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DEPT OF
AUG 14 2017
LAND CONSERVATION AND DEVELOPMENT

August 14, 2017

Via Hand Delivery

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

Re: Objections to Re-Adoption of Urban and Rural Reserves by Metro and Multnomah County (Metro Ord. No. 17-1405, Multnomah County Ord. No. 1246)

Dear Specialist:

This submission is on behalf of landowners with property located in western Multnomah County, and more specifically in Study Area 9B (commonly referred to as the Lower Springville Road area or the "L"). The landowners are Springville Investors, LLC, Katherine Blumenkron, David Blumenkron, Burnham Farms, LLC, and Bob Zahler (collectively, the "Owners"). Together they own approximately 225 acres within the "L" location.

The Owners take exception to the process and decisions made by Multnomah County and the Metro Council (the "Agencies") leading to the adoption of Multnomah County Ordinance No. 1246 and Metro Ordinance No. 17-1405 regarding the urban and rural reserves designations. This letter supplements the Owners' individual and collective testimony, comments, and exceptions previously submitted to the Agencies.[1]

The Owners assert that the Agencies joint submittal of urban and rural reserves designations to the Oregon Department of Land Conservation and Development (the "Department"), including but not limited to the Agencies' decisions with respect to Area 9B, violate ORS 197.010, ORS 197.040, ORS 195.141, ORS 195.145, OAR 660-027-0040, OAR 660-027-0050, and OAR 660-027-0060. Furthermore, the Owners assert that the Agencies' actions culminating in the adoption of Metro Ordinance 17-1405 and Multnomah County Ordinance No. 1246 violated the Owners' constitutionally-protected rights to Due Process and Equal Protection under the Fourteenth Amendment to the U.S. Constitution.

A summary of the errors include the following:

1. The Agencies did not provide for an impartial tribunal to assess the actual facts concerning the promulgation of Multnomah County Resolution No. 09-153 nor Multnomah County Ordinance No. 1165 (2010). This in spite of two Commissioners stating that the Board's decision to designate Area 9B was

[1] *See e.g.* Metro Rec. 101-102, 126-129, 130-132, 291-292, 662-680, 684-699, 904-908; MultCo Rec. 20090-20095, 20097-20103, 20105-20110, 20112-20119, 20253-20259.

unsupported by the factors analysis, and the Commissioner casting the deciding vote stating that it was based on constituent letters, emails, and telephone calls.

2. The Agencies did not provide for any review, much less an impartial tribunal review to assess the evidence that the petitioners were not afforded the equal protection of the law in comparison to other similarly situated owners and properties.
3. The Agencies did not apply any meaningful due process procedure in their determination of either the 2010 ordinance or the 2017 proposed ordinance.
4. The Agencies did not consider the evidence that the 2010 ordinance was accomplished with improper political influence, nor the evidence that the 2017 ordinance was the product of improper political influence.
5. The Agencies did not apply a designation process that met constitutional standards for land use regulation.
6. The Agencies failed to comply with the express orders of the *Barkers Five* court and LCDC to review the designation of 9D and ascertain the effect of its error on the entirety of Multnomah County.
7. Multnomah County and Metro have never directly or properly applied the urban and rural reserve factors to Area 9B. Rather, Area 9B was designated based upon a grossly generalized analysis of Areas 9A, 9B, and 9C together. As a result of this faulty analysis, the Agencies improperly designated Area 9B as rural reserve based on the characteristics of *other* study areas (9A and 9C) which are distinctly different from Area 9B.
8. Multnomah County failed and refused to consider the substantial new evidence presented to the Board by the Owners and other interested parties that required an urban reserve designation for petitioners' lands.
9. Multnomah County acted improperly by prejudging the outcome of the proceedings pertaining to Multnomah County Ordinance No. 1246. Rather than reviewing the existing record or considering new evidence, the Board simply accepted the prior decisions of the Board without further review.
10. The Agencies erred in finding that there is an adequate factual basis to support their conclusions regarding Area 9D and Area 9B.
11. The Agencies failed to apply the requirements of ORS 197.040 as it should apply to reserves designations and petitioners' lands, and specifically they did not ascertain whether an alternative action would achieve the underlying governmental objective with a lesser economic impact.
12. In doing all of the foregoing, Multnomah and Metro Board members abrogated a duty to investigate, apply and operate within constitutional boundaries, as they are presumed to know the requirements and limitations of the state and federal Constitutions. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[A] reasonably competent public official should know the law governing his conduct.").

