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VIA HAND DELIVER AND E-MAIL

August 14, 2017

Urban and Rural Reserves Specialist
DLCD
635 Capitol St NE Ste 150
Salem OR 97301

Re: **Objections to Redesignation of Urban and Rural Reserves in Metropolitan Portland
(Metro Ord. No. 17-1397, Multnomah County Ord. No. 1246)**
Our File No. 52736-73749

Dear Urban and Rural Reserves Specialist:

This office represents Barker's 5 LLC, and the Barker family (collectively, "Appellants"), the owner of property in Area 9D in Multnomah County. The purpose of this letter is to file written objections with the Department of Land Conservation and Development ("DLCD") to the redesignation of the lower portion of Multnomah County Area 9D as rural reserves by the Metro Council ("Metro") and Multnomah County.

Participation in the Process

Appellants' have continuously participated in the Urban and Rural Reserves process dating back prior to the decision of the Oregon Court of Appeals in *Barker's 5 LLC v. LCDC* which remanded the Reserves designation to LCDC in 2014. Subsequent to the Court of Appeals' decision, Appellants have remained active participants in all proceedings before LCDC, Multnomah County and Metro. The following is a summary of Appellants' continuing participation in the process wherein Appellants have maintained their standing in the process:

On October 8, 2015, Wendie Kellington provided a letter to Metro on behalf of Appellants, regarding the LCDC Remand Order with attachments;

On March 23, 2017, Peter Watts provided a letter to Metro on behalf of Appellants, regarding objections to Metro Ordinance 17-1397;

On May 3, 2017, Peter Watts provided a letter to Multnomah County on behalf of Appellants, regarding objections to Multnomah County Ordinance 1246;

On May 3, 2017, Steven Barker provided a letter to Multnomah County on behalf of Appellants, regarding objections to Multnomah County Ordinance 1246;

On May 4, 2017, Sandy Baker provided a letter to Multnomah County on behalf of Appellants, regarding objections to Multnomah County Ordinance 1246, and provided oral testimony at the hearing;

On May 4, 2017, Matt Lowe provided a letter to Multnomah County on behalf of Appellants, regarding objections to Multnomah County Ordinance 1246, and provided oral testimony at the hearing;

On June 7, 2017, Peter Watts provided a letter to Metro on behalf of Appellants, regarding objections to Metro Ordinance 17-1405, and provided oral testimony at the June 8, 2017 hearing;

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On June 7, 2017, Steven Barker provided a letter to Metro on behalf of Appellants, regarding the Barker property;

On June 8, 2017, Sandy Baker provided written and oral testimony on behalf of Appellants, regarding objections to Metro Ordinance 17-1405;

On June 14, 2017, Steven Barker provided a letter on behalf of Appellants, regarding the remand;

On June 15, 2017, Peter Watts provided a letter on behalf of Appellants, regarding objections to Multnomah County Reserves;

On June 15, 2017, Sandy Baker provided a letter on behalf of Appellants, regarding the Barker's 5 LLC;

Objections and Proposed Changes:

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

Goal 2 requires that Multnomah County's land use planning process assure an "adequate factual base" for land use decisions and actions. Among the factors that Goal 2 requires Multnomah County to consider are "man-made structures and utilities, their location and condition" and "population and economic characteristics of the area." In this case, Multnomah County's refusal to reopen the record resulted in the Multnomah County Commissioners relying upon data that is more than seven years old. The County's data does not include the substantial urbanization that has occurred in the area known as North Bethany, which is directly adjacent to Appellants' property and the other properties in the lower portion of Area 9D. [METRO 157-167] This urbanization has resulted in a public school and other urban-level services within feet of Appellants' property. [METRO 116] Traffic conflicts or other impacts between the North Bethany residential uses and the lower portions of Area 9D make farm use of Appellants' and nearby property impracticable. [Metro 103 and 110]. Additionally, because of ORS 215.213(1)(k)(relating to the reconstruction and modification of roads and supporting infrastructure), 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 that 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 otherwise 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.

The Ordinance should be remanded to Multnomah County so that the County can open the record, consider evidence related to the North Bethany Area development, and other factors and properly classify the lower portion of Area 9D.

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

Oregon Administrative Rule ("OAR") 660-027-0040(2) specifies that reserves are to be calculated using "the most recent inventory, determination and analysis performed under ORS 197.296." Therefore, the most recent Urban Growth Report ("UGR") is to be utilized during the pendency of the Urban and Rural Reserve process. Metro adopted the 2014 UGR on November 12, 2015; however, Multnomah County refused to reopen the record to add the most recent UGR or to introduce any new evidence from the

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last seven years relating to the Reserve factors applicable to Area 9D and regional development needs generally.

