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September 25, 2014

Via HAND DELIVERY
Land Conservation and Development Commission
635 Capitol St. NE Ste. 150
Salem, OR 97301-2540

Re: PETITIONERS' BARKERS FIVE, LLC LCDC REMAND BRIEF (LCDC
No. A152351)

Dear Clerk:

Enclosed please find for filing PETITIONERS' BARKERS FIVE, LLC LCDC
REMAND BRIEF (LCDC No. A152351). If you have any questions, please feel to
contact me. Thank you for your courtesies.

Very truly yours,



Wendie L. Kellington

WLK:wlk
Enclosures
CC: Clients

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

IN THE MATTER OF THE REVIEW)
OF THE DESIGNATION OF URBAN)
RESERVES BY METRO AND RURAL) LCDC No. A152351
RESERVES BY CLACKAMAS COUNTY,)
MULTNOMAH COUNTY, AND)
WASHINGTON COUNTY)

PETITIONERS BARKERS FIVE, LLC REMAND BRIEF¹

Petitioners Barkers Five and Sandy Baker (Petitioners) file this brief per LCDC’s September 4, 2014, Scheduling Order. As relevant to the Barkers petitioners, LCDC asks the following questions: “Whether there is substantial evidence in the record that clearly supports² a conclusion that Multnomah County applied the reserves factors to Area 9D”; “the extent to which the subsequent enactment of HB 4078 by the 2014 Oregon Legislature impacts those issues” and “any other issues the parties determine should be briefed”.

Court of Appeals Decision

In *Barkers Five v. LCDC*, 261 Or App 259 (2014), the court of appeals held that LCDC’s approval of the Multnomah County designation of rural reserves was “unlawful in substance” because the county failed to lawfully consider the reserves factors and failed to explain why lawful consideration of the factors yielded a result that included the Barkers property in Area 9D as a rural reserve. The court of appeals explained a lawful “consideration of the factors in this context:

“requires that the local government meaningfully explain why a designation as urban or rural reserves is appropriate by reference to the totality of the land

¹ Citations to the record in this brief, follow the citation format and references in Petitioners’ Opening Brief, appendices, joint excerpt of record (JER) and excerpt of record (ER) submitted to the court of appeals.

² Technically, the HB 4078 Sec. 9 standard is whether there is “evidence in the record that clearly supports” a decision. The amount of evidence needed to “clearly support” a decision is much greater than that needed for “substantial evidence”. *Waugh v. Coos County*, 26 Or LUBA 300, 307-08 (1993).

encompassed within that designation. In that regard, *to the extent that a property owner challenges the inclusion of his or her property within a designated area, the local government is obligated to have explained why its consideration of the factors yields, as to the totality of the designated land, a result that includes that property.*” (Emphasis supplied.) 261 Or App 343

The responding parties had the opportunity to show the court the required analysis was performed. Neither did so beyond pointing to the analyses that the Court of Appeals evaluated and rejected. Where the court finds the required analysis was not performed, it is undeniable the evidence cannot clearly support that the required analysis was performed.

The Court of Appeals rejected Multnomah County’s contention that the errors petitioner argued, were a “substantial evidence” problem. 261 Or App 341. The court explained: “The meaning of “consideration of the factors” in ORS 195.141(3) is “derived from the governing statutes” not OAR 660-division 27. *Id* 261 Or App at 302. The error identified by the court of appeals is an error “concerning compliance with applicable laws” which LCDC is required to address under ORS 197.633(3)(c).

The court recited evidence identified in the LCDC order that showed the Barkers property did not qualify as rural reserve as a part of Area 9D. *Barkers Five*, 261 Or App 345-46. The court explained Multnomah County had not performed the required analysis. The court of appeals directed LCDC to “determine the effect of that error on the designation of reserves in Multnomah County in its entirety.” *Barkers Five*, 261 Or App 347.

The court’s decision demonstrates that, at a minimum, the evidence is conflicting about whether Multnomah County properly considered the reserve factors or made a lawful decision based on the yield of a proper consideration of the factors. Conflicting evidence is not “evidence that clearly supports” a decision. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536, 551 (2003).

Summary Answers to Questions LCDC Asked

The court of appeals decided that the required consideration of reserves factors and determination of whether the yield of that analysis “best achieves” specific purposes, is nonexistent. The court of appeals decided that the county analysis LCDC approved was wrong. The county and LCDC had fully briefed their claim that the required analysis was performed. The court rejected that the analysis was correct with respect to Area 9D and the Barker property. The court said the required analysis was absent. As such, the “evidence clearly supports” standard cannot be invoked by LCDC to perform the required “highly discretionary”³ analysis required and then speculate about the results of that analysis. The authority to perform the required analyses, are *reserved to Multnomah County and Metro*.

Because the court of appeals decided that the required analysis is missing, it violates the separation of powers doctrine for HB 4078 Sec. 9 to authorize, for the purposes of its response to the court’s remand only, that LCDC to ignore the court’s decision and find that the county performed the analysis the court decided had not performed.

The evidence in the record does not “clearly support” the conclusions that Multnomah County either lawfully considered the reserves factors or lawfully concluded that the yield of a lawful analysis of the reserves factors means that, on balance, the purposes of the reserves rules are best achieved by designating Area 9D and petitioners’ property, rural reserve. Rather the evidence is at best conflicting and conflicting evidence is not evidence that “clearly supports” a decision. Finally, the evidence in the record cannot as a matter of law “clearly support” the Multnomah County / Metro “decision” the court of appeals remanded, because Metro and Multnomah County’s performance of the required analysis

³*Barkers Five*, 261 Or App at 352.

necessarily must consider the effect of HB 4078 on how area 9D, including petitioners' property, "fares" under the factors. HB 4078 significantly changed the regional balance of urban and rural reserves.

LCDC's Options

LCDC has two options based on the express terms of the court's remand, on LCDC's authority under OAR 660-025-160; ORS 195.141 and 143 and OAR 660-027-0020.

LCDC's first option is to determine that the effect of the errors identified by the court significantly undermines and delays final designation of Multnomah County reserves "in their entirety". From this, LCDC is free to acknowledge that the court decided Multnomah County unlawfully made the Barkers property rural reserve as a part of Area 9D, and order Multnomah County to remove the Barkers property from Area 9D, and simply leave the Barkers property undesignated. OAR 660-025-0160(7)(c).

LCDC's second option is to acknowledge the county's incorrect analysis affects the Multnomah County reserves "in their entirety" and remand them reserves to the county to: (1) correctly apply the reserves analysis to Area 9D to determine whether Area 9D, including petitioners' property, is properly designated rural reserve, (2) make a new decision based on the proper application of the law which reserves designation "on balance best achieves" the particular identified objectives of the reserves rules. OAR 660-027-005(2). The analysis required under the second option must consider the dramatic change to the regional balance of reserves following HB 4078 (for example the legislature took 2000 acres from urban reserves and added those acres to the rural reserves)⁴ to determine whether

⁴DLCD staff submitted a summary to the parties and LCDC of HB 4078 and its effects placing it in the record of this matter. One of the attachments is a May 8, 2014 DLCD staff summary of HB 4078 which explains that under HB 4078, a total of 2000 acres of land designated as urban reserves and subject to LCDC's order, was converted to rural reserves, among other changes. The page of that staff summary is attached to this brief as Exhibit 1.

leaving the Barkers property and Area 9D designated rural reserve on balance best achieves specific reserves' purposes described in OAR 660-027-005(2).

These two options follow from the disparate authority possessed by LCDC and by the affected local governments. The analysis of whether to designate the Area 9(D) rural reserve and include the Barker property in that rural reserve, requires a *local consideration of the reserves factors and a local decision* that to do so would “best achieve” particular purposes of the reserves rules.

LCDC, on the other hand, has independent authority to respond to the court of appeals remand determining Multnomah County incorrectly applied the reserves factors by including the Barkers property in Area 9D rural reserves. LCDC can and must acknowledge the court directed it to consider the effect of the errors the court identified on the Multnomah County reserves “in their entirety.” LCDC can decide the effect of this error undermines and delays Multnomah County reserves in their entirety. From here, per OAR 660-025-0160(7)(c), LCDC can resolve the court's remand by ordering Multnomah County to remove the Barkers property from the Area 9D rural reserves and leave the Barker property undesignated. LCDC has authority to take this action because (1) the court charged LCDC to decide the effect of the identified errors on the Multnomah County reserves in their entirety, (2) the determination to respond by removing the Barker property and leaving it undesignated is not reserved by rule or statute to the county or Metro, and (3) OAR 660-025-0160(7)(c) gives LCDC authority to make such an order because it does not tread on authority reserved to others.

Thus, while only the county and Metro have statutory and rule authority to *designate* urban and rural reserves, ordering that property be left undesignated because the court of appeals determined a rural reserves designation is unlawful, is not reserved to the county or

Metro. As noted, the only other option is to remand the Multnomah County reserves in their entirety and address whether the Barkers property is properly included in Area 9D in light of HB 4078 and the evidence in the record that it either poorly meets or meets not at all, the rural reserves factors.

Evidence in the Record is at Best Conflicting

Petitioners' anticipate that the county will cite various parts of the record to claim the county *could* have designed petitioners' property rural reserve as part of Area 9D under a proper analysis of the factors; or that the county really did properly consider the reserves factors, and that an explanation of both can be cobbled together under a "clearly supports" theory. These arguments would be wrong for the reasons outlined in this brief. Before discussing why that is so, it is important to outline the envelope for LCDC's review.

LCDC's role, including under HB 4078, is limited to review of the county decision submitted to it. LCDC cannot change the composition of Area 9D or Area 9D/9F to assemble an area it claims "clearly supports" a rural reserves designation for petitioners' property. Further, it can't invent a different basis for making petitioners' property a rural reserve than the natural resource basis the designation in the decision is based on. *Barkers Five, supra* 261 Or App 339. The terms of HB 4078 establish that the "evidence clearly supports" standard is limited to enabling LCDC to "approve all of part of the local land use decision * * *" not to make a new local land use decision.

Under this scope of review and the court of appeals remand, LCDC would have to decide that there is no conflicting evidence to undermine that the county properly applied the required analysis respecting petitioners' property, and similarly no conflicting evidence that the only designation of petitioners' property to be yielded from a proper analysis of the reserves factors, is that the Barkers' property must be designated rural reserve with Area 9D

or 9D/9F. This is impossible under the findings relied on in court's decision and the record.

With this in mind we evaluate the court's remand and what the evidence says regarding it.

