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September 13, 2017

Urban and Rural Reserves Specialist
Department of Land Conservation & Development
635 Capitol Street N.E., Suite 150
Salem, OR 97301

Re: Metro Urban/Rural Reserves (Ord. 17-1405)
Multnomah County Written Correspondence Regarding Objections

Dear Urban and Rural Reserves Specialist:

Pursuant to OAR 660-025-0130(4), Multnomah County (County) submits this written correspondence regarding objections to Multnomah County Ordinance No. 1246 (June 1, 2017) as incorporated in Metro Ordinance 17-1405 ("Submittal").

INTRODUCTION

The Submittal responds to LCDC's Remand Order in this matter, Remand Order 14-ACK-001867. Through the Remand Order, LCDC reaffirmed all findings and conclusions set forth in Compliance Acknowledgment Order 12-ACK-001819, except, in relevant part, the findings and conclusions relating to Rural Reserve Area 9D. *Id.* LCDC remanded Area 9D to Multnomah County and Metro "for further action consistent with the principles expressed in *Barkers Five LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014)." *Id.*

With respect to Area 9D, the court found that the County had failed to meaningfully explain the Rural Reserve designation of Area 9D and remanded the matter for: (1) further explanation; and (2) a determination regarding the effect of the error on the designations of reserves in Multnomah County in its entirety. *Barkers Five*, 261 Or App at 345–347, 364; *see* METRO-00083 through METRO-00085 (explaining the remand orders in detail in County's supplemental findings) (2017).

Thus, the Director's (or LCDC's) review of the Submittal is quite narrow: (1) has the County now offered sufficient explanation for its Rural Reserve Designation of Area 9D (*see* METRO-00085 through METRO-00089 (providing additional explanation)); and (2) did the error have any effect on the designations of reserves in Multnomah County in its entirety (*see* METRO-00089 through METRO-00091 (finding no effect)).

In further clarification of the scope of LCDC's review, unless the Area 9D error had an effect on the designations of reserves in Multnomah County in its entirety, it is now too late to challenge the reserve designation of such other areas. Despite this limitation, 5 of the 6 Objections pertaining to Multnomah County object to the continued designation of Area *9B* as Rural Reserve. If such objectors fail to establish, as Multnomah County asserts they have, that their objection arises from an effect of the error in Area 9D on the designations of reserves in Multnomah County in its entirety, then their objections should be dismissed. *See* Remand Order 14-ACK-001867 (in alignment with *Barkers Five*, re-affirming the Rural Reserve designation of Area 9B).

OBJECTION BY: BARKERS FIVE LLC AND BARKER FAMILY (BARKER)

Objection #1 – Inadequate Factual Basis

Barker asserts that the County failed to comply with the requirements in Goal 2 to consider "man-made structures and utilities, their location and condition" and "population and economic characteristics of the area." *Objection*, p. 2. Barker asserts that this failure arises from Multnomah County not re-opening the evidentiary record in its proceedings on the Area 9D error and, consequently, relying on old data. Specifically, Barker asserts that the data the County relied on "does not include the substantial urbanization that has occurred in the area known as North Bethany [adjacent to Area 9D]."

Barker is wrong - the County's data *does* include the North Bethany development and the County's reserve designations were made with complete knowledge of this development:

- "Although the N. Bethany plan is not adopted, we should assume that it will be for purposes of this analysis." MC-3014 (2012) (Multnomah County Citizen Advisory Committee Recommendations, adopted by the County Board, considering and applying the factors and making findings and conclusions).
- *See also (e.g.)*, just a few of the other instances where the N. Bethany development plan appears in Multnomah County's evidentiary record:
    - MC 1023–1036 (West Forest Park Concept Plan, *including the N. Bethany Concept Plan*, admitted into the record of the Multnomah County Citizen Advisory Committee's May 28, 2009, meeting); and
    - MCC 1612-1618 (Detailed analysis of the impact of the pending N. Bethany development on reserve designations in Multnomah County, admitted into the record of the Multnomah County Citizen Advisory Committee meeting on July 23, 2009).

Objection #2 – Failure to Utilize Most Recent Urban Growth Report

Barker asserts that the County failed to comply with OAR 660-027-0040(2), which, in relevant part, requires that Urban Reserves accommodate population and employment growth based on the most recent Urban Growth Report (UGR). *Objection*, p. 2. Barker asserts that the County failed to satisfy this requirement by failing to open its evidentiary record to include the 2014 UGR.

As an initial consideration, because Metro bears the burden of the obligations in this OAR, it is not clear that it is even possible for the County to violate this rule.

In any event, to the extent this rule imposes obligations on the County, the County fully satisfied those obligations because it absolutely *did* utilize the 2014 UGR:

- As part of Multnomah County Ordinance No. 1246, the County adopted Metro Ordinance No. 17-1397. MC-21003 (2017) (Ord. 1246, Sec 4).
- Metro Ord. 17-1397 was adopted:
    - "For the Purpose of Addressing State Rule Requirements Regarding the Amount of Urban Reserves and the Balance of Urban and Rural Reserves in the Metro Region;" and more specifically:
        - To "adopt findings addressing two state rule requirements that apply to the designation of urban and rural reserves across the entire region, in light of . . . *the Metro Council's adoption of newer*

regional urban growth projections in the 2014 Urban Growth Report ... " METRO-00200 (2017) (emphasis added).