I. LCDC's decisions in this matter must be consistent with the requirements of the U.S. Constitution.

The Department and LCDC are required to review the Agencies' joint submittal to determine whether the Agencies' actions are constitutional.[2] As shown below, the Agencies actions and decisions in designating Area 9B as a rural reserve violated the Owners' constitutionally-protected rights to due process and equal protection. Accordingly, the Department must reject the Agencies' joint submittal with respect to Area 9B and remand the designation back to the Agencies for further proceedings consistent with constitutional and statutory requirements.

A. Multnomah County and Metro violated the Owners' Equal Protection rights by treating their property differently than other similarly-situated landowners.

The Agencies adopted a rural reserve designation for Area 9B in violation of the Owners' constitutionally protected right to equal protection, because the Agencies treated the Owners differently than other similarly situated properties without a legitimate reason for doing so.

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution ensures that "all persons similarly situated should be treated alike." *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985 (9th Cir. 2007), affirmed, 128 S. Ct. 2146 (2008). Indeed, the U.S. Supreme Court has stated that the purpose of equal protection "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, (2000) (per curiam) (internal quotations omitted).

When a plaintiff alleges an Equal Protection violation based on unique treatment rather than classification, the Supreme Court has described it as a "class of one" claim. *North Pacifica, LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008). For example, in *Willowbrook*, the U.S. Supreme Court found that the plaintiffs had adequately stated an equal protection claim against the Village of Willowbrook where the Village required the plaintiffs to grant a 33-foot easement in order to connect the municipal water supply, but only required a 15-foot easement for similarly-situated landowners. 528 U.S. at 563. A "class of one" claim does not require that only one individual or entity be treated differently. *Id.* at 564 n.1 ("Whether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis.").

To succeed on a "class of one" claim, Plaintiffs must demonstrate that Defendants: (1) intentionally (2) treated the Plaintiffs differently than other similarly situated property owners (3) (a) without a rational basis, or (b) "that the defendants' rational basis for selectively enforcing the

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[2] State and federal constitutional objections fall within the scope of the Department's review under ORS 197.633 and OAR 660-027-0080. The Oregon Court of Appeals reviews the Department's acknowledgement of the Agencies' joint submittal under ORS 197.651(10)(b), which requires the Court to reverse or remand the order if the Court find that it is:

(a) Unlawful in substance or procedure. However, error in procedure is not cause for reversal or remand unless the Court of Appeals determines that substantial rights of the petitioner were prejudiced.
(b) Unconstitutional.
(c) Not supported by substantial evidence in the whole record as to facts found by the commission.

law is a pretext for an impermissible motive." *Squaw Valley Development Co. v. Goldberg*, 375 F3d 936, 944 (9th Cir 2004) (overruled on other grounds by *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F3d 1020, 1025 (9th Cir 2007)).

Under Metro Ordinance No. 17-1405, Metro and Multnomah County treated the "L" of Area 9B differently than other similarly situated properties in the tri-county.[3] Area 1C in Multnomah County is one example. Like Area 9B, which includes small sections of Abbey Creek, Area 1C has several stream corridors that flow through the area. Also like Area 9B, Area 1C is bounded by the Urban Growth Boundary, has few topographical constraints on urban use, and local agencies indicated the ability and desire to provide the area with urban services. But unlike Area 9B, Area 1C is "Foundation" agricultural land, whereas Area 9B is "conflicted" land less suitable to agricultural use. However, Metro designated Area 1C as urban reserve, but agreed with Multnomah County that Area 9B should be designated rural reserve on grounds including that 9B could not be developed in ways that protect natural landscape features.[4] Differential treatment of Area 9B can also be seen in comparisons with other reserves in the tri-county area.[5] Critically, there is no evidence the Agencies have ever applied these standards, and the record is devoid of any acknowledgement of their application.

B. The Agencies violated the Owners' Procedural Due Process rights.

The Agencies adopted a rural reserve designation for Area 9B in violation of the Owners' constitutionally protected right to Due Process, because the Agencies failed to provide the Owners with adequate procedural protections to guard against erroneous deprivation, including a meaningful opportunity for the Owners to present and rebut evidence to a tribunal that is impartial in the matter. Accordingly, the Department must reject the Agencies' joint submission on grounds that the Agencies' decisions violated the Owners' protected rights to due process.

