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**IN THE CIRCUIT COURT FOR THE STATE OF OREGON**

**COUNTY OF HOOD RIVER**

	)	Case No.: 020055 CC
<b>HOOD RIVER VALLEY RESIDENTS' COMMITTEE, INC.</b> , an Oregon non-profit corporation, and <b>MIKE MCCARTHY</b> , an individual resident of the State of Oregon and Hood River County,	)	<b>PLAINTIFFS' REPLY ON CROSS-MOTION FOR SUMMARY JUDGMENT</b>
Plaintiffs,	)	
vs.	)	<b>Oral Argument Scheduled for March 27, 2003</b>
	)	
<b>BOARD OF COUNTY COMMISSIONERS OF HOOD RIVER COUNTY</b> , an Oregon Municipal Corporation, and <b>MT. HOOD MEADOWS OREGON, LTD</b> , an Oregon limited partnership.	)	
Defendants.	)	

**Cross-Motion for Summary Judgment**

Defendants fail to address and ignore the overwhelming evidence that plaintiffs have marshaled in this case. Instead, defendants misapprehend the law, obfuscate the issues, misstate plaintiffs' arguments and then ask this Court to act as the Board of County Commissioners and approve a transaction that is unsupported by the record and at odds with what the County has told to the public. MHM makes an about face to construct entirely new arguments, which are directly contrary to what the County has admitted in these proceedings. This reply is supported by the Second Affidavit Robert T. Bancroft and exhibits thereto, and the following points and authorities.

1 **Reply on Statement of Undisputed Facts**

2 While plaintiffs did not object to any particular item in the statement of facts set forth by  
3 the defendants, the defendants’ statement of undisputed of facts left out numerous material facts.  
4 The plaintiffs’ have supplemented that deficient statement. In response, MHM has manufactured  
5 a few attacks on plaintiffs’ statement in an effort to bolster its newly minted arguments. MHM is  
6 either wrong on the facts or it has put those facts in dispute. Otherwise MHM has failed to  
7 address these material facts head-on. Regardless of how these issues would be resolved at trial,  
8 plaintiffs’ statement of undisputed facts demonstrates that the County acted outside of its  
9 authority in approving the Land Exchange. Using plaintiffs’ paragraph numbering from  
10 Plaintiffs’ Cross-Motion for Summary Judgment and Response (the “Plaintiffs’ CMSJ&R”),  
11 plaintiffs provide the following additional evidence, citations and discussion to support their  
12 statement.

13 **4. Letter from Virgil Ellet to Michael Benedict.**

14 The exclusion of the Ellet Farm would facilitate the development of the County Property  
15 that was traded to Meadows. Second Affidavit of Ralph Bloemers in Support of Cross-Motion  
16 for Summary Judgment (“Second Bloemers Aff.”) at Ex. 301. Although this Court granted  
17 plaintiffs motion to compel production of the Goal 8 CAD maps provided to the County in April  
18 2001, and despite plaintiffs’ repeated requests, MHM still has not provided those maps as of this  
19 filing.<sup>1</sup>

20 **9. Singular pursuit of trade with MHM**

21 Ms. Foxley/Ms. Hoffman’s response was not “late.” Ms. Foxley/Ms. Hoffman  
22 responded just 20 days after May 30, 2001, the date of the letter from Kenneth Galloway to her.  
23 Ex. 7 at p. 18; Ex. 8 at p.2. This was just 8 days after Mr. Riley met with Mr. Galloway. Ms.

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24  
25 <sup>1</sup> Plaintiffs compelled production of electronic and hard copies of those maps, and because MHM suggested those maps had changed, plaintiffs compelled MHM to detail any such changes in an affidavit.

1 Foxley/Ms Hoffman responded in less than half the time that it took for Mr. Riley to meet with  
2 Mr. Galloway to discuss a possible exchange after Mr. Galloway's initial letter to Mr. Riley.  
3 *Compare id.* to Ex. 7 at p. 1. Ms. Foxley/Ms Hoffman wanted to sell 300 acres outright, and the  
4 County's acquisition of this property would have allowed for consolidation. Ex. 31 at p. 7,  
5 46/21-47/6. Mr. Brown did not respond until sometime after the public hearings. Ex. 31 at p. 4,  
6 34/4-9. Yet despite Mr. Brown's late response Mr. Galloway pursued the process with him, but  
7 put off Ms. Foxley/Ms. Hoffman. Ex. 31 at p.7, 48/18-21. Mr. Galloway noted that the Ms.  
8 Foxley/Ms. Hoffman, the Longs, DSL and SDS were willing to sell property to the County. Ex.  
9 8 at p. 1. Yet those options were not pursued. The direction on the process to be employed in  
10 this exchange came from the Board, as Mr. Galloway stated that the Board, contrary to  
11 established policy, did not ask him to report a range of options. Ex. 31 at 4, 35/21-25. Once the  
12 deal with MHM was in the works, Mr. Galloway ceased actively pursuing other options after he  
13 heard from MHM. Ex. 31 at p.7, 46/23-47/6. While positive responses were put off, MHM was  
14 allowed to hand pick the County land it wanted. Ex. 31 at p. 12, 89/7-15. The County singularly  
15 pursued a deal with MHM.

16 **15. No reports on the value of the properties at the hearing.**

17 The County Forester provided estimates on the value at the public hearings. The public  
18 was told that an appraisal would be conducted on the properties. The exact methodology and  
19 process, or limitations thereon, were not provided to the public. Ex. 31 at p. 9, 55/17-24 and at p.  
20 11, 59/24-60/3; Ex. 101 and Ex. 102 (collectively, the "Minutes"). MHM argues that the public  
21 was given full information on the procedures and value of the properties. The Minutes and the  
22 testimony of County officials directly contradict that argument. The fact remains that the  
23 reports, required by ORS 275.335, were not provided to the public at that meeting. The public  
24 had no information about the County's effort, or lack thereof, to make a highest and best use  
25 determination.

