Metro Urban and Rural Reserves –
Petitions for LCDC Review of Director's Actions
Remand Order 14-ACK-001861

- Barkers Five LLC and Sandy Baker
- Clackamas County
- Chris Maletis; Tom Maletis; Exit 282A Development Company, LLC; and LFGC, LLC
- Metropolitan Land Group
- Multnomah County
- City of Tualatin and City of West Linn

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LAND CONSERVATION
AND DEVELOPMENT

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January 23, 2015

Via CERTIFIED FIRST CLASS U.S. MAIL
Jim Rue, Director
Land Conservation & Development Commission
635 Capitol St. NE, Suite 150
Salem OR, 97301-2564

Re: Remand Order 14-ACK-001861

Dear Mr. Rue:

Enclosed please find for filing a PETITION FOR LCDC REVIEW OF DLCD DIRECTORS ORDER in the above captioned matter. If you have any questions please feel free to contact us.

Very truly yours,

Edward E. DeMott
Paralegal
Wendie L. Kellington, Attorney at Law, PC

EED:eed
Enclosure
CC: Parties of Record via First Class Mail and E-Mail
Clients

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

IN THE MATTER OF THE REMAND OF THE DESIGNATION OF URBAN RESERVES BY METRO AND RURAL RESERVES BY CLACKAMAS COUNTY, MULTNOMAH COUNTY, AND WASHINGTON COUNTY	**REMAND ORDER 14-ACK-001861**

PETITION FOR LCDC REVIEW OF DLCD DIRECTOR'S ORDER

Pursuant to OAR 660-002-0020(1), Barkers Five LLC and Sandy Baker (hereinafter jointly referred to as "Barkers Five"), petition LCDC for (1) rescission or vacation of REMAND ORDER 14-ACK-001861, and (2) review of REMAND ORDER 14-ACK-001861 (hereinafter "Remand Order").

I. Petitioners' address is 13493 NW Countryview Way, Portland, OR 97229-4467. Petitioners' telephone number is (503) 690-2031. Petitioners are represented by Wendie L. Kellington, Attorney at Law, P.O. Box 159, Lake Oswego OR 97034, (503) 636-0069. All correspondence to Petitioners concerning this Petition should be directed to Wendie L. Kellington.

II. Petitioners' interest in the outcome of the action sought to be reviewed follows:

(1) Petitioners are one of three successful litigants in the Court of Appeals decision on urban and rural reserves, *Barkers Five v. LCDC*, 261 Or App 259 (2014);

(2) Petitioners own or have interests in the real property in Multnomah County Area "9D" that Multnomah County designated "Rural Reserve", that formed a basis for the court's remand;

(3) The Multnomah County rural reserves in Area 9D are one of two bases for the Remand Order.

(4) Petitioners' property in "Area 9D" will be considered by Multnomah County under the Remand Order.

(5) Petitioners' intend to ask Multnomah County on remand to either leave their property undesignated or designate it as urban reserve. Accordingly, their interests are adversely affected if, under the Remand Order, the county is unable to adjust reserves on remand.

III. The Action of the Director sought to be reviewed is the Remand Order dated January 15, 2015.

IV. Petitioners petition LCDC to do two things: (1) rescind or vacate the Remand Order, and (2) issue a new order that directs Multnomah County on remand to take actions consistently with the decision of the court of appeals. The form of order should simply say, substantially, that it is: "ORDERED the Reserves Submittal is remanded to Multnomah County to take action consistent with the decision of the court of appeals in *Barkers Five v. LCDC*, 261 Or App 259 (2014)."

V. LCDC should take the actions specified in Paragraph IV, because the Remand Order is unclear regarding whether it is designed to be narrower than the decision of the court of appeals directed with respect to Multnomah County's options on remand; and more specifically, whether it is intended to deprive Multnomah County of the option to respond to the court of appeals and LCDC remand by leaving the Barkers Five property undesignated or designating it urban reserve.

In this regard, in relevant part the Remand Order says "based on the decision of the Court of Appeals," that the "Reserves Submittal" complies with law "except with respect to * * * Multnomah County's explanation of why its consideration of the rural reserves actors yields a rural reserve designation of all land in Rural Reserve Area 9D * * *". The Remand Order then orders remand "to Multnomah County for further findings under ORS 195.141 and ORS 195.145, and OAR chapter 660 division 27."

The problem with the Remand Order is that it appears the make the only remand option available to Multnomah County being to draft new findings to support the rural reserve designation of the Barkers Five property in area 9D. However, clear options otherwise available to the county under the court of appeals' decision, are to leave the Barkers Five property undesignated (an option that consumes almost no effort and very few public or private resources) or urban reserve (a findings intensive option). The former will likely be particularly attractive locally as no particular legal standard need be invoked, and no findings are required, to leave land undesignated. Importantly, these options are consistent with the court of appeals decision in *Barkers Five v. LCDC*, 261 Or App 339-343, that if application of the factors does not yield a rural reserve designation, then property should not be rural reserve. Further, based on the court's remand, the Barkers Five property in Area 9D has to be redesignated or left undesignated - *something* must be done to respond to the court of appeals remand. This is because the mapping decision that made the Barkers' property in Area 9D rural reserve was remanded by the court of appeals and, when that happened, the decision designating the Barkers' Five property as part of the Area 9D rural reserve became legally ineffective. *Turner v. Jackson County,* 62 Or LUBA 199, 210 (2010) and *NWDA v. Portland*, 58 Or LUBA 533, 541-42 (2009).

Petitioners' request is simply that LCDC make clear that Multnomah County may respond to this legal reality by doing essentially nothing – by deciding that the Barkers Five property be left undesignated. Moreover, petitioners request that the Remand Order also make clear that the county has the option of deciding an evaluation of the factors means the Barkers Five property should be urban reserve. While the latter may or may not be politically unlikely, the county should have that option: after all no matter how one views the Barkers Five property or Area 9D at this point, the court of appeals affirmed LCDC's approval of the idea that property can be designated urban or rural reserves even though theoretically, it might meet either rural or urban reserves factors. *Barkers Five v. LCDC*, 261 Or App 351-355. Respectfully, the point is that nothing justifies restricting the county's only option on remand to merely writing better findings to make the Barkers Five property in Area 9D redesignated "rural reserve". Multnomah County should be free to make a legal/political decision to simply leave Barkers Five property "undesignated" (which requires almost no effort) or to decide it should be urban reserve.

Petitioners suggested form of order: "ORDERED the Reserves Submittal is remanded to Multnomah County to take action consistent with the decision of the court of appeals in *Barkers Five v. LCDC*, 261 Or App 259 (2014)", would leave these options available to the county on remand.

VI. This Petition is filed with the DLCD Director Jim Rue within fifteen days of the date of issuance of the Remand Order.