A procedural due process violation under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution occurs when there is a deprivation of a protected property interest and denial of adequate procedural protections. *Brewster v. Board of Educ.*, 149 F.3d 971, 982 (9th Cir. 1998). Due process protects individuals from mistaken or unjustified deprivations of life, liberty, or property by requiring adequate procedural protections that enable a person to contest the basis on which the government proposes to deprive them of protected interests. *Carey v. Piphus*, 435 U.S. 247, 259 (1978); *Fuentes v.Shevin*, 407 U.S. 67, 81 (1972). Protected property interests are not created by the Constitution, but by "existing rules or understandings that

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[3] These contentions are currently the subject of litigation in federal court against both Metro and Multnomah County. *See Blumenkron v. Eberwein*, 2015 U.S. Dist. LEXIS 129837, *22, 2015 WL 5687869 (D. Or. Sept. 28, 2015).

[4] This finding stands in stark contrast to how Metro treated Area 8C. Metro designated 8C as urban reserve subject to its "Integrating Habitats" program in order to protect extensive mapped natural landscape features after environmental groups expressed concern that urban development would negatively impact those features. See Exhibit B to Metro Ordinance No. 11-1255, at 66. Such design concepts can also be applied to Area 9B—in fact, Multnomah County acknowledged that such concepts were available for the East Bethany area, *see* Attachment A to Multnomah County Resolution 09-153, at 2 (recommending undesignated status for area 7b (which includes Area 9B) in order to allow for exploration of development concepts that "could both protect landscape features . . . while contributing to urban development."). Nevertheless, the Agencies designated 9B as rural reserve, while designating 8C as urban reserve.

[5] For example, Area 8C is approximately 440 acres in Washington County immediately adjacent to the UGB, and includes extensive mapped natural landscape features. Area 4A is approximately 350 acres in Clackamas County, includes mapped natural landscape features, and lacks efficient access to existing or planned urban infrastructure. Both 4A and 8C were designated urban reserve, while Area 9B (which has very limited natural landscape features, low slope, and ready access to existing urban infrastructure) was designated as rural reserve.

stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005) (*citing Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

The reserves designations enacted by Metro and the Counties implicate a number of protected property interests, including but not limited to: the right to seek inclusion in the Urban Growth Boundary, the right to seek a zoning change or amendment, the right to seek a variance or change in use of property, and the right to challenge or appeal other government actions concerning the affected property. *See e.g. Harris v. County of Riverside*, 904 F.2d 497, 502-503 (9th Cir. 1990) (finding that the operation of an ATV business on landowner's property a sufficient interest); *see also Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (identifying that all limitations of property rights invoke constitutional standards). Hence, the Department must ensure that Metro and Multnomah County's actions in adopting the reserves designations comport with due process requirements before acknowledging the Agencies' joint submission.

Due process is not a perfunctory requirement for notice and an opportunity to be heard. Rather, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a *meaningful* manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (emphasis added) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)). The sufficiency of process turns on, among other things, the degree of the right at issue and the risk of erroneous deprivation through the procedures used. *Id.* at 332-335.

Furthermore, in the Oregon land-use context, "a determination whether the permissible use of a specific property should be changed is usually an exercise of judicial authority that is properly subject to a less deferential standard of review." *Columbia Riverkeeper v. Clatsop County*, 267 Or.App. 578, 597 (2014); *see also Hood River Valley Residents' Comm., Inc. v. Bd. Of County Comm'rs*, 193 Or.App. 485, 495 (2004) (determining whether a government action represents an exercise of quasi-judicial functions involves consideration of at least three balancing factors: whether the process calls for reaching a decision that is confined by preexisting criteria rather than a wide discretionary choice of action or inaction; whether the decisionmaker is bound to apply preexisting criteria to concrete facts; and whether the decision is directed at a closely circumscribed factual situation or a relatively small number of persons) (*citing Strawberry Hill 4 Wheelers v. Bd. of Comm'rs*, 287 Or. 591, 602-604 (1979)). Parties to quasi-judicial proceedings are "entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter . . . and to a record made and adequate findings executed." *Fasano v. Board of County Comm'rs*, 264 Or. 574, 588 (1973).