1           **20. County Assessor’s report**

2           Plaintiffs correctly reference and summarize the substance of the letter from Mr. Ely to  
3 Mr. Galloway and the study upon which it is based. Exhibits 10 and 11. The language in  
4 Exhibit 10 regarding the scope and limitations on the value provided therein is at best  
5 ambiguous. *Compare* Ex. 34 at p. 9, 32/13-33/7 to p. 8, 25/1-26/12. The letter states that the  
6 values set forth in the letter reflect the current zoning in place. However, the letter is completely  
7 unclear about whether Mr. Ely considered other higher and better uses allowed under current  
8 zoning, or, instead, only the existing use allowed under current zoning. Mr. Ely has stated that  
9 Exhibit 10 is based on Exhibit 11. The depositions plainly establish that the County knew that  
10 Exhibit 11 only valued the existing use of the property.<sup>2</sup> The County did not determine the  
11 highest and best use under current zoning. Exhibit 11 is material to this Court because it clarifies  
12 that Exhibit 10 does not value the property for anything other than its existing use for  
13 commercial timber production. The statute requires that the “equal value” determination must be  
14 supported by reports.

15           **22. Galloway reported on October 16, 2001 after valuation was completed.**

16           Plaintiffs correctly present the facts to this Court. The letter from Mr. Galloway to the  
17 Board and David Meriwether was not sent until October 16, 2001. In that letter Mr. Galloway  
18 reported the figures from the two reports.

19           **25. County Administrator facilitated Meadows’ development purposes**

20           Mr. Meriwether admitted in deposition that he meant development when he stated  
21 “purposes” in his email. Bloemers Aff. Ex. 28; Bloemers Aff. Ex. 41 at 82/1-83/21.

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23           <sup>2</sup> The County often confusingly phrased the valuation inquiry as a search for the “highest and best” existing  
24 use. The term is inherently contradictory and therefore is not used in appraisal practice. As Mr. Ely correctly stated  
25 in his deposition, using the term “highest and best” existing use completely misstates and confuses the analysis. Ex.  
34 at 9, 31/8-32/17. Mr. Ely concurred that one either looks at an array of uses to determine the highest and best  
one, or one looks at the existing use. The County assessor was only asked to look at the existing use allowed under  
current zoning. There was no highest and best use analysis performed.

1 **Point and Authorities**

2 **I. The County did not comply with ORS 275.335.**

3 ORS 275.335 applies to and governs the Land Exchange, because there is no local  
4 enactment governing the exchange of County forestland that could trump state law. Even if  
5 there were a local enactment on point, Oregon Supreme Court precedent provides that  
6 substantive state law would control. The County's determination of value was arbitrary, because  
7 the County failed to perform an analysis of the highest and best use of the properties subject to  
8 the exchange and thereby failed to determine their value as required by ORS 275.335. The  
9 County knew that other higher and better uses were allowed under current zoning, or through a  
10 reasonably probable change in zoning, yet the County completely ignored that possibility. The  
11 Court should not artificially constrain the inquiry to the limited testimony and information  
12 presented to the Board and the public at the two initial public meetings in August of 2001.  
13 Finally, MHM cannot defend the County's empty analysis by arguing that MHM is a unique  
14 actor subject to undue stimulus. MHM's approach wrongly focuses on the investment value of  
15 the County Property to MHM in an attempt to obfuscate the real issue. The County was required  
16 to determine the market value of the property, yet failed to do so.

17 **A. ORS 275.335 applies to and governs the Land Exchange.**

18 The Oregon Supreme Court has determined that a general state law controls over a  
19 conflicting local ordinance passed by a home rule charter municipal body, unless the local  
20 ordinance pertains to the structure or procedures of local government. *City of La Grande v.*  
21 *Public Employees Retirement Board*, 281 Or 137, 576 P2d 1204 (Tongue, J., dissenting) ("*La*  
22 *Grande I*"), *adhered to reh'g*, 284 Or 173, 586 P2d 765 (1978) ("*La Grande II*"). While Hood  
23 River County is a home rule charter county, ORS 275.335 still governs the exchange of County  
24 forestland.

25 In, *La Grande I*, the Supreme Court framed its holding as follows:

1           “When a statute is addressed to a concern of the state with the structure  
2 and procedures of local agencies, the statute impinges on the powers reserved by  
3 the amendments to the citizens of local communities. Such a state concern must  
4 be justified by a need to safeguard the interests of persons or entities affected by  
5 the procedures of local government.

6           Conversely, a general law addressed primarily to substantive social,  
7 economic, or other regulatory objectives of the state prevails over contrary  
8 policies preferred by some local governments if it is clearly intended to do so,  
9 unless the law is shown to be irreconcilable with the local community's freedom  
10 to choose its own political form. In that case, such a state law must yield in those  
11 particulars necessary to preserve that freedom of local organization.”

12 281 Or at 156, 576 P2d at 1215.

13           On rehearing in *La Grande II*, the Supreme Court found that the home rule amendment  
14 did not take from the legislature the authority to supersede local enactments of any kind. The *La*  
15 *Grande II* court specifically found that a local municipality's "charter" was significant, and that it  
16 was these organic and constitutive powers of self-government, rather than municipal powers  
17 generally, that were protected from interference by the state. In cases of conflict between state  
18 and local laws, the Supreme Court found that the home rule amendment assigned the power over  
19 local government procedures to the city and sovereignty over substantive issues to the state. 284  
20 Or at 179-182, 586 P2d at 768-71.<sup>3</sup>

21           Hood River County has not enacted any local law governing the exchange or purchase of  
22 County forestland. Therefore there is no Hood River County law that needs to be reconciled  
23 with state law on this point. MHM brazenly asserts that the County has independent authority to  
24 trade forestland simply because Hood River County is a home rule charter County. MHM has  
25 grossly oversimplified the holding of *LaGrande I* and ignored the Supreme Court's clarification  
on rehearing in *La Grande II*.

