



Oregon

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March 5, 2015

TO: Land Conservation and Development Commission

FROM: Carrie MacLaren, Deputy Director

SUBJECT: **Agenda Item 10, March 12, 2015, LCDC Meeting**

METRO URBAN & RURAL RESERVES REMAND ORDER (MURR) AND PETITIONS FOR REVIEW OF DIRECTOR'S ACTION

I. AGENDA ITEM SUMMARY

On November 13, 2014, the Land Conservation and Development Commission (LCDC and/or commission) remanded Rural Reserve Area 9D and Urban Reserve Areas 4A, 4B, 4C, and 4D to Multnomah County and Metro, respectively. On January 15, 2015, the director of the Department of Land Conservation and Development (DLCD and/or department) acted to implement the commission's decision by preparing and executing a written order pursuant to OAR 660-002-0010(6). *See* Remand Order 14-ACK-001861 (hereinafter, "Remand Order") (Attachment A). Shortly thereafter, several parties to the remand filed petitions for commission review of director's action under OAR 660-002-0020(1). (Attachment B). While the specifics of each petition vary, the general focus is the same: a concern that the Remand Order is written too narrowly, imposing a limited set of options on remand and preventing local governments from exercising the range of options that should be available.

On February 5, 2015, the department withdrew the Remand Order because, although the commission has 60-120 days to consider the petitions and to affirm, reverse, or modify the order, any petition for judicial review of the order was required to be filed within 21 days of January 15, 2015, before the petitions could reasonably be addressed by the commission. (Attachment C).

The petitions for commission review of director action are now before the commission for consideration. Parties to the matter have been notified of the option to present oral argument to the commission at the hearing on March 12, 2015, after which the department recommends the a commission act to modify the remand order as proposed in Section IV of this report.

A. Type of Action and Commission Role

Commission response to petitions for review of director's action is governed by OAR 660-002-0020. Ultimately, the commission's charge is to decide whether to affirm, reverse, or modify the action of the director. OAR 660-002-0020(3).

Other than a procedural requirement that the department provide “reasonable notice to all parties of the date, time, and place that the commission will take action on the petition, and the manner in which such parties may express their views,” OAR chapter 660, division 2 does not prescribe any criteria under which the commission should review a director’s action. However, because the action being reviewed is one delegated to the director – specifically, the preparation and execution of written orders to implement an action taken by the commission – the substantive question is whether the Remand Order is consistent with the action taken by the commission to remand certain reserve designations to the local governments.

Ultimately, the commission’s charge under OAR 660-002-0020(3) is to affirm, reverse, or modify the action of the director.

B. Staff Recommendation

The department recommends that the commission accept oral argument at its March 12, 2015 meeting, deliberate on the merits of the various arguments, and make a decision whether to affirm, reverse, or modify the action of the director. Although the department believes that the Remand Order is consistent with the commission’s November 13, 2014 remand decision and motion, the department believes that the parties have raised a number of ambiguities that would benefit from clarification.

C. Staff Contact Information

If you have questions about this agenda item, please contact Rob Hallyburton, Community Services Division Manager, at 503-934-0018, or rob.hallyburton@state.or.us.

II. BACKGROUND

The November 7, 2014, staff report to the commission provides a summary of the Court of Appeals decision in *Barkers Five, LLC v. LCDC*, 261 Or App 259 (2014) (hereinafter “*Barkers Five, LLC*”) and the subsequent legislative response in HB 4078 (2014), codified as Oregon Laws 2014, chapter 92 (hereinafter, “HB 4078”), as well as the commission’s response after receipt of the appellate judgment, including a summary of the major legal and policy issues before the commission in the remand proceeding. A copy of that staff report is available at:

http://www.oregon.gov/LCD/docs/meetings/lcdc/111314/Item_8_MURR_Remand_Response.pdf.

For additional background on the purposes of urban and rural reserves, the rules governing their designation, and a summary of local actions, see the July 28, 2011, staff report to the commission which can be accessed here: http://www.oregon.gov/LCD/docs/meetings/lcdc/081711/item_11_murr.pdf.