- Metro then proceeded to make very thorough findings pursuant to OAR 660-027-0040(2) *and based on the 2014 UGR.* METRO-00204 ("The findings below address the status of existing urban reserve acreage in light of the newer growth projections in the 2014 UGR;" with the next paragraph then stating the requirements of OAR 660-027-0040(2)).

- By adopting all of Metro's findings pursuant to OAR 660-027-0040(2), which derive from direct utilization of the 2014 UGR, the County fully satisfied its obligations, if any, under the rule.

Objection #3 – Failure to Consider the Impact of HB 4078 (2014)

Barker asserts that the County failed to consider the impact of HB 4078, which reduced the number of acres in Urban Reserves in Washington County. *Objection*, pp. 2–3. Barker asserts further that a change in one County *necessitates* a change in the other two.

Barker is wrong on both counts. First, the County *did* consider the impact of HB 4078:

- As noted above, through Ordinance No. 1246, the County adopted Metro Ordinance No. 17-1397. MC-21003 (2017) (Ord. 1246, Sec 4).

- Metro Ord. 17-1397 was adopted:

  - "For the Purpose of Addressing State Rule Requirements Regarding the Amount of Urban Reserves and the Balance of Urban and Rural Reserves in the Metro Region;" and more specifically:

    - To "adopt findings addressing two state rule requirements that apply to the designation of urban and rural reserves across the entire region, in light of . . . *the reduction of urban reserve acreage in Washington County via HB 4078.*" METRO-00200 (2017) (emphasis added).

  - Metro then proceeded to make thorough findings regarding the impact of HB 4078. METRO-00202 – 00211.

- Thus, as above, by adopting all of Metro's findings relating to HB 4078, the County fully considered the impact of that bill on the designation of reserves.

Second, Barker is incorrect in its assertion that a change in the reserves in one county *necessitates* changes in other counties:

- More accurately stated, a change in reserves in one part of the region has the *potential* to prompt changes elsewhere; Metro and the County have acknowledged and considered this potentiality. METRO-00090 (2017).
- Metro and the County have also considered the changes to reserves in Washington County and have concluded that they *do not necessitate* a change in any other county. METRO-00019 – 00028 (2017).

Objection #4 – Failure to Coordinate with Metro

Barker asserts that the County failed to coordinate with Metro. *Objection*, pp. 3–4.

Among the evidence demonstrating coordination:

- Remand action occurred in coordinated lockstep:
  - **In the Fall of 2016**, Metro commenced action on remand by adopting Ordinance No. 16-1368, relating to reserves in Clackamas County;
  - **On April 13, 2017,** Metro completed its first step on remand by adopting Metro Ord. 17-1397, relating to the regional requirements.
  - **On May 4, 2017,** the County commenced its action and completed that step on June 1, 2017, when it adopted County Ord. 1246, *through which the County, in relevant part:*
    - *Adopted Metro Ord. 17-1397; and*
    - *Authorized Metro to compile all findings and conclusions for submission to LCDC.*
  - **On June 15, 2017,** Metro adopted Metro Ord. 17-1405, through which it compiled all findings and conclusions adopted by Metro and Clackamas and Multnomah Counties.
  - **On July 24, 2017,** Metro filed the Submittal with DLCD, on behalf of Clackamas and Multnomah Counties.
- As noted in the bullet points above, not only did Metro and the County *act* in concert (i.e., one after the other in a short period of time), but they coordinated the adoption of their findings and conclusions.

Objection #5 – Failure to Make "Further" Findings

Barker asserts that the County offered findings to LCDC that are substantially similar to those adopted through Ord. 1246, but that LCDC had ordered the County to make *further* findings. *Objection*, pp. 4–5.

Barker has this entirely wrong in several respects.

First, Barker is referring to the wrong order. The order of "further findings" is found in Remand Order 12-ACK-001819. That order was subsequently replaced by Remand Order 14-ACK-001867, which remains the operative order today.

Second, the correct Remand Order does not include an order of "further findings," but instead remands certain Areas for "further action consistent with the principles expressed in *Barkers Five*," which is a near verbatim quote from the concluding line in *Barkers Five* (at 364), evidencing the "pass-thru" nature of the Remand Order further described in the next paragraph. In addition, in adopting Ord. 1246, the County complied with LCDC's order to take "further action."

Lastly, and most importantly, Barker fails to understand what actually happened at LCDC's November 13, 2014, hearing. At that hearing, LCDC never reached the findings and arguments submitted by Metro and Clackamas and Multnomah Counties because, by the time of that hearing, Metro and Clackamas had decided that they preferred to simply have the matter pass through LCDC and remanded to them. Multnomah County stated its preference against remand, but agreed that it would be most efficient to be included in the local remand, and address the merits there, if that was what the Commission was inclined to do—which it was. *See Hearing Audio*, http://webserver.lcd.state.or.us/LCDC/audio/LCDC/2014/11/playlist.m3u?Play+All+Recursive=1.

Thus, LCDC did not:

- reach the merits on November 13, 2014, nor through its Remand Order (14-ACK-001867);
- did not review the County's findings; and
- did not find those findings lacking and needing "further" work.
- Instead, LCDC merely passed the court's order through to the local governments.

