ATTORNEYS:
CHRISTOPHER JAMES
AREK FRISTENSKY
EXECUTIVE ASSISTANT:
LISA SMITH

THE JAMES LAW GROUP LLC

ATTORNEYS

May 11, 2017

VIA HAND DELIVERY

Multnomah County Board of Commissioners
501 SE Hawthorne Blvd, Suite 600
Portland, Oregon 97214
boardclerk@multco.us

Re: Supplemental Submission Opposing Ordinance No. 1246 – Request for Separate Consideration – May 11th, 2017

Dear Chair Kafoury and Commission Members:

This submission is on behalf of landowners with property located in Multnomah County, in what is known as Study Area 9B, and more specifically within what has been called the "L" or the Lower Springville Road area in Area 9B. The landowners are Springville Investors, LLC, Katherine Blumenkron, David Blumenkron, Burnham Farms, LLC, and Bob Zahler (collectively, the "Owners"). Together they own approximately 225 acres within the "L" location.

The Owners oppose Ordinance No. 1246 (referred hereafter as the "Ordinance") that would designate their property (a portion of Area 9B) as rural reserve. Their opposition is based on both factual and legal defects underlying Ordinance No. 1161, dated May 13, 2010, as amended by Ordinance Nos. 1150 and 1180. Those ordinances—which are reaffirmed, continued, and re-adopted by Ordinance 1246—designated the Owners' properties as rural reserve.

This submission supplements the Owners' respective submissions and testimony presented to the Multnomah County Board of Commissioners on May 4, 2017.

I. The Owner's properties are currently able to be served by urban services and utilities.

At the time Multnomah County adopted Ordinance No. 10-1151, there was clear evidence in the record that Area 9B could be served by financially-capable urban service providers. In a letter dated September 4, 2009, the City of Beaverton informed Multnomah County that "Beaverton City is willing to provide governance and urban services to the East Bethany area," should Multnomah County designate the area as urban reserve. MC Rec. 2768-2769. Similarly, Tom Brian, the chair of the Washington County Board of County Commissioners delivered a letter to Multnomah County on February 17, 2010 informing the County that the "L," if developed, is "likely to receive services from Washington County and one or more of its service districts due to its topography and proximity to urban services on the west side of the Multnomah/Washington County line. MC Rec. 3922. Other parties have also submitted evidence and testimony to Multnomah County that the East Bethany area including the "L" could be efficiently served by urban services.[1]

[1] *See* Attachment 1, at 2-3.

That was in 2010. Since that time, the urban Bethany area immediately adjacent to the "L" has developed rapidly, and the availability of urban infrastructure to service the "L" has only grown more apparent.

II. The Owner's properties do not have any features which cannot be protected by urban reserve designation.

The "L" in Area 9B can be developed at urban densities while at the same time protecting and preserving Abbey Creek and its riparian habitat. Indeed, the Multnomah County Board recommended to the Core 4, on December 10, 2009, that the area should remain undesignated in order to allow for further consideration of a development concept "that would leverage revenue from more intensive development east of N. Bethany to support lower density development in targeted areas to the east and acquire other land for public ownership." Attachment A to Multnomah County Resolution No. 09-153, at 2. The County found that "this approach *could both protect landscape features by sensitive use of development and open space together with public ownership, while contributing to urban capacity*." *Id*. (emphasis added). Similarly, Metro designated Area 8C, which includes mapped natural landscape features (see Exhibit 2), as urban reserve subject to Metro's "Integrating Habitats" program, which "utilizes design principles to improve water quality and provide wildlife habitat." Exhibit B to Metro Ordinance No. 11-1255, at 66. Such design principles and careful planning can also be applied to the "L" in Area 9B.

Additionally, it is important to note that rural reserve designation does not, by itself, ensure that natural landscape features will be protected and preserved to any greater extent than can be achieved under an urban reserve designation, or even after inclusion in the urban growth boundary.

III. To the extent that Area 9B has characteristics that would qualify it for rural reserve designation, the "L" does not. It primary characteristics fit an urban designation.

