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

MULTNOMAH COUNTY'S RESPONSE BRIEF ON REMAND FROM COURT OF APPEALS

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I. Introduction

This brief presents Multnomah County's response to the opening arguments of Barkers Five, LLC (Barkers); Springville Investors, LLC *et al.* (Springville) and Metropolitan Land Group (MLG) in this matter of the remand of the urban and rural reserves package to LCDC by the Court of Appeals.

In reading the Barkers, Springville and MLG briefs, one might conclude that the issue on remand relating to Multnomah County is quite complex. That is not the case - LCDC's task on remand is clear and straightforward. In fact, the court's own explanation of this task is so informative, instructive and succinct that no brief by any party can do a better job of explaining the task now before you. Accordingly, Multnomah County urges you to read the court's opinion once more and rely upon the court's own words. For your convenience, the relevant portion of the court's decision is appended to this brief.

II. Summary of the Multnomah County Issue

The court denied all challenges to the designation of reserves in Multnomah County with the exception that the county failed to meaningfully explain the rural reserve designation of Area 9D in light of the differences between the north and south halves of that area. Further, because the designations are reviewed as a package, the court instructed LCDC to "determine the effect of that error on the designation of reserves in Multnomah County in its entirety." *Barkers*, 261 Or App 345–347.

Through the following three rules, the court clarified the limited scope of the defect in the designation of Area 9D:

- A meaningful explanation need not be elaborate - simple acknowledgement and explanation of the differences between the two halves of Area 9D would suffice (*Barkers* at 346);
- Multnomah County does not need to justify the designation of the *Barkers property itself* (*Id.*); and
- Multnomah County does not need to establish that it chose the designation that "better suits" the area - if an area could be designated as either urban or rural reserve, then Multnomah County may select either designation (*Id.* at 309–311).

Lastly, through HB 4078(9) (2014), LCDC now has authority to affirm the rural reserve designation of Area 9D despite the county's failure to meaningfully explain the designation. In Multnomah County's Opening Brief, the county provided the information LCDC needs under HB 4078(9) to find that the record evidence "clearly" and "obviously" demonstrates that a rural reserve designation is one of the lawful choices available for Area 9D.

III. Summary of LCDC's Task and Options

In addition to the Area 9D issue, the court identified an error in the urban reserve designation of the Stafford area. Accordingly, LCDC has two tasks on remand: with respect to each issue (i.e., Area 9D and Stafford), LCDC must decide whether to resolve the issue or remand the issue to its respective county.

Importantly, the two issues are distinct and should be reviewed separately such that LCDC may resolve one error yet remand the other error to the

respective county. To illustrate, LCDC may affirm the rural reserve designation of Area 9D pursuant to HB 4078(9), yet remand the Stafford issue.

If LCDC utilizes the authority in HB 4078(9) to re-affirm the designations in both Multnomah and Clackamas Counties, then LCDC may issue a revised acknowledgement order - nothing more is needed because maintenance of the status quo will have no "effect" on any other designation.

Alternatively, if LCDC remands either error (or both), then LCDC should, as it did in its 2010 remand of the Washington County designations, instruct Metro and the three counties to consider the effect of the local resolution of such error on the previously adopted "overall findings" that address the overarching "best achieves" and "amount of land" standards.

IV. Response to Barkers

A. This case is about Area 9D <u>not</u> the Barkers' Property.

Despite the court's ruling that Multnomah County does not need to justify the designation of the *Barkers property* itself (*Barkers* at 346), Barkers continue to mistakenly frame this case in terms of their own property. This case is not about the Barkers' property, it is about the designation of Area 9D.

This error permeates Barkers' opening brief (pp. 2, 6, 9–15) and serves as the basis for many of Barkers' arguments - such arguments must be dismissed.

To illustrate the needless confusion this error introduces into this remand proceeding, consider Barkers assertion that "[t]he court recited evidence . . .

that showed the *Barkers' property* did not qualify as rural reserve as a part of Area 9D." Barkers Op. Br. 2 (emphasis added), *citing Barkers* at 345–346.

The court said no such thing. Instead, the court identified evidence showing differences between the north and south halves of Area 9D and held that the county should have addressed such differences. *Barkers* at 345–346.

The court did not pass judgment on whether the Barkers' property, *or even Area 9D*, "qualifies" as rural reserve. In fact, just the opposite is true: the court clarified that "the county *was not required* to justify the designation of the *Barkers' property*" and the court left the door wide open for re-affirmation of Area 9D as a rural reserve so long as such designation can be explained in light of the differences between the two halves of that area. *Id.* (emphasis added).

