

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 RESERVES BY
CLACKAMAS COUNTY,
MULTNOMAH COUNTY, AND
WASHINGTON COUNTY

SUPPLEMENTAL BRIEF OF
THE CITY OF TUALATIN AND THE
CITY OF WEST LINN

I. INTRODUCTION

The City of Tualatin and the City of West Linn ("Cities") file this supplemental brief pursuant to the Scheduling Order Before the Land Conservation and Development Commission ("LCDC") dated September 4, 2014 ("Order"). The Order was issued in response to the decision of the Oregon Court of Appeals in Barkers Five, LLC v. LCDC, 261 Or App 259, ___ P3d ___ (2014) ("Barkers Five"), reversing and remanding LCDC's decision (12ACK001819) that approved the designation of urban and rural reserves by Metro and Washington, Clackamas, and Multnomah Counties (collectively, "Metro and the Counties"). The Cities have standing to submit this supplemental brief pursuant to the Order because the Cities were petitioners on review in Barkers Five and are thus parties to the proceeding.

Based upon the points and authorities below, the Cities argue that LCDC must remand the decision to Metro and the Counties for further proceedings.

II. STATEMENT OF FACTS

Metro and the Counties adopted joint and concurrent decisions designating urban and rural reserves pursuant to ORS 195.137 to ORS 195.145 and OAR 660-027-0050 in 2010 (the "Metro Decision"). The Metro Decision was submitted to

LCDC for acknowledgment on June 23, 2010. On October 29, 2010, following the objections and the hearings process, LCDC passed a motion approving the designation of urban and rural reserves in Clackamas and Multnomah Counties, but remanded Washington County's designation.

Metro and Washington County revised their decisions in April 2011, and Metro resubmitted the Metro Decision, as revised, on May 31, 2011. After another round of objections and hearings during the summer of 2011, LCDC moved to approve the Metro Decision at the conclusion of its hearing on August 19, 2011. LCDC issued its final Order almost one year later on August 14, 2012.

The Cities have consistently objected to the designation of Urban Reserve Areas 4A (Stafford), 4B (Rosemont), 4C (Borland), and 4D (Norwood) (collectively, "Stafford") as urban reserves throughout the Clackamas County, Metro, and LCDC proceedings. The Cities were among multiple parties that petitioned the Court of Appeals for review of LCDC's decision.

On February 20, 2014, the Oregon Court of Appeals issued its decision in Barkers Five. The decision upheld much of LCDC's interpretation and application of the legal framework and applicable rules for designation of urban and rural reserves, but concluded that LCDC had misapplied the law in the following four ways:

1. By approving Washington County's misapplication of the rural-reserve factors applicable to agricultural land;
2. By concluding that Multnomah County had adequately considered the rural-reserve factors pertaining to Area 9D (West Hills North);
3. By concluding that LCDC had the authority to approve a local government's inadequate findings if the evidence in the record "clearly supports" the decision; and

4. By failing to meaningfully explain why—"even in the face of weighty countervailing evidence"—Metro and the Counties' designation of Stafford as urban reserve is supported by substantial evidence. Barkers Five, 261 Or App at 265.

In March 2014, the 2014 legislature enacted House Bill ("HB") 4078, the so-called "grand bargain" bill. HB 4078 substantially modified the urban and rural reserves designated by Metro in Metro Resolution 11-4245 in Washington County and legislatively designated them as modified. HB 4078 § 3. HB 4078 also legislatively validated Metro's subsequent urban growth boundary decision pursuant to Metro Ordinance 11-1264B, with three modifications. HB 4078 § 4. These enactments essentially mooted the Court of Appeals in Barkers Five regarding the Washington County urban and rural reserves.

HB 4078 did not affect or amend the court's decisions with regard to Area 9D or Stafford. It did, however, make one modification that affects LCDC's scope of review on remand. HB 4078 § 9 now allows LCDC to consider whether evidence in the record "clearly supports" all or part of the decision, legislatively reversing the Court of Appeals' contrary holding. HB 4078 § 9 provides:

"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 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." (The "clearly supports" standard.)

The Order requests additional briefing on whether there is evidence in the record that "clearly supports" the Metro Decision with regard to Area 9D and Stafford and allows parties to raise any other issues based upon Barkers Five or HB 4078.