The court of appeals specifically explained the analysis the county was required to perform in view of Barkers' objections:

“[the law] requires that the local government meaningfully explain why a designation as urban or rural reserves is appropriate by reference to the totality of the land encompassed within that designation. In that regard, *to the extent that a property owner challenges the inclusion of his or her property within a designated area, the local government is obligated to have explained why its consideration of the factors yields, as to the totality of the designated land, a result that includes that property.*”⁵ (Emphasis supplied.) *Barkers Five*, 261 Or App 343.

There is nothing in the record to support, let alone evidence to “clearly support,” a conclusion that the county gave *any* thought to Barkers' objections, let alone explaining “why its consideration of the factors yields, as to the totality of the designated land, a result that includes [the Barker] property.” The evidence is that the Barkers' objections were wholly ignored by the county. The findings cited by the court of appeals demonstrate this was also the court's view of the matter. Even if the county were to come up with some evidence of consideration, the court decided the county failed to supply the required explanation and this means whatever evidence the county comes up with is at best conflicting. Conflicting evidence is not “evidence that clearly supports” a conclusion that the county performed the required analysis with respect to Barkers' property. *Shaffer v. City of*

⁵ The court further explained: “The gravamen of those challenges is that Metro and the counties inadequately considered the reserve factors with regard to the land that was actually designated as either urban or rural reserves. Resolution of those challenges requires an examination of the adequacy of the local government's consideration of the factors *as to the “land” that was ultimately designated under the standards described above.*” (Emphasis supplied.) 261 Or App 305.

Happy Valley, 44 Or LUBA 536, 551 (2003); *Waugh v. Coos County*, 26 Or LUBA 300, 207-08 (1993); *Forster v. Polk County*, 22 Or LUBA 380, 384 (1991).

Second, the evidence about the outcome of an adequate consideration of the reserves factors would yield with respect to petitioners' property, is also conflicting in fact and necessarily conflicting. We know that the "Best Achieves Standard' Allows for a Range of Permissible Regional Designations". *Barkers Five*, 261 Or App 314. The court explained in several places that any particular area, like the Barkers property and Area 9D, may be designed rural reserve, urban reserve or left undesignated based on the outcome of a proper application of the factors.⁶ Given the law holds that under the required analysis of the factors and application of the "best achieves" standard, that any type of reserves designation can potentially shake out, it is impossible to conclude there is "evidence that clearly supports" an inferred factors analysis *necessarily* leads to any particular reserves conclusion about the Barkers' property and Area 9D. It is important to understand, that for "evidence to clearly support" a decision, the evidence must necessarily lead to the decision's conclusion. The evidence cannot be conflicting, equivocal or merely "substantial evidence". An example of evidence that *does not* clearly support the decision, is cited by the court of appeals 261 Or App 345-346:

"[the county's] application of the factors to Study Area 6⁷ often yielded different results as to the land in the area that is south of Skyline Boulevard—including Barkers' property. For example, staff ranked the land in the study

⁶*Barkers Five* 261 Or App at 349 ("Any one area may be, and many areas could have been, designated either as an urban or a rural reserve."); 261 Or App 352 ("in the situation where Metro and the county could determine that an area could be either a rural reserve or an urban reserve, based on their consideration of the statutory and rule factors, the decision concerning which designation to apply is *highly discretionary*.") 261 Or App 310 ("LCDC concluded that, even though 'many areas could have been designated either as an urban or rural reserve,'"").

⁷As the court explained, at one point, Area 6 included the Barkers' property and Barkers' was considered for an urban reserves designation. *Barkers Five*, 261 Or App 339.

area south of Skyline Boulevard as having a high potential for urbanization and the land north of Skyline as having a low potential for urbanization.”

The court went on:

“Second, the submittal's description of why Areas 9D and 9F were designated as rural reserve consists of a single paragraph with broad, unqualified declarations that appear to relate to some of the factors in OAR 660–027–0060(3) pertaining to the designation of rural reserves to protect important natural landscape features. However, it does not meaningfully explain why consideration of the pertinent factors yields a designation of all of the land in Area 9D—including Barkers property—as rural reserve. That is so, because, as noted above, the application of the factors to Study Area 6 often yielded different results as to the land in the area that is south of Skyline Boulevard—including Barkers' property.”

A new analysis to infer a different analysis that the county cobbles together cannot overcome the undisputed facts and law that the court has decided. Recall that the court of appeals decided that the findings and evidence cited by LCDC and the county show that the Barker property is different from other property in Area 9D, and that designating the Barker property 9D rural reserves does not lawfully flow from the evidence and analysis cited in the Order that the court of appeals reviewed. Any other analysis the county will present then will necessarily conflict with the analysis the court found to be deficient. This baked in conflict means that the evidence simply cannot “clearly support” that the county properly considered the reserves factors or properly included the Barker property in the Area 9D rural reserves.

Additionally, substantial evidence in the record shows that petitioners' property is not justified as a rural reserve by being lumped with dissimilar Area 9 D and/or 9F on protection of “important natural resources” bases. This evidence further undermines any possibility of an “evidence clearly supports” decision outcome.

The statutory bases for designating rural reserves is either to supply “long term protection to the agricultural industry” or to provide “important natural landscape features that limit urban development or help define appropriate natural boundaries of urbanization,

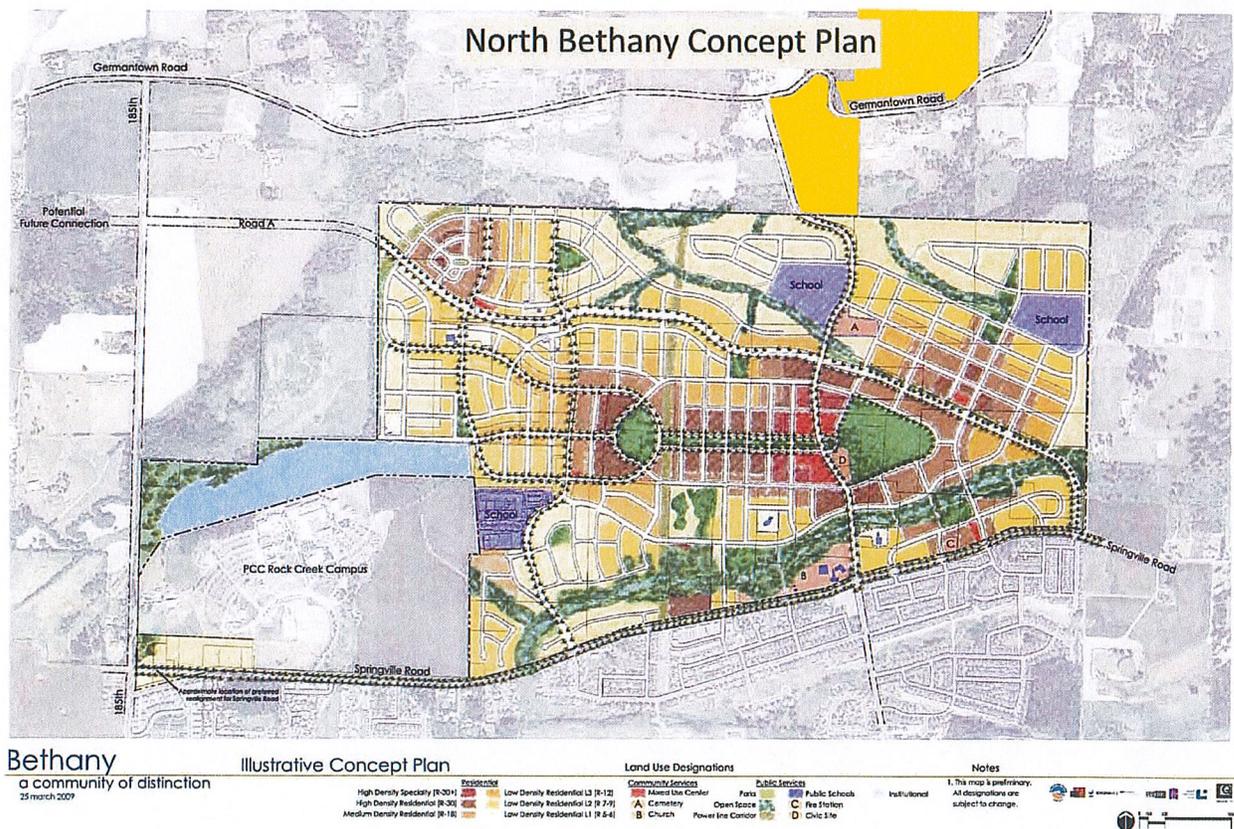
including plant, fish and wildlife habitat, steep slopes and floodplains.” ORS 195.137.

Petitioners property in Area 9D was made a rural reserve on the “natural resources” basis (Barkers Five, 261 Or App 339), meaning the relevant rural reserves factors are found in OAR 660-027-0060(3). Petitioners’ property meets none of those factors other than the subject property is certainly poised for urbanization and was ranked by county staff “medium/low suitability” under urban reserves factors meaning it meets those *urban reserves* factors in OAR 660-027-0050. Mult Co. Rec. 2567. Multnomah County staff ranked Area 6b low for rural reserves suitability. Mult Rec. 2597. The City of Beaverton indicated interest in urbanizing approximately 800 acres including the Barkers property in Area 6b. Mult Rec. 2658. To be designated rural reserve based on the natural resources bases, there must be an analysis of how designating petitioners’ property as a part of the Area 9D rural reserves “protects important natural landscape features.” As best there is only conflicting evidence on this topic as shown and conflicting evidence is not evidence that “clearly supports” a decision.

Designating reserves to protect “important natural resources” was based on Metro mapping (Metro’s 2007 Natural Landscape Features Inventory) and, as relevant here from a Metro map (Fig 1 below) entitled “Subset of the Natural Landscape Features Inventory for the Urban and Rural Reserves Process”. Petitioners’ property is not mapped as anything special by Metro – it is not mapped as part of the “Forest Park Connections” or as headwaters, as can be seen from Figure 1 below (Petitioners’ property is represented by a “b”).

However, please understand that Abbey Creek “sits below the bluff *already inside the UGB* and the North Bethany expansion”. (Emphasis supplied). Rec-Transcript-Vol.II-144; See ER-7; Rec-Item-21, 585; ER-10, Rec-Item-21, 585. Therefore, there would be no justification to make the subject property a rural reserve based on Abby Creek as it is already in the UGB.