Here, the urban and rural reserve designations are quasi-judicial determinations[6] because they are confined by preexisting criteria (the reserves factors) that the Agencies are bound to apply to concrete facts, and are directed at closely circumscribed factual situations (the reserves study areas) and which involve a relatively small number of persons (landowners within the study areas). Hence, the Department, in its review of the Agencies' joint submittal, must determine whether the Owners' received adequate due process consistent with the Constitution and Oregon

[6] "[L]and use planning decisions less extensive than general rezoning c[an] not be insulated from notice and hearing requirements by application of the 'legislative act' doctrine." *Harris v. County of Riverside*, 904 F.2d 497, 502 (9th Cir. 1990) (finding that procedural due process applies to amendments to a general zoning plan) *quoting Horn v. County of Ventura*, 24 Cal.3d 605, 613, 596 P.2d 1134, 1138, 156 Cal.Rptr. 718, 722 (1979).

law, including (at a minimum) a substantive and fair opportunity to be heard, an opportunity to present and rebut evidence regarding the application of the reserves factors to their property to *impartial* decisionmaker, and fair consideration of the factors under SB 1011.

As the Owners have repeatedly asserted since 2010, the Agencies adopted the reserves designations in violation of the Owners' procedural due process rights. The procedures employed by the Agencies were woefully inadequate to protect the Owners and other parties from erroneous deprivation of their protected property interests.

First, the Multnomah County Board was not an impartial tribunal in 2010, nor in 2017 when it adopted Multnomah County Ordinance No. 1246. As discussed further in Section III below, the County Commission designated Area 9B based on political considerations instead of an impartial application of the reserves factors and criteria. If the Board had based its decision strictly on the factors analysis, it is very likely that Area 9B would have remained undesignated (as Multnomah County staff and the Board initially recommended in late 2009) instead of rural reserve. Moreover, one of the three County Commissioners that voted to change Area 9B from undesignated to rural reserve in 2009 based on political considerations is now the County Chair. And with respect to Ordinance No. 1246, the Board clearly showed that it was predisposed to simply reaffirm the Board's prior reserves decisions without objectively considering the evidentiary record. At the close of the public hearing on May 4, 2017, Chair Kafoury stated[7] that she appreciated the public engagement in the issue, but that "it's the time for us to reaffirm the decision." Commissioner Stegmann stated[8] that because she was a new Commissioner, she felt that she had "to honor the work that has gone on since 2008." Similarly, Commissioner Meieran[9] stated that "we are reaffirming a decision that was made by the previous board, and I'm going to support that." These statements strongly indicate that the County was predisposed to simply "rubber stamp" the County's previous decisions without considering substantial evidence and testimony submitted by interested parties, some whom have asserted grievances against the County with respect to those decisions. Importantly, there was no means to determine from Board members whether they were, or had been, in fact, impartial or subject to potential influence.

Second, as further evidence of the County's lack of impartiality and failure to provide adequate due process, the County refused to admit or consider any new evidence submitted to the County regarding Ordinance No. 1246.[10] Thus, the County adopted the ordinance based on an outdated evidentiary record from 2010 rather than on the most recent information. The Owners and other parties presented evidence at the May 4, 2017 Board meeting that relevant circumstances in and about the reserves study areas, including 9B, have substantially changed since 2010, and that the reasons and conclusions supporting the Board's 2010 designations do not

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[7] A video recording of the Multnomah County Board hearing on May 4, 2017 is publicly available at http://multnomah.granicus.com/MediaPlayer.php?view id=3&clip id=1554. (Last accessed 6/6/17). The referenced and quoted statements by Chair Kafoury and Commissioners Stegmann and Meieran at the May 4th, 2017 hearing begin at 01:31:20 of the video recording.

[8] *See* supra note 7.

[9] *See* supra note 7.

[10] The Agenda Placement Request (APR) for the May 4, 2017 meeting of the Multnomah County Commission stated that "in order to respond to the specific issues identified by the court, there is no need to re-open the evidentiary record in this matter and the hearing on this matter has been scheduled to proceed on the existing evidentiary record." The APR is available at http://multnomah.granicus.com/MetaViewer.php?view id=3&clip id=1554&meta id=105554. (Last accessed 8/14/17).

reflect the facts. Nevertheless, the County[11] refused to admit new evidence, and simply proceeded on the 2010 record while turning a blind eye to current circumstances.

