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DEPT OF

NOV 06 2017

**LAND CONSERVATION
AND DEVELOPMENT**

November 6, 2017

Mr. Jerry Lidz
LCDC Chair
635 Capitol St NE Ste150
Salem OR 97301-2540

Re: **Land Conservation and Development Commission Hearing on Metro Urban and Rural Reserves**
Urban/Rural Reserve Matter
Our File No. 52736-73749

Dear Mr. Lidz:

The Barker's 5 LLC, and the Barker family (collectively, "Appellants") owners of property in Area 9D in Multnomah County, filed valid objections to Multnomah County and Metro's decision designating rural reserves, Metro Ord. No. 17-1397, and Multnomah County Ord. No. 1246. On October 26, 2017, the Department issued a Director's Report responding to Multnomah County and Metro's decision and all objections. This letter constitutes exceptions to that Director's Report on behalf of Appellants. We recommend that the Commission reject Metro and Multnomah County's decision to designate the lower portion of Area 9D, as a rural reserve. We ask the Commission to remand this portion of the reserves decision to Multnomah County and Metro.

Summary of Exceptions

Multnomah County's failure to reopen the record, and its reliance on seven year old data, prevented stakeholders from adequately participating in the process in violation of Goal 1, and also resulted in a violation of the "adequate factual basis" requirement of Goal 2. Multnomah County's process was procedurally deficient, and Appellants suffered cognizable prejudice as a result of those deficiencies under ORS 197.633(b). The deficiencies, in violation of state land use goals as well as Multnomah County's Citizen Involvement Plan, which requires "multiple citizen input and involvement opportunities and activities... during all phases of land use planning actions" resulted in a decision that lacks substantial evidence in the record as a whole to support Multnomah County's decision, in violation of the requirements of ORS 197.633(c).

Multnomah County's failure to consider the build-out of North Bethany and impacts on the lower portions of Area 9D violate both the terms and the spirit of Goal 2, as well as this process. While there is no bright line rule for when data is too stale to result in sufficient data for the "supported by substantial evidence" standard, the duration of seven years, combined with the actual development that occurred during that period, results in a decision that is not supported by substantial evidence. Where factors are present that would support either an urban reserve or rural reserve Multnomah County is required to demonstrate a balancing, or consideration, of pertinent factors in order to determine the

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proper designation of reserves. That balancing test presupposes accurate data. Metro opened the record and allowed new evidence. However, the record does not demonstrate that they balanced the urban and rural reserve factors. Additionally, Multnomah County did not consider “all evidence in the record” as required by the substantial evidence test, because they did not consider the evidence that was before Metro. Based on the evidence in front of Metro, a reasonable person could not reach the decision that was made by Multnomah County, that the lower portion of Area 9D should be designated as a Rural Reserve.

The first Urban Reserve factor under ORS 195.145(5) (to look at when determining whether land should be designated as an Urban Reserve) is whether a potential urban reserve area “can be developed at urban densities in a way that makes efficient use of existing and future public investment and infrastructure.” The first, and remaining urban factors, focus on two urban form elements:

- (1) Can urban services be efficiently provided over the long-term? (Factors (a), (c), (d))
- (2) If brought into the UGB, would the potential urban reserve reinforce a compact, healthy urban community – healthy economically, socially, and environmentally? (Factors (b), (d), (f))

As a result, the fact that North Bethany, immediately adjacent to Area 9D, is close to being built out, and that there are urban services such as water, sewer, a school and transportation infrastructure within feet of the Barker property and other properties in the lower portion of Area 9D, is absolutely relevant to the balancing. The information that was in front of Multnomah County was that North Bethany could speculatively urbanize. With each day that went by, since Multnomah County closed the record, the case for an Urban Reserve designation in the lower portion of Area 9D became stronger.

Similarly, the Rural Reserve Factors found in ORS 195.141 are based on the qualities of the land, its location in relationship to other nonfarm uses, and whether it is capable of sustaining long term agricultural options. These criteria are qualitative and fact specific. The urbanization of North Bethany, which is estimated to be fully built out within the next two years, results in thousands of trip counts and other factors that would argue against a rural reserve designation for the lower portion of Area 9D. The build out of North Bethany and potential conflicts between urban and agricultural uses is absolutely relevant to the question of the proper classification of the lower portion of Area 9D. The record in front of Metro demonstrated that the properties in the lower portion of Area 9D are scrub lands, do not have water rights, and are not in production. With each day that has gone by since Multnomah County closed the record, seven years ago, the case for the lower portion of Area 9D being a designated Rural Reserve has diminished. The record for Urban Reserve status in front of Metro was incredibly strong, and the evidence for a Rural Reserve designation was almost non-existent.