Objection #s 6 and 7 – A Rural Designation is Wrong / An Urban Designation is Right

Through these two objections, Barker raises challenges the propriety of a Rural Reserve Designation for Area 9D and asserts that the Area should be designated Urban Reserve.

Barker raised these concerns in its appeal to the court. *Barkers Five*, *Opening Brief, Appendix & Excerpt of Record for Petitioner Barkers Five, LLC and Sandy Baker* at 13–44; *and see e.g., Barkers Five* at 338–347 (*particularly*, at 338, "As part of its first assignment of error, petitioner Barkers contends that LCDC erred in concluding that it was legally permissible to designate its property as rural reserve.").

The *only* error the court affirmed on Barker's behalf was the County's failure to meaningfully explain why a Rural Reserve Designation was appropriate for all the land in Area 9D in light of the differences between the northern and southern portions of that Area. *Barkers Five* at 346–347. *See also Barkers Five* at 347, fn9 (denying remaining Barker arguments).

The County has responded to the Area 9D error. METRO-00083 – 00091 (Ord 17-1405, supplemental findings).

Barker does not challenge the County's supplemental findings, but, instead, continues to cite differences and similarities that it believes support an Urban Designation—an argument the court heard, did not affirm, and cannot now be re-raised.

OBJECTION BY: METROPOLITAN LAND GROUP (MLG)

MLG objects to the Submittal on seven counts. The latter six objections concern various aspects of the "amount of land" and "best achieves" standards—these objections fail for the reasons set forth in the Submittal, and as further explained in Metro's written corrrespondence. *See* METRO-00017 – 00028 (relevant findings from Ord 17-1405).

For its first objection, MLG challenges the Rural Reserve designation of Area 9B. *Objection*, pp. 1-2. MLG does not establish, or even assert, that its objections arise from the error in Area 9D. Accordingly, as explained in the Introduction above, because MLG has failed to establish that its Area 9B objections arise from the error in Area 9D, MLG's first objection should be dismissed. However, even if this were not the case, the record does not support MLG's objection as demonstrated by the record citations offered below.

MLG asserts the following:

- It's property "is a component of the larger 9D study area;"
- It's property "differs markedly from other propertys within [the area]" and "a designation of Rural Reserve is not appropriate;" and
- Multnomah County failed to analyze MLG's property correctly.

With respect to this objection, the record in this matter shows the following:

- MLG's property is not in Area 9D, it is in Area 9B (previously Area 7). *Barkers Five*, *Opening Brief and Excerpt of Record of Metropolitan Land Group* at 6.
    - Further, there is no such thing as a "larger 9D study area" for which urban or rural reserves factors were considered by Multnomah County or Metro. Metro Ord. 17-1405, Ex. B, Section IX and X (setting for the *distinct* Areas considered by Multnomah County and Metro).
- The County *is not* required to justify the inclusion of any particular lot or parcel, such as "MLG's property," within a rural reserve. Instead, the County is obligated to meaningfully explain why its consideration and application of the factors yield a rural reserve designation of *all of the land* in a given rural reserve. *Barkers Five* at 346; *see also* METRO-00085 (County's supplemental findings, citing these rules from *Barkers Five*).
- Lastly, in *Barkers Five*, MLG asserted that the Rural Reserve Designation of its property and of Area 9B was not supported by substantial evidence; the court denied this challenge. *Barkers Five* at 363.
    - Not only is MLG now precluded as a matter of law from now re-raising this issue, but LCDC has already issued its final decision on this matter. Remand Order 14-ACK-001867 (incorporating the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819 concerning the application of urban and rural reserve factors to Area 9B).
    - Again, MLG does not assert or establish that the error in Area 9D is cause for reconsideration of the designation of Area 9B.

OBJECTION BY: SPRINGVILLE INVESTORS, LLC *ET AL.* (SPRINGVILLE)

Introduction: Through its Objection, Springville challenges the Rural Reserve designation of Area 9B. Springville does not establish, or even assert, that its objections arise from the error in Area 9D. Springville makes passing reference to this obligation, but then simply asserts, without any basis of support, that the County failed to determine the effect of the Area 9D error on the designation of reserves in Multnomah County in its entirety. Springville Objection, p. 11.

Springville is incorrect; the County did consider the effect of the Area 9D error on the designation of reserves in Multnomah County in its entirety and explained its conclusion that the error did not have any effect on any other designation. METRO-00089 through METRO-00091.

Thus, as explained above, because Springville has failed to establish that its Area 9B objections arise from the error in Area 9B, Springville's objections should be dismissed. Even if this were not the case, the record does not support Springville's objections as demonstrated by the citations offered below.