Third, the County violated the Owners and others due process rights by only permitting interested parties to testify for 2-3 minutes. Considered together with the Board's refusal to admit and accept new evidence, the extremely limited time permitted for testimony utterly failed to provide interested parties, including the Owners, with a *meaningful* opportunity to present and rebut evidence. Collectively, these facts show that it was County's intention to preclude the very evidence due process was intended to reach.

Additionally, the Agencies' designation of Area 9B is not supported by an adequate record. As discussed further in Section II below, Owners have repeatedly objected to the Agencies' statement that "there is not a city in a position to provide urban services to Areas 9A to C." Exhibit B to Metro Ordinance No. 17-1405, at 74; Metro Rec. 77. That statement was contradicted by substantial evidence in the record when Multnomah County adopted Ordinance No. 1165 in 2010, and was again unsupported when the County adopted Ordinance No. 1246 in 2017. The Owners have repeatedly informed the Agencies that their stated reasons for designating Area 9B as rural reserve are in error, but the Agencies have never addressed those objections nor explained their decisions in light of contradictory evidence.

For all of these reasons, the Department should reject the Agencies' joint submittal with respect to Area 9B and remand the designations to the Agencies for further proceedings consistent with Due Process.

C. The Agencies violated the Owners' Substantive Due Process rights.

Substantive due process is also implicated in the Agencies' and the Department's decisions in this matter. Substantive due process bars "certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The two elements of a substantive due process claim are the existence of a protected interest, and proof the government arbitrarily or capriciously interfered with that interest. *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025 (9th Cir. 2007). The remedies for violations of substantive due process include declaratory and injunctive relief, and give rise to damage remedies under federal civil rights statutes. 42 U.S.C.A. § 1983 (2006). See *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) (constitutional property claims are actionable under section 1983); *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007) (recognizing substantive due process claims in the land use context).

The designation of the Owners' property as rural reserve interferes with their protected property interests, including but not limited to: the rights to uses, values, rights, and privileges arising from an urban designation; an adequate right to appeal from adverse designation; a right to seek a change in zoning or designation due to changes in circumstances, mistake, or otherwise; a right to further develop their property (including building a single family dwelling); and prohibitions on opportunities for development of services such as water and sewer—all for the next 40-50 years, which is an irrationally long period of time. And as discussed further in this

[11] Unlike Multnomah County, the Metro Council admitted new evidence into the record with respect to Metro Ordinance No. 17-1405.

letter, Multnomah County designated Area 9B as rural reserve based not on an impartial consideration of the evidentiary record and application of the reserves factors, but based on political considerations and or constituent votes. As the Supreme Court found in *Washington ex. rel. Seattle Title Trust Co* (supra), giving non-agency parties a "vote" is both an improper delegation of duty and a violation of due process as they are not subject to inquiry for bias. By designating Area 9B as rural reserve, the Agencies violated the Owners' substantive due process rights, and the Department should remand the joint submittal for further proceedings consistent with constitutional requirements.

II. Multnomah County and Metro failed to properly analyze Area 9B under ORS 195 and OAR 660-027.

Multnomah County and Metro have never directly or properly applied the urban and rural reserve factors to Area 9B. Rather, Area 9B was designated based upon a grossly generalized analysis of Areas 9A, 9B, and 9C together. As a result of this faulty analysis, the Agencies improperly designated Area 9B as rural reserve based on the characteristics of *other* study areas (9A and 9C) which are distinctly different from Area 9B. The Department should therefore reject the Agencies' designation of Area 9B as unsupported by substantial evidence in the record and inappropriate as a matter of land use policy, and remand Area 9B for further analysis and findings.

ORS Chapter 195 and OAR 660-027 require that urban and rural reserve designations must be based on consideration of the applicable factors and criteria, and that the Agencies' submittal to the Department must include findings of fact and statements of reasons and conclusions explaining why areas were chosen as urban or rural reserves. The joint submittal with respect to Area 9B fails to satisfy these requirements.