Following a protracted analysis of the area, County staff, the Multnomah County board, Metro, and the Core 4 all agreed that the "L" should not receive a rural reserve designation. The "L" should not have been, and should not again be, considered together with the other lands comprising Area 9B that are more suitable for rural reserve designation.

IV. Inclusion of the "L" land in study Area 9B together with land which does not share designation criteria is contrary to the intent of the reserves statute, and independently violates the Owner's property rights under the US Constitution.

The process by which individual study areas (e.g. Area 9B) were delineated and analyzed by Multnomah County was arbitrary. The selection of study areas in Multnomah County was explained as follows:

> "The approach to developing the proposed reserve plans began with analysis of the study area by the [Citizen's Advisory Committee, or "CAC"]. The county study area was divided into areas corresponding to the four affected county Rural Area Plans, and further segmented using the Oregon Department of Agriculture (ODA) mapping *and CAC discussion* for a total of nine county subareas."

Exhibit E to Metro Ordinance 10-1238A, at 33 (emphasis added). This area selection process yielded overbroad study areas that encompass properties with distinctly different characteristics.

Indeed, one of the reasons the Board is considering the Ordinance before it today, seven years after Ordinance 10-1151 was adopted, is that Multnomah County failed to adequately explain why the broadly-defined Area 9D was designated as rural reserve notwithstanding the dissimilar characteristics of properties located across the study area.[2]

Multnomah County can and must correct the error of designating the "L" as rural reserve by considering the "L" separately from the remainder of Area 9B and applying the appropriate designation. Nothing prevents the County from undertaking this process except the alleged "honoring" of the prior Board's decisions. That Board, in 2009, recommended to the Core 4 that Area 9B should not be designated as either rural or urban reserve, because "not designating this area allows for further consideration of the viability of [a unique development concept] and time for potential governance of this area to become clearer." in order to await 'future circumstances (quote from resolution)". Attachment A to Multnomah County Resolution No. 09-153, at 2. The inconsistency is obvious.

If the Ordinance is adopted without a bona fide recognition and treatment of the "L" consistent with constitutional requirements and the Federal Court's assumption of 'a meaningful opportunity" for equal treatment,[3] it will have needlessly put in jeopardy the entire reserves legislation. The Owners again assert the right to have their properties be evaluated separately from Area 9B or alternatively receive a separate designation within Area 9B based on the statutory criteria, and including the requirements of ORS 197.040.

Respectfully Submitted,

THE JAMES LAW GROUP, LLC

Christopher James

On behalf of:
Springville Investors, LLC
Katherine Blumenkron
David Blumenkron
Burnham Farms, LLC
Bob Zahler

[2] The Oregon Court of Appeals, in *Barkers Five, LLC et al. v LCDC*, 261 Or.App. 259, 364 (2014), held that Multnomah County failed to "meaningfully explain why consideration of the pertinent factors yields a designation of all land in Area 9D" as it did, notwithstanding that "a significant amount of land in [the] area . . . is dissimilar from the rest of the land in that area as demonstrated by the county's application of the factors."

[3] *See Blumenkron v. Eberwein*, 2015 U.S. Dist. LEXIS 129837, *22, 2015 WL 5687869 (D. Or. Sept. 28, 2015) (stating that "a meaningful opportunity remains for Plaintiffs to convince Multnomah County and Metro to change the designation of Area 9B.").

Christopher James, OSB #74151
cjames@jameslawgroup.com
THE JAMES LAW GROUP
121 SW Morrison Street, Suite 910
Portland, Oregon 97204
Telephone: (503) 228-5380
Facsimile: (503) 228-5381
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

KATHERINE BLUMENKRON, an individual; **DAVID BLUMENKRON**, an individual; **SPRINGVILLE INVESTORS, LLC**, a limited liability company,

PLAINTIFFS,

v.