III. REVIEW CRITERIA, PROCEDURAL REQUIREMENT & RECORD

A. Review Criteria

As discussed in Section II.A, OAR 660-002-0020 does not provide substantive review criteria to guide the commission’s review of a director’s action. Instead, the focus of the rule is a decision by the commission to affirm, reverse, or modify the Remand Order prepared and executed by the

director to implement the commission’s decision to remand rural reserve Area 9D and urban reserve Areas 4A, 4B, 4C, and 4D (collectively referred to as the “Stafford Areas”).

B. Procedural Requirements

With respect to petitions for commission review of director’s action, OAR 660-002-0020 sets forth certain specifications for filing such a petition, as well as a notice requirement for the department. Specifically, petitions for commission review of director’s action must be: (a) filed within 15 days of the date of the taking of the action sought to be reviewed; (b) contain the name, address, and telephone number of the petitioner, a brief statement of the petitioner’s interest in the outcome of the action sought to be reviewed or of the public interest represented by the petitioner; and (c) specify the action of the director to be reviewed, when the action was taken, the action sought by petitioner, and the reason why the commission should so act. OAR 660-002-0020(2).

The director is then required to provide notice to “all parties of the date, time, and place that the commission will take action on the petition, and the manner in which such parties may express their views.” OAR 660-002-0020(3). Consistent with ORS 183.310(7), the department has determined that all parties to the Court of Appeals decision in *Barkers Five, LLC*, qualify as “parties” to this review; accordingly any such party may provide oral argument at the March 12, 2015 hearing, irrespective of whether that party filed a petition for commission review. A copy of the notice letter sent to the parties is attached as Attachment D.

Finally, substantively, OAR 660-002-0020(3) requires that, in response to such a petition, the commission: “by order within 60 days of the filing of the request, or within a period of time not to exceed 120 days if good cause therefore is shown, *[sic]* affirm, reverse, or modify the action of the Director.”

C. Written Record

In addition to those items enumerated as Items 1-6 in Section III.C of the November 7, 2014 staff report, the following are part of the written record of this proceeding:

7. Remand Order 14-ACK-001861, January 15, 2015. (Attachment A).
8. Withdrawal of Remand Order 14-ACK-001861, dated February 5, 2015. (Attachment B).
9. Petitions for Commission Review of Director’s Action (Attachment C), filed by:
 - Clackamas County;
 - Barkers Five, LLC and Sandy Baker (hereinafter “Barkers”);
 - Cities of Tualatin and West Linn (hereinafter “Cities” or “the Cities”);
 - Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC, and LFGC, LLC (hereinafter “Maletis”);
 - Metropolitan Land Group; and
 - Multnomah County.

10. The notice letter sent to parties dated February 27, 2015. (Attachment D)
11. This staff report.

IV. DEPARTMENT ANALYSIS

The commission must decide whether to affirm, reserve, or modify the action of the director, which in this case is a written order remanding Areas 9D and the Stafford Areas to Multnomah County and Metropolitan Service District (Metro) for further findings consistent with the statutory and administrative rule requirements.

Six parties have filed petitions for commission review of the Remand Order. Although presented differently, the general thrust of the petitions is that the written Remand Order either could be construed as limiting – or in fact does limit – the scope of actions Metro, Multnomah County, and Clackamas County can take on remand, a limitation that the petitioners view as inconsistent with the Commission’s deliberations and decision to remand.

The limitations identified by the petitioners can be grouped into the following sets of questions:

1. Does the Remand Order preclude any action other than the adoption of new findings? For example, does the Remand Order give local governments the ability to make changes to the current reserves designations, such as to change a rural reserve designation to undesignated, or to otherwise alter the map? *See, e.g.*, Clackamas County Petition at 1; Barkers Petition at 2-3.
2. Are the local governments precluded from reconsidering the “best achieves” standard in OAR 660-027-0005(2) or the “amount of land” standard in OAR 660-027-0040(2)? *See, e.g.*, Clackamas County Petition at 1-2; Cities Petition at 1-2; Maletis Petition at 6-8; Metropolitan Land Group Petition at 6-8.¹

Though asked as distinct questions, parties’ questions as to scope boil down to whether the Remand Order describes the *minimum* of what the local governments must do, or *all* that the affected local governments can do.