First, the analysis of Area 9B by Multnomah County staff and the Citizen's Advisory Committee (CAC) was not specific to Area 9B. Instead, County staff and the CAC applied the factors to a broad study area (then referred to as Area 7b) that included Area 9B as well parts of Area 9A and 9C. In this analysis, Multnomah County staff and the CAC distinguished the "L" or Lower Springville Road area (later named Area 9B) as being much more suitable for urban designation than the broader study area. Nevertheless, County staff and CAC recommendations, as well as the County Commission's recommendations to the Core 4 on December 10, 2009,[12] did not apply directly to Area 9B, but rather to a broader study area that included lands outside of Area 9B.

Second, the Agencies' joint statement of reasons fails to adequately explain why Area 9B was designated as rural reserve. The statements of reasons and conclusions are addressed to Areas 9A-9C in general, without adequate findings or conclusions specific to Area 9B.[13] Indeed, it is unclear which of the Agencies' stated reasons and conclusions apply to Area 9A, or Area 9B, or Area 9C, or some combination. Hence, the Agencies' statements of reasons and conclusions fail to adequately explain why Area 9B was designated as rural reserve, because the characteristics of Areas 9A and 9C are distinctly different than those of Area 9B, including having substantially

[12] *See* Attachment A to Multnomah County Resolution 09-153, at 2.
[13] *See* Exhibit B to Ordinance No. 17-1405, at 73-74.

greater slope, more extensive natural landscape features, and limited access to current or planned urban infrastructure compared with Area 9B.[14]

Third, the Agencies' reasons for designating Area 9B as rural reserve ignore clear and contradictory evidence in the record. The Agencies state that Areas 9A-9C were designated as rural reserve because "there is not a city in a position to provide urban services to Areas 9A to C." Exhibit B to Metro Ordinance No. 17-1405, at 74; Metro Rec. 77. However, this statement with respect to Area 9B is directly contradicted by the evidentiary record. In a letter dated September 4, 2009, the Beaverton informed Multnomah County that "Beaverton City is willing to provide governance and urban services to the East Bethany area" if Multnomah County designated the area as urban reserve."[15] Similarly, Tom Brian, the chair of the Washington County Board of County Commissioners, delivered a letter to Multnomah County on February 17, 2010 informing the County that the "L," if developed, is "likely to receive services from Washington County and one or more of its service districts due to its topography and proximity to urban services on the west side of the Multnomah/Washington County line."[16] Thus, the Agencies' finding that "there is not a city in a position to provide urban services to Area 9A to C" is unsupported by the record. This disconnect between the Agencies' findings regarding Area 9B and the evidentiary record has been repeatedly raised by the Owners throughout the reserves designation process since 2010, but neither the Agencies nor the Department nor LCDC have ever addressed those objections.

For all of these reasons, the Agencies' explanation of why they designated Area 9B as rural reserve is inadequate and unsupported by substantial evidence in the record. Accordingly, the Department should reject the Agencies' joint submittal regarding the urban and rural reserves in Multnomah County, and remand the designations for further analysis and findings with respect to Area 9B.

III. Multnomah County's decision to designate Area 9B as rural reserve was based on political considerations instead of an impartial application of the reserves factors.

Multnomah County designated Area 9B as rural reserve on the basis of political considerations instead of an impartial application of the urban and rural reserves factors under ORS Chapter 195 and OAR 660-027. Political considerations and public opinion are not among the statutory and regulatory factors and criteria for designating urban and rural reserves. Designating an area based on political considerations is not only inconsistent with the applicable rules, but violates the due process rights of affected parties.

There is ample evidence in the record that the Agencies designated Area 9B as rural reserve based on political considerations. The Multnomah County Board's vote on February 25, 2010 is a salient example. In December of 2009, the Multnomah County Board adopted

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[14] Notably, the current remand proceedings are due, in part, to the Oregon Court of Appeals' finding that Multnomah County failed to "meaningfully explain why consideration of the pertinent factors yields a designation of all land in Area 9D" as it did, notwithstanding that "a significant amount of land in [the] area . . . is dissimilar from the rest of the land in that area as demonstrated by the county's application of the factors." *Barkers Five, LLC et al. v. LCDC*, 261 Or.App. 259, 364 (2014). Multnomah County committed a similar error with respect to Area 9B, by failing to adequately explain why it designated Area 9B as rural reserve without reference to the characteristics of areas 9A and 9C, which areas are distinctly different than 9B, and are, by the County's own analysis, both more suited for rural designation and less suited for urban designation than Area 9B.

