Jeff Bachrach
Bachrach.Law P.C.

The Pittock Block, Suite 320
921 SW Washington Street
Portland, Oregon 97205

(o) 503.295.7797
(c) 503.799.0242
jeffb@bachrachlaw.com

November 6, 2017

Jerry Lidz, Chair
Land Conservation and Development Commission
635 Capitol Street NE, Suite 150
Salem, OR 97301

SUBMITTED ELECTRONICALLY

Re: Metro Urban and Rural Reserves - Agenda Item 15
Exception to Director's Report

Dear Chair Lidz and Commissioners,

Pursuant to OAR 660-025-0160(4), this letter and the attached memorandum are submitted on behalf of Lanphere Construction and Development LLC ("LCD").

LCD owns an 18.25-acre site located south of Wilsonville at the southwest corner of the I-5 interchange with Miley Road (Exit 282).

Pursuant to a Conditional Use Permit ("CUP") approved by Clackamas County in 2005, the property has been developed with a 3.5-acre asphalt parking lot, a warehouse, two storage buildings, and a cell tower and maintenance shed.

The property was first designated rural reserve in 2010, but there was no evidence in the record about the CUP approval and the fact that the site had been developed with urban-level improvements. Clackamas County allowed all parties to testify and submit new evidence during its remand hearings so LCD was able to present the evidence that was missing from the 2010 record.

Based on that evidence, LCD argued that the rural reserve designation should not be re-applied and that its property should be left in its current undesignated status. Clackamas County failed to consider the new evidence and instead re-adopted the rural reserve designation based on the 2010 record.

LCD is requesting that the Commission remand the order with instruction to the county to consider the new evidence, apply the factors, and either remove the rural reserve designation or adopt findings to explain why the designation is appropriate.

Very truly yours,

Jeff Bachrach

Jeff Bachrach

BEFORE THE LAND CONSERVATION
AND DEVELOMENT COMMISSION

Exceptions to Director's Report, October 26, 2017, Re:
Metro Urban and Rural Reserve Designations

Submitted by Jeff Bachrach, Bachrach.Law PC
On behalf of Lanphere Construction and Development LLC ("Petitioner" or "LCD")
November 6, 2017

---

1. **Petitioner's Request.**

Petitioner requests that LCDC remand Clackamas County Order 06-2017 (urban and rural reserves) with instructions that the county consider the new evidence it allowed to be submitted into the record, apply the applicable rural reserve factors in light of that evidence, and then either remove the rural reserve designation from Petitioner's property or adopt findings to explain why the designation is appropriate.

2. **Summary of Facts and Argument.**

PLCD owns an 18.25-acre property located south of the City of Wilsonville at the southwest corner of the I-5 interchange with Miley Road (Exit 282). Pursuant to a Conditional Use Permit ("CUP") approved by Clackamas County in 2005, the property was developed with a 3.5-acre asphalt parking lot, a warehouse, two storage buildings, and a cell tower and maintenance shed.

In 2010, the property was included as part of a larger area, Area 5I, designated as rural reserve. The findings adopted by the county in 2010 described Area 5I as containing "a mixture of hay, nursery, viticulture, horse farms and small woodlots." No evidence was presented to the Board of County Commissioners about the CUP and the resulting development of the property so the decision-makers were unaware that LCD's property was developed in a manner starkly different than the rest of Area 5I.

At the remand hearings Clackamas County held in April 2017, it chose to allow anyone to testify and submit evidence about any of the urban and rural reserve designations that were made in 2010. Arguably, the county could have chosen to keep the record closed and limited testimony to parties who appeared before the Court of Appeals in the *Barkers Five v. LCDC*. But the county did not limit its review, and that is the critical fact that supports LCD's objection.

By opening its review to all parties and allowing new evidence, the county was then obligated to consider LCD's evidence about the condition of its property and, as the Court of Appeals put it, "meaningfully explain why" in light of the evidence it decided a rural reserve designation was appropriate.

The county failed to do that. Instead, it simply re-adopted the same findings it made in 2010 relying on the 2010 record. The county cannot accept relevant new evidence, and then ignore it. Its failure to consider the new site-specific evidence is a procedural error that substantially prejudiced LCD's rights.

That error can only be remedied by LCDC remanding the matter back to Clackamas County with instructions to consider all the evidence and provide a meaningful explanation for its decision.

The responses to Petitioner's objection in the county attorney's letter of September 8, 2017 ("county response") and in the director's report are after-the-fact speculation and justifications for why the Board of County Commissioners took the action it did. But the arguments offered by the county attorney and the director cannot remedy the failure of the county to consider the new evidence and provide its own explanation for why it designated LCD's property rural reserve based on the 2017 record.

As discussed below, none of the defenses raised in the county response or in the director's report overcome the procedural defect caused by the county's failure to "fairly consider" the new evidence.

3. LCDC's remand order from the Court of Appeals' decision did not prohibit the county from considering new evidence.

The County argues that it could not consider Petitioner's evidence about its property because LCDC's remand order limited its "scope of review to only those areas and issues specifically identified by the Remand Order."