Respectfully submitted, this 23rd day of January 2015

Wendie L. Kellington
Attorney for Petitioners Barkers Five, OSB # 83-2589

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2015, I served a true and correct copy of this PETITION FOR LCDC REVIEW OF DLCD DIRECTOR'S ORDER, by FIRST CLASS U.S. CERTIFIED MAIL, postage prepaid, on the following person:

Jim Rue, Director
Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem, OR 97301-2564

I further certify that on January 23, 2015, I served a true and correct copy of this PETITION FOR LCDC REVIEW OF DLCD DIRECTOR'S ORDER, by FIRST CLASS U.S. MAIL, postage prepaid on the following persons:

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Dated this 23rd day of January, 2015

Wendie L. Kellington, 83-2589
Attorney at Law

Taylor, Casaria

From: Wendie Kellington <wk@wkellington.com>
Sent: Friday, January 23, 2015 6:32 AM
To: Rue, Jim; Taylor, Casaria; roger.alfred@oregonmetro.gov; sking@perkinscoie.com; jed.tomkins@multco.us; spfeiffer@perkinscoie.com; jeff.condit@millernash.com; cjames@jameslawgroup.com; Madkour, Stephen; Nate Boderman
Cc: Sandy Baker; Steven Barker; Edward DeMott
Subject: Reserves Remand
Attachments: Barkers Pet LCDC Review Remand Order.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr. Rue, Ms. Taylor and Counsel:

Attached please find the Petition for Review of DLCD Director's Order, filed this date by Barkers Five LLC and Sandy Baker. The original is being filed with Mr. Rue via certified first class mail today. Please feel free to contact me with any questions. Thank you. Wendie Kellington

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BEFORE THE
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IN THE MATTER OF THE REMAND OF THE DESIGNATION OF URBAN RESERVES BY METRO AND RURAL RESERVES BY CLACKAMAS COUNTY, MULTNOMAH COUNTY, AND WASHINGTON COUNTY	) REMAND ORDER 14-ACK-001861

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VI. This Petition is filed with the DLCD Director Jim Rue within fifteen days of the date of issuance of the Remand Order.

Respectfully submitted, this 23rd day of January 2015

Wendie L. Kellington
Attorney for Petitioners Barkers Five, OSB # 83-2589

IN THE COURT OF APPEALS OF THE STATE OF OREGON

BARKERS FIVE, LLC; SANDY BAKER; CITY OF TUALATIN; CITY OF WEST LINN; CAROL CHESAREK; CHERRY AMABISCA; SAVE HELVETIA; ROBERT BAILEY; 1000 FRIENDS OF OREGON; DAVE VANASCHE; BOB VANDERZANDEN; LARRY DUYCK; SPRINGVILLE INVESTORS, LLC; KATHERINE BLUMENKRON; DAVID BLUMENKRON; METROPOLITAN LAND GROUP; CHRIS MALETIS; TOM MALETIS; EXIT 282A DEVELOPMENT COMPANY, LLC; LFGC, LLC; ELIZABETH GRASER-LINDSEY; and SUSAN MCKENNA, Petitioners, v. LAND CONSERVATION AND DEVELOPMENT COMMISSION, METRO, WASHINGTON COUNTY, CLACKAMAS COUNTY, MULTNOMAH COUNTY, STATE OF OREGON, and CITY OF HILLSBORO, Respondents.	Land Conservation and Development Commission No. 12ACK001819` CA A152351 **EXPEDITED PROCEEDING UNDER ORS 197.651**

RESPONDENT LAND CONSERVATION AND DEVELOPMENT COMMISSION'S ANSWERING BRIEF

Continued...

Petition for Judicial Review of the Final Order of the
Land Conservation and Development Commission

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Attorney for Washington County

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	REMAND ORDER 14-ACK-001861 CLACKAMAS COUNTY'S PETITION FOR COMMISSION REVIEW OF DIRECTOR'S ACTION

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Attorneys for Clackamas County

"amount of land" and the "best achieves" standards. Moreover, the County submits that the designation, or redesignation, of certain properties may be required on remand if found necessary to achieve the "amount of land" or the "best achieves" standard.

Such consideration was clearly contemplated by the Court of Appeals when it recognized that a change in the joint designation of the urban reserves by Metro and the counties would require the parties to reassess whether the designation was still appropriate. *Barkers Five, LLC v. LCDC,* 261 Or. App. 259, 333 (2014). When describing the effect that the remand of Washington County's reserves would have on the overall decision, the Court said:

> "because the best achieves standard applies to Metro and the counties' joint designation 'in its entirety,' *LCDC must remand the entire submittal to Metro and the counties so that they can ultimately assess whether any new joint designation, in its entirety, satisfies that standard.*"
>
> *Barkers Five, LLC,* 261 Or. App. at 333 (emphasis added).

As currently drafted, the Director's Order on remand is too narrowly worded to afford Clackamas County the requisite latitude necessary to comply both with the court's remand instructions and with existing authority. Clackamas County respectfully requests that the Commission revisit the Director's Order and issue a revised Order on remand that is aligned with the remand from the Court of Appeals.

In addition to seeking clarification of the Director's Order, Clackamas County further requests that the Commission withdraw the Director's Order to allow the Commission ample time to consider the County's request. Additional time is needed because by rule, review by the Commission is mandatory and not discretionary. OAR 660-002-0020(3), provides that "[t]he Commission *shall*, by order within 60 days of the filing of the request, or within a period of time not to exceed 120 days if good cause therefore is shown, either affirm, reverse, or modify the action of the Director. The Director shall provide reasonable notice to all parties of the date, time, and place that the Commission will take action on the petition, and the manner in which such parties may express their views." (Emphasis Added).

Clackamas County requests that the Director's Order be withdrawn because the 60-day time period for the Commission to take action under OAR 660-002-0020(3) will not expire until at least March 21, 2015. Whereas a petition for judicial review to the Court of Appeals must be filed within 21 days from the date of the Director's Order. ORS 197.650. The 60-day time period for the Commission to take action under OAR 660-002-0020(3) will not have expired but the Commission would be divested of jurisdiction if any party is forced to petition for judicial review by February 5, 2015.

Clackamas County respectfully requests that the Commission withdraw the Director's Order on remand, and modify the action of the Director by issuing an Order that is

Clackamas County's Petition for Commission Review of Director's Action

Pursuant to OAR 660-002-0020(1), Clackamas County, by and through its Office of County Counsel, seeks Commission review of the Director's Remand Order 14-ACK-001861 issued on January 15, 2015. Clackamas County also requests the Commission direct the Director to withdraw or vacate the existing Order pending the Commission's disposition of this review.

The LCDC has delegated authority to the Director to, among other things, "prepare and execute written orders, on behalf of the Commission, implementing any action taken by the Commission of any matter." ORS 660-002-0010(6). The Director issued the Order at issue on January 15, 2015.

Any party may seek review of the Director's Order by the Commission. OAR 660-002-0020(1). The challenge is timely filed within 15 days of the date of the Order. OAR 660-002-0020(1)(c). On review, the Commission may affirm, reverse, or modify the action of the Director. OAR 660-002-0020(3).

The Director's Order affects a significant land area within Clackamas County commonly known as the Stafford Triangle and referred in the Remand Order as Urban Reserve Areas 4A, 4B, 4C, and 4D. Clackamas County seeks clarification from the Commission on the following points:

1. Is the Director's Order on remand more restrictive that the remand issued by the Court of Appeals;
2. Does the Director's Order on remand preclude Clackamas County from considering the "best achieves" standards set forth in OAR 660-027-0005(2) and the amount of land standard found in OAR 660-027-0040(2); and
3. Does the Director's Order on remand preclude any revisions to urban reserves other than the drafting of additional findings?

Clackamas County construes the Director's Order on remand to be overly restrictive as it does not permit the local jurisdictions to address all of the issues identified by the court's remand, and those issues that resulted after adoption of HB 4078. The County continues to contend that a remand was necessary to adopt additional findings related to the urban reserve designation of the Stafford Area, particularly as it applies to the transportation issues. However, it is inappropriate to limit the options on remand to simply preparing new or additional findings. It may be instead that the parties find on remand that the appropriate response is to alter the map. For example, transportation issues could conceivably require a change in the reserves designations to limit the number of vehicle trips.

The County also finds that a revised Order on remand is necessary so that Metro and the counties can address what effect the removal of the net acreage of land designated urban reserve in Washington County as a result of HB 4078 has on the so-called

aligned with the remand issued by the Court of Appeals, and also that allows Clackamas County and Metro to consider the "best achieves" standards set forth in OAR 660-027-0005(2) and the amount of land standard found in OAR 660-027-0040(2); and that allows some flexibility concerning urban reserves other than merely the drafting of additional findings.