A. The Court of Appeals’ Decision and Commission Response

In August 2012, the commission approved the urban and rural reserves designations submitted by Clackamas, Multnomah, and Washington counties and Metro. That approval was appealed to the Oregon Court of Appeals, which reversed and remanded the decision. The court’s decision required the commission to:

¹ Several of the parties frame this question as whether the scope of the Remand Order is more restrictive than the remand decision by the Court of Appeals, but the specifics of the question center on whether the local governments are precluded from reconsidering the “best achieves” and “amount of land” standards. The department has elected to use the more specific description because it focuses the issue on the more relevant question of what can and/or must be undertaken on remand, and avoids a need to parse the particulars of the court opinion – a particularly difficult exercise after the passage of HB 4078 (2014).

1. Remand Washington County’s reserves designation as a whole for reconsideration and remand the submittal to Metro and the counties so that they can ultimately assess whether any new joint designation, in its entirety, satisfies the best achieves standard.
2. Determine the effect of Multnomah County’s deficient consideration and explanation of why it designated all of Area 9D as rural reserves, and determine whether such error effects the designations of reserves in Multnomah County in its entirety.
3. Meaningfully explain why the designation of Stafford as urban reserves is supported by substantial evidence.

After the court’s remand, the Oregon Legislature enacted HB 4078, which effected a settlement reached among the parties to the Washington County dispute and established “acknowledged” reserves in Washington County. This legislation removed the need for the commission to address the first remand item above, leaving only Area 9D and the Stafford Areas to be addressed on remand. The bill also gave the commission the authority to approve all or part of the remaining reserves decision if the commission identified evidence in the record that “clearly supports” the decision, despite insufficient findings by the local government. *See* HB 4078, Sec. 9.

After receiving the appellate judgment, the commission asked parties to the appeal to submit briefs to help guide its response to the remand. Several parties submitted written briefs, and the commission held a hearing on November 13, 2014, to hear oral argument and determine what action to take. At the conclusion of its deliberations, the commission decided to “Remand Rural Reserve Area 9D and Urban Reserve Areas 4A, 4B, 4C, and 4 D, as instructed by the Court of Appeals.”

In so doing, the commission declined to utilize the authority granted to approve the all or part of the remanded reserved issues if it identified evidence in the record that would “clearly support” the local government’s initial decision. Further, because the commission was remanding the reserves designations to the local governments, the commission also declined to determine the intent of the legislature with respect to the “best achieves” and “amount of land” standards; that is, the commission did not reach a conclusion as to whether, in adopting HB 4078, the legislature pre-empted consideration of those standards on remand (at least with respect to the effect of the adjustments made to Washington County) or whether those standards could – or perhaps must – be reevaluated by the local governments as part of the remand.

B. Order Implementing Commission’s Remand Action

The director issued the Remand Order on January 15, 2015. That Remand Order identified the geographic areas being remanded. The Remand Order also replaced the phrase in the commission’s motion “as instructed by the Court of Appeals” with the phrase “for further findings under ORS 195.141 and 195.145, and OAR chapter 660, division 27.” This change was made in large part to reflect the fact that the Court of Appeal’s remand (or instructions) was to the commission, and not directly to the local governments. Consequently, there were no “instructions” for the local governments. Therefore, the Remand Order used language consistent with the deficiencies identified by the court in the *Barkers Five, LLC*, decision – which concerned the adequacy of explanation in the findings and the evidence used to support such findings under the applicable statutory and regulatory requirements.

Following the commission discussion to focus the remand, and standard department and commission practice to be responsive to an entire submittal in the written order, the Remand Order was structured to reincorporate the portions of the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819 that were not at issue on remand, *i.e.*, those portions of the Compliance Acknowledgment Order that were either not appealed to the Court of Appeals, or were affirmed by the Court of Appeals.

Thus prepared, the Remand Order read in relevant part:

“Conclusion”

“Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court’s decision, the Commission finds that the Reserves Submittal as amended by Oregon Laws 2014, chapter 92, complies with ORS 195.141 and 195.145, OAR chapter 600, division 27, the applicable statewide planning goals, and all other applicable rules of the Commission, except with respect to (1) Multnomah County’s explanation of why its consideration of the rural reserve factors yields a rural reserve designation of all land in Rural Reserve Area 9D; and (2) Metro’s explanation of why the designation of Areas 4A, 4B, 4C, and 4D as Urban Reserves is supported by substantial evidence.

