



Oregon

John A. Kitzhaber, M.D., Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Fax: (503) 378-5518

www.oregon.gov/LCD



August 15, 2014

TO: Land Conservation and Development Commission

FROM: Carrie MacLaren, Deputy Director
Jim Rue, Director

SUBJECT: **Agenda Item 3, August 25, 2014, LCDC Meeting**

METRO URBAN AND RURAL RESERVES COURT OF APPEALS REMAND

I. AGENDA ITEM SUMMARY

In February 2014, the Oregon Court of Appeals issued its opinion reversing and remanding the Land Conservation and Development Commission (commission) decision acknowledging the designation of the Metro-area urban and rural reserves (MURR). On July 30, 2014, the Department of Land Conservation and Development (department) received the appellate judgment, which makes the court's decision effective and transfers jurisdiction back to the commission (Attachment A). Under ORS 197.651(12), the commission must "respond" to the court's appellate judgment within 30 days.

This matter is before the commission to consider the appropriate response. The department proposes that the commission respond by directing the department to prepare and issue a scheduling order to request additional briefing from the parties.

For additional information about this report, please contact Rob Hallyburton at 503-934-0018, or by e-mail at rob.hallyburton@state.or.us.

II. BACKGROUND AND DISCUSSION

ORS 197.651(12) provides, "If the order of the commission is remanded by the Court of Appeals or the Supreme Court, the commission shall respond to the court's appellate judgment within 30 days." The statute does not identify what the nature of the response must be. A nearly identical statute applies to the Land Use Board of Appeals (LUBA). ORS 197.850(11).¹ LUBA interprets this requirement to mean it must either issue a responsive final opinion and order or take some

¹ "If the order of the board is remanded by the Court of Appeals or the Supreme Court, the board shall respond to the court's appellate judgment within 30 days."

other responsive action, such as requesting additional briefs from the parties, within 30 days after the remanding court issues its final judgment in the appeal. *Land Use* (2010 edition) §20.127. Thus, interpreting ORS 197.651(12) to mirror LUBA’s interpretation, the commission has 30 days to either issue a responsive final order or take some other responsive action, such as requesting additional briefing from the parties.

The issues before the commission on remand are complex and the commission has several options to consider (in particular whether to utilize the authority granted under [HB 4078 \(2014\)](#)² to identify evidence in the record that “clearly supports” the decision made by Multnomah County with respect to Area 9D and Metro with respect to Stafford,³ or whether to remand the submittal to Multnomah County and Metro to address those issues). See [May 8, 2014, Staff Report, Agenda Item 18 \(Update: Metro Urban and Rural Reserves and HB 4078\)](#).⁴ Therefore, the department believes that the commission will be well served by receiving additional briefing before addressing the matter on remand.

III. RECOMMENDATION & DRAFT MOTION

Staff recommends that the commission respond to the appellate judgment by directing staff to prepare a scheduling order for additional briefing from any of the parties to [Barkers Five, LLC v. LCDC, 261 Or App 259 \(2014\)](#).⁵ Staff recommends that the scheduling order identify the issues the parties should address, including: (a) whether substantial evidence in the record clearly supports a conclusion that Multnomah County applied the reserves factors to Area 9D; and (b) whether substantial evidence in the record clearly supports Metro’s designation of the Stafford area as urban reserves. Staff further recommends that the parties not be limited to the above two questions, but be allowed to provide briefing on any other issues that party believes the commission should address, and that parties be allowed to file both an opening brief and a response brief so that the issues are fully fleshed out for the commission’s review. Staff also recommends that the scheduling order specifically identify that the commission would like to hear from both the parties with assignments of error relating to the above two remanded issues and the local governments that made the MURR submittal, but that the scheduling order allow any party who desires to submit a brief to do so; briefing should also be limited to preserved arguments (i.e., only those new arguments that are based on decision of HB 4078 that could not have been raised before).

² Section 9 of HB 4078 provides, in relevant part:

“the commission may approve all or part of the local land use decision if the commission identifies evidence in the record that clearly supports all or part of the decision even though the findings of the local government either:

- (1) Do not recite adequate facts or conclusions of law; or
- (2) Do not adequately identify the legal standards that apply, or the relationship of the legal standards to the facts.

See <https://olis.leg.state.or.us/liz/2014R1/Measures/Text/HB4078/Enrolled>

³ The “Stafford” area includes Areas 4A to 4D.

⁴ The URL for the report is:

http://www.oregon.gov/LCD/docs/meetings/lcdc/052214/14Item_18_Metro_Rural_Reserves.pdf

⁵ The URL for the opinion is: <http://www.publications.ojd.state.or.us/docs/A152351.pdf>.

In order to accommodate both an opening brief and a response brief, staff recommends that the schedule set September 25, 2014 as the due date for opening briefs and October 9, 2014 as the due date for response briefs to afford the department time to prepare its staff report for distribution prior to the commission's November 2014 meeting. Finally, staff recommends that the scheduling order specify the briefing form and length.

Recommended motion: I move the commission direct the department to issue a scheduling order requesting briefing from the parties on the remand issues, including:

1. Whether there is substantial evidence in the record that clearly supports a conclusion that Multnomah County applied the reserves factors to Area 9D;
2. Whether there is substantial evidence in the record that clearly supports Metro's designation of the Stafford area as urban reserves; and
3. Any other issues the department determines should be briefed.

Such scheduling order should allow parties to address other issues that a party believes is important to the commission's review on remand. The scheduling order should be such that the commission could take a substantive action at the November 2014 meeting. The director may specify the length and format of briefs.

Optional actions: The commission may choose another date for completion of the briefing or opt to remand the MURR submittal based on the reasons identified in the court's decision.

ATTACHMENT

- A. Appellate judgment