B. This is not a case of conflicting evidence.

The Barkers assert that there is a conflict in the evidence that prevents LCDC from finding, per HB 4078(9), that the record "clearly" demonstrates that a rural reserve designation is one of the lawful choices available for Area 9D.

There is no conflict in the evidence and, fortunately, a clear basis exists for reaching this conclusion - the court of appeals did not find any conflict.

In describing the error in Area 9D, the court noted that the record demonstrates differences in the land attributes of the north and south halves of Area 9D, but did not describe this evidence as conflicting.

If the court conceived of the Area 9D issue as an issue of conflicting evidence, the court would have said so. We know this because that is precisely how the court described the Stafford issue in Clackamas County. The court's remand of the Stafford designation *is expressly based* on a conflict in the evidence that the court described as "weighty, countervailing evidence that is squarely at odds with" the urban designation of that area. *Barkers* at 363.

Consequently, Barkers' argument is completely undermined by the absence of any description of Area 9D as an issue of conflicting evidence.

Moreover, Barkers' theories on conflicting evidence are erroneous. For instance, Barkers err in asserting that evidence in support of urban reserve conflicts with a rural reserve designation. Not true - the court held that the evidence may support more than one designation and, in such case, the local government is free to choose either designation. *Barkers* at 309–310.

Further, Barkers err in comparing the qualities of *their property* and to the evidence supporting a rural reserve designation. Barkers Op. Br. 9–14. However, because "the county *was not required* to justify the designation of *Barkers' property*[,]" the record evidence is not judged against evidence of the qualities of the Barkers' property itself. *See Barkers* at 346 (emphasis added).

C. HB 4078(9) is not meaningless.

Through HB 4078(9), the legislature has authorized LCDC to overlook Multnomah County's failure to meaningfully explain the rural reserve

designation of Area 9D and re-affirm that designation if LCDC finds that the evidence "clearly supports" that designation.

Relying on a line of LUBA decisions, Barkers assert that the "clearly supports" standard is not met when the evidence supports more than one conclusion, such as evidence that supports both a rural and urban designation.

Multnomah County addressed this same line of cases in its Opening Brief and explained that these cases concern the review of land use approval *criteria* that either *are* or *are not* met. The present case is different in that the reserve *factors* do not operate as criteria that must be met. *Barkers* at 300–301. Instead, the factors are applied and evaluated and weighed and balanced. *Id.* Consequently, an area may qualify for both an urban and a rural designation, in which case the local government may select either designation. *Id.* at 309–311.

Thus, it makes sense that LUBA has held that the "clearly supports" standard is not met when the evidence shows that a *criterion* is both met and not met. However, extending that approach to HB 4078(9) and the *factors-based* reserves program makes no sense at all because evidence that supports more than one designation is not a problem in the reserves program - in such instance, the local government may select either designation.

Barkers' interpretation would render HB 4078(9) meaningless because it would make that tool unavailable to LCDC. However, legislative acts must be given effect. ORS 174.010.

The better approach is to understand that the legislature intended HB 4078(9) as a useful tool, meaning that the legislature recognizes the difference between the *criteria* at issue in the LUBA decisions and the *factors* at issue here and that the legislature understands that the analysis of *factors* frequently culminates in a record that supports more than one conclusion.

Accordingly, the question before LCDC is not, as Barkers suggest, whether the record clearly supports *only* the designation selected by the local government. Such interpretation would render HB 4078(9) meaningless.

Instead, to give meaning to HB 4078(9), the question before LCDC is whether the record evidence "clearly" and "obviously" demonstrates that the designation selected by the local government for an area *is one of* the lawful choices available for that area.

To illustrate, even if the record clearly supports, for instance, an urban designation, LCDC may still employ its "clearly supports" standard to affirm a rural designation if the record clearly supports that designation as well.

Here, the record not only clearly supports the rural reserve designation for both halves of Area 9D, but, contrary to Barkers' assertions, also shows that both halves ranked low overall for urban reserve. Mult. Co. Op. Br. 10–21. Accordingly, even under Barkers' erroneous interpretation of HB 4078(9), LCDC may utilize that authority to uphold the rural reserve designation of Area 9D because that is *the only* reasonable designation for this Area.

D. No ex parte contact occurred.

Barkers err in asserting that Multnomah County has had *ex parte* contact with LCDC. *Ex parte* communication is a communication to a decision maker not made in the presence of all parties to the hearing. OAR 137-003-0055. Multnomah County has not had any private contact with any decision maker (i.e., LCDC Commissioner). In any event, the remedy for ex parte contact is disclosure and opportunity for rebuttal - the contact of which Barkers' complain of has been disclosed and they now have their opportunity for rebuttal.