THEREFORE, IT IS ORDERED THAT:

“The Commission incorporates by reference the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819, except with respect to its approval of the inclusion of Rural Reserve Area 9D and Urban Reserve Areas 4A, 4B, 4C, and 4D. Accordingly, the Commission remands Rural Reserve Area 9D to Multnomah County and Urban Reserve Areas 4A, 4B, 4C, and 4D to Metro for further findings under ORS 195.141 and 195.145, and OAR chapter 660, division 27.

“Before final acknowledgment, the Commission will review a resubmittal of the Metro Region urban and rural reserves designations for acknowledgement of compliance with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and all other applicable rules of the commission.”

C. Department Analysis of Petitions for Commission Review of Director’s Action

As described earlier, several of the petitions are phrased in a manner that describes the Remand Order as creating ambiguities as to the scope of actions the local governments may take on remand, while others assert that the Remand Order is inconsistent with the commission’s decision, and still others simply request that the commission address the concerns for purposes of administrative and judicial efficiency. Despite these differences, however, all of the petitions request the commission

take a similar action – that the commission review the Remand Order and modify the order in a manner that more clearly expresses the commission’s remand decision and what several of the petitions characterize as a “pass-through” remand based on the Court of Appeal’s decision.

While the department believes the Remand Order is consistent with the commission’s remand decision, and in fact “passes through” the Court of Appeals decision, the department agrees that there is substantial merit to modifying the Remand Order to remove ambiguity and confusion, and to facilitate the matter returning to the local governments where the remaining substantive issues can be appropriately addressed.

As a result of that recommendation, this staff report does not address the specifics of the various arguments, and points and authorities made in each of the petitions. However, a couple of arguments and suggestions merit specific discussion.

1. Suggestions that a modified remand order spell out options available on remand

The Barkers Petition requests that a modified remand order spell out the options available on remand; for example, that the remand order “make clear that the county has the option of deciding an evaluation of the factors means the [Barkers Property] should be urban reserve.” Barkers Petition at 4. As discussed elsewhere in this staff report, the department and the commission are charged with reviewing what is submitted to the department, not what could have been submitted. In similar vein, remand orders typically identify what portions of a submittal are consistent with the applicable requirements, and remand the portions that are not, but do not identify all of the possible actions a local government could take to achieve final acknowledgment. Thus, the department does not recommend spelling out the various options available for Metro, Multnomah County, and Clackamas County to respond to the remand, but instead recommends continuing the practice of identifying specific deficiencies and what must be addressed on remand.

2. Arguments concerning “best achieves” standard

Metropolitan Land Group’s petition and Maletis’s petition find fault with the Remand Order because the order was “far more limited in nature” than the commission’s intent, and because it did not pass through all aspects of the Court of Appeal’s remand in *Barkers Five, LLC*. See Metropolitan Land Group Petition at 6; Maletis Petition at 6; see also Clackamas County Petition at 2. Among the examples identified is the failure to include court’s remand of the best achieves standard due to the errors in the Washington County reserves designations (which issue was addressed by the legislature in HB 4078), and whether the remand to Multnomah County is limited to Area 9D or also includes all Multnomah County reserves. *Id.* at 7.

It is not clear whether examples are cited to show how the Remand Order is more limited than the commission’s remand decision, or whether the parties are arguing that the commission’s decision is somehow in error. To the extent it is the latter, such arguments are misplaced as it would require the commission to revisit its decision, an action which the department believes is outside the scope of reviewing a director’s action under OAR 660-002-0020.

If the arguments are in fact directed at a perceived gap between the Remand Order and the commission’s decision, the department disagrees. In reaching its decision, the commission declined

to interpret the effect of HB 4078 on the “best achieves” standard, leaving that issue to be addressed – if needed – on remand. Therefore, this was not an issue the commission was requiring be addressed on remand.² Similarly, the court’s direction with respect to a consideration of the effect of the error in 9D on the “designation of the reserves in Multnomah County in its entirety” was not made a separate part of the commission’s decision; therefore, it was not included as a separate remand issue.