As shown on Figure 2 below in yellow (Rec-Att-C-MultCo-Vol.1 1028), Petitioners’ property adjoins the North Bethany/UGB, planned for upwards of 15,000 new residents. *Id.*; WashRec-Vol. 10(IV), pgs-4433, 4110. To the southwest of the Barker property is Area “8C” (Peterkort property) that Washington County designated “Urban Reserve.” Rec-Metro-Vol.2, 92, 94; see Rec-WashRec-Vol.14, 8668.



Petitioners’ property is bisected by busy Germantown Road at Kaiser Road, and is surrounded by urbanization, including the City of Portland, residential uses, subdivisions,

and the UGB. It is sandwiched between a large high voltage power line corridor to the west and a smaller corridor to the east. See Figure 3 map, below (ER-24; Rec-MultCo-Vol-1, 699; -697). Its immediate area has at least 80 undeveloped lots that can be residentially developed. MultRec-Vol.2, 2744; APP-16 (from the county plan). Wells in the area are going dry. MultRec-Vol.1, 701, ER-27. Septic systems are failing. *Id.* The need to install public infrastructure in this area is a foreseeable necessity in 50 years. Petitioners land ranks favorably for suitability for public water and sewer. ER-23; Rec-MultCo-Vol.3, 2879; see ER-22; Rec-MultCo-Vol-1 693.

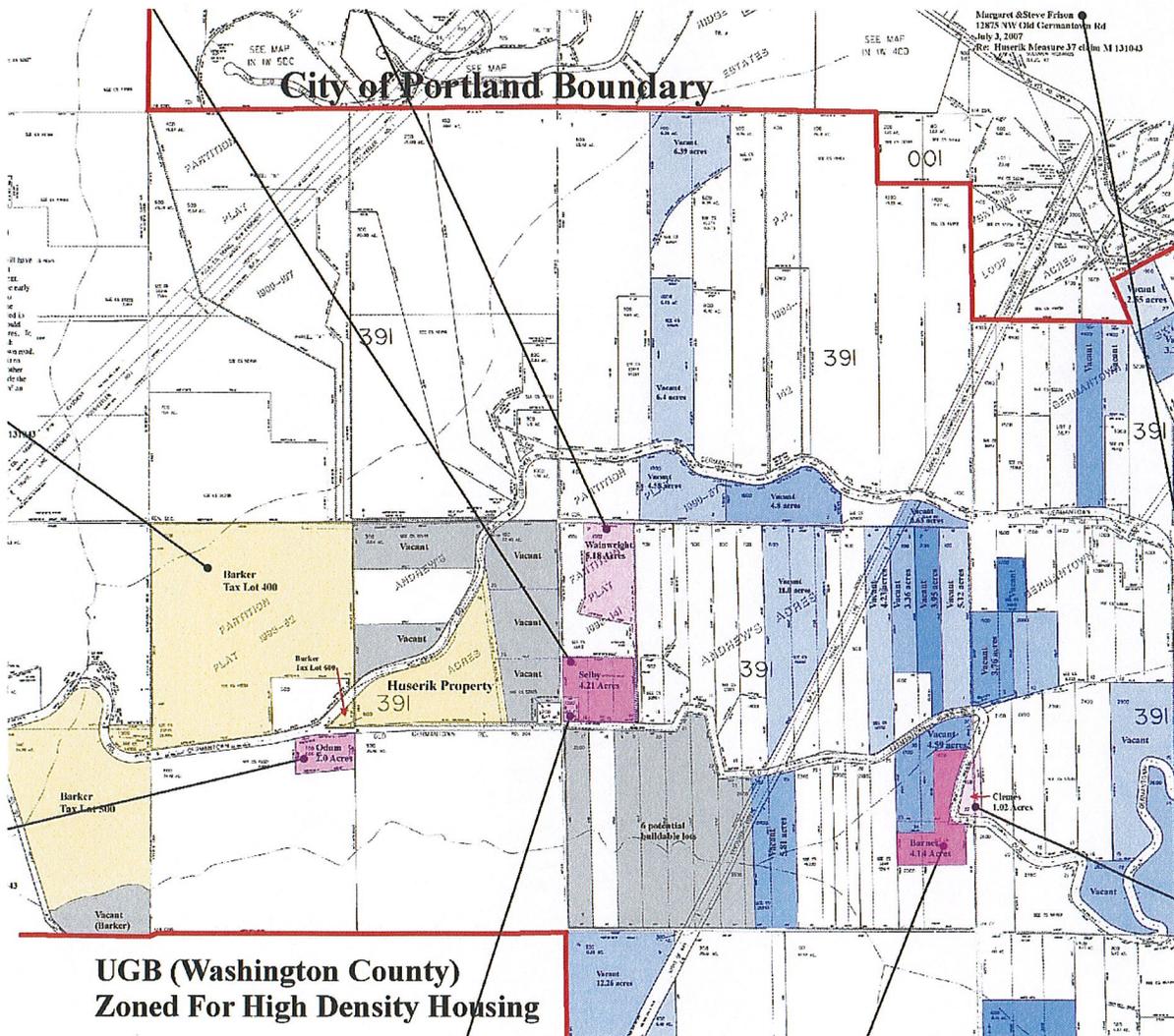


Fig.3

As explained above, Petitioners property was not designated rural reserve on agricultural bases. Regardless, and in the alternative only and without waiving that LCDC cannot apply the “evidence clearly supports” standard to a decision that was not made, the evidence in the record respecting the petitioner’s property as agricultural land is also conflicting. Although petitioners’ property is zoned EFU, it is not “foundation farmland”; it has never been in farm use and has no water rights. ER-19, 5, 1-2, Rec-Item-21 580, 604; AttC- MultRec-Vol.2, 1732, Rec-Tr-Vol.11, 143-144. The evidence is that a rural reserve designation is not required to protect agriculture or agricultural values:

“Undesignated EFU areas continue to be planned and zoned for exclusive farm use, in compliance with Goal 3. There is nothing in Goal 3 that requires Applicable statutory and rule provisions to be interpreted to require rural reserve designation of lands that could qualify under the rural reserve factors.”
Order 104

Therefore, as a matter of law there can be no “evidence that clearly supports” a decision that either a proper reserves “consideration” analysis occurred with respect to Petitioners’ property or that such an analysis necessarily yields a decision that Petitioners property should be designed rural reserve as a part of Area 9D or 9D/9F. The total failure of the county governing body⁸ to properly apply the reserves analysis in view of petitioners’ objections to being designated rural reserve, means that it is not possible to decide any particular designation of petitioners property meets: “*The objective of [division 27] [of] balance in the designation of urban and rural reserves that, in its entirety, best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents.*” 261 Or App 277.

⁸ The required analysis must come from the governing body as only it made the final analysis and decisions respecting reserves.

In this regard, achieving livable communities includes leaving the region with the ability and capacity to deal with failing septic systems, failing wells and 80 additional undeveloped home sites ready to be developed in the immediate area over the next 50 years. Even being left undesignated allows tools to be deployed if needed, as does making the property urban reserve. The point is, that after a proper analysis, the resulting designation of petitioners' property and some part of Area 9D could be urban reserve, rural reserve or undesignated. Thus, the evidence in the record does not "clearly support" that petitioners' property should be within the Area 9D or 9D/9F rural reserve.

How the "Evidence Clearly Supports" Standard Works

The "evidence clearly supports" standard in HB 4078 Sec 9 is borrowed from LUBA's scope of review and sets an extremely high bar. Caselaw is well-developed that the standard does not apply where, as here, the relevant evidence in the record is conflicting, or provides a reasonable basis for different conclusions. *Waugh v. Coos County*, 26 Or LUBA 300, 306-08 (1993); *Shaffer v. City of Happy Valley*, 44 Or LUBA 536, 551 (2003). It is applicable only to correct "minor defects" in decisions" which the errors here are certainly not *See, e.g., Harcourt v. Marion County*, 33 Or LUBA 400, 408 (1997). The evidence "clearly supports" standard is not designed for situations where, as here, the approval criteria require a consideration of alternatives,⁹ *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129, 140 (2000). The "evidence clearly supports" standard is inappropriate where the evidence must be evaluated under discretionary standards or the standards require "the exercise of considerable judgment" as here. *Hubenthal v. City of Woodburn*, 39 Or LUBA

⁹In this regard, the court quoted the following from LCDC's order: "LCDC also concluded that, generally, Metro and the counties must apply the factors 'to *alternative areas* with a county to decide which ones to designate as urban or rural reserves.'" *Barkers Five LLC v. LCDC, supra*, 261 Or App at 306.

20, 50 (2000); *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14, 28 (2000); *Waugh v. Coos County*, 26 Or LUBA 300, 306-08 (1993). The court of appeals explained that the reserves standards – from consideration of the factors to the determination of resulting reserves designations – are highly discretionary and require a great deal of judgment.

HB 4078 did not change these fundamentals; it did not amend the allocation of decision making responsibility in ORS 195.141 and ORS 195.143. HB 4078 Sec 9 relates solely to LCDC's function as reviewing body in this particular case and even sunsets at the end of this year. ORS 195.141 and 195.143 place the sole responsibility and authority for the initial urban and rural reserves analysis and the initial decisions the court found missing, with Multnomah County and Metro. Further, the law is clear that designating reserves, lawfully under the "the statutes * * * require intergovernmental coordination and cooperation." LCDC is in no position to act for the county or Metro or perform any of the cooperation or coordination that the proper designation of reserves requires.

In sum, HB 4078 Sec 9 does not authorize LCDC to substitute its discretion or judgment for the county's. As a matter of law, LCDC can't exercise the discretion reserved by statute to Multnomah County and Metro to analyze the reserves factors and make a determination in the first instance that land should be urban or rural reserves. The applicable statutes require Multnomah County and Metro to perform the required analysis (ORS 195.141(3); ORS 195.143) and require the county and Metro to make a reserves decision after performing a lawful analysis. Similarly, OAR 660-027-0060(1), "Factors for Designation of Lands as Rural Reserves," requires the *county* to perform the analysis and

make the required decisions.¹⁰ The court of appeals decided as a matter of law that Multnomah County failed to understand what the law required, failed to apply the reserves analysis the law required and failed to explain that the results of that analysis yields a result that the Barker property be designated rural reserve as a part of Area 9D or 9D/F. LCDC must either order the removal of petitioners' property from Area 9D and to leave it undesignated or remand the Multnomah County Area 9D reserves for the county and Metro to lawfully apply the factors and lawfully determine the result a lawful application of the factors yields respecting the Barker property.