Dated this 22nd day of January 2015.

STEPHEN L. MADKOUR
CLACKAMAS COUNTY COUNSEL

Nathan K. Boderman, OSB #073311
Assistant County Counsel
nboderman@clackamas.us
Attorney for Clackamas County

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a true copy of the foregoing **CLACKAMAS COUNTY'S PETITION FOR COMMISSION REVIEW** on:

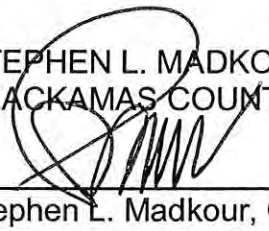
Jim Rue, Director Land Conservation & Development Comm 635 Capitol St. NE, Suite 150 Salem, OR 97301 jim.rue@state.or.us casaria.taylor@state.or.us	Roger Alfred Metro 600 NE Grand Ave. Portland, OR 97232 Roger.alfred@oregonmetro.gov Attorney for Respondent Metro
Wendie L. Kellington PO Box 159 Lake Oswego, OR 97034 wk@wkellington.com Attorney for Petitioner Barkers Five	Steven L. Pfeiffer Seth J. King 1120 NW Couch St., Tenth Floor Portland, OR 97209 spfeiffer@perkinscoie.com sking@perkinscoie.com Attorneys for Metropolitan Land Group, Chris Maletis, Tom Maletis, Exit 282 Development Co and LFGC
Jed Tomkins Asst. County Counsel Office of Multnomah County Attorney 501 SE Hawthorne Blvd, Ste 500 Portland, OR 97214 Jed.tomkins@multco.us Attorney for Multnomah County	Jeffrey G. Condit, PC Miller Nash 111 SW 5th Ave, Suite 3400 Portland, OR 97204 Jeff.condit@millernash.com Attorneys for City of Tualatin and City of West Linn
Christopher James 121 SW Morrison St, Suite 910 Portland, OR 97204 cjames@jameslawgroup.com Attorneys for Plaintiffs	Carol Chesarek 13300 NW Germantown Road Portland, OR 97231

[x] by **MAILING** a full, true and correct copy thereof in a sealed, postage-paid envelope, addressed as shown above, and deposited with the U.S. Postal Service at Oregon City, Oregon, on the date set forth below;

[x] by **EMAILING** a full, true and correct copy thereof to the party, at the email address shown above, which is the last-known email address for the party's office, on the date set forth below;

DATED this 22 day of January, 2015.

STEPHEN L. MADKOUR
CLACKAMAS COUNTY COUNSEL



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LAND CONSERVATION
AND DEVELOPMENT

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635 Capitol St. NE, Suite 150
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97301$2540 C007

Taylor, Casaria

From: Peterson, Kay <KPeterson@co.clackamas.or.us>
Sent: Thursday, January 22, 2015 2:57 PM
To: Taylor, Casaria
Subject: FW: Urban Reserves Appeal
Attachments: Filed CC Petition for Com Rev of Dir Action.PDF

Follow Up Flag: Follow up
Flag Status: Flagged

Please find my forwarded email with correct address. Kay

From: Peterson, Kay
Sent: Thursday, January 22, 2015 2:54 PM
To: 'jim.rue@state.or.us'; 'Cesaria.taylor@state.or.us'
Cc: 'roger.alfred@oregonmetro.gov'; 'wk@wkellington.com'; 'spfeiffer@perkinscoie.com'; 'sking@perkinscoie.com'; 'jed.tomkins@multco.us'; 'jeff.condit@millernash.com'; 'cjames@jameslawgroup.com'; Madkour, Stephen
Subject: Urban Reserves Appeal

Counsel:

Attached please find CLACKAMAS COUNTY'S PETITION FOR COMMISSION REVIEW OF DIRECTOR'S ACTION, also sent via first class mail today. Please contact our office with any questions.

Kay Peterson, Paralegal to
Stephen L. Madkour
Clackamas County Counsel
2051 Kaen Road
Oregon City, OR 97045
Tel: 503/742-5395
Fax: 503/742-5397

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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	REMAND ORDER 14-ACK-001861 CLACKAMAS COUNTY'S PETITION FOR COMMISSION REVIEW OF DIRECTOR'S ACTION

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Clackamas County's Petition for Commission Review of Director's Action

Pursuant to OAR 660-002-0020(1), Clackamas County, by and through its Office of County Counsel, seeks Commission review of the Director's Remand Order 14-ACK-001861 issued on January 15, 2015. Clackamas County also requests the Commission direct the Director to withdraw or vacate the existing Order pending the Commission's disposition of this review.

The LCDC has delegated authority to the Director to, among other things, "prepare and execute written orders, on behalf of the Commission, implementing any action taken by the Commission of any matter." ORS 660-002-0010(6). The Director issued the Order at issue on January 15, 2015.

Any party may seek review of the Director's Order by the Commission. OAR 660-002-0020(1). The challenge is timely filed within 15 days of the date of the Order. OAR 660-002-0020(1)(c). On review, the Commission may affirm, reverse, or modify the action of the Director. OAR 660-002-0020(3).

The Director's Order affects a significant land area within Clackamas County commonly known as the Stafford Triangle and referred in the Remand Order as Urban Reserve Areas 4A, 4B, 4C, and 4D. Clackamas County seeks clarification from the Commission on the following points:

1. Is the Director's Order on remand more restrictive that the remand issued by the Court of Appeals;
2. Does the Director's Order on remand preclude Clackamas County from considering the "best achieves" standards set forth in OAR 660-027-0005(2) and the amount of land standard found in OAR 660-027-0040(2); and
3. Does the Director's Order on remand preclude any revisions to urban reserves other than the drafting of additional findings?

Clackamas County construes the Director's Order on remand to be overly restrictive as it does not permit the local jurisdictions to address all of the issues identified by the court's remand, and those issues that resulted after adoption of HB 4078. The County continues to contend that a remand was necessary to adopt additional findings related to the urban reserve designation of the Stafford Area, particularly as it applies to the transportation issues. However, it is inappropriate to limit the options on remand to simply preparing new or additional findings. It may be instead that the parties find on remand that the appropriate response is to alter the map. For example, transportation issues could conceivably require a change in the reserves designations to limit the number of vehicle trips.

The County also finds that a revised Order on remand is necessary so that Metro and the counties can address what effect the removal of the net acreage of land designated urban reserve in Washington County as a result of HB 4078 has on the so-called

"amount of land" and the "best achieves" standards. Moreover, the County submits that the designation, or redesignation, of certain properties may be required on remand if found necessary to achieve the "amount of land" or the "best achieves" standard.

Such consideration was clearly contemplated by the Court of Appeals when it recognized that a change in the joint designation of the urban reserves by Metro and the counties would require the parties to reassess whether the designation was still appropriate. *Barkers Five, LLC v. LCDC,* 261 Or. App. 259, 333 (2014). When describing the effect that the remand of Washington County's reserves would have on the overall decision, the Court said:

> "because the best achieves standard applies to Metro and the counties' joint designation 'in its entirety,' *LCDC must remand the entire submittal to Metro and the counties so that they can ultimately assess whether any new joint designation, in its entirety, satisfies that standard.*"
>
> *Barkers Five, LLC,* 261 Or. App. at 333 (emphasis added).

As currently drafted, the Director's Order on remand is too narrowly worded to afford Clackamas County the requisite latitude necessary to comply both with the court's remand instructions and with existing authority. Clackamas County respectfully requests that the Commission revisit the Director's Order and issue a revised Order on remand that is aligned with the remand from the Court of Appeals.