BARTON EBERWEIN, HANELY JENKINS, TIM JOSI, GREG MACPHERSON, CHRISTINE M. PELLETT, JOHN VANLANDINGHAM, MARILYN WORRIX, and **DAVID BRAGDON** all in their official capacities as a member of the Land Conservation and Development Commission; **DAVID BRAGDON, SHIRLEY CRADDICK, CARLOTTA COLLETTE, CARL HOSTICKA, KATHRYN HARRINGTON, REX BURKHOLDER**, and **BARBARA ROBERTS**, all in their official capacities as Metro councilors; and **MULTNOMAH COUNTY**,

DEFENDANTS.

Case No. 3:12-cv-00351-BR

DECLARATION OF THOMAS VANDERZANDEN

Exhibit 2
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I, Thomas Vanderzanden, declare:

1. I have been involved in Oregon land use matters since 1972 at Columbia Region Association of Governments…the prelude to Metro. During this period, I had extensive involvement in the drafting of the first regional Urban Growth Boundary (UGB) and related land use planning experiences.

2. I have served as a Director of Development for Clackamas County and other positions during my career, and I have been exposed to inter-county (intergovernmental) agreements for the provision of utilities by one county to serve areas and properties in another county or city. These intergovernmental agreements are necessitated by topography, proximities, and efficiencies that make them practically suitable and efficient. For example only, if a neighboring county has a larger capacity installation closer to the property to be served, or at a superior location for other reasons (example: sewer service and surface water treatment is directly related to drainage basins and not political boundaries), it is typical for the counties to simply execute an intergovernmental agreement for such service.

3. Since 2000, I have been fully engaged in the regional UGB and Reserves planning processes as a private consultant, serving as a principal owner in Ir-Van Consulting Group, LLC. I was retained by a group of owners in the "L" in East Bethany to identify how it could be planned as urban, including infrastructure provision, as a part of the regional planning process.

4. In connection with the land area known as 9B and including the "L" area of East Bethany, such services can be provided by Washington County and the Tualatin Valley Water District. I submitted testimony and other proof to Multnomah County planning staff on August 10, 2009 and later dates that the East Bethany area could be efficiently served by urban services.

5. I am very familiar as well with the North Bethany development which was included in the UGB in 2002. It has utilities which are, for the most part, adequate to serve East Bethany.

6. There are no significant landscape features present to justify a blanket rural reserve decision for all of Area 9B. In fact, Multnomah County's own Comprehensive Plan, in place at the time of the Reserves process, has the western portion of Area 9B designated for "agriculture" and/or "rural residential" as opposed to resource protection.

7. Attached is a map ("Attachment A") showing the land use status under the Comprehensive Plan as of the inception of the Urban and Rural Reserves Designations Process. The legend for the attached map is:

"1" = "agricultural land,"

"2" = "land that changed boundaries from Multnomah County to Washington County,"

"3" = "exception" lands," and

"4" = North Bethany (included in the UGB in 2002).

8. Under the Comprehensive Plan, "exception" lands (denoted as "3" on the attached map) were lands that were to have first priority for inclusion in the UGB for Multnomah County. Substantial portions of the "L" are "exception" land.

9. Multnomah County did not have urban planning staff in 2009 and 2010, but rather relied on planning staff from the City of Portland for the Urban and Rural Reserves planning process.

10. Multnomah County originally identified and separately considered the "L" (also referred to as "Lower Springville Rd.") early in the Urban and Rural Reserves planning process.

11. Area 9B is identified by the Oregon Department of Agriculture as low-value "conflicted" agricultural land.

12. I am unfamiliar with the concept, in the context of land use implementation, of a "buffer" exceeding 50 to 100 feet.

13. There were numerous changes to proposed urban and rural reserve designations after initial designation proposals had been issued by the counties. Most of those late changes did not derive from the application of the urban and rural reserves factors and criteria. For example, Clackamas County proposed that the Stafford area (Areas 4A, 4B, 4C) for rural reserve designation. Although Area 4A was identified as conflicted agricultural land, it did not have immediate access to urban services, and has significant natural landscape features. However, Metro strongly asserted that the Stafford area should be designated as urban reserve, and Clackamas County ultimately agreed.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 31, 2015.