Where substantial evidence in the record supports a county's adopted findings concerning compliance with the Goals and the commission's administrative rules, the commission nevertheless must determine whether the findings lead to a correct conclusion under the Goals and rules. *See 1000 Friends of Oregon v. LCDC*, 244 Or App 239, 267-268, 259 P3d 1021 (2011). In this instance, the facts do not support the designation of the lower portion of Area 9D as a Rural Reserve.

I. General Exceptions

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A. Multnomah County's Refusal to Reopen the Record, Resulted in an Inadequate Factual Basis for their Decision, in Violation of Statewide Land Use Goal 2 ("Goal 2")

When making a Rural Reserve designation, a county must (1) apply and evaluate each rural reserve factor, (2) weigh and balance the factors – which are not independent criteria – as a whole, and (3) meaningfully explain why a rural reserve designation for the entire area is appropriate. *Barkers Five v. LCDC*, 261 Or App 259, 301 (2014). Goal 2 requires that there be an adequate factual base for decisions that relate to the use of land. The Goal 2 requirement for an adequate factual base requires that a legislative land use decision be supported by substantial evidence. ORS 197.633(3)(a).

While there is no bright line rule regarding whether data is too stale to be sufficient, LCDC and the Oregon Court of Appeals have recognized at least in the context of an Economic Opportunities Analysis that there are limitations on a jurisdiction's ability to use dated information. The court wrote that the decision could be based on "information available at the time of preparation, so long as that information is not significantly undercut by evidence made part of the EOA adoption record." See *Zimmerman v. LCDC*, 274 Or App 512, 526 (2015).

In that case, the city of Scappoose had relied in part on employment data and projections collected prior to the 2008 recession. The city's reliance on that data was ultimately upheld, but there are several important distinctions between the facts in *Zimmerman* and the facts present in this case. The city allowed new data to be entered into the record. *Zimmerman* at 525. And, the city clearly demonstrated why it was choosing to rely upon the assumptions within the EOA. Specifically, "[t]he city did not ignore the testimony regarding the new data, as is alleged. The council responded to the testimony in its deliberations, explaining why it did not choose to alter the base year for the assumptions in the EOA." *Zimmerman* at 525.

In this case, Multnomah County did not allow any new information into the record. As a result, the Multnomah County Commissioners did not articulate why they were choosing to rely upon historic data, versus current data, as it related to the urban and rural reserve factors. In regards to the record, "there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n. 6, 38 P.3d 956 (2002). In this case, there is not.

Goal 2 requires that the Multnomah County's land use planning process assure an "adequate factual base" for land use decisions and actions. Among the factors that Goal 2 required Multnomah County to consider are "man-made structures and utilities, their location and condition" and "population and economic characteristics of the area." Multnomah County's refusal to reopen the record resulted in the Multnomah County Commissioners relying upon seven-year-old data. Their data did not include the substantial urbanization that has occurred in the area known as North Bethany, which is directly adjacent to Appellant's property and the other properties in the lower portion of Area 9D. The urbanization puts a public school and other urban-level services within feet of Appellant's property. Traffic conflicts or other impacts between the North Bethany residential uses and the lower portions of Area 9D make farm use of the property impracticable.

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Additionally, because of ORS 215.213(1)(k), the designation of the lower portion of Area 9D as a rural reserve will prevent transportation infrastructure improvements to the portions of Kaiser and Old Germantown Road, the run through the Rural Reserve.

The Goal 2 “adequate factual basis” obligation is designed to ensure that the evidence relied upon in such decisions is relatively current or has not been overtaken by recent events. In this case, Multnomah County’s lack of consideration of North Bethany and its impact on the lower portions of Area 9D violate both the terms and the spirit of Goal 2, and Appellants suffered cognizable prejudice as a result of Multnomah County’s deficiencies in violation of ORS 197.633(3)(b). LCDC’s standard of review in determining whether a violation of ORS 197.633(3)(b) occurred “is whether the local government failed to follow the procedures applicable to the matter before the local government in a manner that prejudiced the substantial rights of a party to the proceeding. *Barkers 5* at 413. Multnomah County’s Citizen Involvement Program is predicated on “multiple citizen input and involvement opportunities and activities... during all phases of land use planning actions.” See *Multnomah County Comprehensive Plan p. 1-9*. In this case, the inability for Appellants to enter current data into the record, prejudiced the substantial rights of Appellants as balancing the urban and rural designations using current data that would have resulted in a reasonable person designating the lower portion of Area 9D as an Urban Reserve. At a minimum, the county should have reviewed the current data and explained in its findings why it chose to ignore it, or why the balancing favored retaining the rural reserve designation.

Given Multnomah County’s failure to carefully consider all data, and make findings that meaningfully explained its decisions, Multnomah County’s decision is legally flawed and should be remanded.

