Michael C. Robinson

Enclosures

cc: Ms. Laura Dawson Bodner, Metro (w/encl.)  
Ms. Maggie Dickerson, Clackamas County (w/encl.)  
Mr. Chuck Beasley, Multnomah County (w/encl.)  
Mr. Steve Kelley, Washington County (w/encl.)  
Mr. Tim O'Callaghan (w/encl.) (via email)  
Mr. Seth King (w/encl.) (via email)



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April 21, 2010

**VIA HAND DELIVERY**

Marc San Soucie, Chair  
Washington County Planning Commission  
c/o Land Use and Transportation Department  
155 N First Ave, Suite 350  
Hillsboro OR 97124-3072

**Re: Ordinance No. 733; Reserve Status of 6955 and 7235 NW 185th Avenue**

Dear Chair San Soucie and Members of the Planning Commission:

This office represents Tim O'Callaghan, the owner ("Owner") of approximately 58.34 acres of property located at 6955 and 7235 NW 185th Avenue ("Property") in Washington County. The Owner will be adversely affected by proposed Ordinance No. 733 ("Ordinance"), which would designate the Property as a "rural reserve." This designation is inconsistent with the Washington County ("County") staff recommendation and the recommendation of the Washington County Urban and Rural Reserves Coordinating Committee ("WCRCC"), which both determined that it was appropriate to designate the Property as an "urban reserve."

The Planning Commission should recommend that the County Board of Commissioners ("Board") modify the Ordinance to be consistent with the original County recommendation of "urban reserve" for the following reasons: (1) the "urban reserve" designation is supported by substantial evidence in the whole record; (2) development of the Property with urban uses will support existing public and private investment in the area; (3) the Property can be developed to avoid or mitigate adverse effects on farm and forest practices and important natural landscape features; and (4) the decision of the regional Reserves Steering Committee ("RSC") to designate the Property as a "rural reserve" is not supported by substantial evidence and does not adequately rebut the County recommendation.

18812-0001/LEGAL18134596.1

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Perkins Coie LLP and Affiliates

**EXHIBIT A**

**1. The County properly determined that the Property should be designated as "urban reserve."**

County staff completed a comprehensive assessment of County lands and recommended that the Property be designated as an "urban reserve." The WCRCC reached a similar conclusion. These recommendations were based upon a detailed technical analysis of the reserves designation approval criteria in OAR 660-027, including the suitability of land to accommodate urban development and the County's projected land needs. Specifically as to the Property, County staff determined that the Property was one of the most suitable properties in the County for "urban reserve" status. This conclusion is justified for the reasons already included in the record for the Ordinance and for the reasons explained below.

**A. Development of the Property will support existing public and private investment in the area, including North Bethany and the Portland Community College ("PCC") Rock Creek campus.**

The Property is ideally located to make efficient use of existing and planned public and private infrastructure investments. It is located immediately north of the Jin property, which is designated as an "urban reserve." Moreover, it is located immediately west of the Urban Growth Boundary and developed properties, including North Bethany and the PCC Rock Creek campus. The Property is also located within four (4) blocks of an existing Albertson's grocery store, a Key Bank, and fronts on NW 185th Avenue, which is a designated **arterial** road with four (4) lanes of traffic. A locational map of the Property is attached for convenience. The Property is currently served by all utilities. Moreover, the Owner has agreed to provide an easement across the Property to allow installation, operation, and maintenance of a sanitary sewer line to serve the North Bethany area. Development of the Property will complement the existing development in the area, potentially by providing neighborhood-serving commercial uses or by providing additional residences that can support area businesses. The Property's ability to serve this function buttresses the County's significant planning in North Bethany and PCC's significant investment in the Rock Creek campus. This result is far preferable to designating the Property as a rural reserve, which will isolate North Bethany and PCC on the frontier of urban development for the next 50 years, perhaps preventing their optimal development. For these reasons, the Property will make efficient use of existing investment in the area.