If LCDC Decides the Effect of the Errors Identified by the Court Requires Analysis of All Multnomah County Reserves, this Includes HB 4078

OAR 660-027-0040(2) requires the region to decide the amount of land needed for urban reserves. The LCDC order reviewed by the court of appeals, adopted a particular amount of urban reserves acres. The court of appeals rejected challenges to the amount of land designated urban reserve, ostensibly determining that the region approved a proper amount of urban reserves acres for the 50 year planning horizon. After LCDC's order the court of appeals made its decision, HB 4078 was enacted, taking 2000 acres of land from the urban reserves. Exh 1. There has been no joint local decision about these reserves or how they impact the region's supply of urban reserves or the region's compliance with the reserves factors. This does not square with OAR 660-027-0040(10), which requires Metro and the counties:

¹⁰“When identifying and selecting lands for designation as rural reserves under this division, a county shall indicate which land was considered and designated in order to provide long-term protection to the agriculture and forest industries and which land was considered and designated to provide long-term protection of important natural landscape features, or both. Based on this choice, the county shall apply appropriate factors in either section (2) or (3) of this rule, or both.”

“shall adopt a single, joint set of findings of fact, statements of reasons and conclusions explaining why areas were chosen as urban or rural reserves, how these designations achieve the objective stated in OAR 660–027–0005(2) [(the ‘best achieves * * *standard’)], and the factual and policy basis for the estimated land supply determined under [OAR 660–027–0040(2) (the ‘amount of land standard’)].”

There is no single, joint set of findings of fact, statements of reasons and conclusions making the required conclusions at this point. HB 4078 added to the regional balance more rural reserves and took away two thousand acres of urban reserves. Exh. 1. Whether the Multnomah County urban and rural reserves “in their entirety” meet the “best achieves” standard in light of HB 4078, must be considered if there is a remand for Multnomah County to perform the required analysis.

One thing is sure: whether Area 9D, including the Barkers property, should be designated “rural reserve” after the required analysis in view of the shortage the region indisputably now has of 2000 acres of urban reserves because of HB 4078, and whether more rural reserves is yielded from such an analysis is unknown. Moreover, it is unknown what is the appropriate resulting designation of the Barker property and some or all of Area 9D based on the “balance in the designation of urban and rural reserves that, in its entirety, best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents.”

Procedural Fairness

LCDC’s proceedings are judicial in nature. Review of Metro area designations of reserves occurs after a hearing and those proceedings are subject to ORS 183.417. As a matter of law, LCDC’s proceedings must be free of ex parte contact, bias and based on the record. LCDC is required to conduct its hearings and exercise its review functions consistently with the requirements of AGs Model Rules and Uniform Rules of Procedure.

OAR 660-001-005(1). These model rules are OAR 137-003-000 to 0092. These rules include requirements that LCDC about disclosures and rebuttal rights if ex parte contacts occur. OAR 137-003-0055.

The attorney for LCDC recently advised the undersigned, in the context of reply to a public records request that through the post court of appeals remand LCDC is and has been working with Multnomah County under a “joint defense agreement” between LCDC/DLCD, Multnomah County, Metro and certain other parties to this case. Exh 2.¹¹ The apparent premise of the “joint defense agreement” is that the decision maker and select parties to LCDC’s remand proceedings have a “common interest” and assumption that the outcome goal is to defend LCDC’s original order that the court of appeals remanded. This obviously has enormous consequences to petitioners’ in the context of LCDC fairly applying the “evidence clearly supports” scope of review, where LCDC is affirmatively working to “save” its original decision at the private request of particular parties to this case.

With all due respect there can be no “joint defense agreement” between LCDC and select parties to this case and that any such agreement is contrary to OAR 137.003-0055. Further, LCDC’s attorney advised that based on the “joint defense agreement”, Multnomah County’s communications with LCDC are private and not subject to public review. *See* Exhibit 2.

With respect, all of this is wrong. LCDC’s role is neutral decision maker. It is required to base its decision in this matter solely on the evidence and argument in the record. ORS 197.633. It may not privately consider communications that are not in the record from a party to the case, whether they are direct or summarized by staff. Multnomah County’s

¹¹ LCDC may review the attachment because it identifies procedural irregularities not otherwise shown in the record that it would seem that LCDC is required to cure.

private lobbying is ex parte. LCDC must comply with OAR 137-003-0055 regarding these ex parte contacts, including when they have been summarized for LCDC by LCDC staff. The disclosure requirements are LCDC must (1) disclose all ex parte communications, including any written Multnomah County lobbying materials, (2) supply parties an opportunity to present evidence and argument to respond to the ex parte communications, (3) declare that as the no part of its decision or analysis will be limited or informed by a “joint defense agreement” with certain of the litigation parties to this case and that it is not in fact a part of any such “joint defense agreement.”

HB 4078 Sec 9 Violates the Principal of Separation of Powers

HB 4078 violates the constitutional principle of “separation of powers” by (1) directing certain findings in pending litigation and authorizing LCDC to ignore the court’s remand directive without changing any generally applicable underlying law; (2) encroaching on power delegated by the executive to LCDC; and (3) encroaching on the exclusive jurisdiction of the Court of Appeals to review and remand LCDC cases. The most egregious example of how HB 4078 Sec 9 violates separation of powers is that the court of appeals specifically decided that Multnomah County did not supply the required reserves analysis to designate petitioners’ property rural reserve. HB 4078 Sec 9 unquestionably violates separation of powers if it is interpreted to mean that LCDC can ignore these judicial determinations and instead decide the “evidence clearly supports” that the county performed the analysis that the court expressly found it did not. The arguments below presume this is how HB 4078 Sec. 9 is being interpreted.¹²

¹² As between a constitutional interpretation of HB 4078 and one that is not, LCDC should select the one that is constitutional. If it does this, then LCDC will find that HB Sec 4079 Sec 9 does not authorize it to find the “evidence clearly supports” an analysis was made that the court found was not made.

HB 4078 Sec 9 is a specific change to LCDC's scope of review that applies only to this specific case and sunsets at the end of this year. It improperly purports to change the nature of the court of appeals' directive on remand and change the nature of the way LCDC responds to that remand from that which the court contemplated. HB 4078 makes more than half of the court's decision irrelevant – the portions regarding LCDC's understanding of its scope of review, regarding its analysis of substantial evidence in the record and its specific rejection of arguments about the “evidence clearly supporting” the decision finding that LCDC had no such authority.

HB 4078 is contrary to Or Const, Art III, § 1 which provides: “The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; *and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as this Constitution expressly provided.*” (Emphasis supplied.) It is contrary to Or Const, Art VII, § 1, which provides that the judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law.

It interferes with LCDC's executive authority in its exclusive jurisdiction to review local reserves decisions ORS 197.626, see also ORS 197.633. It is contrary to OAR 660-003-0050 (1) which provides:

“The commission shall reconsider an acknowledgment request as a result of a remand or reversal *from the Oregon Court of Appeals or Oregon Supreme Court* within 90 days of the date the decision becomes final. The director shall review the Court's decision and make written recommendations to the commission regarding any additional planning work that is required for acknowledgment of compliance with the goals as a result of the Court's decision.” (*Emphasis supplied.*)

It is contrary to ORS 183.482(1), which confers jurisdiction for judicial review of contested cases on the Court of Appeals as well as ORS 197.650 (2) conferring jurisdiction

for judicial review of a final order of the commission under ORS 197.633 and other relevant to this case. It interferes with ORS 197.040(C) specifying the duties of LCDC:

“(i) Review the land use planning responsibilities and authorities given to the state, regions, counties and cities, review the resources available to each level of government and make recommendations to the Legislative Assembly to improve the administration of the statewide land use program; and

(j) Perform other duties required by law.

It is undeniable that Section 9 of HB 4078 directs LCDC’s findings concerning its review of this particular case, authorizes LCDC to ignore much of the court’s analysis and decision and changes the nature of the court of appeals remand and LCDC’s response to that remand as the court contemplated. The plain language of HB 4078, Sec 9, “When the Land Conservation and Development Commission acts on remand of the decision of the Oregon Court of Appeals in Case No. A152351, the commission may...” is clear in these regards.

HB 4078, Sec 9, interferes with and attempts to change *pending* litigation - the ruling of Case No. A152351 was filed by the Oregon Court of Appeals on February 20, 2014 and HB 4078 Sec. 9 was signed into law two months later in April, and LCDC’s has not yet acted on the court of appeals remand.

HB 4078, Sec 9 did not change *any underlying law* of general applicability -- Section 9 is not mentioned anywhere else in conjunction with any statute or regulation, and Section 9 itself does not refer to any statute or regulation. While it is true that HB 4078 may make changes to underlying law in other sections of the Bill, Section 9 only explicitly directs LCDC’s outcome of this pending case. Additionally, the language of Section 9 does not explicitly or impliedly announce that any other case be handled in the same manner directed by Section 9. It does not purport to amend ORS 197.633 generally, rather only for this case.

In *State ex rel. Dewberry v. Kitzhaber*, 259 Or App 389, 395, 313 P3d 1135, 1139 (2013) *rev den*, 354 Or 838 (2014), the court of appeals explained the Oregon separation of powers rule:

“In determining whether there is a separation of powers violation, the court's first inquiry is whether one branch of government has unduly burdened the action of another in an area of responsibility or authority committed to that other department; the second inquiry is whether one branch is performing the functions committed to another branch. *State ex rel. Dewberry v. Kitzhaber*, 259 Or App 389, 395, 313 P3d 1135, 1139 (2013) *rev den*, 354 Or 838 (2014); *see also Jones v. Douglas Cnty.*, 247 Or App 56, 270 P3d 264 (2011), and *State v. Speedis*, 350 Or 424, 256 P3d 1061 (2011).”

There can be little doubt that the review of LCDC's order and decision about the permissible responses on remand is committed to the authority of the court of appeals. That in HB 4078 Sec 9, the legislature significantly and unduly burdened the court's review and remand directive is undeniably clear. HB 4078 Sec 9 change to LCDC's scope of review after LCDC reviewed the initial submittal, made a decision about the original submittal, after all parties had briefed whether LCDC's decision was wrong, after the court of appeals decided the extent to which LCDC properly performed its review function under its then in effect ORS 197.633 scope of review and after it remanded to LCDC finding LCDC erred based on its then in effect permissible range of options, are unlawful interference. Changing the scope of review post remand, impermissibly changes the nature of the court's remand.

The court of appeals decided the Multnomah County reserves designation affecting Petitioners property was unlawful. The court of appeals decided the required reserves analysis announced in the decision is improper and a proper analysis is missing. The court decided that petitioners' property cannot be designated rural reserves on the basis of the decision it reviewed and the evidence and argument presented. The court explained in a specific footnote that it will not deal with an “evidence clearly supports argument” because LCDC had no such authority. *Barkers Five*, 261 Or App 341 n 44.