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<sup>3</sup> The *La Grande II* court found further support for the preeminence of general laws over local regulations  
in another constitutional amendment, Article IV, section 1(5), enacted at the same time as the home rule amendment.  
The *La Grande II* court determined that Article XI did not remove the legislature's power to enact purely local law.  
284 Or at 184.

1 In making its claim, MHM relies upon *AT&T Communications v. City of Eugene*, 177 Or  
2 App 379 (2001) (“*AT&T*”). *AT&T* did nothing to the change holdings of *La Grande I* or *La*  
3 *Grande II*, instead it simply confirmed the authority of a municipality under its home rule charter  
4 to choose its own political form and to regulate in a substantive area where there is no  
5 preemptive state enactment directly on point or preemption cannot be found generally. *AT&T* at  
6 388-401

7 In *AT&T*, the municipality had passed legislation imposing a special excise tax on  
8 telecommunications providers. *Id.* at 382-384. There was no state law on point. *Id.* at 392-395.  
9 The plaintiff, a telecommunications provider, attempted to challenge the local regulation, arguing  
10 the state preempted the field of taxation and that the local tax was therefore invalid. *Id.* The  
11 Court held that in order to find preemption, the state legislature must specifically state that no  
12 local regulation is allowed in that sphere of regulation. *Id.* Without that, local regulation would  
13 not be preempted. *Id.*

14 MHM ignores the fact that there are extensive state regulations limiting the ability of a  
15 County to exchange, use and alienate County owned forestland. *See* ORS Chapters 271 and 275.  
16 Here the County has not enacted any law governing the exchange or purchase of County  
17 forestland. Even if the County had done so, ORS 275.335 would trump any such enactment.  
18 The County has purported to follow the provisions of ORS 275.335 throughout the exchange  
19 process and in these proceedings. Now that it has become clear that the County acted outside of  
20 the authority provided by ORS 275.33, defendants make and adopt these new arguments. ORS  
21 275.335 applies to the Land Exchange.

22 **B. ORS 275.335 requires a determination of the market value of the properties**  
23 **that is based upon an analysis of the highest and best use of property.**

24 ORS 275.335 requires the County to determine whether the exchange is for “equal value”  
25 and in the “best interests” of the County. The “equal value” requirement of ORS 275.335

1 requires the County to obtain reports that determine the value of the property in support of the  
2 “equal value” determination. While “value” is not defined, the County admitted that the term  
3 “value” as used in ORS 275.335 means “real market value.” Exhibit 36 at 1. The County  
4 officials have equated that term with “market value.” Plaintiffs’ CMSJ&R at 10-12. Mr. Ely  
5 stated that the term means what one would expect the property to sell for on the open market  
6 with a knowledgeable and willing seller and buyers in an arm’s length transaction. *Id.* The  
7 County must try to obtain the highest price for the County Property that it could possibly get in  
8 an open market transaction, even though it is completing a trade, when it values property subject  
9 to an exchange. *Id.* While the Court is ultimately charged with determining the meaning of  
10 “value” as used in the statute, the defendants’ admissions, deposition testimony and public  
11 statements inform this Court’s interpretation.<sup>4</sup>

12 Plaintiffs contend that the County must determine the property’s market value. Plaintiffs’  
13 CMSJ&R at 10-12. MHM has admitted that the County must first determine the property’s  
14 highest and best use in order to determine its market value. Affidavit of Ralph O. Bloemers in  
15 Support of Reply on Cross-Motion for Summary Judgment (“Second Bloemers Aff.”), Exhibit  
16 204. The County has to determine the highest and best use, because “a seller of property  
17 reasonably can expect to receive the highest offer from a prospective buyer who intends to put  
18 the property to its most profitable use.” *STC Submarine v. Dep’t of Revenue*, 320 Or 589, 592 n.  
19 5, 890 P2d 1370 (1995); Plaintiffs’ CMSJ&R at 10-12. The Oregon Supreme Court specifically  
20 recognized the highest and best use analysis as a critical piece of valuing a property for tax

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22 <sup>4</sup> If this Court determines the text and context are ambiguous, then the second level of analysis, the  
23 legislative history, provides instructive guidance on the legislative intent. Rep. Annala, the bill’s proponent, pointed  
24 out that property would not necessarily “be traded acre for acre but rather that the value of each would have to be  
25 considered.” Plaintiffs CMSJ&R at 12. In other words, the legislature contemplated that the property subject to the  
trade would have **different and unique** values, and that **the value of each unique property** would have to be  
considered prior to making an exchange. Contrary to what MHM and the County would have this court believe, the  
County was not given the discretion to simply trade equivalent properties acre for acre without considering the  
actual value of the properties.

1 assessment purposes. *STC Submarine*, 320 Or at 589, n 5.

2 Plaintiffs have analyzed ORS 275.335 through the lens provided by *Portland General*  
3 *Electric Company v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993)  
4 (“PGE v BOLI”). The statute requires the trade to be for “equal value” and in the “best  
5 interests” of the County. Here the County’s determination of the highest and best use of the  
6 County Property directly contradicts the direct and substantial evidence that plaintiffs have  
7 provided. Plaintiffs’ CMSJ&R at 24-30. That evidence clearly establishes, at a minimum, that  
8 there is a reasonable probability that the County Property has a higher and better use other than  
9 commercial timber production. Plaintiffs’ CMSJ&R at 24-28.