[15] *See* MultCo Rec. 2768-2769 (2010-2011 record).

[16] See Multco Rec. 3922 (2010-2011 record).

Resolution 09-153, which recommended to the Core 4 of the Reserves Steering Committee that Multnomah County study area 7b (which encompasses Area 9B) should remain undesignated (neither rural reserve nor urban reserve) in order to allow for future events to clarify a future assignment of appropriate reserve designations, if any, and allow for further consideration of a development concept "that would leverage revenue from more intensive development east of N. Bethany to support lower density development in targeted areas to the east and acquire other land for public ownership." Attachment A to Multnomah County Resolution No. 09-153, at 2.

However, just over 10 weeks later, on February 25, 2010, the Board voted, in a 3-2 decision, to amend the proposed IGA between Multnomah County and Metro to change the designation of Area 9B from undesignated to rural reserve. Multnomah County Chair Ted Wheeler opposed the amendment, stating that he did not want to jeopardize the important rural reserves in other parts of Multnomah County with "a somewhat tenuous rural reserve designation in those areas where even our own legal counsel indicate that we can't provide an adequate record to defend it."[17] Commissioner Jeff Cogen, who had been deeply involved with the reserves designation process as a member of the Core 4, also opposed the amendment because "this has to be a factors-based decision, and I don't believe the factors are there both in terms of our own staff and Metro's staff analysis."[18]

Nevertheless, the Board voted to adopt the amendment to the IGA, and Area 9B was ultimately adopted as a rural reserve under Multnomah County Ordinance No. 1165. Importantly, Commissioner Deborah Kafoury, one of the three Commissioners to who voted in favor of changing the designation of Area 9B from undesignated to rural reserve, stated with respect to her vote that she had received nearly 700 letters, emails, and phone calls from the public in support of rural reserve designation for Areas 9A and 9B, and that she "can't not take that into consideration."[19] This is clear evidence in the record that the rural reserve designation of Area 9B was derived from *political* motivations—i.e., in consideration of public votes of Board member constituents in support of rural reserve designation for Area 9B—rather than an impartial application of the reserves factors and criteria. The record indicates those constituents could live miles away from Area 9B. That their vote could have <u>any</u> influence on a criteria-based decision is unconstitutional. Not only was the decision to designate Area 9B inconsistent with the applicable rules, it violated the due process rights of landowners in Area 9B, including the right to present and rebut evidence to a tribunal which is impartial in the matter.

The County's reliance on political considerations is also seen in the Agencies' stated reasons and conclusions for designating Area 9B as rural reserve. In Exhibit B to Metro Ordinance No. 17-1405, at 74, the Agencies state that "[r]ural reserve for this area [9A-9C] is supported *not only by the weight of responses from the public*, but by the Planning Commission and the regional deliberative body MPAC as well." (emphasis added). The "weight of responses

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[17] The quoted and referenced statements by Chair Wheeler begin at approximately 3:08:07 of the video and audio recording of the February 25, 2010 County Board meeting, available at: http://multnomah.granicus.com/MediaPlayer.php?publish_id=84dc7d4f-4b7c-11e5-ab53-00219ba2f017.

[18] The quoted statements by Commissioner Cogen begin at approximately 3:07:39 of the video and audio recording cited in note 17 above.

[19] The quoted and referenced statements by Commissioner Kafoury begin at approximately 3:22:58 of the audio and video recording of the February 25, 2010 Board meeting cited in note 17 above.

from the public" in favor of one designation or another is not a legitimate basis for designating reserves and violates due process.[20, 21]

Additionally, Multnomah County also stated that it used the county line—a political division, not a natural landscape feature—as justification for designating Area 9B as rural reserve. See Exhibit B to Metro Ordinance 17-1405, at 73 ("The county agrees that the west edge of area 9B defines a boundary between urbanizing Washington County and the landscape features to the east in Multnomah County."); Metro Rec. 76. The location of county lines is not a basis for designating reserves under the applicable factors. Furthermore, the fact that the "L" of Area 9B has very similar characteristics to the adjacent North Bethany urban area, that both Beaverton City and Washington County expressed willingness[22] to provide urban services to the area, and that the City of Portland strongly opposed urban reserve for Area 9B,[23] it is clear that the Owners' properties were designated rural reserve instead of urban reserve because their land is located in Multnomah County instead of Washington County. The passage of the "Grand Bargain" legislation, HB 4078, that reversed Washington County designations through legislation is itself de facto political. So too the proposal that Clackamas County urban reserves in the Stafford area are retained only with the political approval of neighboring cities pursuant to the 5-Party IGA adopted this year.

