

**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**

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

I. Introduction.

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

For the reasons explained below, LCDC should remand the reserves matter to Metro and Multnomah County to address the “designation of reserves in Multnomah County in its entirety.”

II. Procedural Status.

On February 20, 2014, the Oregon Court of Appeals reversed and remanded LCDC’s order acknowledging the joint designation of urban and rural reserves by Metro and the Counties of Clackamas, Multnomah, and Washington (together,

the “Counties”). *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014).

In its decision, the Court concluded that LCDC erred in the following four respects:

- Approving Washington County’s misapplication of the rural reserve factors for agricultural lands;
- Determining that Multnomah County had properly “considered” the rural reserve factors for Area 9D;
- Failing to explain how the Stafford urban reserve designation was supported by substantial evidence, in light of the extensive countervailing evidence in the record; and
- Affirming a decision with inadequate findings on the grounds that there was evidence in the record that “clearly supports” the local decision.

Barkers Five, LLC, 261 Or App at 265. To address these issues, the Court expressly directed LCDC to remand the matter to Metro and the Counties. *Barkers Five, LLC*, 261 Or App at 333, 363-364.

On April 1, 2014, Governor Kitzhaber signed House Bill (“HB”) 4078, which, among other things, re-mapped the location of reserve lands in Washington County and legislatively “acknowledged” the re-mapped reserves. HB 4078 took effect immediately upon its signing.

On July 30, 2014, the Court entered the appellate judgment in this matter.

On August 25, 2014, LCDC entered a Scheduling Order authorizing the parties to brief LCDC on any and all issues pursuant to a defined schedule.

III. Statement of Standing.

MLG has actively participated in the reserves designation process since it began in 2009 and has made submittals to Multnomah County (February 17, 2009; July 20, 2009; August 6, 2009; May 6, 2010), Metro (October 21, 2009; May 18, 2010; and May 20, 2010), the Department of Land Conservation and Development (July 14, 2010 and May 31, 2011), and LCDC (October 8, 2010 and August 8, 2011). Further, MLG was a petitioner to the Court of Appeals in *Barkers Five, LLC*.

MLG will be adversely affected by LCDC's decision because MLG owns approximately 38 acres of property ("Property") within a 607-acre study area in Multnomah County that was designated rural reserve in the original reserves decision. The Property is immediately adjacent to lands within the Metropolitan Portland Urban Growth Boundary to the south and west, and there is substantial evidence in the whole record to support designating it as an urban reserve. See Letter from S. Pfeiffer to DLCD dated July 14, 2010 at 6, 9-14. Further, unlike the remainder of the property included within its rural reserve, the Property is not characterized by significant landscape features, so there is no basis to include the Property as a rural reserve. See Letter from S. Pfeiffer to LCDC dated October 8, 2010 at 8.

IV. Argument: LCDC Must Remand the Submittal to Metro and Multnomah County to Reconsider the “Designation of Reserves in Multnomah County in its Entirety.”

A. The Court Ordered Reconsideration of the “Designation of Reserves in Multnomah County in its Entirety.”

The Court remanded LCDC’s order because LCDC erred in concluding that Multnomah County’s “consideration” of the rural reserve factors for Area 9D was legally sufficient:

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

Barkers Five, LLC, 261 Or App at 345. The Court reached this conclusion because the County’s findings indicated that certain portions of the rural reserve including the Barkers’ property was dissimilar to the remainder of the reserve; however, the findings did not adequately explain why a rural reserve designation was nevertheless appropriate for the entire area:

“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 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 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 rural reserve designation of Area 9D was legally sufficient. Accordingly, we must remand LCDC’s order in that regard.”

Barkers Five, LLC, 261 Or App at 346-347. To address this issue on remand, the Court ordered a determination of how Multnomah County’s error affected “the designations of reserves in Multnomah County in its entirety.” *Barkers Five, LLC*, 261 Or App at 347.

B. Resolving this Remand Issue Requires Consideration of New Evidence and Potential Remapping of Reserves, and LCDC Lacks the Authority to Complete These Tasks.