10 In response, MHM skirts those facts and deviates from its own admission (as well as the  
11 County’s admissions and statements) to make the circular argument that the County can decide  
12 to trade land based on its own “assessment.” MHM’s RCMSJ at 7, 10-12. Without saying it  
13 outright, MHM seems to suggest that the County can merely report the value on the tax rolls.  
14 MHM essentially alleges that the County can attribute a value to the property even if the values  
15 assigned are nowhere near what a willing buyer would pay a willing seller and no highest and  
16 best use analysis is performed. *Id.* and at 20.

17 MHM’s argument ignores the text and context of the applicable statute. MHM broadly  
18 pronounces, without any relevant citation, that the County has broad discretion to attach any  
19 value it would like to the properties. MHM’s RCMSJ at 7. MHM’s implores this Court to read  
20 the law to give the County unfettered and boundless discretion. The County’s valuation process,  
21 however, violated standard appraisal practices, violated standard tax assessment practices as set  
22 forth in *STC Submarine* and ignored all of the evidence in the record that the property traded to  
23 MHM had higher and better uses that would render the property more valuable on the open  
24 market. MHM’s interpretation allows the County to evade any meaningful review of its “equal  
25 value” determination.

1                   **1.       ORS 275.335 requires that the reports support the “equal value”**  
2                   **determination.**

3                   ORS 275.335 requires that the “equal value” determination “shall be supported by  
4 reports...” The report from the County assessor contains no analysis of the highest and best use  
5 of the County property, whether under current zoning or a reasonably probably change in zoning.  
6 The County’s discretion is therefore limited to making a determination that is within the confines  
7 of the legislative mandate. MHM’s RCMSJ at 4. The County cannot arbitrarily ignore, fail to  
8 analyze or reconcile evidence known either by the Board, or the other County officials working  
9 at the direction of the Board, that suggests that the County Property has a different higher and  
10 better use than is valued in the reports. The reports must support the “equal value”  
11 determination. An arbitrary report that failed to contain a highest and best use analysis does not  
12 support the County’s determination of “equal value.” As MHM itself acknowledges, the County  
13 is not “merely required to place values on a spreadsheet when looking at “equal value.””  
14 MHM’s RRCMSJ at 7. That is, in short, what the County did in this case.

15                   Moreover, even though the statute and the REEA required the consideration of uses  
16 allowed under current zoning, the appraiser working for the County Assessor’s office was never  
17 asked to consider other uses. Plaintiffs’ CMSJ&R at 25; Ex. 14 at 7. The report from the  
18 County Assessor’s office does not properly determine the market value of the County Property  
19 and therefore fails to support the County’s “equal value” determination.

20                   MHM would have this Court believe that simply having a report from the County  
21 assessor is enough to meet the statutory requirements, even if that report does not support the  
22 County’s “equal value” determination. MHM’s RCMSJ at 10-12. It is the province of this Court  
23 to determine what the statute says. Plaintiffs inform this Court’s determination with the  
24 defendants’ own admissions, testimony from an expert appraiser, statements made by County  
25 Counsel Wil Carey and the text, context and legislative history of the statute. Plaintiffs’

1 CMSJ&R at 10-13. ORS 275.335 requires a determination of “real market value.” Oregon  
2 Supreme Court precedent has plainly and clearly informed this Court of the meaning of “real  
3 market value.” *Id.* at 12. Considering what that precedent requires, the report from the County  
4 Assessor’s office simply does not support the County’s “equal value” determination. MHM’s  
5 about face from their earlier admissions and arguments must fail.

6 **2. The County’s “equal value” determination was arbitrary and**  
7 **capricious.**

8 ORS 275.335 sets forth the procedural mechanisms and substantive criteria that govern  
9 when a County may trade its forestland. The statute uses the term “may” because it sets forth an  
10 exception to the prohibitions on transactions involving County property found in ORS 275.330  
11 and ORS 275.340. As MHM has acknowledged, the legislature authorized the County to make a  
12 decision to trade its property “within the limited authority “ set by ORS 275.335. MHM’s  
13 RCMSJ at 4. Plaintiffs have asked this Court to determine whether the decision was outside of  
14 the County’s limited authority.

15 MHM contends that the *Gurdane* court did not overturn the decision of a municipal body  
16 because there was “no evidence of fraudulent conduct.” *Gurdane v. North Wasco Co. P.U.D.*,  
17 183 Or 565, 581, 19 P2d 171 (1948); MHM’s RCMSJ at 13. Unlike in *Gurdane*, the plaintiffs in  
18 this case have presented a substantial body of evidence that establishes that the County Property  
19 had significantly greater value than was assigned to it in the Assessor’s report. The Board was  
20 clearly aware of the availability of other uses and the reasonable probability of a change in uses.  
21 The Board never reconciled the conflicting public testimony or the facts known to it that  
22 evidence a greatly increased value for the County Property.

23 MHM argues that *Archdiocese* informs this Court’s review of this decision. *Archdiocese*  
24 *of Portland v. County of Washington*, 254 Or 77, 458 P2d 682 (1969); MHM’s RCMSJ at 13. In  
25 *Archdiocese* there was enough information in the record to allow the decision maker to reconcile

1 the concerns presented by the public. In this case, unlike in *Archdiocese*, the Board of  
2 Commissioners did not have the reports required by the statute, nor was there any analysis or  
3 information in the record establishing a rational basis for the County to exclude the consideration  
4 of any other higher and better use. While in *Archdiocese* there was ample information and the  
5 plaintiffs claims' were easy to reconcile, in this case, in this case the Board did not have any  
6 information on the actual value or the methodology that would be performed by the Assessor's  
7 office or the other qualified agent. Instead, the Board and the public only heard general  
8 estimations of the value of the properties. Ex. 31 at p. 9, 55/17-24 and at p. 10, 59/24-60/3. The  
9 public and the board were told that the properties would be appraised. *Id.* In addition, the  
10 probability of a destination resort is mentioned over nine times in the Minutes. See Exhibits 201  
11 and 202. The only statement made in opposition to considering that possibility was Mr. Riley's  
12 statement that MHM had not yet submitted an application.<sup>5</sup> A highest and best analysis,  
13 however, does not depend on whether an applicant has submitted a development proposal.