This evidence again demonstrates a violation of required constitutional standards.

IV. Multnomah County failed to satisfy the requirements of the remand orders from the Oregon Court of Appeals and LCDC.

In the *Barkers Five* decision, the Oregon Court of Appeals held that "LCDC's order is unlawful in substance to the extent that it concluded that Multnomah County's 'consideration' of the factors pertaining to the rural reserve designation of Area 9D was legally sufficient. On remand, LCDC must determine the effect of that error on the designations of reserves in Multnomah County in its entirety." *Barkers Five, LLC et al. v. LCDC*, 261 Or.App. 259, 429 (2014). LCDC subsequently remanded certain reserves designations back to the Multnomah County "for further action consistent with the principles expressed" in *Barkers Five*. LCDC Remand Order 14-ACK-001867.

Multnomah County failed to take appropriate action in response to the remand orders from the *Barkers Five* court and LCDC, because the County failed to reconsider the evidentiary record or re-apply the reserves factors, failed to consider additional factual and legal changes that have occurred since 2010, and failed to determine the effect of the County's error on the designation of reserves in Multnomah County in its entirety.

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[20] The procedures for the designation of reserves under Senate Bill 1011 (2007) includes specific factors and criteria to be applied by the partner agencies involved. Or. Rev. Stat. § 195.141(5) (urban reserve factors); Or. Rev. Stat. § 195.141(3) (rural reserve factors). Public opinion is not a factor for determining an appropriate reserve designation under those statutes or the implementing regulations.

[21] *See* Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (ordinance violated due process because it gave neighboring landowners the authority over the issuance of a permit to construct a residential building). Otherwise appropriate zoning can be precluded

[22] *See* supra notes 15 and 16.

[23] See e.g. Multco Rec. 3897-3900 (letter dated 12/10/2009 from Portland Mayor Sam Adams to Multnomah County supporting rural reserve designation for Map Areas 7a and 7b); Metro Rec. 1561-1564 (letter dated 01/11/10 from Mayor Adams to Metro urging rural reserves for the East Bethany area); MultCo Rec. 3895 (letter dated 02/23/10 from Mayor Adams to Multnomah County urging rural reserve designation for Area 9B).

V. LCDC must apply ORS § 197.040 when it determines whether the Agencies' urban and rural reserves decisions are

LCDC's enabling statute provides that LCDC, in designing its administrative requirements, must "assess the likely degree of economic impact on identified property or economic interests," and "assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact." ORS § 197.040.[24] LCDC is required to apply the analysis of ORS 197.040 with regard to the "L" of Area 9B and apply an urban reserve designation on the record before it.

With respect to Area 9B, any reasonable application of ORS 197.040 would lead to the conclusion that an urban reserve designation of Area 9B would have a lesser economic impact than the rural reserve designation while still accomplishing the underlying governmental objective.

VI. Conclusion

There is clear evidence in the record of the Owners' property rights being determined by political will, not the merits of evidence-based criteria. The Multnomah County Board has never been impartial. Metro has refused to correct the County's violations, and deferred to political resolutions in the three Counties. LCDC must remand the joint submission for further proceedings before an impartial decisionmaker and according to the requirements of Due Process and Equal Protection.

The Owners have been the subject of wrongful determinations for over eight years. It is the duty of the Department and LCDC to effect these corrections, or face the loss of the entire urban and rural reserves statutory scheme as failing to afford citizens the protection of their basic constitutional rights.

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[24] ORS 197.040(1) incorporates the overarching principle of equity set forth in ORS 197.010 and requires that the Commission shall adopt rules that it considers necessary to carry out the land use statutory mandate, including, in relevant part, mandating that the Commission:

> "(C) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;
> (D) Assess the likely degree of economic impact on identified property and economic interests; and
> (E) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact."

Respectfully Submitted,

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