3. Arguments concerning “amount of land” standard

Metropolitan Land Group and Maletis, and to some extent Clackamas County, make similar arguments with respect to the “amount of land” standard. Specifically, Clackamas County argues that the changes made to the net amount of urban reserves as a result of HB 4078 *may* require the re-designation of some property on remand, *if* found necessary to achieve the “amount of land” standard. *See* Clackamas County Petition at 2. Metropolitan Land Group and Maletis make a slightly different argument, contending that the commission should modify the order because it “unlawfully restricts the ability of Metro and the counties to consider modifications to reserve designations that may be required as a consequence of addressed the identified remand issues.” Metropolitan Land Group Petition at 8; Maletis Petition at 8. As with the “best achieves” standard, neither the commission’s decision or the implementing Remand Order identify the “amount of land” standard as an issue that is required to be addressed on remand; however, nothing in either action prevents Metro, Multnomah County, or Clackamas County from considering the issue, if needed, on remand.

D. Staff Recommendation

Several petitions provided suggestions for language to remove ambiguity and serve as a pass through remand. Specifically, Barkers recommends that the portion of the order relative to Multnomah County provide:

“ORDERED the Reserves Submittal is remanded to Multnomah County to take action consistent with the decision of the court of appeals in *Barkers Five v. LCDC*, 261 Or App 259 (2014).”

The Cities recommend that the second sentence of the order be rephrased using the exact language from the Court of Appeals decision³ (recommendation shown in track changes):

“THEREFORE, IT IS ORDERED THAT:

“The Commission incorporates by reference the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819, except with respect to its approval of the inclusion of Rural Reserve Area 9D and Urban Reserve Areas 4A, 4B, 4C, and 4D. Accordingly, the Commission remands Rural Reserve Area 9D to Multnomah County **and Metro** and Urban Reserve Areas 4A, 4B, 4C, and 4D to

² Moreover, the portion of the opinion cited by Metropolitan Land Group and Maletis is a consequence of the court’s wholesale remand of the reserves in Washington County, which reserves designations were adjusted and acknowledged by the legislature in HB 4078.

³ *See* the Court of Appeals’ final ruling at 261 Or App at 364, which closes with this final sentence:

“Reversed and remanded for further action consistent with the principles expressed in this opinion.”

Metro and Clackamas County for further findings under ORS 195.141 and 195.145, and OAR chapter 660, division 27 **action consistent with the principles expressed in *Barkers Five, LLC, v. LCDC, 261 Or App 259, 323 P3d 368 (2014).***

Metropolitan Land Group and Maletis recommend striking the conclusion and replacing the first paragraph of the order as follows (recommendation shown in track changes):

“THEREFORE, IT IS ORDERED THAT:

“Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court’s decision, [The Commission incorporates by reference the findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819, except with respect to its approval of the inclusion of Rural Reserve Area 9D and Urban Reserve Areas 4A, 4B, 4C, and 4D. Accordingly, the Commission remands Rural Reserve Area 9D to Multnomah County and Urban Reserve Areas 4A, 4B, 4C, and 4D to Metro for further findings under ORS 195.141 and 195.145, and OAR chapter 660, division 27 remands the reserves matter to Metro and the Counties for further action consistent with the principles expressed in *Barkers Five, LLC, v. LCDC, 261 Or App 259, 323 P3d 368 (2014).*”

Neither Multnomah nor Clackamas County made an independent recommendation as to language, though both counties are willing to accept either the Cities’ or the Maletis’ proposed language.

The primary differences between the suggestions are whether to incorporate the findings and conclusions of the commission’s prior order (as to those portions not appealed or reversed or remanded by the Court of Appeals, or adjusted by HB 4078), and whether to identify the specific reserve areas that are remanded.

The department and commission practice is to address each of the objections raised in the written order. This practice reflects a requirement that orders respond to objections made by the parties OAR 660-045-0140(6), and the practical effect of providing local governments with clear direction on what must be addressed on remand (while not limiting what *may* be addressed). The department recommends that the commission maintain that practice in this instance, but also recommends that the statement modified to be clear that what the commission has approved is the application of the urban and rural reserves factors to designate areas as urban or rural reserves, and that the commission is not reincorporating the earlier “best achieves” and “amount of land” findings. Finally, the department recommends adding Metro to the Area 9D remand, and Clackamas County to the Stafford Areas remand. While the statutes and administrative rules provide that a county designates rural reserves, and Metro designates urban reserves, both decisions have to be made in coordination and concurrently between Metro and the affected county under ORS 195.137 to 195.145, and there is no harm in making that coordinated obligation clear.