Objection, Section I.A – Equal Protection:

Springville asserts, as a class of one, that the Rural Reserve designation of Area 9B violates the Equal Protection Clause (US Const.). The following citations are relevant to this charge:

- **Relevant rules of law include:**
  - Under the class of one theory, the Equal Protection Clause is violated only if the government intentionally treats a person differently from others similarly situated and there is no rational basis for the difference in treatment. *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *North Pacifica LLC v. City of Pacifica,* 526 F.3d 478, 486 (9th Cir. 2008).
    - "Rational basis" is the test because "zoning and land use issues do not implicate fundamental rights" and there is no assertion here of discrimination against a suspect class. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1239 (9th Cir. 1994).
    - "Rational basis" means "rationally related to a legitimate [government] interest." *Pennell v. San Jose*, 485 U.S. 1, 14 (1988).
    - With regard to "legitimate interest," the Court does not insist that the defenders of the law identify the actual purpose of the law, but rather, only a conceivable, and sometimes hypothesized, purpose.

- *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.' Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.")

- Similarly, with regard to "rationally related," the Court does not insist that such a connection exist in fact, but only that the legislative body could reasonably have believed that there was such a connection.

  - *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) ("Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives." (emphasis in original)).

- Lastly, Springville asserts that a pretext for an impermissible motive does not suffice as a Rational Basis. *Objection*, p. 4 (*quoting Squaw Valley* (375 F.3d 936, 944); which in turn relied on *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187-88 (9th Cir. 1995); and *Armendariz v. Penman*, 75 F.3d 1311, 1327 (9th Cir. 1996) (en banc).

  - Springville fails, however, to explain what this means and, in so doing, creates an inaccurate inference.

  - The "impermissible motive" doctrine is not an additional, distinct element of an Equal Protection claim as implied in the Objection (pp. 3-4, purportedly setting forth distinct elements of an Equal Protection claim).

  - Instead, whereas the previous bullet points above set forth what a "Rational Basis" <u>is</u>, the "impermissible motive" doctrine is simply the converse—what a Rational Basis <u>is not</u>. Here is the explanation provided in *Armendariz* at 1326 (internal citations and quotation marks omitted, emphasis added):

- "Although state action that does not implicate a fundamental right or a suspect classification passes constitutional muster under the equal protection clause so long as it bears a rational relation to a legitimate state interest, *the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary.*"
- Indeed the court recognized in the next sentence that it was simply stating the obvious: "It is well established that a city may not enforce its zoning and land use regulations arbitrarily. *Id.*

- Lastly, the "impermissible motive" analysis is triggered only where selective enforcement of laws is alleged. *Freeman* at 1187.
  - Springville does not allege selective enforcement, but instead alleges only that Area 9B was treated differently from Area 1C despite similarities alleged by Springville. *Objection*, p.4.

- **Regarding "legitimate governmental interest" in the present matter:**
  - With respect to the Reserves Program, the Oregon Legislative Assembly has set forth its findings in ORS 195.139 as follows:

> "(1) Long-range planning for population and employment growth by local governments can offer greater certainty for:
>
> "(a) The agricultural and forest industries, by offering long-term protection of large blocks of land with the characteristics necessary to maintain their viability; and
>
> "(b) Commerce, other industries, other private landowners and providers of public services, by determining the more and less likely locations of future expansion of urban growth boundaries and urban development.
>
> "(2) State planning laws must support and facilitate long-range planning to provide this greater certainty."

- Metro and the County clearly acted pursuant to ORS 197.137–197.145 (SB 1011 (2007)):
  - METRO–0001 ("WHEREAS, in 2007 the Oregon Legislative Assembly enacted SB 1011, authorizing Metro and the three counties in the Metro region to designate urban and rural reserves");
  - Rec. Item 1, *Compliance Acknowledgment Order 12-ACK-001819*, p.1 (2012) (explaining that the Submittal came before LCDC "pursuant to ORS 195.137 to 195.145, and OAR chapter 660, divisions 25 and 27."); and
  - *Barkers Five* at 264 (Metro and the counties designated reserves "under a new process that had been established by the legislature in 2007…").

- **Regarding "Rational Relation" in the present matter:**
  - In *Barkers Five*, Springville challenged the Rural Reserve designation of Area 9B as not supported by substantial evidence. *Barkers Five*, *Opening Brief of Springville Investors, LLC and Katherine and David Blumenkron* at 22–33.
    - Decisions in the Submittal must be supported by substantial evidence. *Id.* at 24 (*Citing* ORS 197.651(10)(c) (court reviews orders for support by substantial evidence); and ORS 197.633(3)(a) (LCDC reviews submittals for support by substantial evidence).
    - Among the decisions made in the Submittal, Metro and the Counties were required to "(a) apply and evaluate each factor, (b) weigh and balance the factors—which are not independent approval criteria—as a whole, and (c) meaningfully explain why a designation as urban or rural reserves is appropriate." *Barkers Five* at 301.
    - The court rejected Springville's substantial evidence challenge:
      - "We have considered and *reject without discussion* . . . Springville's third assignment of error, contending that LCDC misapplied its substantial evidence standard of review." *Barkers Five* at 363 (emphasis added).
      - Thus, because there is substantial evidence that Metro and the County considered and applied the factors implementing SB 1011 and meaningfully explained how

the decision furthers the legitimate government interest upon which SB 1011 is based, the "rational relation" element is satisfied.