E. There is no separation of powers violation.

Barkers err in asserting a violation of the separation of powers principle in Art III, Sec. 1 of the Oregon Constitution. Such violation occurs in only two circumstances not present here: one department performs the functions committed to another; or one department exerts coercive influence over another. *Rooney v. Kulongoski (Elections Division #13)*, 322 Or 15, 28 (1995).

In adopting HB 4078(9), the legislature performed *its* function, not a function of the judicial or executive branches. Through HB 4078(9), the legislature authorized an additional standard of review for the reserves program. Importantly, it is the *legislature's* function to establish the reserves program, including all standards of review.

Similarly, the legislature did not exert coercive influence over another department. It is the legislature's role to *establish* standards of review. No other

branch has any say in that matter; instead, the role of the executive and judicial branches is limited to *applying* and *policing the application of* such standards.

V. Response to Springville and MLG.

A. The meaning of "determine the effect of that error on the designation of reserves in Multnomah County in its entirety."

In remanding the Area 9D error, the court instructed LCDC to "determine the effect of that error on the designation of reserves in Multnomah County in its entirety." *Barkers* at 347.

Springville and MLG (and Barkers) misinterpret this instruction as requiring "immediate vacation" of all rural reserve designations in Multnomah County and as obligating LCDC to remand the matter to Multnomah County. Springville Op. Br. 1–2; MLG Op. Br. 6–8; Barkers Op. Br. 24–25.

The court offered this instruction because the designations are reviewed as a package such that a change in one designation could (though not always will) create a need to change one or more additional designations in order to strike an appropriate balance. Accordingly, the court is simply asking LCDC to keep these relationships in mind, which LCDC can do in the following manner:

- If, per HB 4078(9), LCDC re-affirms Area 9D as rural reserve, then LCDC may determine that the error has no effect because there is no change to any Multnomah County designation.

- Alternatively, if LCDC declines to affirm the rural reserve designation of Area 9D and, instead, remands the error to Multnomah County, then LCDC should simply pass the court's instruction along by instructing Multnomah County to consider the impact of the error on other reserves in Multnomah County.

B. Remaining arguments are unavailing.

Springville's and MLG's remaining arguments relate to Area 9B. These arguments may be dismissed as beyond the scope of this remand proceeding because the court of appeals found no error in the designation of Area 9B.

Lastly, MLG seeks remand to Multnomah County because new evidence *could* be required and changes to designations *could* be needed. MLG is asking LCDC to skip a step - MLG overlooks the fact that HB 4078(9) allows LCDC to consider whether *existing* evidence supports *existing* designations.

VI. Conclusion

For the foregoing reasons and the reasons set forth in Multnomah County's Opening Brief, the county respectfully requests that LCDC utilize its new authority in HB 4078(9) to re-affirm the rural reserve designation of Area 9D instead of remanding the matter to the county.

DATED this 9th day of October, 2014.

Respectfully submitted,

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Thus, we agree with Barkers that the issue on review is whether the county adequately considered the pertinent factors in designating all of the land in Area 9D as rural reserves. Further, as amplified below, we agree with Barkers that LCDC erred in concluding that the county's consideration was adequate. Before turning to our evaluation of the county's "consideration" of the pertinent rural reserve factors, we revisit the legal principles that govern our review.

As we have described, the legislature required that the designation of reserves be based on "consideration" of the pertinent reserve factors. *ORS 195.141(3)*;*ORS 195.145(5)*. Further, as we have explained, ___Or App at ___(slip op at 49), "consideration" of the reserve factors requires that Metro and the counties (a) apply and evaluate each factor, (b) weigh and balance the factors as a whole, *and* (c) meaningfully explain why a designation as urban or rural reserves is appropriate. In other words, "consideration" of the reserve factors is a legal requirement that Metro and the counties must demonstrate in order for the designation of reserves to be sustained.

That demonstration must be made in Metro and the counties' joint and concurrent submittal to LCDC. OAR 660-027-0040(10) (providing, in part, that Metro and the counties "shall adopt a single, joint set of findings of fact, statements of reasons and conclusions explaining why areas were chosen as urban or rural reserves"). LCDC reviews the submittal for "[c]onsideration of the factors in *OAR 660-027-0050 or 660-027-0060*, whichever are applicable." OAR 660-027-0080(4)(c). In turn, we review LCDC's order to determine whether it is "unlawful in substance." *ORS 197.651(10)(a)*.