**B. The Property can be developed to avoid or mitigate adverse effects on farm and forest practices, and adverse effects on important natural landscape features, on nearby land including land designated as rural reserves.**

The property to the south is designated as an urban reserve. The property to the east is existing urban development within the North Bethany area. The property to the north is designated EFU; however, it is separated from the Property by the existing buffer of Green Lane. The property to

the west is also designated EFU but can be buffered from any development planned for the Property. Thus, urban development of the Property can be designed to avoid or mitigate adverse impacts on farm and forest practices. Furthermore, although Rock Creek and its associated riparian corridor are located on the Property, these natural areas are limited in size and scope. Furthermore, they are located near the southern and eastern property lines. Thus, urban development can be clustered on the vast remainder of the Property without adversely impacting the Rock Creek corridor.

**2. The RSC erred in designating the Property as "rural reserve" by improperly elevating form over substance.**

Notwithstanding the substantial evidence in support of the County staff and WCRCC recommendations, the regional RSC chose to redesignate the Property as a "rural reserve." The Planning Commission should find that the RSC erred in reaching this conclusion for three reasons. First, there is no substantial evidence in the whole record to support this conclusion. According to the minutes of the RSC meeting of December 9, 2009, the proposal rejected the County's recommendation in order "to ensure that Rock Creek becomes a boundary." There is no further explanation offered. This conclusion greatly oversimplifies the analysis and improperly elevates form over substance in the reserve designation process. Whether a boundary looks good on a map does not mean it makes sense based upon existing development patterns or underlying conditions in the field.

Secondly and more saliently, there is no substantial evidence to rebut the County's recommendation. For example, at the same December 9, 2009 meeting, according to the minutes, County Planning Manager Brent Curtis inquired about the technical basis and methodology for the new proposal. Mr. Curtis' inquiry was perhaps directed at the requirement under OAR 660-027-0040(2) that agencies designate sufficient urban reserves to accommodate estimated urban population and employment growth in the area for the next 40-50 years. According to the minutes, Metro Councilor Hosticka responded to Mr. Curtis' question by stating "that the period of the technical analysis as the focal point for decisions on reserves is ending, and that now is when vision and values are the focus." The approval criteria of OAR 660-027 play at least as important a role in the decision-making process as "vision and values." As explained above, the Property satisfies the approval criteria for designation as an "urban reserve."

Marc San Soucie  
April 21, 2010  
Page 4

Accordingly, the Owner requests that the Planning Commission recommend that the Board modify the Ordinance to remove the "rural reserve" designation and replace it with an "urban reserve" designation. This type of adjustment is permitted by the Intergovernmental Agreement entered between the County and the Metro Council. Thank you for your consideration of the points in this letter.