- For analysis and explanation of the designation of Area 9B see:
  - METRO-00075 through METRO-00077 (Submittal findings and explanations);
  - MC-3004 through MC-3015 (2012) (County's factor-by-factor analysis (Area 9B previously referred to as Area 7a));
  - Rec. Item 1, *Compliance Acknowledgment Order 12-ACK-001819*, pp. 121–122 (2012); and Remand Order 14-ACK-001867 (LCDC affirming Rural Reserve designation of Area 9B).
- Lastly, where the evidence supports the designation of an area as either urban reserve or rural reserve, the local government may choose either designation and need not demonstrate that it has chosen the designation that "better suits" the area. *Barkers Five* at 309–311.
  - Thus, even if Area 9B could have been given and *urban* reserve designation, the rural reserve designation still (given the substantial evidence) bears a rational relation to the legitimate governmental interest.

- **Regarding disparate treatment:**
  - The proper comparison is the treatment of Springville as compared to all others in *Area 9B* (rather than Area 1C as Springville asserts). Because *all* land in Area 9B has been designated Rural Reserve, there has been no disparate treatment at all. *See* METRO-00075 through METRO-00077 (designating as Rural Reserve all of the land in Area 9B).
  - Even if it were proper to compare Area 9B to Area 1C, there is no disparate treatment:
    - Metro and the County considered and applied all of the factors for both areas. *Barkers Five* at 363 (rejecting substantial evidence challenge to Area 9B; no challenge raised regarding Area 1C); and
    - Where the evidence supports the designation of an area as either urban reserve or rural reserve, Metro and the County are allowed, *as a matter of law*, to choose either designation and need not demonstrate that it has chosen the designation that "better suits" the area. *Barkers Five* at 309–311.

- Adding this to the fact that the court took no issue with the designation of Area 9B or Area 1C, Metro and the County applied the law equally with respect to both areas.

- **Regarding "similarly situated":**
  - Even if it were proper to compare Area 9B to Area 1C, the two areas are not similarly situated.
  - For instance, unlike Area 9B, Area 1C is adjacent to a Regionally Significant Industrial Area (RSIA), the Springwater employment area added to the UGB in 2002. METRO-00073 – METRO 00074, *citing* MC-2983, 2985, 3226–3227 (2012).
    - In relevant part, as defined in ORS 197.722(2)(b) and (c), a "Regionally significant industrial area" is an area planned and zoned for industrial use that:
      - Has site characteristics that give the area significant competitive advantages that are difficult or impossible to replicate in the region; and
      - Has superior access to transportation and freight infrastructure, including, but not limited to, rail, port, airport, multimodal freight or transshipment facilities, and other major transportation facilities or routes.
      - Indeed, Foundation Agricultural Land (FAL), such as Area 1C, was designated Urban Reserve because of the very qualities that qualify it as FAL. METRO-00008 – 00009.
  - In addition, as compared to Area 9B, Area 1C generally received better rankings for Urban Reserve on 6 out of the 8 urban factors (albeit only *slightly* better in some instances). MC-2982 – 2985 (2012) (Area 1C (formerly 4b) ranks higher on factors 1–3, 5, and 7–8), *compare* MCC-3011 – 3015 (Area 9B (formerly Area 7b) ranks lower on those factors).

Springville Objection, Section I.B – Procedural Due Process:

Springville asserts that Metro and the County adopted a rural reserve designation for Area 9B in violation of its right to Procedural Due Process. The following citations are relevant to this charge:

- **Relevant rules of law include:**
  - Springville asserts that the action taken by the County was *quasi-judicial* in nature (as opposed to *legislative*) and, therefore, adoption of Ordinance 1246 should have been considered by an "impartial tribunal"—Springville asserts that the County Board was not impartial. *Objection*, pp. 5–7.
    - As set forth below, Springville is incorrect about the law:
      - the subject action was *legislative*; and,
      - even if it was not, the County Commissioners *were* "impartial" within the meaning of the Due Process Clause.
  - Adoption of Ordinances 1246 and 17-1405 were *legislative* in nature:
    - "governmental decisions which affect large areas and are not directed at one or a few individuals are legislative in nature." *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060–1061 (9th Cir. 2012) (internal quotation marks omitted), *citing Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1262 (9th Cir. 1994).
    - In *Samson* (at 1061–1061), the City's decision to impose a moratorium on development was legislative in nature because the ordinances applied generally to all owners of shoreline property on Bainbridge Island.
    - In *Halverson* (at 1261), the County's decision to operate a diking system was legislative in nature because:
      - The design, construction, and improvement of the diking system entailed complex decisions and activities over a period of several decades;
      - Many parts of the county, and the properties of thousands of people, were potentially affected at all times; and
      - The governmental undertakings were of general applicability and were carried out under state law grants of legislative authority.

