

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

| | | |
|-------------------------------|---|------------------------|
| FRIENDS OF FRENCH PRAIRIE, |) | |
| AND MARION COUNTY FARM BUREAU |) | |
| |) | LUBA No.: 2008-186 |
| Petitioners, |) | |
| v. |) | PETITIONERS' MOTION TO |
| |) | FILE REPLY AND EXCEED |
| MARION COUNTY, |) | PAGE LIMIT |
| |) | |
| Respondent |) | |
| and |) | |
| |) | |
| THE CITY OF DONALD and |) | |
| SUTHERLAND DEVELOPMENT, LLC |) | |
| |) | |
| Intervenors-Respondents |) | |
| _____ |) | |

Petitioners move the Board for permission file the attached Reply Brief pursuant to OAR 661-010-0039.

1. Reply filed “as soon as possible”.

The Respondents’ combined brief, though dated December 23, 2008, was received in the office of the undersigned December 29, 2008. Counsel is handling this case as a cooperating attorney for 1000 Friends of Oregon and was not able to get the red brief to cooperating counsel for comment until January 2, 2009, when Respondent’s counsel was kind enough to provide an electronic copy. Oral argument is scheduled for January 29, 2009. This motion is filed “as soon as possible” within the meaning of the rule. *E.g. Sparrows v. Clackamas County*, 24 Or LUBA 318, 320 (1992)(Reply brief accepted when filed 17 days after respondent’s brief and received by respondent four days before oral argument).

2. “New Matter” – First Assignment of Error

The attached reply brief addresses “new matters raised in respondent’s brief” as required in OAR 661-010-0039. Petitioners argued in their First Assignment of Error that the local decision below failed to base its Urban Growth Boundary (UGB) amendment on “demonstrated need to accommodate long range urban population” as required by Goal 14 and that the County had in fact disavowed any reliance on long range population growth. Pet. Br. at 8-12. Respondents’ Brief concedes that the local decision is not based on population growth or any job growth estimate but argues that there is evidence in the record from which employment need based on population growth can be derived. Respondents then construct a new rationale to try to support the decision below based on analysis by appellate counsel of various population numbers from the record. Resp. Br. at 6-11. This new analysis attempts to provide a new, population-based logic to support the local decision, which had expressly renounced any reliance on population growth in deciding to expand the City’s UGB. *E.g.* R. 32.

Respondent’s argument on the First Assignment of Error is therefore “new matter[]” to which a reply is appropriate under the rule.

3. “New Matter” – Second Assignment of Error

The local decision below purports to follow the “safe harbor” requirements for population forecasting set out in OAR 660–24-0030. R. 45. Petitioners argued in their Second Assignment of Error that the City and County had failed to meet the regulatory criteria for “safe harbor”. Pet. Br. at 13-17. Respondents concede that the population projection done by the City and County is “not based on a safe harbor”, but they argue that the “County and City agreed to a reasonable

mechanism for producing a more accurate prediction.” Resp. Br. at 12-13.

Again, in response to the Second Assignment, respondents on appeal concede the error of the local decision on its own terms and offer an alternative rationale on LUBA review. These new arguments are “new matters” to which petitioners respond in the attached proposed Reply Brief.

4. Page Limit

Petitioners’ proposed Reply Brief consists of six pages, which exceeds the five pages allowed in the rule. Petitioner believe the novelty of Respondents’ arguments and the complexity of the issues addressed require the additional page and therefore ask the Board to accept the Reply as offered.

Dated January 8, 2009.

SWANSON THOMAS & COON

James S. Coon, OSB No. 771450
820 SW 2nd Avenue, Suite 200
Portland, OR 97204
(503) 228-5222
(503) 273-9175 (facsimile)
Jcoon@stc-law.com
Attorney for Petitioners

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 8, 2009, I filed the original of this Petition for Review together with four (4) copies, with the Land Use Board of Appeals, 550 Capitol Street NE, Suite 235, Salem, Oregon 97301-2552, by first class United States mail.

I also certify that on January 8, 2009, I served a true and correct copy of this Notice of Intent to Appeal on the following by first class mail:

Jane Allen Stonecipher
Marion County Legal Counsel
555 Court St. NE
P.O. Box 14500
Salem, Oregon 97309
(503) 588-5220
Attorney for Marion County

Andrew M. Cole
Andrew M. Cole, Lawyer, P.C.
1919 Willamette Falls Drive
West Linn, Oregon 97068
(503) 650-1731
Attorney for the City of Donald

Dana L. Krawczuk
Ball Janik, LLP
101 SW Main Street
Suite 1100
Portland, Oregon 97204
(503) 228-2525
Attorney for Sutherland Development
LLC

DATED: January 8, 2009.

James S. Coon, OSB No. 771450
Attorney for Petitioners