For two reasons, LCDC lacks the authority to complete the tasks required to resolve this remand issue. Metro and the Counties have the authority to complete these tasks under Oregon law. Therefore, LCDC must remand the matter to Metro and Multnomah County in order to resolve this remand issue.

1. The Multnomah County Remand Issue Requires Consideration of Additional Evidence, and LCDC is Precluded from Accepting New Evidence.

LCDC's authority to review evidence is limited to the local record. ORS 197.633(3). Accordingly, LCDC cannot generally accept new evidence in the first instance. In the present case, resolution of the Multnomah County remand issue will require consideration of new evidence. Therefore, LCDC must remand the submittal.

As ordered by the Court, Metro and Multnomah County must consider how the error in designating the Barkers' property as a rural reserve affects designation of reserves throughout Multnomah County. *Barkers Five, LLC*, 261 Or App at 347. This reconsideration could entail such evidence-intensive questions as re-examining the characteristics and boundaries of all study areas as well as assessing how the designations of reserves affect supply and demand for urban land over the 50-year study period.

Although LCDC has the authority to affirm a local government's decision with inadequate findings if the evidence "clearly supports" the decision, the evidentiary record on this issue does not "clearly support" the reserves designations in Multnomah County for the reasons previously set forth by MLG on the record. Therefore, LCDC must remand the entire submittal to allow Metro

and Multnomah County to, as needed, take new evidence to address this remand issue.

2. Resolution of the Multnomah County Remand Issue May Require Remapping Reserves, a Task that Only Metro and the Counties Have the Authority to Complete.

LCDC should also remand the entire submittal to Metro and Multnomah County because the Court's order likely requires modifying and applying reserves designations, a task LCDC lacks the authority to complete. Under Oregon law, only Metro and the Counties have the authority to designate reserves. *See, e.g.*, ORS 195.141 (authorizing a county and metropolitan service district to jointly designate reserves); OAR 660-027-0020 (authorizing Metro and counties to designate reserves). LCDC's role is limited to acting as a review body "[a]fter designation of urban and rural reserves." OAR 660-027-0080(2). Thus, LCDC lacks the authority to designate, undesignate, or re-designate reserves.

In the present case, resolution of the Multnomah County remand issue may require modifying or applying reserves designations. As explained above, the Court ordered a remand to address how the error committed by Multnomah County/LCDC affected "the designations of reserves in Multnomah County in its entirety." *Barkers Five, LLC*, 261 Or App at 347. Thus, resolution of this issue will require consideration of, and possible changes to, reserve designations across

Multnomah County. Such re-mapping could include removing the rural reserve designation for the Property on the same grounds argued by the Barkers. That is, like the Barkers' property, the Property is unlike the remainder of the property included within its rural reserve, so there is no basis to include the Property as a rural reserve. There is ample evidence in the record to support this conclusion:

“This substantial evidence included the following: Metro’s findings that slopes on the Property are less significant than those found in Area 9C; the conclusion of Multnomah County staff that, unlike surrounding areas, the Property was not well-suited for designation as a ‘rural reserve’ (‘This small area does not appear to be a good fit with the key landscape features factors and should be ranked low.’); and expert testimony from a private environmental consultant that the Property has low suitability as a ‘rural reserve’ upon application of the relevant factors in the context of the available record.”

Letter from S. Pfeiffer to LCDC dated October 8, 2010 at 8.

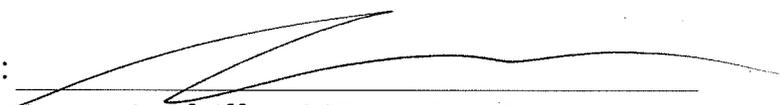
In conclusion, resolution of this remand issue will potentially require designation of reserves. Although LCDC lacks the authority to designate reserves, Metro and the Counties have such authority. Therefore, LCDC must remand the submittal to allow Metro and Multnomah County to address this issue.

V. Conclusion.

For the foregoing reasons, LCDC should enter an order remanding the reserves matter in its entirety to Metro and Multnomah County to reconsider “designations of reserves in Multnomah County in its entirety.”

DATED: September 25, 2014

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