B. Multnomah County Violated OAR 660-027-0040(2) By Not Utilizing the Most Recent Urban Growth Report

Oregon Administrative Rule (“OAR”) 660-027-0040(2) specifies that reserves are calculated using “the most recent inventory, determination and analysis performed under ORS 197.296.” DLCD staff argues that:

“Metro adopted an ‘urban growth report’ (its assessment of urban land capacity and need under ORS 197.296) in November 2015 – after the initial reserves decisions and after the Court of Appeals and LCDC remands, but before the local governments conducted hearings to address the remand. The urban growth report was therefore available for consideration by Multnomah County and Metro during the remand-response hearings.”

Although Metro reviewed the UGR, as the adopting agency, it is not in Multnomah County’s record, and there is no evidence that the Multnomah County considered the UGR. Moreover, at the time of adoption of the UGR by Metro, a majority of the Multnomah County Commissioners did not hold office. So, even if the Multnomah County Commission participated in the UGR process at the time of adoption, it was not before a majority of the Multnomah County Commissioners. However, the UGR is not in the record, and there is no evidence that the Multnomah County considered it. The mere fact that it was available is not sufficient to demonstrate that Multnomah County met its obligations under

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OAR 660-027-0040(2) to calculate necessary reserves. The OAR is not Metro specific, rather it applies to the process as a whole.

Multnomah County's decisions are legally flawed and should be remanded.

C. Multnomah County's Failure to Allow Evidence on HB 4078's Global Impact on Multnomah County Reserves, Violated Goal 2 and Goal 1

As DLCD staff points out, "Multnomah County adopted Ordinance No. 1246, and section 4 incorporated Metro Ordinance No. 17-1397 by reference. Attachment C at MC-21003."

The Metro ordinance includes findings related to the effect of HB 4078. However, Multnomah County did not allow testimony regarding the impact of HB 4078 into the record and, because the record was never opened, it is unclear how it could end up in the record. Multnomah County's Citizen Involvement Program provides "[l]and use planning processes, outreach, and involvement activities will respect and encourage participation of all citizens and vested organizations, regardless of background or viewpoints." In this instance, the Multnomah County Commission incorporated the findings and legal conclusions of Metro, but did not allow testimony by other citizens and vested organizations." See *Multnomah County Comprehensive Plan p. 1-9*. This decision denied Appellants the ability to meaningfully offer testimony regarding the impacts of HB 4078, and participate in the process in violation of Goal 1, and resulted in an inadequate record in violation of Goal 2.

Multnomah County's decision is legally flawed and should be remanded.

D. Multnomah County's Lack of Coordination with Metro Resulted in the Governments Having Substantially Different Records, and an Inability for Metro, affected Governmental Units and the Public to Meaningfully Participate in the Process in Violation of Goal 1, and Goal 2

Multnomah County's Citizen Involvement Process recognizes that "[a]n informed public is critical to effective participation in land use planning. This requires the County to provide education and understandable information for the public to have a clear understanding of the processes, procedures, and timetables of action concerning land use planning issues, as well as to provide comprehensive information about the matters at issue." See *Multnomah County Comprehensive Plan p. 1-9*. In this case, the record is replete with emails, demonstrating that members of the public was not informed and did not have the information necessary for meaningful participation, [MC 20001, 20003, 20005, 20012, 20018, 20022] with one person writing on April 29, 2017, "I and some of my neighbors will be attending your hearing on 5-4-17 with NO idea what you are proposing and NO opportunity to submit testimony because we don't even know what the hearing is considering." [MC-20010].

Multnomah County's complete lack of coordination with "Affected Governmental Units," and the public is illustrated by Jeff Pricher, the Division Chief and Fire Marshal for the Scappoose Fire District and Columbia River Fire and Rescue who wrote, on Tuesday May 2:

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"I am trying to figure out if I need to attend the public hearing on behalf of the fire district as the Fire Marshal. Unfortunately, the ordinance link is a circular link and always takes me back to the board meeting main page. Can you please forward me a copy of the ordinance and perhaps correct the link? Additionally, if the link is truly broken, I am assuming that the general public will not have had the requisite time to evaluate whatever is in the ordinance and the time between the 28th of April and the 4th of May should be reset. At this time, the fire district wishes to ask that no action be taken at the public hearing since there is no time to evaluate the ordinance. " [MC-20025]

This falls well short of the requirements found in Multnomah County's Citizen Involvement Program, in violation of Goal 1. Additionally, Multnomah County's Citizen Involvement Program is predicated on "multiple citizen input and involvement opportunities and activities... during all phases of land use planning actions." See *Multnomah County Comprehensive Plan p. 1-9*. The remand of Area 9D to Multnomah County was undeniably a "phase" of the "land use planning action." Multnomah County's failure to reopen the record violated the terms of its Citizen Involvement Program and resulted in violations of ORS 197.633(3)(a) and ORS 197.633(3)(b).