In addition to seeking clarification of the Director's Order, Clackamas County further requests that the Commission withdraw the Director's Order to allow the Commission ample time to consider the County's request. Additional time is needed because by rule, review by the Commission is mandatory and not discretionary. OAR 660-002-0020(3), provides that "[t]he Commission *shall*, by order within 60 days of the filing of the request, or within a period of time not to exceed 120 days if good cause therefore is shown, either affirm, reverse, or modify the action of the Director. The Director shall provide reasonable notice to all parties of the date, time, and place that the Commission will take action on the petition, and the manner in which such parties may express their views." (Emphasis Added).

Clackamas County requests that the Director's Order be withdrawn because the 60-day time period for the Commission to take action under OAR 660-002-0020(3) will not expire until at least March 21, 2015. Whereas a petition for judicial review to the Court of Appeals must be filed within 21 days from the date of the Director's Order. ORS 197.650. The 60-day time period for the Commission to take action under OAR 660-002-0020(3) will not have expired but the Commission would be divested of jurisdiction if any party is forced to petition for judicial review by February 5, 2015.

Clackamas County respectfully requests that the Commission withdraw the Director's Order on remand, and modify the action of the Director by issuing an Order that is

aligned with the remand issued by the Court of Appeals, and also that allows Clackamas County and Metro to consider the "best achieves" standards set forth in OAR 660-027-0005(2) and the amount of land standard found in OAR 660-027-0040(2); and that allows some flexibility concerning urban reserves other than merely the drafting of additional findings.

Dated this 22nd day of January 2015.

STEPHEN L. MADKOUR
CLACKAMAS COUNTY COUNSEL

Nathan K. Boderman, OSB #073311
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Attorney for Clackamas County

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a true copy of the foregoing **CLACKAMAS COUNTY'S PETITION FOR COMMISSION REVIEW** on:

Jim Rue, Director Land Conservation & Development Comm 635 Capitol St. NE, Suite 150 Salem, OR 97301 jim.rue@state.or.us casaria.taylor@state.or.us	Roger Alfred Metro 600 NE Grand Ave. Portland, OR 97232 Roger.alfred@oregonmetro.gov Attorney for Respondent Metro
Wendie L. Kellington PO Box 159 Lake Oswego, OR 97034 wk@wkellington.com Attorney for Petitioner Barkers Five	Steven L. Pfeiffer Seth J. King 1120 NW Couch St., Tenth Floor Portland, OR 97209 spfeiffer@perkinscoie.com sking@perkinscoie.com Attorneys for Metropolitan Land Group, Chris Maletis, Tom Maletis, Exit 282 Development Co and LFGC
Jed Tomkins Asst. County Counsel Office of Multnomah County Attorney 501 SE Hawthorne Blvd, Ste 500 Portland, OR 97214 Jed.tomkins@multco.us Attorney for Multnomah County	Jeffrey G. Condit, PC Miller Nash 111 SW 5th Ave, Suite 3400 Portland, OR 97204 Jeff.condit@millernash.com Attorneys for City of Tualatin and City of West Linn
Christopher James 121 SW Morrison St, Suite 910 Portland, OR 97204 cjames@jameslawgroup.com Attorneys for Plaintiffs	Carol Chesarek 13300 NW Germantown Road Portland, OR 97231

[x] by **MAILING** a full, true and correct copy thereof in a sealed, postage-paid envelope, addressed as shown above, and deposited with the U.S. Postal Service at Oregon City, Oregon, on the date set forth below;

[x] by **EMAILING** a full, true and correct copy thereof to the party, at the email address shown above, which is the last-known email address for the party's office, on the date set forth below;

DATED this 22 day of January, 2015.

STEPHEN L. MADKOUR
CLACKAMAS COUNTY COUNSEL

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smadkour@clackamas.us
Nathan K. Boderman, OSB No. 07331
Assistant County Counsel
nboderman@co.clackamas.or.us
OF ATTORNEYS FOR CLACKAMAS COUNTY

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	**PETITION FOR REVIEW OF DIRECTOR ACTION BY CHRIS MALETIS; TOM MALETIS; EXIT 282A DEVELOPMENT COMPANY, LLC; AND LFGC, LLC**

I. Introduction.

Pursuant to OAR 660-002-0020, Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC, and LFGC, LLC (together, "Maletis") file this Petition requesting review by the Land Conservation and Development Commission ("LCDC") of the action by the Department of Land Conservation and Development ("DLCD") Director ("Director") to prepare and execute Remand Order 14-ACK-001861 ("Order"), which remanded two aspects of the designation of urban and rural reserves in metropolitan Portland to Metro and Multnomah County and only for the sole purpose of adoption of "further findings."

The grounds for this petition are that the Director exceeded his authority in preparing and executing the Order because: (1) the Order is inconsistent with the

plain language and intent of LCDC's oral decision; and (2) the Order is unlawful in substance because it restricts the ability for Metro and the counties of Clackamas, Multnomah, and Washington (together, "Counties") to modify reserves designations in response to the remand issues.

Maletis requests that LCDC adopt a new order that modifies the Order and remands the matter to Metro and the Counties to take action consistent with the Court of Appeals decision in *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014) ("*Barkers Five*"). The exact language of Maletis' proposed order is set forth below. LCDC's failure to take action in this matter before February 5, 2015, will result in appeal of the Order to the Court of Appeals.

II. Petition Requirements.

OAR 660-002-0020 contains the requirements for a petition for review of a Director action. As explained below, this petition meets all of the requirements of this rule and requires responsive action by LCDC within 60 days.

(2) Any petition filed pursuant to this section shall:

(a) Contain the name, address, and telephone number of the petitioner and, if the petitioner is other than the governmental body directly affected by the action, a brief statement of the petitioner's interest in the outcome of the action sought to be reviewed or of the public interest represented by the petitioner;

RESPONSE: The name, address, and telephone number of Maletis is as follows:

Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC, and LFGC, LLC, c/o Perkins Coie LLP, 1120 NW Couch St, Tenth Floor, Portland, OR 97209, 503.727.2000. Petitioner's interest in the outcome of the action is that Maletis owns several hundred acres of real property in Clackamas County that was designated rural reserve in the original reserves decision and Maletis will be affected by the parameters placed upon any remand. Maletis has actively participated in this matter since it began in 2009, including in the appeal to the Court of Appeals, and the LCDC remand hearing in November 2014.

(b) Specify the action of the Director to be reviewed, when that action was taken, the Commission action sought by the petitioner, and the reason why the Commission should so act in the matter;

RESPONSE: The action to be reviewed is the Director's January 15, 2015 preparation and execution of the Order. The Commission action sought by Maletis is an order by LCDC modifying the Order to read as follows:

> "~~Conclusion~~
>
> ~~"Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court's decision, the Commission finds that the Reserves Submittal as amended by Oregon Laws 2014, chapter 92, complies with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and all other applicable rules of the Commission, except with respect to (1) Multnomah County's explanation of why its consideration of the rural reserve factors yields a rural reserve designation of all land in Rural Reserve Area 9D;~~

~~and (2) Metro's explanation of why the designation of Areas 4A, 4B, 4C, and 4D as Urban Reserves is supported by substantial evidence.~~

"THEREFORE, IT IS ORDERED THAT:

"Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court's decision, t~~T~~he Commission ~~incorporates by reference the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819, except with respect to its approval of the inclusion of Rural Reserve Area 9D to Multnomah County and Urban Reserve Areas 4A, 4B, 4C, and 4D to Metro for further findings under ORS 195.141 and 195.145, and OAR chapter 660, division 27.~~ remands the reserves matter to Metro and the Counties for further action consistent with the principles expressed in *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014)."

"Before final acknowledgment, the Commission will review a resubmittal of the Metro Region urban and rural reserves designations for acknowledgment of compliance with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and all other applicable rules of the Commission."

The reasons why LCDC should so act in this matter are explained in Section III of this Petition.

(c) Be filed with the Director or the Director's designee within fifteen days of the date of the taking of the action sought to be reviewed.