14 **a. The County did not perform a HBU determination.**

15 Plaintiffs allege in this case that the County valued the underlying land subject to the  
16 Land Exchange at \$325 per acre despite the fact that other far more valuable uses are allowed  
17 under current zoning on forestland. Plaintiffs' CMSJ&R at 25-28. Plaintiffs have provided  
18 substantial and uncontroverted evidence establishing that there is a reasonable probability, at the  
19 very least, for a highest and best use of large tract home sites on the County Property. Plaintiffs'  
20 CMSJ&R at 26-27; Affidavit of Robert T. Bancroft in Support of Plaintiffs CMSJ&R ("First  
21 Bancroft Aff.") at 11; Second Affidavit of Robert T. Bancroft in Support of Cross-Motion for  
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23 <sup>5</sup> Even if Mr. Riley's comment were relevant, the fact remains that well prior to October 16, 2001 Mr.  
24 Benedict stated that he expected an application from Meadows in November. Ex. 20 Moreover, County officials  
25 had already providing positive feedback to Meadows about their chances for a destination resort. See, e.g., Ex. 17.  
In addition, the Chair of the Board of County Commissioners and other County officials attended a meeting where  
the land swap and destination resort was discussed on July 18, 2001. Ex. 6

1 Summary Judgment (“Second Bancroft Aff.”) at 3-4. Given that fact, there is no rational basis  
2 for the Board, or any County official for that matter, to limit the process to only valuing the  
3 property as forestland for commercial timber production.

4 The report on the underlying land value from Duane Ely contained no analysis of the  
5 highest and best use of the County property even under current zoning. Exhibits 10 and 11. The  
6 Board was not justified in using a report from the Assessor’s office that contained absolutely no  
7 analysis of the highest and best use of the County Property to support its determination of “equal  
8 value.” The assessor’s office could have performed that analysis or employed a qualified agent  
9 to perform it as the statute allows. Exhibit 34, 4/18—47/10; Second Bancroft Aff. at 5.

10 The County’s approach was contrary to normal appraisal practices. First Bancroft Aff. at  
11 5-12. The County failed to consider any other uses other than the existing use of the property.  
12 Ex. 34 at 9-10, 31/25 –33/3 and at 18, 65/14. As a result, the County’s decision was arbitrary  
13 and acted outside the statutory authority conferred upon it by the State legislature.

14 **b. The County knew that other higher and better uses were**  
15 **available under current zoning or a reasonably probable**  
16 **change in zoning.**

17 Not only did the County know that MHM planned to develop the County Property as  
18 early as July 18, 2001, the County was well aware that other uses were allowed under current  
19 zoning. Plaintiffs’ CMSJ&R at 26 The County did not analyze or consider these facts in  
20 ordering or preparing the requisite reports on the County Property’s value. The County Planning  
21 Director wrote a letter to Dave Riley on July 24, 2001 stating that the County Comprehensive  
22 Plan was not likely to stand in the way of MHM’s plans to construct a destination resort. Ex. 17.  
23 The Destination Resort Plan Document was shown to County officials on October 2, 2001, well  
24 before the land trade was finalized and before the County forester reported on the values of the  
25 properties subject to the exchange. Ex. 37 at 13, 57/15-18. The County never indicated that the  
County Comprehensive Plan (the County zoning ordinances) would stand in the way of a

1 destination resort nor did it signal an unwillingness to assist in the pursuit of one under Goal 2 or  
2 Goal 8.

3 MHM's response fails to address plaintiffs' arguments head-on but attempts to recast  
4 plaintiffs' arguments, as being based solely on MHM's intent to develop the property.<sup>6</sup> MHM's  
5 RCMSJ at 22. MHM's assertion is false. The issue in a highest and best use analysis is not what  
6 the investment value of the property is to a particular buyer. Instead, the issue is what is the  
7 market value of the properties under consideration. Second Bancroft Aff. at 2. In deviating from  
8 the real issue to set up this argument, MHM ignores the fact that forestland zoning allows other  
9 higher and better uses.<sup>7</sup>

10 The market value of the property should, at a minimum, be based on a highest and best  
11 use of large-tract homesites. The uncontested facts inform this Court that a willing buyer or  
12 willing seller would very likely value the County property somewhere between the value of large  
13 tract home sites land and destination resort land.

14 **3. The Court should look at all the evidence known to the County.**

15 Both John Arens and Carol York acknowledged that they count on County officials to  
16 bring relevant information to them. Second Affidavit of Ralph O. Bloemers in Support of Cross-  
17 Motion for Summary Judgment, Ex.303, 28/21-29/8 and 32/24-34/4; Ex. 304 at 17/1-12.  
18 Plaintiffs have provided extensive and uncontroverted evidence supporting the reasonable  
19 probability of other higher and better uses such as large tract home sites. Nowhere in the record

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20 <sup>6</sup> While plaintiffs do point out that MHM intended to develop the property, the plaintiffs also point out that  
21 MHM was actively pursuing that development both before and after the public hearings and well before the County  
forester submitted the reports on the value of the property to the Board and the County Administrator.