- In the present matter:
  - Ordinance 1246 applies generally to all land designated Urban or Rural Reserve in Multnomah County. *See e.g.*, MC-21002 (2017) (Ord. 1246, Section 2, identifying Exhibit 1 as the map depicting the location of all reserves in Multnomah County)
  - The Rural Reserve designation of Area 9B applies generally to all of the land in Area 9B. *See* Ord 1246, Ex. 1 (map depicting all of Area 9B as Rural Reserve); METRO-00075–00077 (findings in support of designating all of Area 9B as Rural Reserve).
    - Springville is the owner of only 225 acres out of the approximately 1,500 acre Area 9B. *Objection*, p. 1.
  - The County adopted Ordinance 1246 pursuant to state law grants of legislative authority.
    - ORS 197.137–197.145); METRO–0001 ("WHEREAS, in 2007 the Oregon Legislative Assembly enacted SB 1011, authorizing Metro and the three counties in the Metro region to designate urban and rural reserves");
    - Rec. Item 1, *Compliance Acknowledgment Order 12-ACK-001819*, p.1 (2012) (explaining that the Submittal came before LCDC "pursuant to ORS 195.137 to 195.145, and OAR ch. 660, divisions 25 and 27."); and
    - *Barkers Five* at 264 (Metro and the counties designated reserves "under a new process that had been established by the legislature in 2007…").
- Now then, with respect to *legislative* acts, such as Multnomah County Ordinance No. 1246 and Metro Ordinance 17-1405:
  - "[D]ue process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law." *Samson, supra*, 683 F.3d at 1060–1061 (internal citations omitted).
    - The "normal manner prescribed by law" refers only to the following of established protocols. *Id.*

        - Thus, contrary to Springville's assertions, the Due Process Clause does not require an impartial tribunal in this instance; instead, Springville's rights are "protected in the only way that they can be in a complex society, by their [election] power, immediate or remote, over those who make the rule." *Id.*

    - The Multnomah County Home Rule Charter sets forth the protocols for legislative action by the County, which, in relevant part, provides:
        - All legislative action "shall be by ordinance." Sec. 5.10
        - "Except as this charter provides to the contrary with reference to emergency ordinances, before an ordinance is adopted it shall be read during regular meetings of the board on two different days at least six days apart." Sec 5.30(1).
        - "Except as this charter provides to the contrary, the board may act at a meeting only with the affirmative concurrence of a majority of its members." Sec. 3.40.

- **In adopting Multnomah County Ordinance No. 1246 and Metro Ordinance 17-1405, the County and Metro complied with established legislative protocols and, thereby, provided due process.**
    - There is no assertion that the County or Metro failed to provide notice of the hearings on the two ordinances—indeed, Springville appeared at these hearings. *See e.g.,* MC-20111, 20252 (2017) (Springville's counsel's testimony signup sheets from two County hearings on Ord. 1246); METRO-126–129; 132–142; 291–292, 904–1171 (written testimony of Springville submitted for Metro hearings).
    - Although Springville complains of time limits on oral testimony at some hearings, both oral and unlimited written testimony were allowed at the hearings and Springville utilized these opportunities. *See e.g.,* MC-20112–20119, 20253–20259 (2017) (written testimony of Springville submitted for County hearings); METRO-126–129; 132–142; 291–292, 904–1171 (2017) (written testimony of Springville submitted for Metro hearings).
    - There is no assertion that the County or Metro failed to comply with any other legislative protocol and, indeed, there was no failure. *See e.g.,* MC-21003 (2017) (showing the two reading dates for Ord. 1246 and signing of the Ordinance by the County Chair indicating adoption by majority vote).

- **Even if the action taken by the County was not *legislative*, Springville would not have a procedural due process claim.**
    - First, under Due Process doctrine, Springville lacks a protected interest in the discretionary decision to designate an Urban Reserve. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (recognizing that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion;" and that a property interest arises only when conferral of the benefit is truly mandatory); *see also Foss v. National Marine Fisheries Service*, 161 F.3d 584.588 (9th Cir. 1998) (property interest exists where "regulations establishing entitlement to the benefit are... mandatory in nature.").
    - Second, even Springville did have a protected interest in an urban reserve designation, due process requirements were met through the fact that Springville received notice and an opportunity to be heard. *Tom Growney Equip., Inc. v. Shelley Irr. Dev., Inc.*, 834 F.2d 833, 835 (9th Cir. 1987) ("In the absence of extraordinary circumstances, procedural due process requires notice and an opportunity to be heard before any governmental deprivation of a property interest.").
        - Springville does not assert a lack of notice.
        - Springville *does* assert a lack of opportunity to be heard based on the time limits on oral testimony and inability to admit new evidence into the record. *Objection*, p.7.
            - The opportunity to be heard was sufficient:
                - Both oral and unlimited written testimony were allowed at all of the several hearings and Springville utilized these opportunities. *See e.g.,* MC-20112–20119, 20253–20259 (2017) (written testimony of Springville submitted for County hearings); METRO-126–129; 132–142; 291–292, 904–1171 (2017) (Springvillr written testimony, Metro).
                - The new evidence Springville desired to admit was beyond the scope of the remand and beyond the scope of the local proceedings. MC-21001 – 21002 (Ord. 1246, Finding G.i. (explaining the bases for keeping the record closed)).
                    - *And see response above to Barker Objection #1*, County evidence is not "outdated."