By: _____
THOMAS VANDERZANDEN

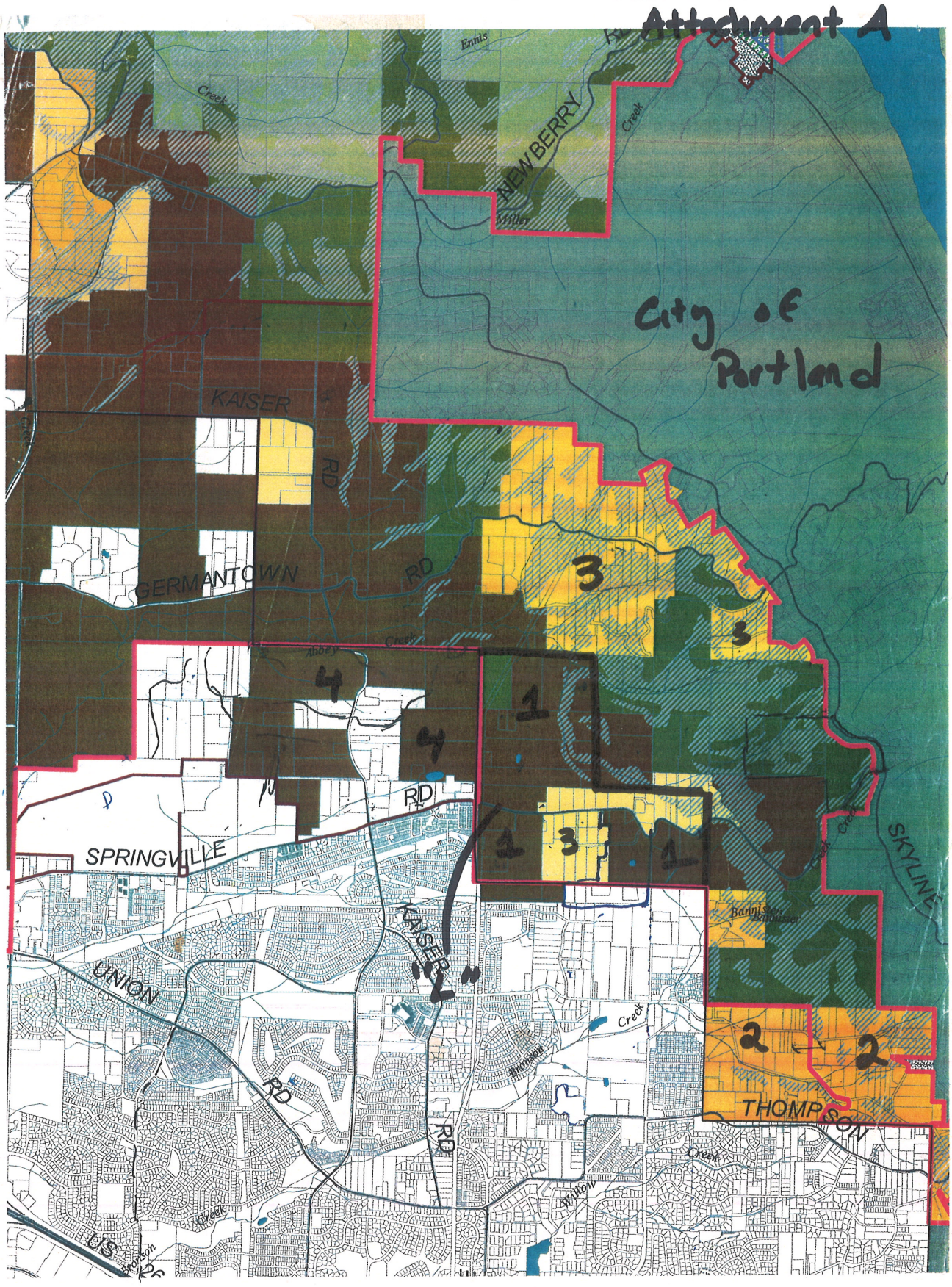

Exhibit 2
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