Accordingly, the department recommends that the Remand Order be modified as follows:

“Conclusion

“Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court’s decision, **including the petitions for review of Director’s action and related oral argument**, the Commission finds that the **application of urban and rural reserve factors to designate areas as urban or rural reserves in Clackamas and Multnomah counties in the Reserves Submittal as amended by Oregon Laws 2014, chapter 92**, complies with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and other applicable rules of the Commission, except with respect to (1) Multnomah County’s explanation of why its consideration of the rural reserve factors yields a rural reserve designation of all land in Rural Reserve Area 9D; and (2) Metro’s explanation of why the designation of Areas 4A, 4B, 4C, and 4D as Urban Reserves is supported by substantial evidence. **As described above, the urban and rural reserves for Washington County were established by Oregon Laws 2014, chapter 92.**

“THEREFORE, IT IS ORDERED THAT:

“The Commission incorporates by reference those findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819 **concerning the application of urban and rural reserve factors to designate certain areas as either urban or rural reserves in Clackamas and Multnomah counties**, except **those findings and conclusions related to the designations** ~~with respect to its approval of the inclusion of Rural Reserve Area 9D and Urban Reserve Areas 4A, 4B, 4C, and 4D.~~ Accordingly, the Commission remands Rural Reserve Area 9D to Multnomah County **and Metro** and Urban Reserve Areas 4A, 4B, 4C, and 4D to Metro **and Clackamas County** for further findings under ORS 195.141 and 195.145, and OAR chapter 660, division 27 **action consistent with the principles expressed in *Barkers Five, LLC, v. LCDC*, 261 Or App 259, 323 P3d 368 (2014).**”

The department believes that the above modifications address the ambiguities identified by the petitions, providing the local governments with both the direction and range of options customarily available on remand. A draft proposed remand order is attached as Attachment E.

The department has discussed similar language with the petitioners, and received statements of support from Clackamas County, the Cities, Multnomah County, and Barkers. The department will discuss the proposed remand order with the parties prior to the commission meeting on March 12, 2015.

V. CONCLUSION

The department recommends that the commission accept oral argument at its March 12, 2015 meeting, deliberate on the merits of the various arguments, and take action to modify the action of the director by adopting the proposed remand order attached to this report.

Recommended motion: I move the commission adopt the proposed remand order in Attachment E.

Optional motion 1: I move the commission adopt the proposed remand order in Attachment E with the following modifications:

One modification which could be considered is to strike the portions of the proposed order which incorporates the earlier findings. This modification would entail amending the first sentence of the “Conclusion” to address only the areas remanded, and striking the entire first sentence under the “Order” section.

A second modification which could be considered is to add the following paragraph to “Order” section:

“On remand, the local governments may either affirm the designation of Area 9D as a rural reserve and Areas 4A, 4B, 4C, and 4D as urban reserves based on findings under ORS 195.141 and 195.145, and OAR chapter 660, division 27 that are supported by substantial evidence, or fulfill the requirements of designating urban and rural reserves in some other manner consistent with ORS 195.141 to 195.145, and OAR chapter 660, division 27 and the Court of Appeals decision in *Barkers Five*.”

Optional motion 2: I move the commission affirm the action of the director and adopt the Remand Order.

VI. ATTACHMENTS:

- A. Remand Order 14-ACK-001861: http://www.oregon.gov/LCD/docs/murr/MURR_Order_14-ACK-001861_remand_final.pdf
- B. Petitions for Commission Review of Director’s Action: http://www.oregon.gov/LCD/docs/murr/MURR_PetitionsforReview_2015.pdf
- C. Withdrawal of Remand Order 14-ACK-001861
- D. February 27, 2015, Notice Letter to the Parties
- E. Proposed Remand Order

**BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON**

**IN THE MATTER OF THE REMAND)
OF THE DESIGNATION OF URBAN) WITHDRAWL OF
RESERVES BY METRO AND RURAL) REMAND
RESERVES BY CLACKAMAS COUNTY,) ORDER 14-ACK-001861
MULTNOMAH COUNTY, AND)
WASHINGTON COUNTY)**