RESPONSE: The Director executed and served the Order on January 15, 2015. Maletis filed this petition with the Director on January 29, 2015, within 15 days after the Director's execution of the Order. Therefore, Maletis' petition is timely.

(3) The Commission shall, by order within 60 days of the filing of the request, or within a period of time not to exceed 120 days if good cause therefore is shown, either affirm, reverse, or modify the action of the Director. The Director shall provide reasonable notice to all parties of the date, time, and place that the Commission will take action on the petition, and the manner in which such parties may express their views."

RESPONSE: This section requires LCDC to address the petition within 60 days by adopting an order affirming, reversing, or modifying the Order.

III. LCDC should grant the petition because the Director exceeded his authority in preparing and executing the Order.

LCDC has delegated authority to the Director to, among other things, "[p]repare and execute written orders, on behalf of the Commission, implementing any action taken by the Commission on any matter." OAR 660-002-0010(6). The Director's action to prepare and execute the Order exceeds this authority in two ways.

A. LCDC should modify the Order because it is inconsistent with the plain language and intent of LCDC's decision to approve a "straight remand" and to require consideration of issues "as instructed by the Court of Appeals."

First, the Order is not consistent with the plain language and intent of LCDC's remand decision. As a result, the Order does not properly "implement[] any action taken by the Commission."

At its November 13, 2014 meeting, LCDC approved the following motion to remand the matter:

> "I move the Commission remand Rural Reserve Area 9D and Urban Reserve Areas 4A, 4B, 4C, and 4D, as instructed by the Court of Appeals." (Transcribed from meeting audio recording available on LCDC website; underline added.)

Further, in responding to a question from one of the parties after LCDC approved the motion, Chair Macpherson explained that LCDC's intent in adopting this motion was for a "pass-through remand," with no intention of limiting the available actions by Metro and the Counties on remand:

> "The interpretation I am going to put on the motion just passed is that it was a straight remand, that is, we didn't preclude...It was a remand of the particular areas. It didn't call out the impact of House Bill 4078, but it also didn't preclude the parties from, in that process, contending that some impact from 4078 would affect the course of action that they would take under the remand. It's what was called, sort of, a straight remand." (Transcribed from meeting audio recording available on LCDC website.)

As these passages reflect, LCDC's decision was to "pass through" the Court of Appeals' remand to Metro and the Counties to allow them to address the matter consistent with *Barkers Five*.

Notwithstanding LCDC's clear intent, the Director prepared and executed an Order that was far more limited in nature and did not pass through all aspects of the Court of Appeals' remand in *Barkers Five*. For example, the Order does not

remand for consideration of the following issues remanded by the *Barkers Five* court. First, the Order did not remand for consideration by Metro and the counties whether, after re-designation of reserves in Washington County, "any new joint designation, in its entirety, satisfies the best achieves standard." *Barkers Five*, 261 Or App at 364. In fact, there are no specific findings in the Order on this issue at all. Second, the Order did not remand for a determination whether and how Multnomah County's error in its consideration of the reserves factors in Area 9D affected "the designation of reserves in Multnomah County in its entirety." *Id.* Again, there are no specific findings on this issue at all, and the remand to Multnomah County is limited to Area 9D only and not to a consideration of all Multnomah County reserves as directed by the Court of Appeals. Third, the Order does not remand for a determination whether the designation of Areas 4A, 4B, 4C, and 4D as urban reserves was supported by substantial evidence. *Id.* Instead, the Order only remands this item to Metro for "further findings," which appears to preclude both the ability to consider new evidence on remand and for Clackamas County to participate in the process altogether.

Leaving aside how these issues should be decided on the merits, the simple fact is that LCDC in its deliberations and oral decision clearly stated that it wanted

to allow Metro and the Counties to address the issues "as instructed by the Court of Appeals." By narrowing the issues from the Court of Appeals' decision, the Order does not allow Metro and the Counties to address the issues "as instructed by the Court of Appeals." Rather, it appears to direct Metro and the Counties to address the issues as instructed by the Director. As a result, the Order fails to fulfill LCDC's intent and must be modified.

B. LCDC should modify the Order because it unlawfully limits the authority of Metro and the Counties on remand.

Second, the Director exceeded his authority in preparing and executing the Order because the Order unlawfully restricts the ability of Metro and the Counties to consider modifications to reserve designations that may be required as a consequence of addressing the identified remand issues. Specifically, Metro and the Counties must determine whether any new joint reserves designation meets the "best achieves" standard in OAR 660-027-0005(2) and whether the amount of land is sufficient to serve projected population and employment for the study period under OAR 660-027-0040(2). By limiting the scope of the remand to specific issues and specific geographic locations, the Order appears to take away this authority from Metro and the Counties and to instead substitute LCDC's judgment for how these rules should be applied. LCDC lacks the authority to

apply these rules in this way, but especially when Metro and the Counties have not yet acted on remand and it is not at all apparent what corrective actions, if any, should be taken on remand. Therefore, the Director has exceeded his authority under OAR 660-002-0020(6).

IV. Conclusion.

For the foregoing reasons, the Order does not properly "implement[] any action taken by the Commission on any matter." As such, the Director lacked the authority to prepare and execute the Order under OAR 660-002-0010(6).

Therefore, LCDC should grant this petition and enter an order modifying the Order to read as follows:

"* * * *

"~~Conclusion~~

~~"Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court's decision, the Commission finds that the Reserves Submittal as amended by Oregon Laws 2014, chapter 92, complies with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and all other applicable rules of the Commission, except with respect to (1) Multnomah County's explanation of why its consideration of the rural reserve factors yields a rural reserve designation of all land in Rural Reserve Area 9D; and (2) Metro's explanation of why the designation of Areas 4A, 4B, 4C, and 4D as Urban Reserves is supported by substantial evidence.~~

"THEREFORE, IT IS ORDERED THAT:

"Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court's decision, t~~T~~he Commission ~~incorporates by reference the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819, except with respect to its approval of the inclusion of Rural Reserve Area 9D to Multnomah County and Urban Reserve Areas 4A, 4B, 4C, and 4D to Metro for further findings under ORS 195.141 and 195.145, and OAR chapter 660, division 27.~~ remands the reserves matter to Metro and the Counties for further action consistent with the principles expressed in *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014)."

"Before final acknowledgment, the Commission will review a resubmittal of the Metro Region urban and rural reserves designations for acknowledgment of compliance with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and all other applicable rules of the Commission."

DATED: January 29, 2015

PERKINS COIE LLP

By: _____

Steven L. Pfeiffer, OSB No. 814533
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1120 NW Couch St, Tenth Floor
Portland, OR 97209

Attorneys for Chris Maletis; Tom Maletis; Exit 282A Development Company, LLC; and LFGC, LLC

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 29, 2015, I served the original of this PETITION FOR REVIEW OF DIRECTOR ACTION BY CHRIS MALETIS; TOM MALETIS; EXIT 282A DEVELOPMENT COMPANY, LLC; AND LFGC, LLC, by First Class U.S. Certified Mail, postage prepaid, on the following person:

Land Conservation and Development Commission
c/o Jim Rue, Director
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635 Capitol St. NE, Suite 150
Salem, OR 97301-2540

I further certify that on January 29, 2015, I served a true and correct copy of this PETITION FOR REVIEW OF DIRECTOR ACTION BY CHRIS MALETIS; TOM MALETIS; EXIT 282A DEVELOPMENT COMPANY, LLC; AND LFGC, LLC, by First Class U.S. Mail, postage prepaid, on the following persons:

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13300 NW Germantown Road
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Carrie Richter
Garvey Schubert Barer
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Portland, OR 97204-3141

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1162 Court St. NE
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DATED this 29th day of January, 2015.