22 <sup>7</sup> In addition, MHM either fails to address the evidence plaintiffs have marshaled showing a reasonable  
23 probability of a change in zoning, or they have countered it with conclusions from Commissioner Perkins. Although  
24 ORS 275.335 requires the County to involve and inform the public that may want to participate in the process, the  
25 County never shared the preparations for development with the public. Rather than making a claim for conspiracy,  
plaintiffs are merely pointing out one of the many ways in which the public's ability to comment on the valuation  
process was curtailed and how the substance of these closed door meetings directly contradicts the value in the  
reports.

1 before the County were these other higher and better uses reconciled or dismissed from  
2 consideration in a highest and best use analysis.

3 Rather than addressing the evidence plaintiffs have marshaled, MHM attempts to shield  
4 the Board by arguing that the Board was not informed or did not know that information. MHM  
5 draws that line in the sand but then fails to allege or establish what the Board knew or did not  
6 know. Instead, MHM attempts to restrict this Court to the Minutes of the two public hearings.

7 Regardless, ORS 275.335 requires that the reports support the County's determination.  
8 Plaintiffs' challenge the foundation required by the statute for the Board's exchange order. In  
9 other words, plaintiffs allege that the Board's determination of equal value is not supported in the  
10 reports, instead it is arbitrary and capricious and outside the Board's statutory authority.<sup>8</sup>  
11 Regardless of what the Board or its individual members "knew," the reports on value do not  
12 support the Board's decision, because those report are arbitrary.

13 Both the director of the County's planning department and the County administrator  
14 report directly to the Commissioners. The Commissioners rely on them to bring information  
15 forward. The County Planning Director and County Administrator knew about MHM's plans  
16 well before the County Forester made the final report on the property's value.<sup>9</sup> The Minutes  
17 contemplate that the County would perform an appraisal of the properties. Because nothing akin  
18 to an appraisal was performed, MHM now argues that the County was allowed to simply report  
19 number on a spreadsheet. MHM's about face must be rejected.

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21 <sup>8</sup> If the Assesor's report were actually based on a highest and best use analysis that was not provided to the  
22 Board, MHM would certainly argue that the decision was justified because the Board counts on its officials to make  
the proper determinations.

23 <sup>9</sup> MHM takes Commissioner Perkins's statement out of context in an attempt to instruct this court on the  
24 board rationality. First, and most importantly, Commissioner Perkins is not qualified to provide reports on the value  
25 of the properties. The Commissioners must obtain reports that support their determination. Second, Commissioner  
Perkins is not qualified to provide an opinion on proper appraisal procedures nor did MHM's counsel ask him any  
questions about those procedures. Commissioner Perkins is understandable given the nature of his relationship with  
other Commissioners and the general failure of the Board to comprehend basic appraisal practices.

1                   **4.       MHM cannot defend an empty analysis by arguing that MHM is a**  
2                   **unique actor subject to undue stimulus.**

3                   Property is unique, and as a result, if both properties subject to this trade were to be  
4                   exchanged “value for value” rather than “acre for acre,” it is very unlikely that the values would  
5                   be a wash. Second Bancroft Aff. at 5-6; Ex. 34 at p. 28, 106/10-108/14. Moreover, current  
6                   zoning allows for the development of homes on large parcels of forestland.

7                   Community opposition to a development proposal does not eliminate the probability of a  
8                   higher and better use from the consideration in the valuation process. Second Bancroft Aff. at 7.  
9                   The need to analyze this possibility is heightened when the County signals a willingness to  
10                  approve a zone change to allow a destination approving. While substantial public opposition  
11                  coupled with other facts, such as an unwilling decision maker, may mean that a change in zoning  
12                  need not be considered, an appraiser can also discount, as appropriate, for the possibility that it  
13                  may not happen. In short, opposition in and of itself does not exclude the consideration of other  
14                  uses allowed under current zoning. Second Bancroft Aff. at 7.

15                  MHM again attempts to cloud the issue, by misstating plaintiffs’ arguments. Plaintiffs  
16                  are not arguing that the County must consider value that is the product of undue stimulus.  
17                  MHM’s RCMSJ at 19, 22-24. The fact that adjacent land in the area has been developed into  
18                  homes, a subdivision and an Inn, are not evidence of undue stimulus. Second Bancroft Aff. at 2.  
19                  Instead, those facts support the need for the County to consider the possibility of large tract  
20                  homes, or something greater, in the determination of the highest and best use. *Id.*

21                  **C.       The County was not authorized to make a \$1 million equalization payment.**

22                  The County paid MHM more than \$1 million to “equalize” the value in the Land  
23                  Exchange. County governments are limited by the authorization in the enabling statute, and the  
24                  applicable statute here simply does not authorize an “equalization payment.” ORS 275.335.  
25                  This Court does not have the authority to completely rewrite the transaction to suit MHM’s

1 wishes.

2 **1. ORS 275.335 does not authorize an “equalization payment.”**

3 ORS 275.335 does not provide for a cash payment to equalize an exchange of properties.  
4 Plaintiffs’ CMSJ&R at 13-14. The statute says that the County may provide for “the exchange  
5 of land within a designated county forest for other land...when such exchange is for equal  
6 value.” *Id.* The statute does not mention a cash payment. ORS 275.335. Stated another way,  
7 only when the trade is for “equal value” can the County provide for it. *Id.*

8 Rather than addressing plaintiffs’ arguments head on, MHM attempts to insert what has  
9 been omitted by creatively juxtaposing the language in the statute with a meaningless target.  
10 Certainly, the statute contemplates that a county may structure a transaction involving the  
11 exchange of properties. However, that does not mean that the County can do whatever it wants  
12 in valuing the property or that it may equalize the deal with a side payment equal to more than  
13 43% of the land value. Rather, the transaction that the County structures must be within the  
14 confines of the legislative authority.