Under these circumstances, where, as here, the court has already decided the required reserves analysis does not exist, it is error for the legislature to allow LCDC to ignore the court's decision and find the missing analysis does exist after all. This interferes with the judicial principle that if one does not like a judicial decision, one must appeal. Instead, the legislature has effectively authorized an unlawful collateral attack on a judicial decision.

LCDC should not decide this case based on HB 4078 Sec. 9.

Summary

The evidence does not "clearly support" that the county performed the required analysis. The evidence is at best conflicting about what the results of a proper analysis of the reserves factors to petitioners' property would yield. To the extent LCDC is tempted to apply the "evidence clearly supports" standard to this case, it should not do so as HB 4078 Sec 9 violates the separation of powers doctrine. Alternatively, if LCDC applies the standard, it should decide the evidence simply does not "clearly support" that the decision in whole or part complies with the court's order.

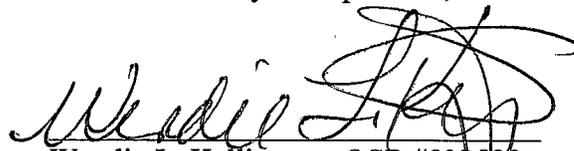
LCDC should disclose all direct and staff summarized ex parte contacts and provide parties the opportunity for rebuttal. LCDC should renounce any participation in the "joint defense agreement" and acknowledge its role as natural decision maker.

To deal with the unlawful Multnomah County decision, LCDC should determine that the errors identified by the court undermine and delay the final designation of Multnomah County reserves in their entirety, acknowledging that the court decided Multnomah County unlawfully made the Barkers property rural reserve as a part of Area 9D. In response, LCDC should order Multnomah County to remove the Barkers property from Area 9D, and simply leave the Barkers property undesignated.

In the alternative, LCDC should acknowledge the county's incorrect analysis affects all of the Multnomah County reserves "in their entirety" and remand the Multnomah County

reserves to the county to: (1) correctly apply the reserves analysis to Area 9D to determine whether Area 9D, including petitioners' property, is properly designated rural reserve, (2) make a new decision based on the proper application of the law that the county's designation of reserves "on balance best achieves" particular identified objectives of the reserves rules. OAR 660-027-005(2). In this regard, LCDC to direct that the latter analysis must consider the dramatic change to the regional balance of reserves imposed by HB 4078 to determine whether leaving the Barkers property and Area 9D a rural reserve on balance best achieves the reserves purposes as stated in OAR 660-027-005(2). Thank you for your consideration.

RESPECTFULLY SUBMITTED this 25th day of September, 2014.



Wendie L. Kellington, OSB #832589

WENDIE L. KELLINGTON, P.C.

PO Box 159

Lake Oswego OR 97034

503 636-0069

wk@wkellington.com

Attorney for Petitioners Barkers Five

CERTIFICATE OF FILING

I hereby certify that on September 25, 2014, I filed the original of this PETITIONERS BARKERS FIVE, LLC REMAND BRIEF to the Land Conservation and Development Commission, 635 Capitol St. NE Ste. 150, Salem, OR 97301-2540 by Hand Delivery.

Dated this 25th day of September, 2014

A handwritten signature in black ink, appearing to read 'Wendie L. Kellington', with a large, sweeping flourish extending to the right.

Wendie L. Kellington 83-2589
Attorney at Law

B. On-the-Ground Results

At the end of the day, the various changes to reserves designations and the UGB resulted in (approximately²):

- +3,200 acres added to the UGB, including the 2,015 acres added as part of Metro's 2011 UGB plus the 1,180 acres added under HB 4078. As above, most of the UGB additions were in the northern areas of Hillsboro, Forest Grove, and Cornelius. [The 2011 Metro UGB expansion is down in hot pink on the Washington County map; the HB 4078 additions are shown in brown. A Metro map is also available, but has less detail.]
- +2,800 acres re-designated as rural reserves, including portions of north Hillsboro, and areas north for Forest Grove and Cornelius as well as the Helvetia area (east of NW Helvetia Road) and an area west of Groveland Road. [Dark green on the Washington County Map]
- -770 acres of undesignated lands (re-designated to either urban or rural reserves).
- -2,000 acres of urban reserves net converted to rural reserves or undesignated (using Metro's 2011 UGB decision as the baseline).

IV. FUTURE CONSIDERATIONS

Responding to the remand. As described earlier, the court of appeals remanded certain aspects of the reserves decisions in Clackamas and Multnomah counties. Related, the court also ruled that the commission could not approve a county's decision where the findings were inadequate, even if the record clearly supported the county's decision. Section 9 of HB 4078, however, gives the commission the authority that the court found it lacked. Thus, notwithstanding the insufficient findings, the commission *could* find that the evidence in the record clearly supports the decisions reached by Clackamas and Multnomah counties and adopt a new order approving the designations. The department has started discussions with our local government partners (Clackamas County, Multnomah County, and Metro) about how to address the remand.

Additional employment capacity. HB 4078 added additional land to the UGB, some of which was declared "employment land of statewide significance" and, as such, cannot be counted as providing any employment capacity in Metro's first legislative review of the UGB. This provision was added to address understandable fairness concerns on the part of Clackamas County, particularly since the addition was made without any demonstrated need. At the same time, this section of the bill creates planning concerns and questions, including the fact that the next capacity analysis could assert an employment land need, even if no such need actually exists, or could assert a larger employment land need than is actually necessary. It is

² The numbers were provided by Metro staff, and have been rounded.

Wendie L. Kellington
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97034

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Email: wk@wkellington.com

September 19, 2014

Via U.S. Mail
Ellen Rosenblum
Oregon Attorney General
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

RE: ORS 192.450 Petition for Attorney General Review of DLCD/LCDC September 18,
2014 Denial of Request to Review Public Records

Dear Ms. Rosenblum:

This petition is for attorney general review DLCD/LCDC's denial of petitioner's right to review public records. This petition is substantially in the form required by ORS 192.470. This firm represents Barkers Five LLC and, on its behalf on August 4, 2014, requested the opportunity to review certain DLCD/LCDC public records at the offices of DLCD/LCDC. *See* attached public records request, Exhibit 1. Yesterday (September 18, 2014), in a phone call with the undersigned and DLCD/LCDC's lawyer, assistant attorney general Steve Shipsey, the undersigned's public records request was orally denied. We seek your review of that denial, per ORS 192.450.

DLCD/LCDC did nothing with the undersigned's August 4, 2014 public records request for nearly 7 weeks. Specifically, despite the undersigned's request for updates on the progress of processing petitioner's public records request, we heard nothing from DLCD/LCDC until the afternoon of September 12, 2014, which the undersigned had set as the date it would treat DLCD/LCDC's non-responsiveness as constructive denial. *See* attached Exhibit 2, p 3. However, DLCD/LCDC's response was to merely refer the undersigned to the agency's attorney general representative, Steve Shipsey. *See* attached Exhibit 3. On September 13, 2014, the undersigned contacted Mr. Shipsey regarding release of the requested public records. *See* attached Exhibit 3. In Exhibit 3 (page 1), you will note the reference to a "joint defense agreement." The "joint defense agreement" is an email string between certain litigants and is the sole basis Mr. Shipsey gave for refusing to release any of the requested public records. The "joint defense agreement" does not shield the requested public records from the public's review. To explain.

Barkers Five LLC is one of two successful appellants in *Barkers Five LLC v. LCDC*, 261 Or App 259 (2014). Petitioners' public records request predates the court of appeals' final judgment in *Barkers Five LLC v. LCDC*. As you may know, the court of appeals remanded the LCDC order at issue in that case. That remand is pending before LCDC for decision. LCDC recently accepted a staff recommendation about decision making milestones. We understand that DLCD staff have been funneling information to LCDC with recommendations of how to

September 19, 2014
Page 2

proceed post remand, including apparently information from the preferred post-remand litigation parties, information sought to be protected from public review here. LCDC's case management order is Exhibit 4.

The referenced "joint defense agreement" is apparently between certain losing litigants and LCDC/DLCD in the *Barkers Five LLC* case. See Exhibit 5. Petitioner learned of such document's existence in the context of requesting substantially similar public records from Multnomah County and Metro. According to Multnomah County and Metro "[parties] and LCDC have been operating under a Joint Defense Agreement in this matter." Exhibit 5, p 7. (Emphasis supplied.) Applied post-court of appeals remand, the joint defense agreement can only be described as designed to facilitate secret communications between some of the *Barkers Five LLC* party litigants and the ultimate decision maker in the nature of lobbying an outcome, without the inconvenience of public scrutiny. This purpose is impermissible.

At the outset we note that the 2012 date of the "joint defense agreement" and its language shows it applied to the joint defense of the LCDC order *when that order was under the court of appeals' review*. Reasonably read, it has nothing to do with the post court of appeals remand, because there is nothing post remand to "jointly defend" ("we are all joint defendants/respondents in the Oregon Court of Appeals appeal of the Land Conservation and Development Commission decision 12-ACK-001819 * * *" Exhibit 5 p 1). That defense is over, and Barkers Five LLC and one other party prevailed. Now LCDC has to decide the matter in light of the court of appeals remand, which will likely involve remanding to the losing local governments to properly apply standards. As noted, we understand Multnomah County is lobbying LCDC/DLCD to simply affirm its decision again, through the protection of the "joint defense agreement". It is these records we understand LCDC/DLCD is refusing to release under Oregon public records laws.

Additionally, the joint defense agreement is ineffective to shield *any* documents from public review. A "joint defense agreement" with particular litigation parties that purports to include the judge, shields nothing. LCDC is the administrative judge, post remand. All a joint defense agreement does is shield what would otherwise be protected as attorney client communications from loss of the attorney client privilege because of third party disclosures to other litigants sharing a common interest. Nothing circulated to the ultimate decision maker or its staff, is a communication between attorney and client, and there can certainly be no "common interest" between particular post-remand parties and the ultimate decision maker or its staff.

Further, the claim that all requested public records are not subject to public review because of a joint defense agreement between certain party litigants and the post court of appeals remand decision maker (LCDC), is contrary to everything we know about public records policy reflected in state law, about governmental transparency and decision maker neutrality. It meets none of the tests of *Port of Portland v. Oregon Center for Environmental Health*, 238 Or App 404 (2009). There can be no "joint defense agreement" between the ultimate decision maker and particular, preferred, party litigants and such a precedent would be a surprising end to the policy that the public's business is to be conducted in public or that judges are to be neutral. No neutral decision maker can *ever* share a "common interest" with *any* parties to post-court of appeals

September 19, 2014

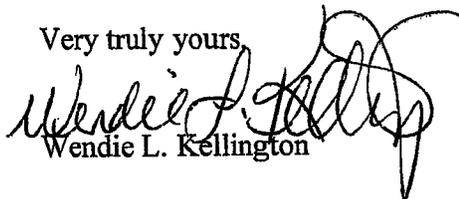
Page 3

remand litigation, because by definition to do so means they are no longer neutral decision makers.