PERKINS COIE LLP

By: _____

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Seth J. King, OSB No. 071384
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Attorneys for Chris Maletis; Tom Maletis; Exit 282A Development Company, LLC; and LFGC, LLC

DEPT OF
FEB 02 2015
LAND CONSERVATION
AND DEVELOPMENT

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	**PETITION FOR REVIEW OF DIRECTOR ACTION BY METROPOLITAN LAND GROUP**

I. Introduction.

Pursuant to OAR 660-002-0020, Metropolitan Land Group ("MLG") files this Petition requesting review by the Land Conservation and Development Commission ("LCDC") of the action by the Department of Land Conservation and Development ("DLCD") Director ("Director") to prepare and execute Remand Order 14-ACK-001861 ("Order"), which remanded two aspects of the designation of urban and rural reserves in metropolitan Portland to Metro and Multnomah County only and for the sole purpose of adoption of "further findings."

The grounds for this petition are that the Director exceeded his authority in preparing and executing the Order because: (1) the Order is inconsistent with the plain language and intent of LCDC's oral decision; and (2) the Order is unlawful in

substance because it restricts the ability for Metro and the counties of Clackamas, Multnomah, and Washington (together, "Counties") to modify reserves designations in response to the remand issues.

MLG requests that LCDC adopt a new order that modifies the Order and remands the matter to Metro and the Counties to take action consistent with the Court of Appeals decision in *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014) ("*Barkers Five*"). The exact language of MLG's proposed order is set forth below. LCDC's failure to take action in this matter before February 5, 2015, will result in appeal of the Order to the Court of Appeals.

II. Petition Requirements.

OAR 660-002-0020 contains the requirements for a petition for review of a Director action. As explained below, this petition meets all of the requirements of this rule and requires responsive action by LCDC within 60 days.

(2) Any petition filed pursuant to this section shall:

(a) Contain the name, address, and telephone number of the petitioner and, if the petitioner is other than the governmental body directly affected by the action, a brief statement of the petitioner's interest in the outcome of the action sought to be reviewed or of the public interest represented by the petitioner;

RESPONSE: The name, address, and telephone number of MLG is as follows:

Metropolitan Land Group, c/o Perkins Coie LLP, 1120 NW Couch St, Tenth Floor, Portland, OR 97209, 503.727.2000. Petitioner's interest in the outcome of the action is that MLG owns approximately 38 acres of real property in Multnomah County that was designated rural reserve in the original reserves decision. MLG will be affected by the parameters placed on the remand of this matter. MLG has actively participated in this matter since it began in 2009, including in the appeal to the Court of Appeals, and the LCDC remand hearing in November 2014.

(b) Specify the action of the Director to be reviewed, when that action was taken, the Commission action sought by the petitioner, and the reason why the Commission should so act in the matter;

RESPONSE: The action to be reviewed is the Director's January 15, 2015 preparation and execution of the Order. The Commission action sought by MLG is an order by LCDC modifying the Order to read as follows:

> "~~Conclusion~~
>
> ~~"Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court's decision, the Commission finds that the Reserves Submittal as amended by Oregon Laws 2014, chapter 92, complies with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and all other applicable rules of the Commission, except with respect to (1) Multnomah County's explanation of why its consideration of the rural reserve factors yields a rural reserve designation of all land in Rural Reserve Area 9D; and (2) Metro's explanation of why the designation of Areas 4A, 4B, 4C, and 4D as Urban Reserves is supported by substantial evidence.~~

"THEREFORE, IT IS ORDERED THAT:

"Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court's decision, t~~T~~he Commission ~~incorporates by reference the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819, except with respect to its approval of the inclusion of Rural Reserve Area 9D to Multnomah County and Urban Reserve Areas 4A, 4B, 4C, and 4D to Metro for further findings under ORS 195.141 and 195.145, and OAR chapter 660, division 27.~~ remands the reserves matter to Metro and the Counties for further action consistent with the principles expressed in *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014)."

"Before final acknowledgment, the Commission will review a resubmittal of the Metro Region urban and rural reserves designations for acknowledgment of compliance with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and all other applicable rules of the Commission."

The reasons why LCDC should so act in this matter are explained in Section III of this Petition.

(c) Be filed with the Director or the Director's designee within fifteen days of the date of the taking of the action sought to be reviewed.

RESPONSE: The Director executed and served the Order on January 15, 2015.

MLG filed this petition with the Director via certified mail and electronic mail on January 30, 2015, within 15 days after the Director's execution of the Order.

Therefore, MLG's petition is timely.

(3) The Commission shall, by order within 60 days of the filing of the request, or within a period of time not to exceed 120 days if good cause therefore is shown, either affirm, reverse, or modify the action of the Director. The Director shall provide reasonable notice to all parties of the date, time, and place that the Commission will take action on the petition, and the manner in which such parties may express their views."

RESPONSE: This section requires LCDC to address the petition within 60 days by adopting an order affirming, reversing, or modifying the Order.

III. LCDC should grant the petition because the Director exceeded his authority in preparing and executing the Order.

LCDC has delegated authority to the Director to, among other things, "[p]repare and execute written orders, on behalf of the Commission, implementing any action taken by the Commission on any matter." OAR 660-002-0010(6). The Director's action to prepare and execute the Order exceeds this authority in two ways.

A. LCDC should modify the Order because it is inconsistent with the plain language and intent of LCDC's decision to approve a "straight remand" and to require consideration of issues "as instructed by the Court of Appeals."

First, the Order is not consistent with the plain language and intent of LCDC's remand decision. As a result, the Order does not properly "implement[] any action taken by the Commission."

At its November 13, 2014 meeting, LCDC approved the following motion to remand the matter:

> "I move the Commission remand Rural Reserve Area 9D and Urban Reserve Areas 4A, 4B, 4C, and 4D, as instructed by the Court of Appeals." (Transcribed from meeting audio recording available on LCDC website; underline added.)

Further, in responding to a question from one of the parties after LCDC approved the motion, Chair Macpherson explained that LCDC's intent in adopting this motion was for a "pass-through remand," with no intention of limiting the available actions by Metro and the Counties on remand:

> "The interpretation I am going to put on the motion just passed is that it was a straight remand, that is, we didn't preclude...It was a remand of the particular areas. It didn't call out the impact of House Bill 4078, but it also didn't preclude the parties from, in that process, contending that some impact from 4078 would affect the course of action that they would take under the remand. It's what was called, sort of, a straight remand." (Transcribed from meeting audio recording available on LCDC website.)

As these passages reflect, LCDC's decision was to "pass through" the Court of Appeals' remand to Metro and the Counties to allow them to address the matter consistent with *Barkers Five*.

Notwithstanding LCDC's clear intent, the Director prepared and executed an Order that was far more limited in nature and did not pass through all aspects of the Court of Appeals' remand in *Barkers Five*. For example, the Order does not

remand the matter on several issues remanded by the *Barkers Five* court. First, the Order did not remand for consideration by Metro and the counties whether, after re-designation of reserves in Washington County, "any new joint designation, in its entirety, satisfies the best achieves standard." *Barkers Five*, 261 Or App at 364. In fact, there are no specific findings in the Order on this issue at all. Second, the Order did not remand for a determination whether and how Multnomah County's error in its consideration of the reserves factors in Area 9D affected "the designation of reserves in Multnomah County in its entirety." *Id.* Again, there are no specific findings on this issue at all, and the remand to Multnomah County is limited to Area 9D only and not to a consideration of all Multnomah County reserves as directed by the Court of Appeals. Third, the Order does not remand for a determination whether the designation of Areas 4A, 4B, 4C, and 4D as urban reserves was supported by substantial evidence. *Id.* Instead, the Order only remands this item to Metro for "further findings," which appears to preclude both the ability to consider new evidence on remand and for Clackamas County to participate in the process altogether.