Thus, in this case, the pertinent legal inquiry reduces to whether LCDC failed to correctly assess whether Multnomah County adequately "considered" the rural reserve factors in designating all of the land in Area 9D as rural reserves. As we have explained, legally sufficient "consideration" in this context, among other things,

> "requires that the local government meaningfully explain why a designation as urban or rural reserves is appropriate by reference to the totality of the land encompassed within that designation. In that regard, to the extent that a property owner challenges the inclusion of his or her property within a designated area, the local government is

> obligated to have explained why its consideration of the factors yields, as to the totality of the designated land, a result that includes that property."__Or App at __(slip op at 55). Accordingly, as did LCDC, we assess the legal sufficiency of the county's explanation as to why all the land in Area 9D—including Barkers' property—was designated rural reserve by turning to the submittal itself."

In that regard, Metro and the counties' submittal explained why Area 9D was designated as rural reserves in conjunction with the explanation pertaining to another area (*i.e.*, Area 9F). In its entirety, the explanation pertaining to Areas 9D and 9F states:

> "Rural Reserves 9A through 9F: West Multnomah County
>
> "This map area includes the north portion of the regional study area. Subareas studied by the [Citizens Advisory Committee (CAC)] in the suitability assessment include NW Hills North ([Study] Area 5), West Hills South ([Study] Area 6), Powerline/Germantown Road-South ([Study] Area 7), Sauvie Island ([Study] Area 8), and Multnomah Channel ([Study] Area 9). MultCo Rec. 2986-3027.
>
> "* * * * *
>
> "Rural Reserves 9D and 9F: West Hills North and South, Multnomah Channel[45]45
>
> "*General Description:* This area extends from the Powerlines/Germantown Rd. area northward to the county line, with Sauvie Island and the west county line as the east/west boundaries. All of the area is proposed as rural reserve. Agricultural designations are Important Agricultural Land in 9D, and Foundation Agricultural Land in area 9F. All of area 9D is within three miles of the UGB, and the three

[45] Our understanding is that Study Area 5 (NW Hills North), Study Area 6 (West Hills South), and Study Area 9 (Multnomah Channel) were ultimately designated rural reserve and denominated Areas 9D and 9F.

mile line from Scappoose extends south to approximately Rocky Point Road in area 9F.

"*How Rural Reserve 9D and 9F Fare Under the Factors:* All of the Multnomah Channel area is an important landscape feature, and the interior area from approximately Rocky Point Rd. south to Skyline Blvd. is a large contiguous block on the landscape features map. MultCo Rec. 1767. This interior area is steeply sloped and heavily forested, and is known for high value wildlife habitat and as a wildlife corridor between the [C]oast [R]ange and Forest Park. It is also recognized as having high scenic value as viewed from both east Portland and Sauvie Island, and from the US Highway 26 corridor on the west. Landscape features mapping south of Skyline includes both Rock Creek and Abbey Creek headwaters areas that abut the [C]ity of Portland on the east and follow the county line on the west.

"The potential for urbanization north of the Cornelius Pass Rd. and Skyline intersection in area 9D, and all of area 9F, was ranked by the CAC as low. Limitations to development in the Tualatin Mountains include steep slope hazards, difficulty to provide urban transportation systems, and other key services of sewer and water. Areas along Multnomah Channel were generally ranked low due to physical constraints including the low lying land that is unprotected from flooding. Additional limitations are due to the narrow configuration of the land between US Highway 30 and the river coupled with extensive public ownership, and low efficiency for providing key urban services. MultCo Rec. 3022-3027. Subsequent information suggested some potential for urban development given the close proximity of US Highway 30 to the area.

"*Why This Area [W]as Designated Rural Reserve:* This area is proposed for rural reserve even though urbanization potential is low. Of greater importance is the high sense of place value of the area. The significant public response in favor of rural reserve affirms the CAC rankings on this factor. In addition, the high value wildlife habitat connections to Forest Park and along Multnomah Channel, the position of this part of the Tualatin Mountains as forming edges to the urban areas of both

> Scappoose and the Portland Metro region, further support the rural reserve designation."[46]

We conclude that, because the county failed to meaningfully explain why its consideration of the rural reserve 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. Two salient conjunctive observations suffice to explain why that is so.