We ask that you immediately require LCDC/DLCD to release all of the requested public records to the undersigned. This is time sensitive because the Exhibit 4 case management order requires the *Barkers Five LLC* parties to file briefs in the matter by September 25, 2014. Whether LCDC and its staff are capable of or prepared to perform the role of neutral decision maker as required or have committed to represent the interests of particular litigation parties, is crucial to that briefing.

Thank you for your consideration.

Very truly yours,



Wendie L. Kellington

WLK:wlk

CC: Clients

From: [Wendie Kellington](#)
To: [Taylor, Casaria](#)
Cc: [Sandy Baker \(sjhb1503@gmail.com\)](#); [Steven. Barker \(Steven.Barker@shell.com\)](#)
Subject: Records Request
Date: Monday, August 04, 2014 11:54:00 AM
Attachments: [DLCD-Letter-Records Request.pdf](#)
[Barkers 5 records request.pdf](#)

Good morning Casaria,

Attached please find a records request form and letter explaining the requested records. If you have any questions, please feel free to let me know. Thank you, Wendie Kellington



Wendie L. Kellington | Attorney at Law P.C.

P.O. Box 159

Lake Oswego Or

97034

(503) 636-0069 office

(503) 636-0102 fax

wk@wkellington.com

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Wendie L. Kellington
Attorney at Law, P.C.

P.O. Box 159
Lake Oswego Or
97034

Phone (503) 636-0069
Mobile (503) 804-0535
Facsimile (503) 636-0102
Email: wk@wkellington.com

August 4, 2014

Casaria Taylor
Records Coordinator
Department of Land Conservation and Development
635 Capitol Street, Suite 150
Salem, OR 97301

RE: Public Records Request Under ORS Chapter 192

Dear Records Coordinator:

This firm represents Barker's Five in a matter involving the Land Conservation and Development Commission (LCDC) and DLCD. This is a request under ORS Chapter 192 to review public records. This request relates to communications and other public records relating to the Court of Appeals opinion *Barkers Five, LLC. v. LCDC* (CA A152351) (referred to herein as "*Barkers Five*"), which opinion was filed by the court on February 20, 2014, and potential subsequent LCDC and local proceedings on remand.

Specifically, I would like to review all public records, (as defined by ORS 192.410(6)) which includes but is not limited to, e-mail correspondence, letters, memoranda, meeting calendar entries, handwritten notes, text messages, files, reports and electronic recordings, that discuss or otherwise refer to the *Barkers Five* appellate opinion and/or potential Metro, Multnomah County, LCDC or DLCD responses to the *Barkers Five* appellate opinion including discussions about proceedings or outcomes on remand. Moreover, we seek to review all public records as defined that mention Barker's Five (Barkers 5 or Barker), Wendie (spelled as Wendie or Wendy) Kellington, Sandy Baker, Area 9D, Area 6b, Kaiser Road., Germantown Rd., Skyline Boulevard, the North Bethany area, Rock Creek, Abbey Creek, urban reserves, rural reserves, rural reserves factors, urban reserves factors or the court of appeals. These records may include communications or other public records made by or between representatives of DLCD, individual or collective members of LCDC, representatives of Metro, representatives of Multnomah County, LCDC or DLCD, Carol Chesarek, Cherry Amabisca, Ed Sullivan, Carrie Richter, Jed Tomkins, Deborah Kafoury and Jules Bailey, and Richard Whitman, but this list of recipients or generators is not exclusive.

The time period to be covered for this request is February 20, 2014 through the present.

Please contact me with an estimate of the fees and amount of time it will take to produce the requested records. Please note that DLCD has an ongoing duty to ensure the orderly retention and destruction of public records. ORS 192.001(1)(c). Implicit in that duty is the obligation to maintain records in a manner that permits them to be located and retrieved with

Ms. Casaria Taylor
August 4, 2014
Page 2

reasonable effort. DLCD cannot fail to maintain such a system and then declare because it can't, with reasonable effort, retrieve records that it must charge an unreasonable amount of time so DLCD can organize the records. By statute, the fees DLCD may charge for responding to a public records request are limited to those fees "reasonably calculated to reimburse it for its actual cost in making such records available." ORS 192.440(3). It is DLCD's burden to show that the fees are reasonably related to its actual appropriate costs. *Davis v. Walker*, 108 Or App 128, 132 (1991). Please feel free to contact me if you have any questions concerning this request.

Thank you for your assistance and promptness in addressing this records request.

Very truly yours,

Wendie Kellington

Wendie L. Kellington

WLK:wlk
CC: Clients



Oregon Department of Land Conservation and Development

Public Records Request

Public records requests must be made to the government agency that is the custodian of the records. If the records you seek are held by another public body, you should instead request them from that body.

Date of request: August 14, 2014

Name: Wendie L. Kellington, Attorney at Law, P.C.

Address: P.O. Box 159

City: Lake Oswego State: OR Zip Code: 97034

Phone: (503) 636-0069 Email: wk@wkellington.com

Description of records:

Please see attached letter.

- I would like to inspect the records.
 I would like electronic copies of the records.
 I would like copies of the records mailed to me.

You may submit this form to Casaria Taylor by email, mail or fax to:

Email: Casaria.Taylor@state.or.us

Mail: 635 Capitol St. Ste, 150, Salem, OR 97301

Fax: 503-378-5518

06/01/2012

Wendie Kellington

From: Taylor, Casaria <casaria.taylor@state.or.us>
Sent: Friday, September 12, 2014 1:21 PM
To: Wendie Kellington
Cc: MacLaren, Carrie; Sandy Baker (sjhb1503@gmail.com); SHIPSEY Steve; Steven. Barker (Steven.Barker@shell.com)
Subject: RE: Records Request

Ms. Kellington.

I have referred your records request to the Assistant Attorney General, Steve Shipsey. Please direct any future inquiries to Mr. Shipsey.

Thank you,
Casaria

Casaria Taylor | Rules, Records & Policy Coordinator/Asst to Deputy Director
Oregon Dept. of Land Conservation and Development
635 Capitol Street NE, Suite 150 | Salem, OR 97301-2540
Office: (503) 373-0050 ext. 322 | Cell: (971) 600-7699 | Direct: (503) 934-0065
casaria.taylor@state.or.us | www.oregon.gov/LCD

From: Wendie Kellington [mailto:wk@wkellington.com]
Sent: Monday, August 25, 2014 1:44 PM
To: Taylor, Casaria
Cc: Sandy Baker (sjhb1503@gmail.com); Steven. Barker (Steven.Barker@shell.com); MacLaren, Carrie
Subject: RE: Records Request
Importance: High

Hi Casaria,

Can you please give me an update on the receipt of the records we requested from DLCD/LCDC? I have heard nothing from you since the communication below. This is now quite time sensitive as LCDC set a briefing schedule that is really tight (September 25) and I need these records for it. Thank you.

From: Taylor, Casaria [mailto:casaria.taylor@state.or.us]
Sent: Tuesday, August 05, 2014 4:40 PM
To: Wendie Kellington
Cc: Sandy Baker (sjhb1503@gmail.com); Steven. Barker (Steven.Barker@shell.com)
Subject: RE: Records Request

Ms. Kellington,

Thank you for your public records request. On, August 5, 2014 I received your request dated, August 4, 2014 for communications records pertaining to Barkers Five, LLC. V. LCDC (CA A152351). I will begin processing your request within the next seven business days.

Thank you,
Casaria

Casaria Taylor | Rules, Records & Policy Coordinator/Asst to Deputy Director
Oregon Dept. of Land Conservation and Development
635 Capitol Street NE, Suite 150 | Salem, OR 97301-2540
Office: (503) 373-0050 ext. 322 | Cell: (971) 600-7699 | Direct: (503) 934-0065
casaria.taylor@state.or.us | www.oregon.gov/LCD

From: Wendie Kellington [<mailto:wk@wkellington.com>]
Sent: Monday, August 04, 2014 11:55 AM
To: Taylor, Casaria
Cc: Sandy Baker (sjhb1503@gmail.com); Steven. Barker (Steven.Barker@shell.com)
Subject: Records Request

Good morning Casaria,

Attached please find a records request form and letter explaining the requested records. If you have any questions, please feel free to let me know. Thank you, Wendie Kellington



Wendie L. Kellington | Attorney at Law P.C.
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To be sure that you do not rely on advice that may not meet the "covered opinion" test in addressing federal tax issues and that we comply with IRS Circular 230 provisions, our firm's e-mail and certain other written communications bear the following notice: IRS CIRCULAR 230 DISCLOSURE To ensure compliance with new requirements of the Internal Revenue Service, we inform you that, to the extent any advice relating to a Federal tax issue is contained in this communication, including in any attachments, it was not written or intended to be used, and cannot be used, for the purpose of (a) avoiding any tax related penalties that may be imposed on you or any other person under the Internal Revenue Code, or (b) promoting, marketing or recommending to another person any transaction or matter addressed in this communication. PLEASE BE NOTIFIED THAT OUR LETTERS AND E-MAILS TO YOU ARE NOT INTENDED TO MEET THE "COVERED OPINION" TEST. We do not provide legal advice on Federal (or any) tax issues.

Wendie Kellington

From: Wendie Kellington
Sent: Wednesday, September 10, 2014 8:52 AM
To: 'MacLaren, Carrie'
Subject: FW: Records Request

Importance: High

Hi Carrie,

DLCD has not responded to our records request and has not responded to the below request for a status update. This is a courtesy heads up that it seems that I have no choice but to treat this as a denial and ask for the AG's review. I'll wait until Friday to take that step. As you probably know, DLCD has an ongoing duty to ensure the orderly retention and destruction of public records. ORS 192.001(1)(c). Implicit in that duty is the obligation to maintain records in a manner that permits them to be located and retrieved with reasonable effort. DLCD cannot fail to maintain such a system and then declare because it can't, with reasonable effort, retrieve records that it must take or charge for an unreasonable amount of time to enable it to organize the records. Moreover, by statute, the fees that may be charged for responding to a public records request are limited to those fees "reasonably calculated to reimburse it for its actual cost in making such records available." ORS 192.440(3). It is DLCD's burden to show that the fees are reasonably related to its actual costs. *Davis v. Walker*, 108 Or App 128, 132 (1991). Best, Wendie

From: Wendie Kellington
Sent: Monday, August 25, 2014 1:44 PM
To: 'Taylor, Casaria'
Cc: Sandy Baker (sjhb1503@gmail.com); Steven. Barker (Steven.Barker@shell.com); 'MacLaren, Carrie'
Subject: RE: Records Request
Importance: High

Hi Casaria,

Can you please give me an update on the receipt of the records we requested from DLCD/LCDC? I have heard nothing from you since the communication below. This is now quite time sensitive as LCDC set a briefing schedule that is really tight (September 25) and I need these records for it. Thank you.