Leaving aside how these issues should be decided on the merits, the simple fact is that LCDC in its deliberations and oral decision clearly stated that it wanted to allow Metro and the Counties to address the issues "as instructed by the Court

of Appeals." By narrowing the issues from the Court of Appeals' decision, the Order does not allow Metro and the Counties to address the issues "as instructed by the Court of Appeals." Rather, it appears to direct Metro and the Counties to address the issues as instructed by the Director. As a result, the Order fails to fulfill LCDC's intent and must be modified.

B. LCDC should modify the Order because it unlawfully limits the authority of Metro and the Counties on remand.

Second, the Director exceeded his authority in preparing and executing the Order because the Order unlawfully restricts the ability of Metro and the Counties to consider modifications to reserve designations that may be required as a consequence of addressing the identified remand issues. Specifically, Metro and the Counties must determine whether any new joint reserves designation meets the "best achieves" standard in OAR 660-027-0005(2) and whether the amount of land is sufficient to serve projected population and employment for the study period under OAR 660-027-0040(2). By limiting the scope of the remand to specific issues and specific geographic locations, the Order appears to take away this authority from Metro and the Counties and to instead substitute LCDC's judgment for how these rules should be applied. LCDC lacks the authority to apply these rules in this way, but especially when Metro and the Counties have

not yet acted on remand and it is not yet apparent what corrective actions, if any, should be taken on remand. Therefore, the Director has exceeded his authority under OAR 660-002-0020(6).

IV. Conclusion.

For the foregoing reasons, the Order does not properly "implement[] any action taken by the Commission on any matter." As such, the Director lacked the authority to prepare and execute the Order under OAR 660-002-0010(6).

Therefore, LCDC should grant this petition and enter an order modifying the Order to read as follows:

"* * * *

"~~Conclusion~~

~~"Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court's decision, the Commission finds that the Reserves Submittal as amended by Oregon Laws 2014, chapter 92, complies with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and all other applicable rules of the Commission, except with respect to (1) Multnomah County's explanation of why its consideration of the rural reserve factors yields a rural reserve designation of all land in Rural Reserve Area 9D; and (2) Metro's explanation of why the designation of Areas 4A, 4B, 4C, and 4D as Urban Reserves is supported by substantial evidence.~~

"THEREFORE, IT IS ORDERED THAT:

"Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court's decision, t~~T~~he Commission ~~incorporates by reference the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819, except with respect to its approval of the inclusion of Rural Reserve Area 9D to Multnomah County and Urban Reserve Areas 4A, 4B, 4C, and 4D to Metro for further findings under ORS 195.141 and 195.145, and OAR chapter 660, division 27.~~ remands the reserves matter to Metro and the Counties for further action consistent with the principles expressed in *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014)."

"Before final acknowledgment, the Commission will review a resubmittal of the Metro Region urban and rural reserves designations for acknowledgment of compliance with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and all other applicable rules of the Commission."

DATED: January 30, 2015

PERKINS COIE LLP

By: _____

Steven L. Pfeiffer, OSB No. 814533
Seth J. King, OSB No. 071384
1120 NW Couch St, Tenth Floor
Portland, OR 97209

Attorneys for Metropolitan Land Group

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 30, 2015, I served the original of this PETITION FOR REVIEW OF DIRECTOR ACTION BY METROPOLITAN LAND GROUP, by First Class U.S. Certified Mail, postage prepaid, on the following person:

Land Conservation and Development Commission
c/o Jim Rue, Director
Department of Land Conservation and Development
635 Capitol St. NE, Suite 150
Salem, OR 97301-2540

I further certify that on January 30, 2015, I served a true and correct copy of this PETITION FOR REVIEW OF DIRECTOR ACTION BY METROPOLITAN LAND GROUP, by First Class U.S. Mail, postage prepaid, on the following persons:

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DATED this 30th day of January, 2015.

PERKINS COIE LLP

By: _____

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Attorneys for Metropolitan Land Group

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	Remand Order No. 14-ACK-001861 **MULTNOMAH COUNTY'S PETITION FOR COMMISSION REVIEW OF DIRECTOR'S ACTION**

DEPT OF

FEB 18 2015

LAND CONSERVATION AND DEVELOPMENT

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Telephone: 503/988-3138

Attorney for Multnomah County

MULTNOMAH COUNTY'S PETITION FOR COMMISSION REVIEW OF DIRECTOR'S ACTION

Pursuant to OAR 660-002-0020(1), Multnomah County, by and through its Office of Multnomah County Attorney, seeks Commission review of the Director's Remand Order 14-ACK-001861 ("Order") issued on January 15, 2015.

As reflected in the petitions filed by Clackamas County, the Cities of Tualatin and West Linn, Barkers Five, and Maletis, parties to this matter have concerns that the Order does not align with the Commission's oral order of November 13, 2014, nor the order and remand principles expressed in *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014).

Multnomah County takes no position on the points and authorities raised by the other petitioners, but the County does have a strong interest in seeing this matter proceed with administrative and judicial efficiency.

Accordingly, Multnomah County respectfully requests that the Commission act expediently to resolve all concerns. More specifically, Multnomah County requests that the Commission modify the Order in the manner requested in the Maletis Petition, pp. 3–4 (the "Requested Modification"). The Requested Modification constitutes the best approach to resolving all concerns because the Requested Modification best reflects the order and remand principles expressed in *Barkers Five* as well as the Commission's oral order.

The following parties join Multnomah County in supporting the Requested Modification: Clackamas County, the Cities of Tualatin and West Linn, and Barkers Five.

Similarly, the Blumenkron Petitioners offer the following statement of qualified support:

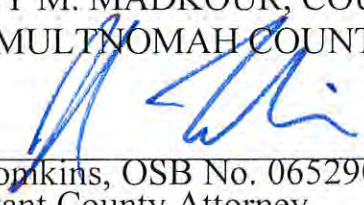
> "The Blumenkron Petitioners support the Order modification represented by the Perkin's Coie Petition for reasons set forth in that Petition and for reasons the Blumenkorn parties asserted in their original Remand pleading. Their Support of the Perkin's Order is expressly not a waiver or preclusion of any position or appeal in any court regarding the Remand, all of which are reserved."

Except as expressly stated above, the statements of support herein for the Requested Modification are limited to the requested modification of the *language* of the Order - nothing in the statements of this petition is intended to indicate any abandonment of the *points and authorities* argued by the various parties in support of their respective petitions; to the contrary, the parties continue to assert the points and authorities set forth in their respective petitions.

DATED this 30th day of January, 2015.

Respectfully submitted,

JENNY M. MADKOUR, COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON



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Assistant County Attorney
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing **MULTNOMAH COUNTY'S PETITION FOR COMMISSION REVIEW OF DIRECTOR'S ACTION** by First Class U.S. Certified Mail, postage prepaid, and e-mail on:

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DATED this 30th day of January, 2015.

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FOR MULTNOMAH COUNTY, OREGON

Jed Tomkins, OSB No. 065290
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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

Remand Order No. 14-ACK-001861

THE CITY OF TUALATIN'S AND THE CITY OF WEST LINN'S PETITION FOR COMMISSION REVIEW OF DIRECTOR'S ACTION

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Attorney for City of Tualatin and City of West Linn

The City of Tualatin's and the City of West Linn's Petition for Commission Review of Director's Action

We represent the Cities of Tualatin and West Linn ("Cities") in the above-noted matter. Pursuant to OAR 660-002-0020(1), the Cities seek Commission review of the Director's Remand Order 14-ACK-001861 issued on January 15, 2015 ("Order"). The Cites agree with the positions expressed by Clackamas County in its January 22, 2015, Petition for Reconsideration and with Barkers Five in its January 23, 2015, Petition for Reconsideration, that the language used in the Order could be construed as limiting Metro's, Multnomah County's, and Clackamas County's scope of review on remand as compared to the Court of Appeals' decision in Barkers Five, LLC v. LCDC, 261 Or App 259, 323 P3d 368 (2014) ("Barkers Five").