The Department of Land Conservation and Development (Department) has received timely petitions for Land Conservation and Development Commission (Commission) review of Remand Order 14-ACK-001861 issued January 15, 2015, from Clackamas County; Barkers Five LLC and Sandy Baker; the Cities of Tualatin and West Linn; Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC, and LFGC, LLC; Metropolitan Land Group; and Multnomah County, pursuant to OAR 660-002-0020(1). Although the Commission has, at a minimum, 60 days to affirm, reverse, or modify Remand Order 14-ACK-001861, pursuant to ORS 197.651, a petition for judicial review of Remand Order 14-ACK-001861 must be filed within 21 days from January 15, 2015, that is today. Therefore, in order to obviate the need for any party to file a petition for judicial review of Remand Order 14-ACK-001861 during the pendency of the Commission's review of the aforementioned petitions, the Department withdraws for reconsideration Remand Order 14-ACK-001861.

THEREFORE, IT IS ORDERED THAT:

Remand Order 14-ACK-001861 is withdrawn for reconsideration.

DATED THIS 5 DAY OF FEBRUARY 2015.

FOR THE COMMISSION:



Jim Rue, Director
Dept. of Land Conservation and Development

NOTE: You may be entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 21 days from the service of this final order. Judicial review is pursuant to the provisions of ORS 197.651.



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February 27, 2015

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Re: Land Conservation and Development Commission hearing to consider petitions for review of director's action concerning the remand of the designation of urban and rural reserves

Ladies and Gentlemen:

The Land Conservation and Development Commission will hold a hearing on March 12, 2015, at 3:00 pm to consider the petitions for review of director's action under OAR 660-002-0005 in the matter of the remand of the designation of urban reserves by Metro and rural reserves by Clackamas County, Multnomah County, and Washington County. The commission will hear oral argument, deliberate, and make a decision to affirm, reverse, or modify the action of the director. Oral argument will be limited to the parties in *Barkers Five, LLC v. LCDDC*, each of whom is listed as an addressee on this letter.

The hearing will be held in the Basement Hearing Room of the Agriculture Building, located at 635 Capitol Street NE, in Salem, Oregon. The commission will accept oral argument from the parties on the petitions for review of director's action and the staff report (which will be issued at least 7 days prior to the hearing). The commission will not accept any additional written materials. The time for oral argument may be limited by the chair.

Documents related to this hearing will be posted at <http://www.oregon.gov/LCD/Pages/meetings.aspx> under the "reports" link for the March 12, 2015, meeting.

Please contact Rob Hallyburton at rob.hallyburton@state.or.us or 503-934-0018 if you have any questions.

Very truly yours,



Jim Rue
Director

cc (via e-mail): Land Conservation and Development Commission
Steve Shipsey, Assistant Attorney General
Carrie MacLaren, Deputy Director
Jennifer Donnelly, Regional Representative
Anne Debbaut, Regional Representative
Rob Hallyburton, Community Services Division Manager

**BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON**

IN THE MATTER OF THE REMAND)
OF THE DESIGNATION OF URBAN)
RESERVES BY METRO AND RURAL) **REMAND**
RESERVES BY CLACKAMAS COUNTY,) **ORDER 14-ACK-XXXX**
MULTNOMAH COUNTY, AND)
WASHINGTON COUNTY)

This matter came before the Land Conservation and Development Commission (Commission) on November 13, 2014, and March 12, 2015, on remand of Compliance Acknowledgment Order 12-ACK-001819 from the Oregon Court of Appeals, pursuant to ORS 197.651.

History and Summary of Urban and Rural Reserves

1. On June 23, 2010, the Department of Land Conservation and Development (Department) received Metro Ordinance No. 10-1238A, the joint and concurrent submittal of Clackamas County, Multnomah County, Washington County, and Metro pursuant to ORS 195.137 to 195.145 and 197.626 (collectively, Initial Submittal).
2. On October 29, 2010, the Commission voted to remand a portion of the Initial Submittal as it applied to certain reserve designations in Washington County.
3. On May 13, 2011, the Department received the re-designation submittal, Metro Ordinance No. 11-1255.
4. On August 19, 2011, the Commission voted to acknowledge the Metro Urban and Rural Reserves submittal in its entirety, including the Initial Submittal, as revised by the 2011 re-designation submittal (collectively, Reserves Submittal).
5. On August 14, 2012, the Department issued Order 12-ACK-001819 implementing the Commission’s acknowledgment of Metro Urban and Rural Reserves.
6. On judicial review of that order, the Court of Appeals reversed and remanded for reconsideration of the decision to approve Rural Reserves in Washington County and to include Rural Reserve Area 9D in Multnomah County and Urban Reserve Areas 4A, 4B, 4C, and 4D in Clackamas County, but otherwise affirmed the order. *Barkers Five, LLC v. LCDC*, 261 Or App 259 (2014).
7. On April 1, 2014, House Bill 4078 became effective. This bill, codified as Oregon Laws 2014, chapter 92, established and acknowledged Urban Reserves and Rural Reserves in Washington County.