III. ARGUMENT

A. **First Issue: The evidence in the record does not "clearly support" Metro's designation of Stafford as urban reserve.**

1. **LCDC's scope of review under the "clearly supports" standard.**

In its original decision, LCDC argued it had the same authority as the Land Use Board of Appeals ("LUBA") to affirm a local decision in the absence of adequate findings if the evidence "clearly supports" the decision. Barkers Five, 261 Or App at 340, n. 44.¹ The Court of Appeals disagreed, noting that LUBA's authority derives from statute², and that LCDC had failed to cite to any statute or other authority in support of its proposition that it enjoyed similar authority. Id. The language in HB 4078 § 9 is substantively akin to ORS 197.835(11)(b) and therefore appears to have been intended to legislatively overrule this portion of the Barkers Five decision.³

In construing the meaning of a statute, the courts employ the interpretational methodology in PGE v. Bureau of Labor and Industries, 317 Or 606, 610-12, 859 P2d 1143 (1993) and State v. Gaines, 346 Or 160, 171-73, 206 P3d 1042 (2009) (the courts determine legislative intent by first looking at the text, context, and

¹ In reaching this conclusion, LCDC relied on its prior decision with regard to the City of Bend urban growth boundary where the commission indicated that it was adopting the LUBA standard. Id.

² ORS 197.835(11)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

³ But only for this particular case.

legislative history of the provision). LCDC's position in its original decision, the enactment of HB 4078 on the heels of the Barkers Five decision, and the use of language in HB 4078 § 9 that is substantively similar to the LUBA standard, indicate a legislative intent to import the LUBA standard into the LCDC statute. Lane County v. LCDC, 325 Or 569, 578, 942 P2d 278 (1997) ("We do not look at one subsection of a statute in a vacuum; rather, we construe each part together with the other parts in an attempt to produce a harmonious whole."); Morsman v. City of Madras, 203 Or App 546, 561, 126 P3d 6, rev denied, 340 Or 483 2006) (relevant "context" includes provisions in the same chapter or statutory scheme). Case law construing the LUBA standard therefore provides relevant context for construing LCDC's scope of review under HB 4078 § 9. See Martin v. Board of Parole, 327 Or 147, 156, 957 P2d 1210 (1998) (relevant context includes prior judicial construction).

LUBA has narrowly interpreted the term "clearly supports" in ORS 197.835(11)(b) to mean "makes obvious" or "makes inevitable." Marcott Holdings, Inc. v. City of Tigard, 30 Or LUBA 101, 122 (1995). ORS 197.835(11)(b) authorizes LUBA to remedy minor oversights and imperfections in local government land use decisions, but does not allow LUBA to assume the responsibilities assigned to local governments, such as the weighing of evidence. Salo v. City of Oregon City, 36 Or LUBA 415, 429 (1999). In Freidman v. Yamhill County, 23 Or LUBA 306, 311 (1992), LUBA concluded that the "clearly supports" standard is "considerably *higher*" than the standard imposed for "substantial evidence." See also Waugh v. Coos County, 26 Or LUBA 300, 306 to 308 (1993). Where relevant evidence in the record is conflicting, or provides a reasonable basis for different conclusions, LUBA has held that such evidence does not "clearly support" the challenged decision. Waugh, 26 Or LUBA at 307; Forster v. Polk County, 22 Or LUBA 380, 384 (1991); Cummins v. Polk County, 22 Or LUBA 129, 133 (1991), aff'd 110 Or App 468 (1992). In addition, LUBA has concluded that where the

underlying standards are subjective, requiring the exercise of considerable judgment by the local government, it is less likely that the evidence will "clearly support" a decision that the standards are met. Waugh, 26 Or LUBA at 308; Bright v. City of Yachats, 16 Or LUBA 161, 171 (1987). Finally, the "clearly supports" standard cannot be used to fix errors of law. West Coast Media LLC v. City of Gladstone, 192 Or App 102, 109-10, 84 P3rd 213 (2004) (ORS 197.835(11)(b) only applies to defective findings; it doesn't permit a reviewing body to determine that a local government was "right for the wrong reasons.") LUBA has consistently interpreted the "clearly supports" standard in this manner over the course of the past 30 years. See, e.g., Alpin v. Deschutes County, ___ Or LUBA ___ (LUBA No. 2013-055, March 12, 2014), slip op at 13.

Based upon the text and context of HB 4078 § 9, in order for LCDC to find that the evidence "clearly supports" Metro's and Clackamas County's decision to designate Stafford as urban reserve, it would have to determine that there is no conflicting evidence in the record, that applicable standards are clear and objective and are not subject to policy judgment, and that Metro's decision doesn't involve an error of law.

2. Application of the "clearly supports" standard to the Stafford record.

a. The record contains weighty, conflicting evidence.

