

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF THE REVIEW OF
THE DESIGNATION OF URBAN
RESERVES BY METRO AND RURAL
RESERVES BY CLACKAMAS COUNTY,
MULTNOMAH COUNTY, AND
WASHINGTON COUNTY

RESPONSE BRIEF OF METROPOLITAN
LAND GROUP ON REMAND FROM THE
OREGON COURT OF APPEALS

I. Introduction.

Pursuant to the Land Conservation and Development Commission (“LCDC”) Scheduling Order dated September 4, 2014, Metropolitan Land Group (“MLG”) files this Response Brief on remand from the Oregon Court of Appeals (“Court”).

MLG responds to the Multnomah County Opening Brief and the Metro Opening Brief as follows: (1) LCDC lacks the authority under the circumstances to find that evidence “clearly supports” the designation of Area 9D as a rural reserve; and (2) Multnomah County and Metro failed to address the remaining aspect of the Court’s order, to wit: how the error in designating Area 9D affected the “designation of reserves in Multnomah County in its entirety.”

In response to the Barkers Five, LLC LCDC Remand Brief, MLG responds as follows: (1) LCDC lacks the authority to designate or redesignate reserves in the first instance. Accordingly, LCDC should remand the reserves matter to Metro and Multnomah County to address the “designation of reserves in Multnomah County in its entirety.”

II. Reply to Multnomah County Opening Brief and Metro Opening Brief.

A. LCDC Lacks the Authority to Find that Evidence “Clearly Supports” the Designation of Area 9D as a Rural Reserve.

In its Opening Brief, Multnomah County contended that LCDC should find that evidence in the record “clearly supports” the designation of Area 9D as a rural reserve. Metro incorporated this contention by reference. LCDC should deny these contentions because they misconstrue the “clearly supports” standard.

Although House Bill (“HB”) 4078, Section 9 authorizes LCDC to, in theory, approve all or part of the reserves decision on remand if LCDC identifies evidence in the record that “clearly supports” the decision even if the findings in support of that decision are deficient, LCDC should find that, under the circumstances, it lacks the authority to find that evidence “clearly supports” the designation of Area 9D as a rural reserve.

LCDC should reach this conclusion because there is conflicting evidence in the record, which precludes LCDC from determining that evidence “clearly supports” the designation of Area 9D as rural reserve. Like LCDC, LUBA also has the authority to affirm a local decision with inadequate findings when evidence in the record “clearly supports” the decision. ORS 197.835(11)(b). LUBA has concluded that the “clearly supports” standard is “considerably higher” than the substantial evidence standard, i.e., whether a reasonable person could reach the decision based upon the evidence in the record. *Friedman v. Yamhill County*, 23 Or LUBA 306, 311 (1992). Additionally, LUBA has held that where there is conflicting evidence, the evidence does not “clearly support” the decision. *Waugh v. Coos County*, 26 Or LUBA 300, 307 (1993). Because LCDC’s standard is analogous to LUBA’s, it should be interpreted in a like manner. Thus, LCDC cannot find that evidence “clearly supports” a decision to designate an area as a rural reserve when there is conflicting evidence.

Conflicting evidence exists in the present case. See *Barkers Five, LLC* LCDC Remand Brief at 6-15. Therefore, LCDC cannot find that there is evidence that “clearly supports” the designation of Area 9D as a rural reserve, and LCDC should remand this issue to Multnomah County and Metro.

B. Although Multnomah County Failed to Address the Issue, LCDC Should Remand the Matter to Address the Court's Order to Reconsider "Designation of Reserves in Multnomah County in its Entirety."

As explained in more detail in MLG's Opening Brief, the Court remanded LCDC's order because LCDC erred in concluding that Multnomah County's "consideration" of the rural reserve factors for Area 9D was legally sufficient:

"We conclude that, because the county failed to meaningfully explain why its consideration of the rural reserves factors yields a rural reserve designation of all land in Area 9D, LCDC erred in concluding that the county's 'consideration' of the factors was legally sufficient * * *"

Barkers Five, LLC v. LCDC, 261 Or App 259, 345, 323 P3d 368 (2014). To address this issue on remand, the Court ordered a determination of how Multnomah County's error affected "the designation of reserves in Multnomah County in its entirety." *Barkers Five, LLC*, 261 Or App at 347. Multnomah County's Opening Brief does not even acknowledge this issue, let alone explain why it does not require any further action on remand.

Resolution of this remand issue will require consideration of, and possible changes to, reserve designations across Multnomah County. There are two possible reasons for changes to reserves designations across Multnomah County. First, changes to reserve designations in Area 9D could change the balance of

reserves and cause Multnomah County and Metro to make corresponding or offsetting changes to other properties. Second, Multnomah County could conclude that it made similar errors as that committed in Area 9D on other properties. For example, like the Barkers' property, MLG's property is unlike the remainder of the property included within its rural reserve designation, so there is no basis to include MLG's property as a rural reserve. *See* Letter from S. Pfeiffer to LCDC dated October 8, 2010 at 8.

Therefore, LCDC should remand the matter for consideration of this aspect of the Court order, including possible redesignation of reserves on the Barkers' property, MLG's property, and other properties.

III. Reply to Barkers Five, LLC LCDC Remand Brief.

LCDC should deny the contention raised by Barkers Five, LLC that LCDC has the authority to designate or redesignate reserves. MLG understands Barkers Five to contend that LCDC has this authority in order to respond to the Court's order and because no other party has such authority. With due respect to LCDC, LCDC lacks this authority.

Rather, under Oregon law, only Metro and the Counties have the authority to designate reserves. *See, e.g.*, ORS 195.141 (authorizing a county and metropolitan service district to jointly designate reserves); OAR 660-027-0020

(authorizing Metro and the counties to designate reserves). LCDC's role is limited to acting as a review body "[a]fter designation of urban and rural reserves." OAR 660-027-0080(2). Thus, LCDC lacks the authority to designate, undesignate, or re-designate reserves. LCDC should deny Barkers Five's contention to the contrary.

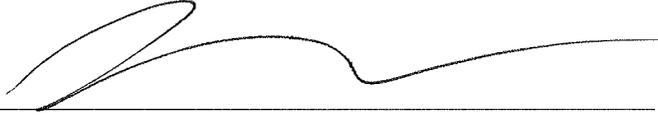
MLG agrees with Barkers Five that the proper resolution of this remand issue may require modifying or applying reserves designations. Specifically, the Court ordered a remand to address how the error committed by Multnomah County/LCDC affected the "designation of reserves in Multnomah County in its entirety." *Barkers Five, LLC*, 261 Or App at 347. Although LCDC lacks the authority to designate reserves, Metro and the Counties have such authority. Therefore, LCDC must remand the submittal to allow Metro and Multnomah County to address this issue.

IV. Conclusion.

For the foregoing reasons, LCDC should grant MLG's responses noted above and enter an order remanding the reserves matter to Metro and Multnomah County to reconsider "designations of reserves in Multnomah County in its entirety."

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