From: Taylor, Casaria [<mailto:casaria.taylor@state.or.us>]
Sent: Tuesday, August 05, 2014 4:40 PM
To: Wendie Kellington
Cc: Sandy Baker (sjhb1503@gmail.com); Steven. Barker (Steven.Barker@shell.com)
Subject: RE: Records Request

Ms. Kellington,

Thank you for your public records request. On, August 5, 2014 I received your request dated, August 4, 2014 for communications records pertaining to Barkers Five, LLC. V. LCDC (CA A152351). I will begin processing your request within the next seven business days.

Thank you,
Casaria

Casaria Taylor | Rules, Records & Policy Coordinator/Asst to Deputy Director
Oregon Dept. of Land Conservation and Development
635 Capitol Street NE, Suite 150 | Salem, OR 97301-2540
Office: (503) 373-0050 ext. 322 | Cell: (971) 600-7699 | Direct: (503) 934-0065
casaria.taylor@state.or.us | www.oregon.gov/LCD

From: Wendie Kellington [<mailto:wk@wkellington.com>]
Sent: Monday, August 04, 2014 11:55 AM
To: Taylor, Casaria
Cc: Sandy Baker (sjhb1503@gmail.com); Steven. Barker (Steven.Barker@shell.com)
Subject: Records Request

Good morning Casaria,

Attached please find a records request form and letter explaining the requested records. If you have any questions, please feel free to let me know. Thank you, Wendie Kellington



Wendie L. Kellington | Attorney at Law P.C.
P.O. Box 159
Lake Oswego Or
97034
(503) 636-0069 office
(503) 636-0102 fax
wk@wkellington.com
www.wkellington.com

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To be sure that you do not rely on advice that may not meet the "covered opinion" test in addressing federal tax issues and that we comply with IRS Circular 230 provisions, our firm's e-mail and certain other written communications bear the following notice: IRS CIRCULAR 230 DISCLOSURE To ensure compliance with new requirements of the Internal Revenue Service, we inform you that, to the extent any advice relating to a Federal tax issue is contained in this communication, including in any attachments, it was not written or intended to be used, and cannot be used, for the purpose of (a) avoiding any tax related penalties that may be imposed on you or any other person under the Internal Revenue Code, or (b) promoting, marketing or recommending to another person any transaction or matter addressed in this communication. PLEASE BE NOTIFIED THAT OUR LETTERS AND E-MAILS TO YOU ARE NOT INTENDED TO MEET THE "COVERED OPINION" TEST. We do not provide legal advice on Federal (or any) tax issues.

Wendie Kellington

From: Wendie Kellington
Sent: Saturday, September 13, 2014 11:14 AM
To: SHIPSEY Steve (steve.shipsey@state.or.us)
Subject: FW: Records Request

Hi Steve,

Please let me know when the records will be released for me to review them. This is extremely time sensitive as they are relevant to the LCDC briefing. I filed the records request August 4, 2014. DLCD simply sat on it ostensibly doing nothing for 6 weeks. I am also interested in knowing whether DLCD or LCDC is a party to the "joint defense agreement". Whether it is, is of course very much relevant to the remand. Please let me know. Thank you. Wendie

From: Taylor, Casaria [mailto:casaria.taylor@state.or.us]
Sent: Friday, September 12, 2014 1:21 PM
To: Wendie Kellington
Cc: MacLaren, Carrie; Sandy Baker (sjhb1503@gmail.com); SHIPSEY Steve; Steven. Barker (Steven.Barker@shell.com)
Subject: RE: Records Request

Ms. Kellington.

I have referred your records request to the Assistant Attorney General, Steve Shipsey. Please direct any future inquiries to Mr. Shipsey.

Thank you,
Casaria

Casaria Taylor | Rules, Records & Policy Coordinator/Asst to Deputy Director
Oregon Dept. of Land Conservation and Development
635 Capitol Street NE, Suite 150 | Salem, OR 97301-2540
Office: (503) 373-0050 ext. 322 | Cell: (971) 600-7699 | Direct: (503) 934-0065
casaria.taylor@state.or.us | www.oregon.gov/LCD

From: Wendie Kellington [mailto:wk@wkellington.com]
Sent: Monday, August 25, 2014 1:44 PM
To: Taylor, Casaria
Cc: Sandy Baker (sjhb1503@gmail.com); Steven. Barker (Steven.Barker@shell.com); MacLaren, Carrie
Subject: RE: Records Request
Importance: High

Hi Casaria,

Can you please give me an update on the receipt of the records we requested from DLCD/LCDC? I have heard nothing from you since the communication below. This is now quite time sensitive as LCDC set a briefing schedule that is really tight (September 25) and I need these records for it. Thank you.

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From: Wendie Kellington [<mailto:wk@wkellington.com>]
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Cc: Sandy Baker (sjhb1503@gmail.com); Steven. Barker (Steven.Barker@shell.com)
Subject: Records Request

Good morning Casaria,

Attached please find a records request form and letter explaining the requested records. If you have any questions, please feel free to let me know. Thank you, Wendie Kellington



Wendie L. Kellington | Attorney at Law P.C.
P.O. Box 159
Lake Oswego Or
97034
(503) 636-0069 office
(503) 636-0102 fax
wk@wkellington.com
www.wkellington.com

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To be sure that you do not rely on advice that may not meet the "covered opinion" test in addressing federal tax issues and that we comply with IRS Circular 230 provisions, our firm's e-mail and certain other written communications bear the following notice: **IRS CIRCULAR 230 DISCLOSURE** To ensure compliance with new requirements of the Internal Revenue Service, we inform you that, to the extent any advice relating to a Federal tax issue is contained in this communication, including in any attachments, it was not written or intended to be used, and cannot be used, for the purpose of (a) avoiding any tax related penalties that may be imposed on you or any other person under the Internal Revenue Code, or (b) promoting, marketing or recommending to another person any transaction or matter addressed in this

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

IN THE MATTER OF THE REVIEW)	
OF THE DESIGNATION OF URBAN)	SCHEDULING
RESERVES BY METRO AND RURAL)	ORDER
RESERVES BY CLACKAMAS COUNTY,)	
MULTNOMAH COUNTY, AND)	
WASHINGTON COUNTY)	

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 Land Conservation and Development Commission (commission) on August 25, 2014, on remand from the Oregon Court of Appeals pursuant to ORS 197.651. On July 30, 2014, the Department of Land Conservation and Development (department) received the appellate judgment following judicial review in *Barkers Five, LLC v. LCDC*, 261 Or App 259 (2014) and the commission now has jurisdiction over the matter. Pursuant to the requirement in ORS 197.651(12), the commission adopts this order in response to the court’s appellate judgment.

The commission finds that the issues presented on remand are complex and present several procedural options. Therefore, the commission hereby offers any of the parties on judicial review in the *Barkers Five, LLC v. LCDC* (A152351) case the opportunity to provide the commission additional briefing on remand as provided in this order. The commission specifically requests briefing that addresses issues identified by the court in *Barkers Five, LLC v. LCDC*, 261 Or App at 363-364 and the extent to which the subsequent enactment of HB 4078 by the 2014 Oregon Legislature impacts those issues. In particular, the commission requests briefing from both the parties with assignments of error relating to issues (A)(1) and (2) below and the local governments that made the designation of urban and rural reserves at issue. Any party who desires to submit a brief may do so; however, briefing should be limited to preserved arguments (*i.e.*, only those new arguments that are based on the court’s opinion or HB 4078 that could not have been raised before).

THEREFORE, IT IS ORDERED THAT:

A. The parties may brief the commission regarding:

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 parties determine should be briefed.

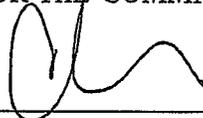
B. Parties may file an opening brief with the department on or before September 25, 2014.

An opening brief is acceptable if it does not exceed 25 pages; type may not be smaller than 12 point for both the text of the brief and footnotes.

C. Parties may file a response briefs with the department on or before October 9, 2014. A party may file a response brief irrespective of whether or not it filed an opening brief. A reply brief is acceptable if it does not exceed 10 pages; type may not be smaller than 12 point for both the text of the brief and footnotes.

DATED THIS 4th DAY OF September, 2014.

FOR THE COMMISSION:



P^r Jim Rue, Director
Oregon Department of Land
Conservation and Development

8/19/2014

Multnomah County Mail - JOINT DEFENSE AGREEMENT AND PRIVILEGE



Jed TOMKINS <jed.tomkins@multco.us>

JOINT DEFENSE AGREEMENT AND PRIVILEGE

30 messages

Alison Kean.Campbell <Alison.Kean.Campbell@oregonmetro.gov> Wed, Sep 12, 2012 at 4:56 PM
To: Roger Alfred <Roger.Alfred@oregonmetro.gov>, Ebbett Patrick M <patrick.m.ebbett@doj.state.or.us>, Alan Rappleyea <Alan_Rappleyea@co.washington.or.us>, "Tatum, Rhett" <RTatum@co.clackamas.or.us>, Chris Crean <Chris@gov-law.com>, Jacquilyn Saito-Moore <Jacquilyn_Saito-Moore@co.washington.or.us>, Jed TOMKINS <jed.tomkins@multco.us>, Shipsey Steven <steve.shipsey@doj.state.or.us>

Team,

As we proceed with strategizing electronically, in an abundance of caution I'd like to suggest that we all agree that we are doing so under a "joint defense agreement" as we are all joint defendants/respondents in the Oregon Court of Appeals appeal of the Land Conservation and Development Commission decision 12-ACK-001819, and that we try to add the statement "SUBJECT TO JOINT DEFENSE AGREEMENT" to our substantive emails to one another.

Please "reply all" with your agreement for all of our records. Thanks.