While there is no requirement that the record in front of Metro and the record in front of Multnomah County be identical, there is a fundamental disconnect when one jurisdiction reopens the record while the other jurisdiction chooses not to do so. This is particularly true given the duration time between the date when Multnomah County closed the record, and the date when Metro reopened the record. The fact that members of the Metro Council were asking whether the case could be remanded to them after it was appealed, and joking that it should so that a third remand could be avoided, is evidence that the Metro Council did not feel that Multnomah County had adequately considered and balanced the Urban Reserve and Rural Reserve factors. Metro Counsel's statement that in the event of a remand "there could be conversations between the jurisdictions" [June 8 Metro Council meeting at 1:01:45] is evidence of the lack of coordination, required by this process under Goal 2, was not present.

Multnomah County and Metro's decision is legally flawed and should be remanded.

E. Multnomah County's Findings are substantially Identical to their Previously Submitted Pleadings

The findings, adopted by Multnomah County are substantially identical to their previously submitted pleadings, and rely on evidence in the existing record, instead of current evidence. While the commission previously concluded that the evidence was substantial evidence that does not mean that the evidence continues to meet the "substantial evidence" threshold. Over the last seven years, the evidence for an Urban Reserve designation has become compelling, while the evidence in the Record for a Rural Reserve is very thin. The Court of Appeals requires a "meaningful explanation" *Barkers Five v. LCDCC*, 261 Or App 259, 301 (2014). Given the weight of the evidence, there has been no meaningful explanation.

For the reasons identified above, Multnomah County and Metro's decision is legally flawed and should be remanded.

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F. The Record Reflects that a Rural Reserve Designation is Not Appropriate for the Properties in the Lower Portion of Area 9D, and there is an Inadequate Factual Basis for that Designation

The first Urban Reserve factor under ORS 195.145(5) to look at when determining whether land should be designated as an Urban Reserve is whether a potential Urban Reserve area “can be developed at urban densities in a way that makes efficient use of existing and future public investment and infrastructure.” The first, and remaining urban factors, focus on two urban form elements:

- (1) Can urban services be efficiently provided over the long-term? (Factors (a), (c), (d))
- (2) If brought into the UGB, would the potential Urban Reserve reinforce a compact, healthy urban community – healthy economically, socially, and environmentally? (Factors (b), (d), (f))

The fact that North Bethany, immediately adjacent to Area 9D, is close to being built out means that that area’s future urbanization is no longer speculative. It has, in fact, happened. That urbanization has occurred is absolutely critical to determining whether the balancing of factors should result in an Urban Reserve designation, Rural Reserve designation, or an Undesignated designation.

Similarly the Rural Reserve factors found in ORS 195.141 are based on the qualities of the land, its location in relationship to other nonfarm uses, and whether it is capable of sustaining long term agricultural options. These criteria are qualitative and fact specific. The urbanization of North Bethany, which is estimated to be fully built out within the next two years, results in thousands of trip counts and other factors that would argue against a Rural Reserve designation. The build out of North Bethany and potential conflicts between urban and agricultural uses, is absolutely relevant to the question of the proper classification of the lower portion of Area 9D.

Metro and the Multnomah County’s consideration of the factors is reviewed for legal error. *See Barker’s 5* at 416. The jurisdictions are required to “(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.” *Id.* Under the ORS 197.633(3)(a) “substantial evidence” standard, they must demonstrate that the evidence in the record, as a whole, permits a reasonable person to make the finding. *See Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). Multnomah County did not reopen the record, as required under Goal 1, Goal 2, and their Citizen Involvement Program, they were not balancing the factors based on the record as a whole. To the extent that the record reflects any balancing, the balancing did not occur utilizing reliable facts or evidence. While Metro reopened the record, the record demonstrates that they merely adopted the findings of Multnomah County rather than carefully balancing the factors as a whole in making a determination. The evidence in the record in front of Metro is so at odds with a Rural Reserve designation, that members of the Metro Council discussed it being remanded. There is not substantial evidence in the record. However, even if there was, it would not support the conclusion reached by Multnomah County and Metro.

Where substantial evidence in the record supports a county’s adopted findings concerning compliance with the Goals and the commission’s administrative rules, the commission nevertheless must determine whether the findings lead to a correct conclusion under the Goals and rules. *See 1000 Friends of*

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Oregon v. LCDC, 244 Or App 239, 267-268, 259 P3d 1021 (2011). In this instance, the facts do not support the designation of the lower portion of Area 9D as a Rural Reserve. It supports a designation of Urban Reserve.

For the reasons identified above, Multnomah County and Metro's decision is legally flawed and should be remanded.

Sincerely,

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