- Lastly, Springville asserts a lack of impartial decisionmaker.
  - Springville misunderstands the requirement for an impartial decisionmaker under the Due Process clause.
  - Only *certain* biases disqualify decision makers. *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482, 496–497 (1976); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (examples of impermissible biases include having a pecuniary interest in the outcome and where the adjudicator has been the target of personal abuse or criticism from the party before the tribunal).
  - In addition, policymakers with decisionmaking power enjoy a presumption of honesty and integrity. *Hortonville*, 426 U.S. at 496–497
    - This presumption is not overcome by circumstances such as the decisionmaker having been "involved" in events preceding a decision. *Id.* (Despite involvement in labor negotiations with teachers, School Board members were not disqualified from making a subsequent decision to fire the teachers); *FTC* v. *Cement Institute,* 333 U.S. 683 (1948) (Despite previously asserting that a certain pricing system was illegal, Commission members were not disqualified then initiating investigative proceedings); *Withrow*, 421 U.S. at 47–55.
  - There is no assertion here that any decision maker had a pecuniary interest in the outcome or was responding to personal abuse or held any animus towards Springville.
    - Instead, Springville simply asserts that decision makers already had their minds made up.
    - *Withrow* (at 48) squarely rejects this assertion:
      - "[T]he fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the

> cement industry were legally authorized participants in the hearings. They produced evidence - volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities."

- Thus, it cannot be said that the County Board and Metro Council failed to be impartial under the Due Process Clause.

Springville Objection, Section I.C – Substantive Due Process:

Springville asserts that Metro and the County adopted a rural reserve designation for Area 9B in violation of its right to Substantive Due Process. The following citations are relevant to this charge:

- **Relevant rules of law include:**
  - The question raised by Springville's challenge is whether Metro's and the County's acts culminating in the Rural Reserve designation of Area 9B were "rationally related to the promotion of the public health, safety or welfare." *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993).
    - The rational relationship test applies because there is no assertion here of discrimination against a suspect class or fundamental right. *Christensen*, 995 F. 2d at 165; *Kawaoka*, 17 F.3d at 1234, *quoting Hodel v. Indiana*, 452 U.S. 314, 331-32, 69 L. Ed. 2d 40, 101 S. Ct. 2376 (1981).
  - Under the "rational relationship" standard, to establish a claim of violation of substantive due process, Springville must show that Metro's and the County's legislative acts were "*clearly arbitrary and unreasonable*, having no substantial relation to the public health, safety, morals or general welfare." *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012);
    - Legislative acts, such as those at issue here (*see correspondence on Objection I.B above*), that do not impinge on fundamental rights or employ suspect classifications are presumed valid and this presumption is overcome only by a "clear showing of arbitrariness and irrationality." *Kawaoka*, 17 F.3d at 1234, *quoting Hodel v. Indiana*, 452 U.S. 314, 331-32, (1981).

- Accordingly, Metro's and the County's ordinances "*must* be upheld" so long as the ordinances advance "*any* legitimate public purpose" or so long as it is "at least fairly debatable" that the ordinances were "rationally related to legitimate government interests." *Kawaoka*, 17 F.3d at 1234; *Christensen*, 995 F.2d at 165.
- Thus, under the "rational relationship" standard, plaintiffs' must meet an "exceedingly high burden." *Samson*, 683 F.3d at1058.

- **As set forth above in the "Rational Relation" discussion on Objection I.A:**
  - In *Barkers Five*, Springville challenged the Rural Reserve designation of Area 9B as not supported by substantial evidence. *Barkers Five*, *Opening Brief of Springville Investors, LLC and Katherine and David Blumenkron* at 22–33.
    - Decisions in the Submittal must be supported by substantial evidence. *Id.* at 24 (*Citing* ORS 197.651(10)(c) (court reviews orders for support by substantial evidence); and ORS 197.633(3)(a) (LCDC reviews submittals for support by substantial evidence).
    - Among the decisions in the Submittal, Metro and the Counties must "(a) apply and evaluate each factor, (b) weigh and balance the factors—which are not independent approval criteria—as a whole, and (c) meaningfully explain why a designation as urban or rural reserves is appropriate." *Barkers Five* at 301.
    - The court rejected Springville's substantial evidence challenge:
      - "We have considered and *reject without discussion* . . . Springville's third assignment of error, contending that LCDC misapplied its substantial evidence standard of review." *Barkers Five* at 363 (emphasis added).
      - Thus, because there is substantial evidence that Metro and the County considered and applied the factors implementing SB 1011 and meaningfully explained how the decision furthers the legitimate government interest upon which SB 1011 is based, the "rational relation" element is satisfied.

- For analysis and explanation of the designation of Area 9B see:
  - METRO-00075 through METRO-00077 (Submittal findings and explanations);
  - MC-3004 through MC-3015 (2012) (County's factor-by-factor analysis (Area 9B previously referred to as Area 7a));
  - Rec. Item 1, *Compliance Acknowledgment Order 12-ACK-001819*, pp. 121–122 (2012); and Remand Order 14-ACK-001867 (LCDC affirming Rural Reserve designation of Area 9B).
- Lastly, where the evidence supports the designation of an area as either urban reserve or rural reserve, the local government may choose either designation and need not demonstrate that it has chosen the designation that "better suits" the area. *Barkers Five* at 309–311.
  - Thus, even if Area 9B could have been given and *urban* reserve designation, the rural reserve designation still (given the substantial evidence) bears a rational relation to the legitimate governmental interest.

Objection, Section II: Springville challenges the findings and reasons adopted by Metro and the County in support of the Rural Reserve Designation of Area 9B.