Findings of Fact

1. On February 20, 2014, the Court of Appeals filed its decision on judicial review of the Commission’s Compliance Acknowledgment Order 12-ACK-001819.

2. On July 30, 2014, the State Court Administrator sent a copy of the appellate judgment to the Commission and the Court of Appeals decision became effective on that date pursuant to ORAP 14.05.
3. On August 25, 2014, the matter of the Review of the Designation of Urban Reserves by Metro and Rural Reserves by Clackamas County, Multnomah County and Washington County, came before the Commission on remand from the Court of Appeals pursuant to ORS 197.651.
4. On September 4, 2014, the Department issued a Scheduling Order implementing the Commission's direction from the August 25, 2014 hearing (6).
5. Between January 22, 2015, and January 30, 2015, six petitions for commission review of Director's action were filed pursuant to OAR 660-002-0020 by: Clackamas County; Barkers Five, LLC, and Sandy Baker; the City of Tualatin and City of West Linn; Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC, and LFGC, LLC; Metropolitan Land Group; and Multnomah County.
6. On February 5, 2015, the Department withdrew Remand Order 14-ACK-001861 because, although the Commission had a minimum of 60 days consider the petitions and to affirm, reverse, or modify the order, any petition for judicial review of the order was required to be filed within 21 days of January 15, 2015, before the petitions could reasonably be addressed by the Commission.
7. On February 27, 2015, the Department notified the parties of the date, time, and place that the Commission scheduled to take action on the petitions, and described how the parties would be able to express their views.
8. On March 12, 2015, the Commission accepted oral arguments from the parties on the petitions for review of the director's action.

Conclusion

Based on the decision of the Court of Appeals, and having considered the briefs and oral arguments of the parties following the court's decision, including the petitions for review of Director's action and related oral argument, the Commission finds that the application of urban and rural reserve factors to designate areas as urban or rural reserves in Clackamas and Multnomah counties in the Reserves Submittal complies with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and other applicable rules of the Commission, except with respect to: (1) Multnomah County's explanation of why its consideration of the rural reserve factors yields a rural reserve designation of all land in Rural Reserve Area 9D; and (2) Metro's explanation of why the designation of Areas 4A, 4B, 4C, and 4D as Urban Reserves is supported by substantial evidence. As described above, the urban and rural reserves for Washington County were established by Oregon Laws 2014, chapter 92.

THEREFORE, IT IS ORDERED THAT:

The Commission incorporates by reference those findings and conclusions of Compliance Acknowledgment Order 12-ACK-001819 concerning the application of urban and rural reserve factors to designate certain areas as either urban or rural reserves in Clackamas and Multnomah counties, except those findings and conclusions related to

the designations of Rural Reserve Area 9D and Urban Reserve Areas 4A, 4B, 4C, and 4D. Accordingly, Commission remands Rural Reserve Area 9D to Multnomah County and Metro and Urban Reserve Areas 4A, 4B, 4C, and 4D to Metro and Clackamas County for further action consistent with the principles expressed in *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014).

Before final acknowledgment, the Commission will review a resubmittal of the Metro Region urban and rural reserves designations for acknowledgement of compliance with ORS 195.141 and 195.145, OAR chapter 660, division 27, the applicable statewide planning goals, and all other applicable rules of the Commission.

DATED THIS ____ DAY OF MARCH 2015.

FOR THE COMMISSION:

Jim Rue, Director
Dept. of Land Conservation and Development

NOTE: You may be entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 21 days from the service of this final order. Judicial review is pursuant to the provisions of ORS 197.651.