That is incorrect. No such limitation was imposed. While the remand order required consideration of the specific reserve areas identified in the *Barkers Five* decision, it does not prohibit a broader consideration of all areas. Indeed, as made clear in director's report, all of the reserve designations, not just the ones directly called out by the Court of Appeals, needed to be addressed and either re-adopted or potentially changed.

The director's report states: "[T]he commission has **not** approved the reserves that were individually unaffected by the remand . . . the jurisdictions **could have amended other reserve areas in addressing the remand …"**

In its defense of the county's order, the director's report notes that the "remand order did not instruct the county to explain why the entirety of Area 5I received a rural reserve designation, or, indeed to reconsider the area at all, and the county did not elect to do so." That statement mischaracterizes the county's action.

While it is true the remand order did not require the county to address the Area 5I issue, as explained above, once the county allowed LCD to submit new evidence and challenge the relationship between its property and the rest of Area 5I, the county had no choice but to explain its decision.

4. The county does not have "policy" discretion to disregard credible new evidence it allowed LCD to submit.

The county response letter tries a second tact to justify its failure to consider Petitioner's evidence. It states: "Elected officials from both Metro and Clackamas County made a clear <u>policy</u> decision that the process on remand would not alter the reserve designations of any property."

The county's findings do not explain the legal or evidentiary rationale for why it was bound by an informal political agreement – one that was not adopted by a land-use process – conceived before it heard testimony and received evidence. Such a policy suggests the public hearing process was something of a sham if the county commission had pre-determined it would not change any designations no matter what. Why then did it open the record for new evidence and testimony about other areas?

Regardless of the outcome of the county commission's deliberation – whether it was pre-determined or not – because LCD was allowed to submit new evidence about its property, the county cannot rely on a nonbinding policy to avoid its legal obligation to fairly consider the evidence.

5. LCD has standing to raise its objection; if county intended to argue otherwise, it would be wrong.

The county's response includes the following sentence: "Clackamas County is not aware, and LCD has not specified, whether there were instances of LCD or LCD's predecessor in interest raising these objections during the original proceedings." Although the county letter does not amplify on the point, arguably, that sentence is intended to challenge Petitioner's standing to appear in this matter. (The director's report does not allege Petitioner lacks standing.)

LCD has standing to contest the re-designation of its property because it appeared before the county commission at its remand hearings and, at the time, the county did not raise any objection to nor imposed any limitation on LCD's appearance. The county has waived any right to now claim LCD lacks standing.

6. The legal dispute about the safe harbor rule is not ripe for resolution by LCDC, and the rule does not excuse the county's failure to fairly consider the new evidence.

In the *Barker Five* opinion, the court expressly left open a question about the scope of the safe harbor provision in OAR 660-027-0060(4).

Petitioner's objection discusses that issue. In light of the site-specific evidence about Petitioner's property, we argued that the county cannot legally rely on the safe harbor rule to support a rural reserve designation. The director's report argues to the contrary.

That legal dispute over the interpretation and application of the safe harbor provision is not yet ripe for resolution by LCDC because the county has not decided whether or how it would apply the provision in light of the new evidence.

The county re-adopted its findings from its 2010 decision based on the 2010 record. As part of its deliberations on remand, the county will have to decide whether or not to rely on the safe harbor rule based on the 2017 evidentiary record. After a fair consideration of the evidence, the county may or may not choose to apply the safe harbor provision in the manner advocated in the director's report.

LCDC's resolution of the legal dispute over the correct interpretation of the safe harbor rule must wait until the county first addresses the issue on remand,

7. It's is not too late to provide a fair review.

The record is clear that Metro and the counties conspired to implement a political decision to re-adopt the 2010 reserves map without changing any designations. Clackamas County, however, potentially jeopardized that desired outcome by opening the door to all parties and the submission of new evidence and arguments.

Having given Petitioner and other property owners an opportunity to seek what they believe is the appropriate designation for their property, the county, backed up by the director's report, then came up with a series of technical and policy-based arguments for why it was permissible for the county to ignore the evidence and deny Petitioner any consideration of its case.

The county's response concludes: "Metro and Clackamas County's position has been that the time has long since passed to raise specific issues related to Area 5I, or any issue beyond the scope of the remand from the Court of Appeals and LCDC." (As discussed above, issues beyond those specified in the remand were, in fact, open to reconsideration.)

In other words, Metro and the county wanted to freeze in time their decision from seven years ago. They sought to prevent the public any opportunity to present updated evidence that might show mistakes were made or circumstances have changed or technical errors happened or anything that could possibly result in the need for changing the designation of any of the 234,000 acres affected by the 2010 decision.

That means LCD's property, and other rural reserve properties, will have their zoning locked in place for the next 40 to 50 years. There is no process in local or state land-use procedures that allow the owner of a rural reserve property to seek re-consideration of the 2010 decision for any reason.

The process now before LCDC may be Petitioner's last opportunity for 50 years to have Clackamas County at least give fair consideration to whether a rural reserve designation is appropriate based on evidence in the record. The desire of Metro and the county to have their 2010 decision validated seven years later without changing the designation of a single acre should not outweigh LCD's right to a land-use review based on the evidence.

Petitioner urges the commission to sustain its objection, remand the county's order, and instruct the county to give full and fair consideration to LCD's contention based on the evidence in the 2017 record.