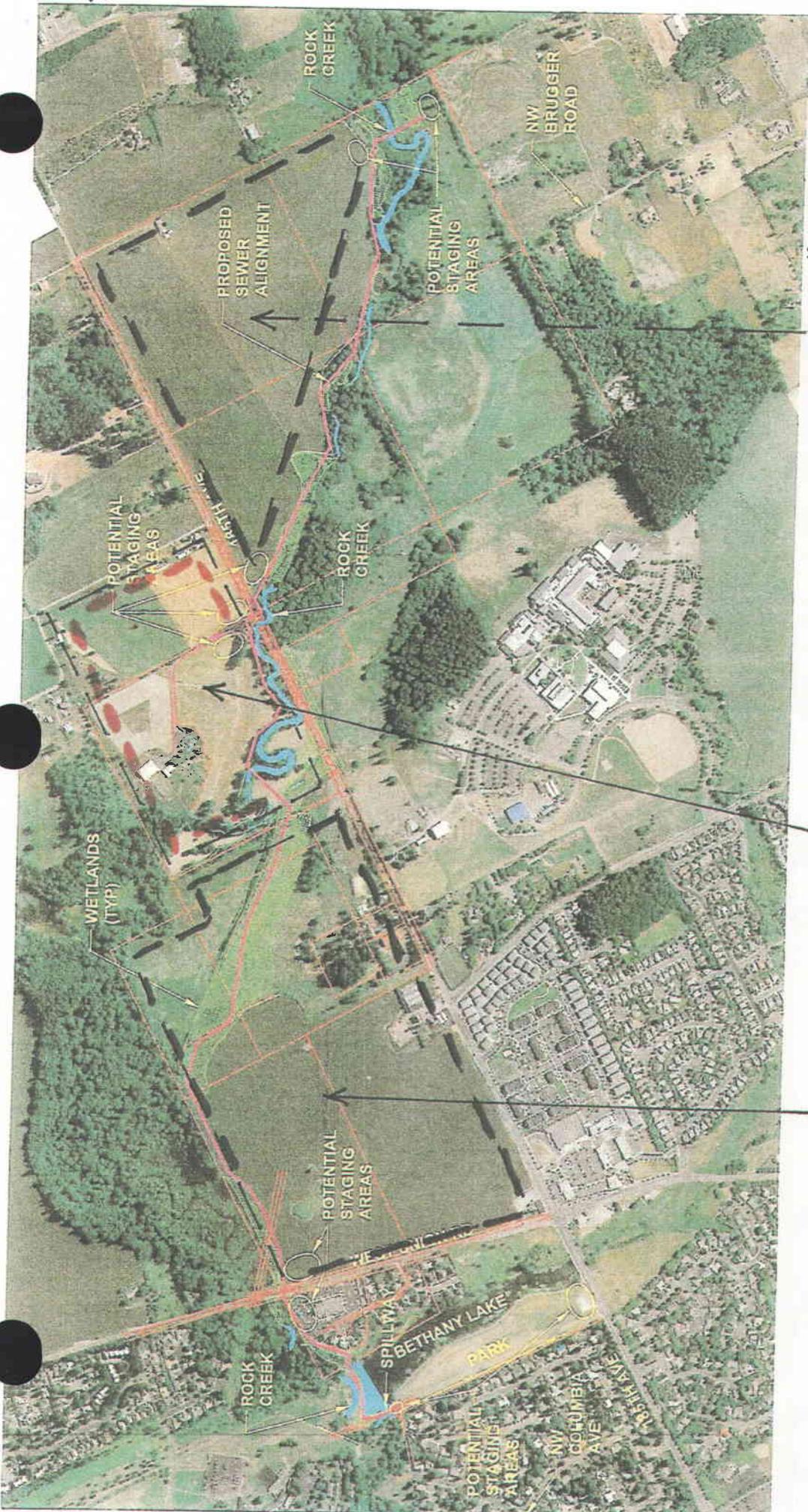
Very truly yours,



Michael C. Robinson

Enclosure

cc: Mr. Tim O'Callaghan (w/o encl.)(via email)



Kennedy/Jenks Consultants

CLEAN WATER SERVICES  
BETHANY AREA  
SANITARY SEWER IMPROVEMENTS

POTENTIAL STAGING AREAS

Peterkort

O'CALLAGHAN

Jin PARK

Michael C. Robinson

PHONE: (503) 727-2264

FAX: (503) 346-2264

EMAIL: MRobinson@perkinscoie.com

May 5, 2010

**VIA E-MAIL**

Ms. Carlotta Collette, Councilor  
Metro Regional Services  
600 NE Grand Ave.  
Portland, OR 97232-2736

**Re: My Client, Tom O'Callaghan**

Dear Councilor Collette:

This office represents Tim O'Callaghan. In advance of our meeting on Thursday, I am writing to summarize the reasons that Mr. O'Callaghan's property should receive an Urban Reserves ("UR") designation. Mr. O'Callaghan's property is located on the west side of NW 185th, just south of Springville.