Alison Kean Campbell

Metro Attorney

Office of Metro Attorney

Metro

600 NE Grand Ave. | Portland, Oregon 97232-2736

Direct: 503-797-1511 | Fax: 503-797-1792

Alison.Kean.Campbell@oregonmetro.gov



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MULTCO/KELL 010001

8/19/2014

Multnomah County Mail - JOINT DEFENSE AGREEMENT AND PRIVILEGE

mistake, please do not review, disclose, copy, or distribute the e-mail. Instead, please notify us immediately by replying to this message or telephoning us at 503-797-1511, and destroy the original message. Thank you.

Chris Crean <Chris@gov-law.com>

Thu, Sep 13, 2012 at 10:20 AM

To: "Alison Kean.Campbell" <Alison.Kean.Campbell@oregonmetro.gov>, Roger Alfred <Roger.Alfred@oregonmetro.gov>, Ebbett Patrick M <patrick.m.ebbett@doj.state.or.us>, Alan Rappleyea <Alan_Rappleyea@co.washington.or.us>, "Tatum, Rhett" <RTatum@co.clackamas.or.us>, Jacquilyn Saito-Moore <Jacquilyn_Saito-Moore@co.washington.or.us>, Jed TOMKINS <jed.tomkins@multco.us>, Shipsey Steven <steve.shipsey@doj.state.or.us>

Cc: Pam Beery <Pam@gov-law.com>

Thanks Alison. The City of Hillsboro agrees.

Chris

Christopher D. Crean
BEERY ELSNER & HAMMOND, LLP
1750 SW Harbor Way, Suite 380
Portland, OR 97201
t (503) 226 7191 | f (503) 226 2348
www.gov-law.com

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From: Alison Kean.Campbell [mailto:Alison.Kean.Campbell@oregonmetro.gov]

Sent: Wednesday, September 12, 2012 4:57 PM

To: Roger Alfred; Ebbett Patrick M; Alan Rappleyea; Tatum, Rhett; Chris Crean; Jacquilyn Saito-Moore; Jed TOMKINS; Shipsey Steven

Subject: JOINT DEFENSE AGREEMENT AND PRIVILEGE

[Quoted text hidden]

Ebbett Patrick M <patrick.m.ebbett@doj.state.or.us>

Thu, Sep 13, 2012 at 10:20 AM

To: Chris Crean <Chris@gov-law.com>, "Alison Kean.Campbell" <Alison.Kean.Campbell@oregonmetro.gov>, Roger Alfred <Roger.Alfred@oregonmetro.gov>, Alan Rappleyea <Alan_Rappleyea@co.washington.or.us>, "Tatum, Rhett" <RTatum@co.clackamas.or.us>, Jacquilyn Saito-Moore <Jacquilyn_Saito-Moore@co.washington.or.us>, Jed TOMKINS <jed.tomkins@multco.us>, Shipsey Steven <steve.shipsey@doj.state.or.us>

Cc: Pam Beery <Pam@gov-law.com>

As does LCDC.

8/19/2014

Multnomah County Mail - JOINT DEFENSE AGREEMENT AND PRIVILEGE

From: Chris Crean [mailto:Chris@gov-law.com]
Sent: Thursday, September 13, 2012 10:21 AM
To: Alison Kean.Campbell; Roger Alfred; Ebbett Patrick M; Alan Rappleyea; Tatum, Rhett; Jacquilyn Saito-Moore; Jed TOMKINS; Shipsey Steven
Cc: Pam Beery
Subject: RE: JOINT DEFENSE AGREEMENT AND PRIVILEGE

[Quoted text hidden]
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Alan Rappleyea <Alan_Rappleyea@co.washington.or.us> Thu, Sep 13, 2012 at 10:52 AM
To: "Alison Kean.Campbell" <Alison.Kean.Campbell@oregonmetro.gov>, Roger Alfred <Roger.Alfred@oregonmetro.gov>, Ebbett Patrick M <patrick.m.ebbett@doj.state.or.us>, "Tatum, Rhett" <RTatum@co.clackamas.or.us>, Chris Crean <Chris@gov-law.com>, Jacquilyn Saito-Moore <Jacquilyn_Saito-Moore@co.washington.or.us>, Jed TOMKINS <jed.tomkins@multco.us>, Shipsey Steven <steve.shipsey@doj.state.or.us>

I agree to a joint defense agreement. I will confirm with my Board.

Alan A. Rappleyea

Washington County Counsel
155 N First Ave. Suite 340
Hillsboro, OR 97124-3072
Ph: 503-846-8747
E-mail: alan_rappleyea@co.washington.or.us

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Multnomah County Mail - JOINT DEFENSE AGREEMENT AND PRIVILEGE

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From: Alison Kean.Campbell [mailto:Alison.Kean.Campbell@oregonmetro.gov]
Sent: Wednesday, September 12, 2012 4:57 PM
To: Roger Alfred; Ebbett Patrick M; Alan Rappleyea; Tatum, Rhett; Chris Crean; Jacquilyn Saito-Moore; Jed TOMKINS; Shipsey Steven
Subject: JOINT DEFENSE AGREEMENT AND PRIVILEGE

Team,

[Quoted text hidden]

Jed TOMKINS <jed.tomkins@multco.us> Thu, Sep 13, 2012 at 11:01 AM
To: "Alison Kean.Campbell" <Alison.Kean.Campbell@oregonmetro.gov>
Cc: Roger Alfred <Roger.Alfred@oregonmetro.gov>, Ebbett Patrick M <patrick.m.ebbett@doj.state.or.us>, Alan Rappleyea <Alan_Rappleyea@co.washington.or.us>, "Tatum, Rhett" <RTatum@co.clackamas.or.us>, Chris Crean <Chris@gov-law.com>, Jacquilyn Saito-Moore <Jacquilyn_Saito-Moore@co.washington.or.us>, Shipsey Steven <steve.shipsey@doj.state.or.us>

Multnomah County agrees.

Jed Tomkins
Assistant County Attorney
Office of Multnomah County Attorney
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214
Ph: (503) 988-3138
Fx: (503) 988-3377

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[Quoted text hidden]

Tatum, Rhett <RTatum@co.clackamas.or.us> Thu, Sep 13, 2012 at 11:02 AM
To: "Alison Kean.Campbell" <Alison.Kean.Campbell@oregonmetro.gov>, Roger Alfred <Roger.Alfred@oregonmetro.gov>, Ebbett Patrick M <patrick.m.ebbett@doj.state.or.us>, Alan Rappleyea <Alan_Rappleyea@co.washington.or.us>, Chris Crean <Chris@gov-law.com>, Jacquilyn Saito-Moore

<https://mail.google.com/mail/u/0/?ui=2&ik=dd2c8728c&view=pt&search=sent&th=139bce9ddb77f6c&siml=139bce9ddb77f6c&siml=139c0cae96dc25b4&siml...> 4/138

MULTCO/KELL 010004

8/19/2014

Multnomah County Mail - JOINT DEFENSE AGREEMENT AND PRIVILEGE

<Jacquilyn_Salto-Moore@co.washington.or.us>, Jed TOMKINS <jed.tomkins@multco.us>, Shipsey Steven
<steve.shipsey@doj.state.or.us>

Clackamas County agrees.

- Rhett

Wendie Kellington

From: Jed TOMKINS <jed.tomkins@multco.us>
Sent: Monday, August 25, 2014 2:47 PM
To: Wendie Kellington
Subject: Re: Your Public Records Request---Barker Opinion
Attachments: Urban Rural Reserves - Defendant's Joint Defense Agreement - stamped.pdf

Yes, I have it for you now, attached.

Jed Tomkins
Assistant County Attorney
Office of Multnomah County Attorney
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214
Ph: (503) 988-3138
Fx: (503) 988-3377

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On Mon, Aug 25, 2014 at 1:54 PM, Wendie Kellington <wk@wkellington.com> wrote:

Jed,

Will you please send me the joint defense agreement you rely on. It is critical that I see this to evaluate your request below. It is also time sensitive now that LCDC has set a briefing schedule for September 25, 2014. Thank you. Wendie

From: Wendie Kellington
Sent: Tuesday, August 19, 2014 1:42 PM
To: Jed TOMKINS
Subject: Re: Your Public Records Request---Barker Opinion

Jed

Please send me the joint defense agreement you rely on. I need to see that to evaluate your response below. Thank you

Sent from my iPhone

On Aug 19, 2014, at 12:28 PM, "Jed TOMKINS" <jed.tomkins@multco.us> wrote:

Wendie,

We received the attached request from you for public records.

It appears on the face of your request that the records you seek are exempt from disclosure based on the attorney-client privilege and other exemptions from the disclosure of public records such as the exemption for records pertaining to litigation and records pertaining to internal advisory communications. In case you are not aware, Metro, the three counties (Multnomah, Clackamas, and Washington), LCDC, and Hillsboro have been operating under a Joint Defense Agreement in this matter, which is an instrument utilized to clarify that the attorney-client privilege extends between certain parties because of their "common interest."

The foregoing exemptions appear to apply because, in the main, you request "public records relating to [the Court of Appeals opinion in Barkers] and potential [MultCo, Metro, LCDC and DLCD] proceedings on remand" as well as "all public records...that discuss or otherwise refer to the [Barkers opinion] and/or potential [Metro, MultCo, LCDC, or DLCD] responses to [that opinion], including discussions about proceedings or outcomes on remand.

I bring this to your attention because, as estimated below, there is a fee associated with this request that is payable whether or not you ultimately receive any records, yet I believe that there is a great likelihood that all or most of the records responsive to your request will not be available for disclosure to you.

At present, the estimated fee for processing your request is \$1,045.92, which includes:

- \$191 - attached estimate to conduct the email search
- \$191 - estimate to conduct the search of electronic records other than email
- \$0 - waiver of charge for searching hardcopy records
- \$829.90 - estimating 5 hours of attorney review at effective rate of \$165.98
- -\$165.98 - waiver of charge for first hour of attorney review

This is only an estimate, actual charges will be based on the time expended by staff. If charges exceed the estimate, you will be contacted for verification of additional charges before the work is completed.

Payment of the total estimated fee of \$1,045.92 must be paid in advance of commencement of further work in response to your request for records. The fee is payable to "Multnomah County" and must be sent to my attention at the address below.

Please verify in writing that the County should proceed with this request on the terms above.

Thank you and kind regards,

Jed

Jed Tomkins
Assistant County Attorney
Office of Multnomah County Attorney
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214
Ph: (503) 988-3138
Fx: (503) 988-3377

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<MultnomahCo-Letter-Records Request (1).pdf>

<EstimateOfFees_IT.pdf>