- The court reviewed and denied this challenge. *Barkers Five* at 363.
- Therefore, as with MLG above, not only is Springville precluded as a matter of law from now re-raising this issue, but LCDC has already issued its final decision on this matter. Remand Order 14-ACK-001867 (incorporating the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819 concerning the application of urban and rural reserve factors to Area 9B).
- Further, as with MLG above, this objection by Springville rests solely on Springville's disagreement with the Rural Reserve designation—a disagreement that has been raised and denied; MLG does not tie this objection to the "meaningful explanation" error in Area 9D, which per the court's and LCDC's remand orders, is a prerequisite to revisiting the designation of any area other than Area 9D.
- Lastly, as noted several times above, the evidence supports the designation; and where more than one designation is available, the local governments are free to choose and need not identify and select a "best" option.

Objection, Section III: Springville asserts that the Rural Reserve Designation of Area 9B was based on political considerations instead of an impartial application of the factors.

- In essence, this is simply another assertion that the designation of Area 9B was not supported by substantial evidence.
- Accordingly, this objection fails for the same reasons set forth above with respect to Springville's assertion in Section II of its Objection. *Please see citations provided in response to Springville's Objection, Section II.*
- Further, the court found that LCDC performed its previous review correctly and did not give inappropriate "political deference" in the course of its review. *Barkers Five* at 319.

Objection, Section IV: Springville asserts general conclusions that the County failed on several counts. Most of these assertions appear to relate to tasks beyond the scope of the Remand Order and, further, Springville fails to offer any bases for its assertions and fails to identify any deficiency in the relevant supplemental findings. METRO-00083 – 00091.

Objection, Section V: Springville asserts, as its final objection, that LCDC was required to apply ORS 197.040 (relating to assessment of economic impact), but failed to do so.

- The court reviewed and denied Springville's challenges based on ORS 197.040. *Barkers Five* at 319 ("we reject without discussion petitioner Springville's first assignment of error…" [ORS 197.040 was the subject of this assignment of error], *see Barkers Five, Opening Brief of Springville Investors, LLC and Katherine and David Blumenkron* at 17 - 20)).
- In addition, LCDC considered and rejected challenges under ORS 197.040. Rec. Item 1, *Compliance Acknowledgment Order 12-ACK-001819*, pp. 43–44 (2012) ("Review of the Metro Urban and Rural Reserves Submittal in the manner of periodic review is not subject to ORS 197.040").
    - The court's and LCDC's holdings on this issue are final (*see* Remand Order 14-ACK-001867 (incorporating the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819); Springville is precluded as a matter of law from re-raising this issue.

OBJECTION BY: HANK SKADE

The Objections filed by Mr. Skade, and material in the record relevant to such Objections, are as follows:

1. Objection: LCDC has a duty to apply ORS 197.040 to this process.
    a. Record: *Please see citations provided in response above to Springville Objection, Section V.*

2. Objection: Multnomah County erred in declining to admit new evidence into the record during the proceedings culminating in Ord. 1246.
    a. Record:
        i. *Please see citations provided above in response to Barker Objection #1* (County's evidence *is not* outdated).
        ii. *And see* MC-21001 – 21002 (Ord. 1246, Finding G.i. (explaining the bases for keeping the record closed)).

3. Objection: Rural Reserve designation of the "L" in Area 9B is factually flawed.
    a. Record: *This is a substantial evidence challenge to Area 9B; please see citations provided in response above to Springville Objection, Section II.*

4. Objection: Rural Reserve designation of the "L" in Area 9B was driven by politics.
    a. Record: This is another form of substantial evidence challenge to Area 9B; please see citations provided in response above to Springville Objection, Section III.

5. Objection: Equal Protection.
    a. Record: Please see citations provided in response above to Springville Objection, Section II.A.

6. Objection: Due Process.
    a. Record: Please see citations provided in response above to Springville Objection, Section II.B.

OBJECTION BY: CARL N. KESERIC

Mr. Keseric appears to make two arguments. First, unlike the Objections addressed above, Mr. Keseric asserts that the Area 9D error *does* have an effect on the Rural Reserve Designation of Area 9B. In short, he argues that, like Area 9D, the findings and conclusions in support of the Rural Reserve Designation of Area 9B lack meaningful explanation. *Keseric Objection, pp. 1–4.*

Second, Mr. Keseric asserts that the Rural Reserve Designation of Area 9B is not supported by substantial evidence.

Both objections may be denied on the basis that both the court and LCDC have reviewed and conclusively denied these objections and, notably, neither body found a lack of meaningful explanation with respect to the Area 9B designation. *Barkers Five* at 363; Rec Item 1, *Compliance Acknowledgment Order 12-ACK-001819*, pp. 121–122; Remand Order 14-ACK-001867 (incorporating the findings and conclusions of the Compliance Acknowledgement Order). Lastly, and importantly, this Objection does not demonstrate any effect of the Area 9D error on the designation of any other area.

OBJECTION BY: THOMAS J. VANDERZANDEN

Mr. VanderZanden objects, on substantial evidence grounds, to the Rural Reserve Designation of Area 9B. As explained above, both the court and LCDC have reviewed and conclusively denied this objection and Mr. VanderZanden does not offer any legal basis for revisiting that final conclusion (e.g., there is no assertion that the Area 9B designation may be revisited due to an effect on that Area arising from the Area 9D error).

Sincerely,

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