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

August 9, 2017

Urban and Rural Reserve Specialist
Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, OR 97301

Re: Metro Council Ordinance No. 17-1405/Clackamas County Ordinance No. 06-2017
Adoption of Urban and Rural Reserves
Objections on behalf of Lanphere Construction and Development LLC

This office represents Lanphere Construction and Development LLC ("LCD"). Attached is LCD's objection to the decision of Clackamas County (Ord No. 06-2017) to adopt rural reserve designations, as incorporated into the decision of Metro (Ord No. 17-1405) adopting urban and rural reserves for Clackamas and Multnomah counties.

Very truly yours,

Jeff Bachrach

Jeff Bachrach

Cc: Paulette Copperstone, Metro
Mike McCallister, Clackamas County
Michael Cerbone, Multnomah County

Encl.

Objections to Clackamas County Rural Reserve Designation
Metro Council Ordinance No. 17-1405/Clackamas County Ordinance No. 06-2017

Submitted by:
Jeff Bachrach
Bachrach.Law PC
921 SW Washington Street, Ste 320
Portland, OR 97205

On behalf of Petitioner:
Lanphere Construction and Development LLC ("Petitioner" or "LCD")

Filed on: August 9, 2017

Standing:

LCD appeared before the Board of Clackamas County Commissioners at the public hearings on this matter held on April 12 and 19, 2017. LCD submitted to the county two letters, dated April 18 and 19, 2017; the second letter included a number of documents.

LCD has standing to file this objection.

Background:

LCD owns approximately 18.25 acres south of Wilsonville commonly known as the I-5 parking lot and warehouse site. Evidence in the record provides the following description of the property:

> "The site is located … at the southwest quadrant of the I-5 interchange (Exit 282) and south of Butteville Road.
>
> "Access to the site is via an approximately 400-foot long driveway that extends from the site's northern property through ODOT right of way and intersects with NE Butteville Road approximately 400 feet west of the I-5 ramp.
>
> "As described below, there are substantial improvements on the site, including four buildings and approximately 3.5 acres of asphalt paving:
>
> - A 9,600-square foot (SF) warehouse.
> - A 2,048 SF equipment storage building.
> - An approximately 1,300 SF house.
> - An approximately 3,000 SF storage structure.
> - A cell tower and maintenance shed at the southern limits of the property.

Objection 1: LCD objects to its land being designated rural reserve solely because of its inclusion within a large rural reserve area identified by Clackamas County as Area 5I (Ladd Hill). The county failed to consider site-specific evidence regarding LCD's land and apply the factors in ORS 195.141(3) and OAR 660-027-0060 to the evidence.

Clackamas County's findings state:

> "With the exception of the Tonquin Geologic Area, all of Rural Reserve Area 5I is comprised of Important or Foundation Agricultural Land. The part of this area lying south of the Willamette River contains a mixture of hay, nursery, viticulture, orchards, horse farms and small woodlots.
>
> "Pursuant to OAR 660-027-0060(4), no further explanation is necessary to justify designation as a Rural Reserve."

LCD submitted evidence showing that its land does not contain any of the agricultural uses listed by the county in its description of Area 5I. As described above, the subject property has substantial improvements, including a 3.5-acre parking lot and four buildings, and has direct access onto I-5 via a nearby interchange.

The evidence presented to the county addressed rural reserve factors in OAR 660-27-0060(2) and explained why the specific circumstances of the land make it unsuitable for a rural reserve designation. Petitioner asserted the evidence demonstrates that the most appropriate outcome is to leave the land undesignated.

Once presented with credible evidence showing that the subject property is developed in a manner radically different from the rest of Area 5I, the county was obligated to provide apply the rural reserve factors in light of the site-specific evidence and provide a meaningful explanation as to why the designation is appropriate. By simply lumping LCD's land in with the rest of Area 5I without any further findings, the county failed to satisfy the legal test for such situations, as established by the Court of Appeals in *Barkers Five, LLC v. Land Conservation and Development Commission*, 259 Or App 259, 323 P3d 368 (2014).

> "[W]e are confronted with challenges by landowners contending that their "land" was improperly designated as urban or rural reserve solely because of its inclusion within an "area" that was similarly designated. … Resolution of those challenges **requires an examination of the adequacy of the local government's consideration of the factors as to the "land" that was ultimately designated**. ...
>
> In other words, when a landowner contends that his or her property was improperly designated within an "area," our task is to determine whether LCDC properly determined that the local government adequately considered the factors in making the designation that included that land. As we have explained, 261 Or App 300-01, 303-05, legally sufficient "consideration" 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. . . . **[T]he 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 the property."** (Emphasis added.)

Barkers Five, 261 Or app 305-06.