1. Washington County Clean Water Services ("CWS") is constructing a sanitary sewer trunk line from south of Mr. O'Callaghan's property in order to serve North Bethany. I spoke with Nora Curtis of CWS on April 28, 2010 and Ms. Curtis told me that the line across the O'Callaghan property is the preferred alignment. The preferred alignment is possible only if Mr. O'Callaghan grants an easement, which he is willing to do, provided his property receives a UR designation. I have enclosed a letter addressed to Washington County Vice Chair Desari Strader with Mr. O'Callaghan's proposal attached to it. **(Exhibit 1).**
2. NW 185th is a major arterial adjacent to Mr. O'Callaghan's property. In fact, Washington County Ordinance 712 approved in October 2009 provides that NW 185th will be expanded to five lanes between Springfield and West Union Roads. Thus, Mr. O'Callaghan's property will front a major arterial. The UR factors include efficient use of public improvements and infrastructure. It is very efficient to front major arterials such as NW 185th with the potential for urban development on both sides.
3. Mr. O'Callaghan's property received a Washington County staff recommendation for the UR designation prior to December 9, 2009 and received a high screening score. **(Exhibit 2).**

Ms. Carlotta Collette, Councilor

May 5, 2010

Page 2

4. Rock Creek does not need to be the urban edge. In fact, the wooded area to the west of Mr. O'Callaghan's property and Green Lane to its north form an appropriate urban edge.

5. Mr. O'Callaghan's property is near the Portland Community College Rock Creek campus, residential and commercial developments and the North Bethany development which will eventually contain over 4,000 dwellings.

Mr. O'Callaghan made this argument to the Washington County Planning Commission which recommended 7-1 that his property receive a UR designation. He understands the difficulty of trying to reach a decision for the entire region but the region must get each property right. The region is faced with the same task as though we had been asked in 1960 to predict how Portland would look fifty (50) years later in 2010. This property makes sense for a UR designation to at least leave open the possibility that some time in the next fifty (50) years, the region might want the urban growth boundary to include property adjacent to a large arterial crossed by a sanitary sewer trunk line with an appropriate physical edge to its west and north sides.

We look forward to meeting with you on Thursday.

Very truly yours,



Michael C. Robinson

MCR/cfr

Enclosures

cc: Mr. Tim O'Callaghan (w/encls.) (via email)



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April 26, 2010

**VIA E-MAIL**

Ms. Desari Strader, Vice Chair  
Washington County Board of Commissioners  
Room 300, MS 22  
155 N. First Avenue  
Hillsboro, OR 97124-3072

**Re: My Client, Tim O'Callaghan; Washington County Ordinance 733**

Dear Vice Chair Strader and Members of the Board of County Commissioners:

This office represents Tim O'Callaghan. As you know, prior to December 9, 2009, Washington County staff had recommended that Tim's property on NW 185th be designated Urban Reserves. After that date, the proposed designation for Tim's property changed to Rural Reserves based on the Bragdon/Hosticka proposal.

Tim and I appeared before the Washington County Planning Commission at the public hearing on Ordinance 733 on April 21, 2010. The Planning Commission recommended by a vote of 7-1 that the designation for Tim's property be changed back to Urban Reserves. They did so in light of the fact that Tim's property meets all of the administrative rule factors for an Urban Reserves designation, is adjacent to the Urban Growth Boundary on the east and an Urban Reserves designation on the south, is served by NW 185th and, most importantly, the Bragdon/Hosticka proposal was based on "vision and values," according to Councilor Hosticka, not on the Urban Reserves factors.

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**EXHIBIT 1**

Mr. Tom Brian, Chair  
April 26, 2010  
Page 2

On behalf of Tim, I respectfully request that the Board follow the Planning Commission's recommendation and approve Ordinance 733 with an Urban Reserves designation for Mr. O'Callaghan's property.

Very truly yours,



Michael C. Robinson

MCR/cfr

cc: Mr. Tim O'Callaghan (via email)  
Ms. Joanne Rice (via email)  
Mr. Mike Dahlstrom (via email)