15 MHM tries in vain to provide the County with broad authority by interpreting the text of  
16 the statute in isolation, and, in so doing, ignores the context of the statute. Reading the text in  
17 context, the phrase “such exchange” is shorthand for and a plain reference to the preceding  
18 phrase that states that the County may provide for “the exchange of land within a designated  
19 county forest for other land.” At best, MHM’s interpretative gymnastics evidence that the statute  
20 is ambiguous. This ambiguity is resoundingly resolved by looking at the legislative history, the  
21 second level of analysis under Oregon law on statutory interpretation. For reasons made obvious  
22 by plaintiffs’ cross-motion and response, MHM has avoided the second level of analysis.

1                   **2.       The Court should not rewrite the transaction to be a mixed land trade**  
2                   **purchase.**

3                   This transaction was advertised to the public and completed as an exchange of properties  
4 made pursuant to ORS 275.335. The County has repeatedly touted the fact that the exchange  
5 would increase the County’s land base. The increased land base claim was central to the  
6 County’s best interest determination in making the exchange.

7                   Because an equalization payment is not allowed, MHM now asks this Court to  
8 contravene the “best interest” determination, supplant the Board and throw holy water on this  
9 transaction by bifurcating it into two completely separate components. Which of the 436 acres  
10 did the County trade to MHM in return for 614 acres? How is this newly minted trade in the best  
11 interest of the County? Did that trade result in better access and more net manageable acres of  
12 timber? What about the actual deeds, which do not, in fact, record this mythical transaction?

13                   Even if the County were able to purchase land, this Court is not in a position to make the  
14 statutory “best interest” and “equal value” determinations required when the county trades  
15 forestland. MHM’s proposal is nothing more than wishful thinking. The fact remains that the  
16 deeds do not contemplate the transaction that MHM now crafts. The County did not advertise or  
17 attempt to sell the transaction to the public in this way.

18                   **II.       Merger does not bar scrutiny of the County’s order to exchange land.**

19                   In a creative effort to avoid ORS 275.335’s prohibition of an “equalization payment,”  
20 MHM now shifts the focus of their arguments on merger to the warranty deed. MHM originally  
21 sought to bind plaintiffs’ claims to the REEA, in an earlier effort to shift this Court’s focus away  
22 from the real issue. While interesting, the argument that this Court must focus on the warranty  
23 deed also fails. As discussed above, MHM’s attempts to have this Court throw holy water on the  
24 deal, as MHM has recast it, should be rejected

1           **A.       MHM second attempt to shift the Court’s focus must fail.**

2           The issue is whether the County Court made an order within the substantive and  
3 procedural bounds of the statutory scheme enacted by the State legislature. ORS 275.335  
4 prohibits a cash equalization payment. As a result, MHM is attempting to recast the entire  
5 transaction and shift this Court’s focus to the warranty deed. MHM’s merger argument makes  
6 no sense even if we shift our focus.

7           Merger is about whether terms from the REEA survive the execution of warranty deeds.  
8 The plaintiffs’ action is not against the real estate agreement or the deeds. Rather, plaintiffs  
9 claim is against the County’s procedurally flawed “order” of August 20, 2001 where the County  
10 authorized its officials to proceed with the consummation of the Land Exchange subject to a  
11 number of conditions. ORS 275.335 requires the County Court to make an order. Plaintiffs  
12 attack that order and the lack of a rational basis for it. The plaintiffs do not attack the warranty  
13 deed or the REEA. The doctrine of merger plays no role in this action against the County’s  
14 “order,” because this is not an action for breach or enforcement of a contract.

15           **B.       The Land Exchange cannot be bifurcated by this Court post-hoc.**

16           The County never authorized or discussed a mixed land trade/purchase. The County  
17 advertised the trade to the public and has contended at all stages that it was made pursuant to  
18 ORS 275.335. The County made the best interest determination in the context of a trade that  
19 would increase its land base. Bifurcating the transaction fundamentally undercuts the County’s  
20 “best interest” determination for the exchange, as it would eliminate the County’s purported goal  
21 of increasing its forestland base. The trade part, as now it has now been creatively segmented by  
22 MHM, would result in a significant net decrease of land for the County as a result of the trade.  
23 Regardless, even if bifurcation were allowed, the trade would need to be for “equal value” as  
24 required by ORS 275.335.

1 **III. The transaction is void.**

2 The County acted outside of its statutorily granted authority. The transaction is therefore  
3 void. The plaintiffs have provided ample precedent to support the appropriate remedy. *See, e.g.,*  
4 *State v. Deshcuttes Land Trust Company*, 64 Or 167, 129 P 764 (1913); *Baker v. Deschutes*  
5 *County*, 10 Or App 236, 498 P2d 803 (1972). “The agent of the State, acting under a public law,  
6 must find sanction for his doings in the statute itself; and the parties dealing with such agent are  
7 bound, at their peril, to take notice of the enactment conferring the agent’s authority.” *Deschutes*  
8 *Land Trust*, 64 Or at 175. “A contract made by a public official in excess of the provisions of the  
9 statute authorizing such contract is void, so far as it departs from or exceeds the terms of the law  
10 under which it was attempted to be negotiated.” *Id.* In, *Baker*, the Court of Appeals held that a  
11 “contract by a public officer in excess of the provisions of the statute authorizing such contract is  
12 void.” 10 Or App at 240. Government contracts are void if they exceed the statutory authority  
13 of the public official. Not only have plaintiffs established their right to a declaration on each of  
14 their claims, the remedy plaintiffs have requested is the only one that makes sense given the facts  
15 and plaintiffs entitlement to it under the law.<sup>10</sup> ORS 28.080.