The Ordinance should be remanded to Multnomah County to reopen the record, include the most recent Urban Growth Report, and make a decision based on current factors.

Multnomah County Failed to Meaningfully Consider the Impact of HB 4078 on Regional Reserves or Allow Evidence on HB 4078's Global Impact on Multnomah County Reserves, in Violation of Goal 2 or Allow Evidence in Violation of Goal 1

HB 4078, the so called Land Use Grand Bargain, had the effect of decreasing the net total number of Metro region Urban Reserves by 11.3%. Multnomah County Counsel has acknowledged that the applicable statutes and OARs contemplate regional coordination. [METRO 90] As such, a change in one county's map necessitates changes in the other two maps. The record fails to demonstrate that Multnomah County has in any meaningful way taken notice of or addressed the regional impact of a statistically significant loss of Urban Reserves. Moreover, the Multnomah County Commission refused to allow or consider any evidence on the impact of HB 4078, in violation of Goal 1 citizen involvement. The impact of the HB 4078 is particularly acute in Multnomah County given that land that has been left "undesignated" is a grouping of islands in the Columbia River [METRO 00003]. Government Island is the largest of these islands. Metro owns 224 acres of Government Island, [METRO-00158] and the remainder of the 2,238 acres [METRO-00913] are subject to a ground lease held by the Oregon Parks and Recreation Department with 81 years left on its term. [METRO 00158] Practically speaking, Multnomah County will be unable to rely on Government Island for development during the next 50 years in the event that the current urban reserves are insufficient.

The Ordinance should be remanded to Multnomah County to reopen the record, in order to determine whether there is sufficient buildable land region wide, given the loss of net urban reserves as a result of HB 4078.

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

While the Multnomah County Commission refused to reopen the record and relied on data from 2010, Metro opened the record and allowed Appellants and others to submit current data related to Area 9D and to advocate, regarding the proper Reserves designation. Notably, the record related to the Clackamas County portion of the remand, which was remanded to Metro, shows robust coordination between Metro and Clackamas County. To the contrary, the record relative to the Multnomah County remand reflects no coordination between Multnomah County and Metro.

The overarching purpose of Goal 2 is to establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions. Goal 2 contemplates coordination between the impacted governments and agencies that allows identification of issues and problems, inventories, and other factual information that leads to final policy choices that have at least some rational factual basis. The lack of communication and coordination between Metro and Multnomah County is illustrated in the discussion that occurred at the June 8, 2017, Metro hearing to consider this issue. In response to questions and concerns related to the process and options that the Metro Council could take, Metro's Counsel responded "it's a pretty challenging ask because what you would need to do is essentially assert yourselves and second guess a decision that's already been made by the Multnomah County Board of

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Commissioners regarding what they want to do with the rural reserves in their county.” [June 8, Council meeting at 55:05] Councilor Collette asked “if we submit this to LCDC, if they decide to remand a portion, the Multnomah County, for example, does that hold up the Clackamas County?” [June 8 Council meeting at 55:28].

President Hughes asked “is it conceivable that the argument could be that this land was not appropriately designated urban reserve so therefore the remand could come to us... if the determination was that there hadn’t been appropriate consideration of urban reserve criteria and that should be considered, could that potentially come to us?” [June 8, Council meeting at 1:00:47] In response to Metro Counsel’s answer that it would likely be remanded to Multnomah County, but there could be conversations between the jurisdictions, President Hughes jokingly replied “how not to get it remanded for the third time.” [June 8 Council meeting at 1:01:45].

Additionally, the record in front of Multnomah County reflects significant confusion over what the commission was doing [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:

“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]

Fire Marshal Pricher’s understanding of the public process necessary to satisfy Goal 1 also demonstrates Multnomah County’s violation of the Goal 2 guidelines for preparation of plans, coordination, and communication. In short, the fact that the Fire Marshal for an impacted Special District had no idea of what the hearing was about less than two days before the hearing is striking.

The Ordinance should be remanded to Multnomah County to reopen the record, take evidence and testimony, and coordinate with the Metro Council and staff, as well as affected governmental units.