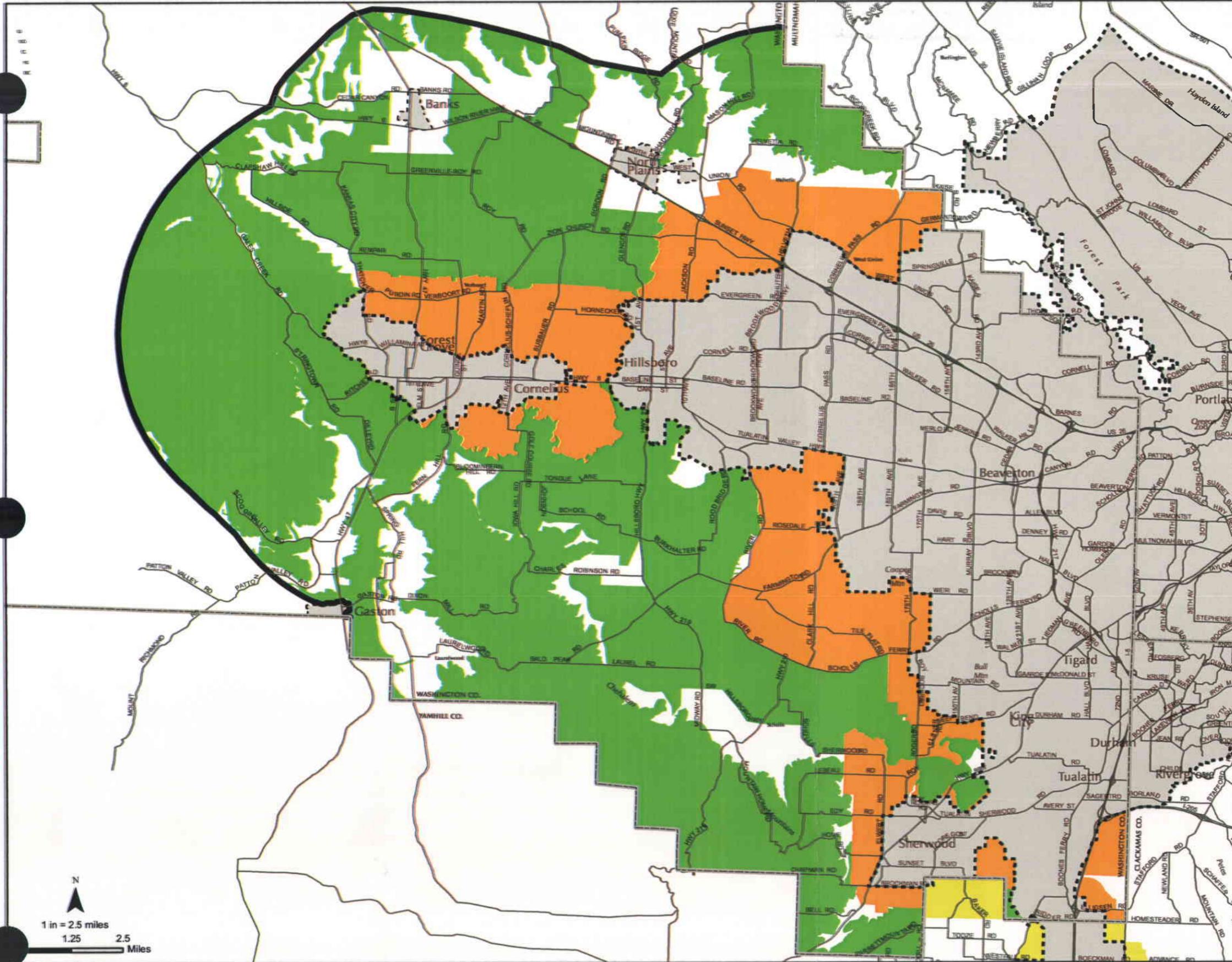
# Recommended Rural and Urban Reserves

-  Recommended Rural Reserve
-  Recommended Urban Reserve
-  Recommended Urban Reserve in Clackamas County
-  Existing Urban Area
-  Extent of Reserves Study Area
-  Urban Growth Boundary
-  County Boundary