The Cities attended the November 13, 2014, Commission hearing on remand and do not believe that the Order reflects the Commission's intent. Our perception of the Commission's deliberation and vote was that the Commission expressly declined to decide the issues raised by the parties, but instead determined that that they would simply pass through the Court of Appeals' remand decision so that Metro and the counties could address those issues on remand in the first instance. The Commission could then review a new decision for compliance based upon new findings and new evidence (if Metro and the counties deem the taking of new evidence necessary on remand). This is the appropriate role of the Commission: It is up to Metro and the counties to make the decision in the first instance under the statute, and then for the

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Commission to review that decision for compliance with applicable state law, goals, and rules. It is not appropriate for LCDC to dictate the local outcome by limiting the scope of review on remand.[1]

The Cities believe that ambiguity can easily be resolved by simply incorporating the Court of Appeals' remand language from Barkers Five. The Cities respectfully request that the Commission amend the second sentence in the first paragraph following "THEREFORE, IT IS ORDERED THAT:" as follows:

> "Accordingly, the Commission remands Rural Reserve Area 9D to Multnomah County and Metro and Urban Reserve Areas 4A, 4B, 4C, and 4D to Metro and Clackamas County for further action consistent with the principles expressed in Barkers Five, LLC v. LCDC, 261 Or App 259, 323 P3d 368 (2014)."

See the Court of Appeals' final ruling at 261 Or App at 364.

This language gives Metro and the counties the full range of options that would otherwise be available on remand, from revising the findings to better explain the decision based upon the existing record, to concluding that a prior decision is wrong and adopting a different decision (as the Cities believe is necessary with regard to the Stafford reserve areas). It also reflects the fact that although a county designates rural reserves under ORS 195.141 and Metro designates urban reserves under ORS 195.145, both decisions have to be made in coordination with and concurrently between Metro and the affected county under ORS 195.137 to ORS 195.145. Neither Multnomah County nor

[1] Indeed, because the "law of the case" doctrine does not apply to legislative land use decisions, it would be an error of law for the Commission to do so. See Hatley v. Umatilla County, 256 Or App 91, 106 to 112, 301 P2d 920 (2013).

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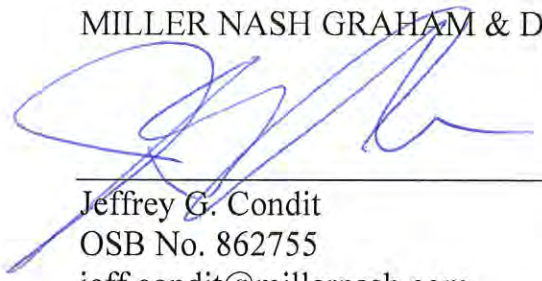
Metro can adopt new findings unilaterally, and so the decision should be remanded to Metro and each county for the respective reserve areas.

For the reasons expressed by Clackamas County, the Cities also support Clackamas County's request that the Commission direct the Director to withdraw or vacate the existing Order pending the Commission's disposition of the petitions.

For these reasons, the Cities respectfully request that the Commission reconsider the Order as described above.

DATED this 27th day of January, 2015.

MILLER NASH GRAHAM & DUNN LLP



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I hereby certify that I served the foregoing The City of Tualatin's and the City of West Linn's Petition for Commission Review of Director's Action by First Class U.S. Mail, postage prepaid, on:

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DATED this 27th day of January, 2015.

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OSB No. 822238

Attorney for City of Tualatin and City of West Linn

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DEPT OF
2015
LAND CONSERVATION
AND DEVELOPMENT

U.S. Bancorp Tower
111 S.W. Fifth Avenue, Suite 3400
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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

Remand Order No. 14-ACK-001861

THE CITY OF TUALATIN'S AND THE CITY OF WEST LINN'S PETITION FOR COMMISSION REVIEW OF DIRECTOR'S ACTION

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The City of Tualatin's and the City of West Linn's Petition for Commission Review of Director's Action

We represent the Cities of Tualatin and West Linn ("Cities") in the above-noted matter. Pursuant to OAR 660-002-0020(1), the Cities seek Commission review of the Director's Remand Order 14-ACK-001861 issued on January 15, 2015 ("Order"). The Cites agree with the positions expressed by Clackamas County in its January 22, 2015, Petition for Reconsideration and with Barkers Five in its January 23, 2015, Petition for Reconsideration, that the language used in the Order could be construed as limiting Metro's, Multnomah County's, and Clackamas County's scope of review on remand as compared to the Court of Appeals' decision in Barkers Five, LLC v. LCDC, 261 Or App 259, 323 P3d 368 (2014) ("Barkers Five").

The Cities attended the November 13, 2014, Commission hearing on remand and do not believe that the Order reflects the Commission's intent. Our perception of the Commission's deliberation and vote was that the Commission expressly declined to decide the issues raised by the parties, but instead determined that that they would simply pass through the Court of Appeals' remand decision so that Metro and the counties could address those issues on remand in the first instance. The Commission could then review a new decision for compliance based upon new findings and new evidence (if Metro and the counties deem the taking of new evidence necessary on remand). This is the appropriate role of the Commission: It is up to Metro and the counties to make the decision in the first instance under the statute, and then for the

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Commission to review that decision for compliance with applicable state law, goals, and rules. It is not appropriate for LCDC to dictate the local outcome by limiting the scope of review on remand.[1]

The Cities believe that ambiguity can easily be resolved by simply incorporating the Court of Appeals' remand language from Barkers Five. The Cities respectfully request that the Commission amend the second sentence in the first paragraph following "THEREFORE, IT IS ORDERED THAT:" as follows:

> "Accordingly, the Commission remands Rural Reserve Area 9D to Multnomah County and Metro and Urban Reserve Areas 4A, 4B, 4C, and 4D to Metro and Clackamas County for further action consistent with the principles expressed in Barkers Five, LLC v. LCDC, 261 Or App 259, 323 P3d 368 (2014)."

See the Court of Appeals' final ruling at 261 Or App at 364.

This language gives Metro and the counties the full range of options that would otherwise be available on remand, from revising the findings to better explain the decision based upon the existing record, to concluding that a prior decision is wrong and adopting a different decision (as the Cities believe is necessary with regard to the Stafford reserve areas). It also reflects the fact that although a county designates rural reserves under ORS 195.141 and Metro designates urban reserves under ORS 195.145, both decisions have to be made in coordination with and concurrently between Metro and the affected county under ORS 195.137 to ORS 195.145. Neither Multnomah County nor

[1] Indeed, because the "law of the case" doctrine does not apply to legislative land use decisions, it would be an error of law for the Commission to do so. See Hatley v. Umatilla County, 256 Or App 91, 106 to 112, 301 P2d 920 (2013).

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Metro can adopt new findings unilaterally, and so the decision should be remanded to Metro and each county for the respective reserve areas.

For the reasons expressed by Clackamas County, the Cities also support Clackamas County's request that the Commission direct the Director to withdraw or vacate the existing Order pending the Commission's disposition of the petitions.

For these reasons, the Cities respectfully request that the Commission reconsider the Order as described above.

DATED this 27th day of January, 2015.

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I hereby certify that I filed the foregoing The City of Tualatin's and the City of West Linn's Petition for Commission Review of Director's Action by First Class U.S. Certified Mail, postage prepaid, and e-mail on:

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I hereby certify that I served the foregoing The City of Tualatin's and the City of West Linn's Petition for Commission Review of Director's Action by First Class U.S. Mail, postage prepaid, on:

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