First, in the submittal, Metro and the county both referred to the part of the county record in which the Citizen Advisory Committee and county staff applied each of the rural reserve factors to evaluate all of the land in Study Area 6—which included Barkers' property—and then ranked how the land in that study area fared under each of the factors. The application of the reserve factors to Study Area 6 often yielded different results as to the land in the area that is north of Skyline

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[46] Further, in explaining why the region designated Foundation Agricultural Land as urban reserve, Metro noted:

> "Many areas of Important and Conflicted Agricultural Lands were not designated urban reserve in part because the presence of steep slopes, bluffs, floodplains, streams and habitat, limiting their suitability or appropriateness for urbanization:
>
> "* * * * *
>
> "• Rural Reserve 9D (West Hills South): steep slopes, many stream headwaters and courses. MultCo. Rec. 2993-30[0]3.
>
> "Urban reserve factors (5), (7), and (8) seek to direct urban development away from important natural landscape features and other natural resources. Much of the Important and some Conflicted Agricultural Lands are separated from the UGB by, or include, important natural landscape features or rural reserves on Foundation or Important Agricultural Land:
>
> "* * * * *
>
> "• Rural Reserve 9D (West Hills South): steep slopes, many stream headwaters (Abbey Creek and Rock Creek) and courses. MultCo. Rec. 2993-30[0]3."(Footnote omitted.)

Boulevard and the land that is south of Skyline—including Barkers' property. Nevertheless, in the description in the submittal as to how Areas 9D (which encompasses all of Study Area 6) and 9F "fare under the factors," only a single sentence pertains to the land in Study Area 6 south of Skyline Boulevard: "Landscape features mapping south of Skyline includes both Rock Creek and Abbey Creek headwaters areas that abut the [C]ity of Portland on the east and follow the county line on the west." Nothing more.[47]

Second, the submittal's description of why Areas 9D and 9F were designated as rural reserve consists of a single paragraph with broad, unqualified declarations that appear to relate to some of the factors in OAR 660-027-0060(3) pertaining to the designation of rural reserves to protect important natural landscape features. However, it does not meaningfully explain why consideration of the pertinent factors yields a designation of all of the land in Area 9D—including Barkers' property—as rural reserve. That is so, because, as noted above, the application of the factors to Study Area 6 often yielded different results as to the land in the area that is south of Skyline Boulevard—including Barkers' property. For example, staff ranked the land in the study area south of Skyline Boulevard as having a high potential for urbanization and the land north of Skyline as having a low potential for urbanization.[48] Under those circumstances, a meaningful explanation as to why Area 9D, in its entirety, was designated as rural reserve would have acknowledged that application of the factors failed to yield similar results as to all of the land in the area but explained, nonetheless, why the entire area should be designated as rural reserve.

To be clear, as explained above, the county was not required to justify the designation of *Barkers' property*. Instead, the county was obligated to meaningfully explain why its consideration of the factors yielded a rural reserve designation of *all of the land* in Area 9D. Where, as here, a significant amount of

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[47] The remainder of the submittal's description refers to how the land in Area 9D (*viz.*, land in Study Area 6 north of Skyline as well as land in Study Area 9) and Area 9F (*viz.*, land in Study Area 5) fared under the factors.

[48] The CAC ranked the land west of McNamee Road NW—including Barkers' property—as having a high potential for urbanization and land to the east of McNamee as having a low potential.

land in an area—that is, in this case, the land in Area 9D south of Skyline Boulevard—is dissimilar from the rest of the land in that area as demonstrated by the county's application of the factors, the county must meaningfully explain why, notwithstanding the ostensible differences, it designated all of the land in that area as it did.

Such an explanation need not be elaborate but should acknowledge the dissimilarities and explain why, nonetheless, the county opted for the reserves designation that it did. For example, a county could acknowledge the qualities of dissimilar land within an area (*e.g.*, differences in potential for urbanization, slopes, or the importance of wildlife habitat compared to other land) but explain nonetheless that, despite those dissimilar qualities, the land should be designated along with the other land in the area (*e.g.*, on balance dissimilar land will serve as a buffer so as to reduce conflicts between urban and rural uses).

We thus conclude that LCDC erred in concluding that the county's "consideration" of the factors pertaining to the rural reserve designation of Area 9D was legally sufficient. Accordingly, we must remand LCDC's order in that regard. On remand, LCDC must determine the effect of that error on the designation of reserves in Multnomah County in its entirety.

CERTIFICATE OF FILING AND SERVICE

I certify that on the date indicated below, I filed the original of the **MULTNOMAH COUNTY'S RESPONSE BRIEF ON REMAND FROM COURT OF APPEALS** to:

Land Conservation and Development Commission
635 Capitol Street, NE, Suite 150
Salem, OR 97301-2540

by email to casaria.taylor@state.or.us.

DATED this 9th day of October, 2014.

JENNY M. MADKOUR, COUNTY ATTORNEY
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