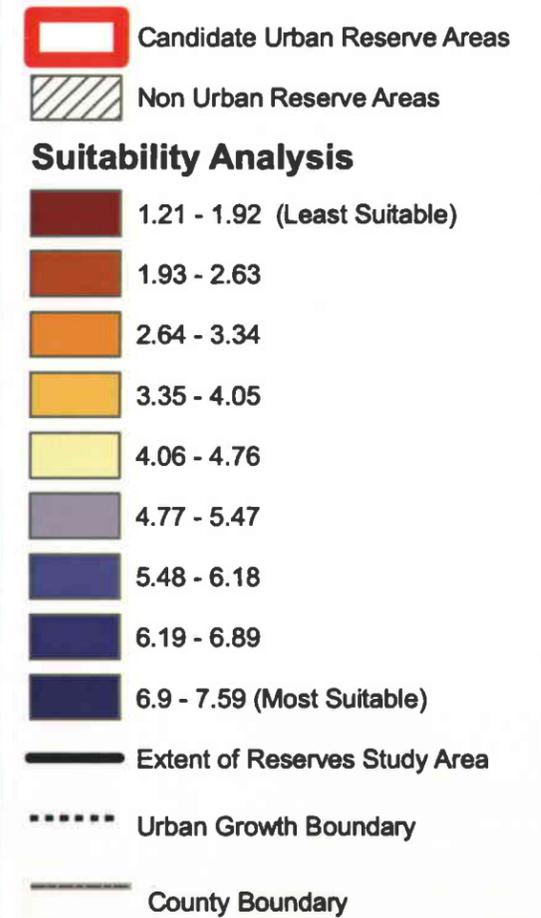
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 ph (503) 846-3519  
 fax (503) 846-4412  
 lutplan@co.washington.or.us



# Candidate Urban Reserves Suitability DRAFT



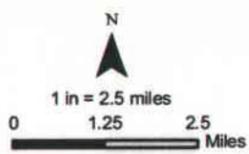
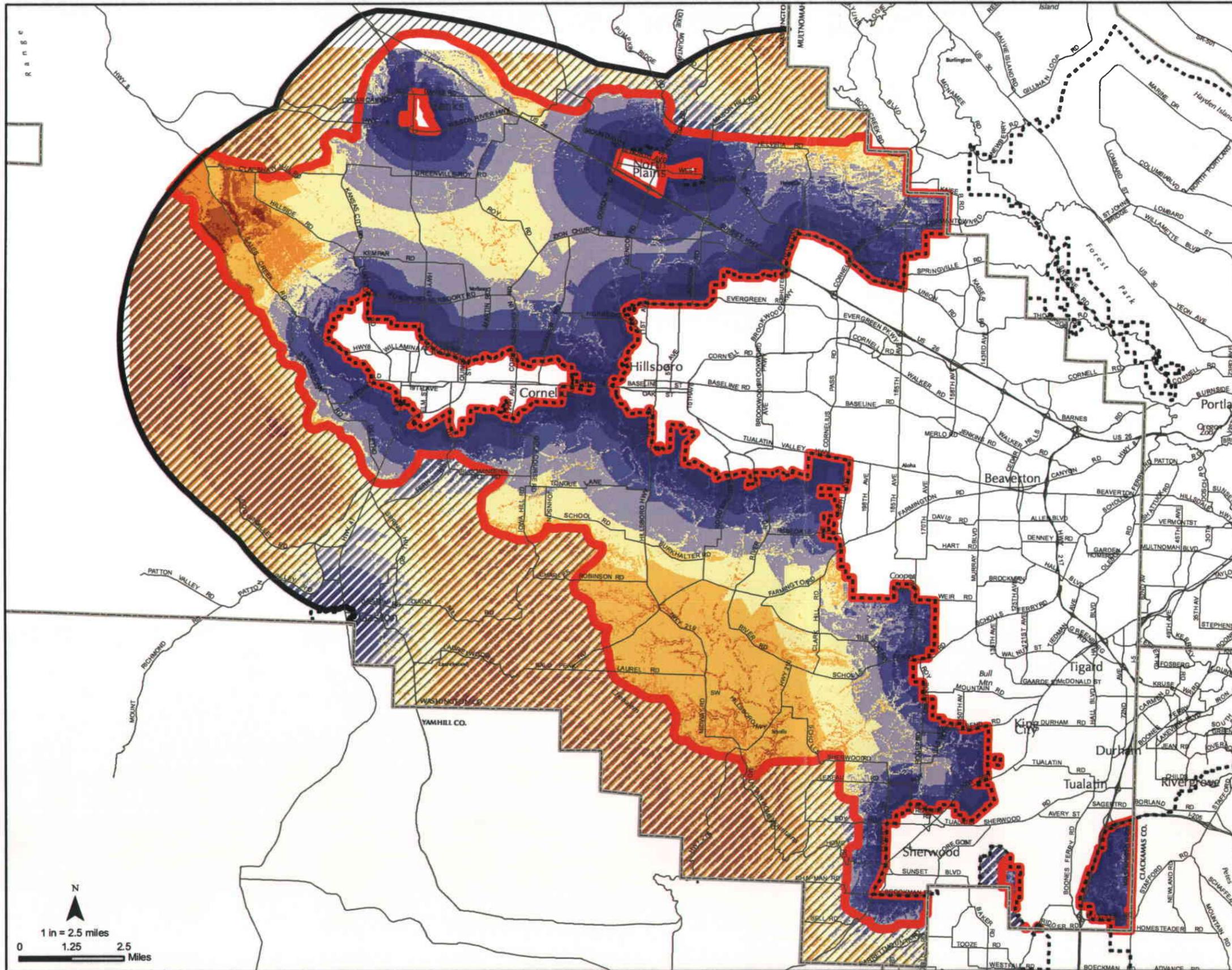
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lutplan@co.washington.or.us