The designation of LCD's property as rural reserve is improper because the county did not undertake a legally sufficient consideration of the evidence and application of the factors, and offered no explanation, meaningful or otherwise, as to why it is appropriate to include the subject land as part of the larger rural reserve area.

Remedy: The remedy is to remand Clackamas County Ord No. 06—2017 back to the county for further consideration. On remand, the county may choose to remove the rural reserve designation from the subject land, or it may consider additional evidence and adopt findings to explain why the evidence supports including the subject land as part of Rural Reserve Area 5I.

Objection 2: Clackamas County improperly interpreted and applied the safe harbor provision in OAR 660-027-0060(4) to justify the rural reserve designation for Petitioner's land.

As quoted above, because Area 5I (excluding the Tonquin Geologic Area) had been mapped as either Foundation or Important Agricultural Lands in the ODA Report[1] the county found it could rely on the so-called safe harbor provision[2] to designate all land within the area – including LCD's - as rural reserve, and that "no further justification is necessary."

The safe harbor may allow the county to designate certain "areas" as rural reserve without further explanation, but the provision should not to be read so broadly as to obviate its obligation to consider evidence showing specific "lands" are dissimilar from the rest of the area and "meaningfully explain why a designation…is appropriate by reference to the totality of the land encompassed within that designation." *Barkers Five*, 261 OR App at 305.

Under the county's interpretation of the safe harbor provision, the ODA Report would be a complete replacement for the requirement in ORS 195.141(3) that counties "shall base the designation [of rural reserves] on consideration of factors…." The county's expansive reading of the rule undermines both the statutory requirement and the analytical framework set out in *Barkers Five* that counties must follow when presented with evidence of dissimilarity between entire "areas" and specific "lands" within an area.

Substantively, the ODA Report is not a like-kind substitute for a full consideration of the statutory factors. The factors that must be considered in order to designate land as rural reserve are specific to the objectives and outcomes created by the legislature when it adopted the urban-rural reserve statute in 2007. The report, which was prepared before ORS 197.137 to 195.145 was adopted, is essentially a compendium of broad generalized conclusions about large areas – "subregions" – covering six counties.

The ODA Report contains no supporting evidence or any findings that cite to the legal standards upon which the conclusions are based. It is worth noting that the report does state that "soils capability is and remains the single most important factor in this assessment." The report's reliance on soil

[1] The "ODA Report" refers to the January 2007 Oregon Department of Agriculture report to Metro entitled "Identification and Assessment of the Long-Term Commercial Viability of Metro Region Agricultural Lands."

[2] OAR 660-027-0060(4) provides: "Notwithstanding requirements for applying factors in OAR 660-027-0040(9) and section (2) of this rule, a county may deem that Foundation Agricultural Lands or Important Agricultural Lands within three miles of a UGB qualify for designation as rural reserve under section (2) without further explanation under OAR 600-027-0040(10)."

capability as a determinative criterion is inconsistent with the large number of factors the statute requires a county to consider and balance.

Moreover, the report was never vetted and adopted through a land-use hearing process. No local government ever approved it. Property owners and other interested parties were not provided an opportunity to submit evidence or challenge any of its conclusions.

To be consistent with ORS 195.141(3) and the limitations of the ODA Report itself, the safe harbor provision cannot be interpreted as giving counties a blanket exemption from considering evidence that conflicts with or is otherwise more in-depth than the generalized conclusions that underlie the report's subregional maps. While the provision can serve as a starting point for designating certain areas as rural reserve without findings, OAR 660-027-0060(4) should not be applied so broadly as to excuse Clackamas County's failure to consider the evidence presented by LCD, apply the factors, and explain, in light of that evidence, what it considers to be the appropriate designation(or non-designation) for the subject land and why.

Remedy: The remedy for this objection is the same as for the first objection – a remand to the county to consider the evidence and adopt appropriate findings for the subject land without reliance on the safe harbor provision.

Objection 3: The county may not rely on the safe harbor provision to justify its designation of Area 5I or any land as rural reserve because the rule is in direct conflict with the statute.

In *Barkers Five*, the Court expressly choose to not resolve the question raised as to whether the safe harbor provision in OAR 660-027-0060(4) should be struck because it directly contravenes the requirement in ORS 195.141(3) that counties shall consider various factors.

For all the shortcomings outlined under Objection 2, the mapping of Foundation and Important Agricultural Lands in the ODA Report is not an acceptable substitute for the array of factors the statue requires counties to consider. There is an irreconcilable conflict between the safe harbor provision and the statute, the consequence of which is to render the former invalid.

Remedy: The remedy is to remand the decision back to the county to re-consider the rural reserve designation for Area 5I and the LCD land, and either maintain the land as undesignated or adopt new findings to justify the designation without reliance on the safe harbor provision.

Respectfully submitted

Jeff Bachrach

Jeff Bachrach,
On behalf of Petitioner, Lanphere Construction and Development, LLC