16 **IV. Res Judicata does not bar this Declaratory Judgment action.**

17 Res Judicata does not bar plaintiffs’ action for declaratory judgment and injunctive relief.  
18 Oregon law provides that a Court’s determination that it lacks subject matter jurisdiction does  
19 not normally bar a different action on the same facts. *Rennie* provides an exception to that rule,  
20 and plaintiffs’ comprehension of *Rennie* is directly on target. *Rennie v. Freeway Transport*, 294  
21 Or 319, 656 P2d 919 (1982). MHM focuses almost entirely on *Rennie*, ignores the general rule

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23 <sup>10</sup> The courts of other jurisdictions have routinely exercised their equitable powers to void or prohibit land  
24 exchanges or other property transactions entered into by government agencies. *See, e.g., National Wildlife*  
25 *Federation v. Espy*, 45 F3d 1337 (9<sup>th</sup> Cir 1995); *Burbank v. Anti-Noise Group v. Goldschmidt*, 623 F2d 115 (9<sup>th</sup> Cir  
1980); *Cambell v. First Baptist Church of Durham*, 259 SE2d 558 (NC 1979); *Skyline Sportsmen’s Ass’n v. Board*  
*of Land Commissioners*, 951 P2d 29 (Mont 1997).

1 and stretches the holding of *Rennie* beyond the breaking point. In fact, *Sherris v. City of*  
2 *Portland*, 41 Or App 545, 599 P2d 1188 (1979), controls this issue and establishes that plaintiffs’  
3 claims are not barred by *res judicata*.

4 Plaintiffs attempted to consolidate this action with the writ of review action. MHM again  
5 misstates facts to this Court by stating that plaintiffs could have but did not request a stay.  
6 MHM’s Reply in Support of its Motion for Summary Judgment at 3. In the alternative to  
7 consolidation, plaintiffs asked this Court to stay the pending writ of review action if the court  
8 declined to consolidate the cases and dismissed the writ of review action. Reply on Motion to  
9 Consolidate at 5.<sup>11</sup>

10 Specifically, Plaintiffs brought five claims in the writ of review action. *See* Petitioners’  
11 Writ of Review. Plaintiffs have brought three claims in the action for declaratory judgment and  
12 injunctive relief. *See* Complaint for Declaratory and Injunctive Relief. Each action applies to  
13 “different” decisions by the County, the writ of review to those termed “quasi-judicial decisions”  
14 --- the declaratory judgment action to those deemed “legislative.” This court and other courts  
15 have noted that the law discussing the difference between these two kinds decisions to be quite  
16 confusing and unsettled. May 23, 2002 Opinion of the Honorable Judge Donald W. Hull at 4;  
17 *See Strawberry Hill 4 Wheelers v. Board of Comm'rs*, 287 Or 591, 608 n 7, 601 P2d 769, 778 n 7  
18 (1979); *Gruber v. Lincoln Hosp. Dist.*, 285 Or 3, 8 n 2, 588 P2d 1281, 1283 n 2 (1979). In the  
19 most recent and perhaps the most stinging opinion, Chief Justice Peterson, concurring in *Forman*  
20 *v. Clatsop County*, remarked: “If a person intended to create an inefficient, unpredictable,  
21 ineffective, expensive, unresponsive system for review of governmental acts, he or she would  
22 use the system we have in Oregon as a perfect model. Ours is senseless and cries for revision.”  
23 297 Or 129, 133, 681 P2d 786, 788 (1984). Because the lack of clarity can be procedurally

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24  
25 <sup>11</sup> Petitioners’ Reply to Respondents’ Objection to Motion for Consolidation of Trials was filed in both  
Case No. 020029 CC and Case No. 020055 CC.

1 wasteful for practitioners, plaintiffs simply attempted to follow the direction of the Oregon  
2 courts, which favor writ of review actions, and plaintiffs' reasonable interpretation of the type of  
3 "decision" made by the County.

4 Here plaintiffs filed the writ. The court issued a letter opinion finding that the decision  
5 was legislative. The plaintiffs asked the court to allow plaintiffs' to amend their complaint and  
6 requested reconsideration. The plaintiffs filed a declaratory judgment action against the  
7 County's legislative decision. Plaintiffs also requested consolidation. As explained above, it is  
8 not possible for plaintiffs to maintain both actions successfully. Instead, the two actions are  
9 separate and independent, applying alternatively to different County decisions.

10 It makes the most sense to try to consolidate the two actions. While, it may be possible to  
11 join the action and set them forth as separate claims, joinder of these two actions would provide  
12 for a more unwieldy and convoluted presentation of the different claims available in each action.  
13 Plaintiffs chose consolidation to avoid the need to argue over the distinctions between ORS  
14 Chapter 28 and ORS Chapter 34. Plaintiffs filed the writ to simplify the presentation of the  
15 action for the Court. After an initial determination of subject matter jurisdiction, plaintiffs made  
16 a motion to consolidate the separately filed declaratory judgment action.

17 Furthermore, MHM's attempted distinction between joinder and consolidation falls apart  
18 in reference to *Sherris* and *Rennie*. In *Sherris*, the Court specifically held that a declaratory  
19 action was not barred when the plaintiff attempted to consolidate that action with a previously  
20 filed petition for a writ of review. *Sherris*, 41 Or App at 550-551. In *Rennie*, the plaintiff was in  
21 federal court, therefore joinder was the only option available with respect to the state law claims  
22 and the initial action. *Rennie*, 294 Or at 321-22. The plaintiff in *Rennie* could not have used  
23 consolidation, because the state law claim was not pending in another action in federal court.  
24 See FRCP 18 (allowing joinder of claims); cf. FRCP 42 (allowing consolidation of actions  
25 currently pending before the federal court).