## Map 9



**STATEMENT OF WILLINGNESS TO  
DEDICATE EASEMENTS FOR  
CLEAN WATER SERVICES SANITARY SEWER LINE,  
WETLANDS MITIGATION NECESSARY FOR  
INSTALLATION OF SANITARY SEWER LINE AND  
TEMPORARY CONSTRUCTION**

WHEREAS, Clean Water Services ("CWS") intends to construct a sanitary sewer line to serve the North Bethany area (the line location is shown in Exhibit 1), and

WHEREAS, the line is proposed to cross property owned by Timothy O'Callaghan (the property location is shown in Exhibit 1 and is Tax Lots 1100 and 1201), and

WHEREAS, the sanitary sewer line will require an easement for associated wetland mitigation necessary for installation of the sanitary sewer line and an easement for temporary construction, and

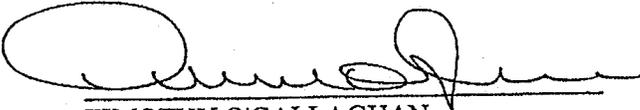
WHEREAS, Mr. O'Callaghan is willing to grant such easements provided his property is designated and approved as an Urban Reserve area,

NOW, THEREFORE, Mr. O'Callaghan does agree as follows.

1. By executing this document, Mr. O'Callaghan agrees to allow the installation of the CWS sanitary sewer line in the location shown in Exhibit 1, necessary wetland mitigation areas adjacent to the easement area and temporary easements for the construction of the CWS line and plant and installation of wetland mitigation areas. This intent is contingent upon inclusion of Mr. O'Callaghan's entire property (Tax Lots 1100 and 1201) as an Urban Reserve designation. Should such designation not occur, Mr. O'Callaghan is not bound by this document.

2. Should the location of the sanitary sewer line across Mr. O'Callaghan's property change from that shown in Exhibit 1, Mr. O'Callaghan reserves the right to examine the new location and grant permission for easements to accommodate the new location. Such permission shall not be unreasonably withheld.

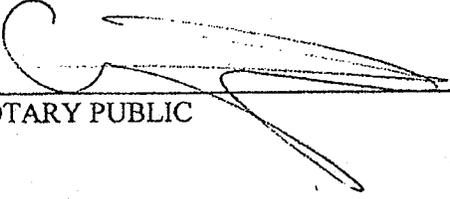
Dated this 23 day of February, 2010.

  
TIMOTHY O'CALLAGHAN

STATE OF OREGON )  
 ) ss.  
COUNTY OF WASHINGTON )

On February 23<sup>rd</sup>, 2010 before me, George Lekas, Notary Public, personally appeared TIM O'CALLAGHAN, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

  
\_\_\_\_\_  
NOTARY PUBLIC