Multnomah County’s Findings are Substantially Identical to their Previously Submitted Pleadings

On January 15, 2015, the Land Conservation and Development Commission (“LCDC”) remanded Rural Reserve Area 9D to Multnomah County, for **further findings** under ORS 195.141 and 195.145, and OAR 660, division 27. (emphasis added). Multnomah County has taken no new evidence nor has it undertaken to develop “further findings” beyond what the County presented to LCDC prior to the remand. Multnomah County’s findings and analysis for Area 9D’s classification as a Rural Reserve is

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substantially identical to Multnomah County's Opening Brief, submitted to LCDC on September 25, 2014. While occasionally a word is changed, or the order of arguments is adjusted, with the exception of the seven paragraphs under Section B of the findings and analysis, Multnomah County has presented no meaningful differences between the newly presented "findings" and the findings and arguments that Multnomah County previously submitted to LCDC in 2014. Appellants highlighted and presented to both Multnomah County and Metro those portions of the findings that are identical and cross-referenced where those same "findings" appear in Multnomah County's prior briefing to LCDC [MC – 20042-20072] [METRO 00168-00198].

The Ordinance should be remanded to Multnomah County for further findings, consistent with LCDC's Order dated January 15, 2015.

The Record Reflects that a Rural Reserve Designation is Not Appropriate for Appellant's Property and Surrounding Properties, and there is an Inadequate Factual Basis for that Designation

The Court of Appeals articulated standards for Rural Reserves in *Barker's 5 LLC v. LCDC* finding that Rural Reserves should be (i) Foundation Agricultural Lands which "provide the core support to the region's agricultural base" [METRO-00113]; (ii) Important Agricultural Lands which are "suited to agricultural production and contribute to or have the ability to contribute to the commercial agricultural economy" [METRO-00113]; or Conflicted Agricultural Lands which are "lands whose agricultural capacity (soils/water) is more times than not considered excellent." [METRO-00113]. The Appellants' property, as well as the surrounding properties in the lower portion of Area 9D, do not have the factors or attributes consistent with Foundation, Important or Conflicted Lands. The property has not been farmed and it has no water rights. [METRO-00150]. The property abuts the North Bethany area with 15,000 persons who are expected to live in the area [METRO-00150] which is bisected by Kaiser and Old Germantown Roads and has a high probability for traffic conflict. [METRO-00116]. The increasing amount of traffic and inability to expand roads in Rural Reserve Areas (because of ORS 215.213(1)(k)) make farming completely unfeasible. Multnomah County has provided no evidence that the lower portion of 9D has any factors or attributes consistent with Foundation, Important or Conflicted Lands. As a result, Appellants are being forced to prove the negative. There is an insufficient record, per Goal 2, to support a Rural Reserve designation for Appellants' property and the surrounding properties.

The Ordinance should be remanded to Multnomah County, so that the property can be properly designated.

The Record Reflects that an Urban Reserve Designation is Appropriate for Appellants' Property and Surrounding Properties and there is an inadequate factual basis for a Designation that is not Urban Reserve

The Court of Appeals articulated standards for Urban Reserves in *Barker's 5 LLC v. LCDC* finding that Urban Reserves factors include that the property can be developed at urban densities in a way that (i) makes efficient use of existing and future public infrastructure investments; (ii) includes sufficient development capacity to support a healthy urban economy; (iii) can be served by public schools and other urban-level public facilities and services efficiently and cost-effectively by appropriate and financially capable service providers; (iv) can be designed to be walkable and served by a well-connected system of streets by appropriate service providers; (v) can be designed to preserve and enhance natural ecological systems; and (vi) includes sufficient land suitable for a range of housing types. Appellants' property is immediately adjacent to North Bethany and the record at Metro demonstrates that the factors necessary for an Urban Reserve designation are present. The slope of

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the property is very manageable [METRO-00119] and significant construction activity is currently occurring. [METRO-00120-00124]. A planned subdivision is located adjacent to the property. [METRO-00116]. The new school is visible from Appellants' property. [METRO-00109] Appellants' property is surrounded by urban development, with Portland to the North and West, and North Bethany to the South. [METRO-00153]. The City of Beaverton has expressed interest in having Appellants' property receive a designation that will allow urbanization. [METRO-00154-00155]. For purposes of comparison, Area 1D, which received an Urban Reserve designation in Clackamas County, is approximately 6.2 miles from available sewer while Appellants' property currently lies adjacent to public sewer and other urban infrastructure. [METRO-00158, 00163, and 00164]. Finally, experienced developers have recognized that Appellants' property is, quite simply, "prime development land." [METRO-00165].

The Ordinance should be remanded to Metro and Multnomah County, so that the property can be properly designated as an Urban Reserve.

Conclusion

For the aforementioned reasons the Ordinance should not be remanded and Appellants' Property, as well as surrounding properties in the lower portion of Area 9D, should not be designated as Rural Reserve. Appellants are prepared to submit additional briefing on the issues to LCDC in advance of a hearing before the Commission. Thank you for your time and consideration.

Sincerely,

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