There is no plausible basis in the Stafford record for concluding that the evidence "clearly supports" the Metro Decision. The gravamen of the Court of Appeals' decision with regard to Stafford was that the Cities had submitted "weighty," conflicting evidence,⁴ that Metro did not contest the accuracy of such evidence, and that Metro's explanation of why that evidence was not compelling was "impermissibly speculative:"

⁴ This evidence consisted of Metro's own regional transportation plan ("RTP") that addresses projected transportation impacts, improvements, and funding over a 25-year planning period.

"In other words—and significantly—Metro and the county do not take issue with the correctness of the evidence to which West Linn⁵ points—viz., that the RTP indicates that, by 2035, almost all of the transportation facilities serving Stafford will be failing. Instead, they reason that the evidence is immaterial because (1) the RTP is only a prediction of traffic flows for a 25-year period; (2) the urban reserves planning period extends to 2060, which is 25 years beyond the time frame addressed in the 2035 RTP; and (3) the transportation system will necessarily change (e.g., a new light-rail line in the vicinity of I-205 has been identified as a 'next phase' of regional priority). Stated simply, Metro and the county's reasoning reduces to nothing more than the proposition that the transportation system will change—and presumably improve—by 2060. However, Metro and the county do not explain, by reference to the evidence in the record, why that is so. Bluntly: Metro and the county's reasoning—which LCDC essentially adopted in resolving the substantial evidence challenge—is impermissibly speculative.

"Although the designation of land as urban reserve must be based on consideration of the factors, which requires, among other things, that the factors are weighed and balanced as a whole—and although Metro and the counties need not demonstrate 'compliance' with any factor—the provision of adequate transportation facilities is critical to the development of urban areas. Evidence demonstrating that 'the RTP indicates that almost all of the transportation system that would provide access to the Stafford Area will be functioning at service level F (for "failing") by 2035,' is weighty, countervailing evidence that is squarely at odds with LCDC's determination that the designation of Stafford as urban reserve is supported by substantial evidence. In its order, LCDC acknowledged the evidence to which West Linn points, but, in response, did nothing more than adopt Metro and the county's speculative reasoning that the transportation system will presumably improve by 2060.

"In sum, West Linn has pointed to weighty, countervailing evidence that is squarely at odds with LCDC's determination that the designation of Stafford as urban reserve is supported by substantial evidence, and LCDC has failed to meaningfully explain why—even in light of that conflicting evidence—Metro and the counties' designation of Stafford as urban reserve

⁵ The Court referred to both Cities as "West Linn" for convenience.

is supported by substantial evidence. See Younger, 305 Or App at 360; Barkers Five, 261 Or App at 361-63."

There is no nonspeculative evidence in the record that supports Metro's determination that at some point during the 50-year urban/rural reserve planning period following the RTP planning period of 25 years, the transportation system will be sufficient to serve Stafford.⁶ The record fails to "clearly support" Metro's analysis under the applicable factors.⁷

The Cities additionally note that, because the Court of Appeals concluded that LCDC's Order was unlawful in substance on the transportation issue and required remand, it did not address the Cities' evidentiary arguments in the remainder of their second assignment of error. Barkers Five, 261 Or App at 362-63. Those assignments were thus not resolved by the court's decision in Barker's Five. Even if LCDC could conclude the evidence in the record clearly supports Metro's designation with regard to the transportation system, LCDC would also have to address the Cities' other evidentiary/findings arguments in order to conclude that the decision to designate Stafford is "clearly supported." The Cities incorporate by reference the arguments in the second assignment of error in their Barkers Five opening brief.⁸

⁶ Even if Metro could cite to such evidence, it is not necessarily dispositive on the question of whether designation of Stafford as urban reserve is supported under the factors. As the Cities noted in their brief, the effect of the designation of Stafford as urban reserve is that it becomes first priority for inclusion in the UGB at the time of expansion. ORS 197.298(1). Metro must review the UGB for expansion every five years. ORS 197.299. Stafford will be considered for inclusion at least five times during the period of time covered by the RTP. This means that Stafford could be subject to urbanization long before the transportation system will be adequate to deal with it. Metro failed to respond to this argument at all in the Metro Decision.

⁷ The Cities' second assignment cited to OAR 660-027-0050(1) and (3), which require an analysis of whether land proposed for an urban reserve designation "can be developed at urban densities in a way that makes efficient use of existing and future public and private infrastructure investments" and "can be efficiently and cost-effectively served with public schools and other urban level public facilities and services by appropriate and financially capable service providers."

⁸ In addition to the RTP, the most significant evidence submitted by the Cities is the CH2M Hill analysis regarding provision of urban services to Stafford that was commissioned by the City of Tualatin. On

b. The applicable standards are not clear and objective.

In addition to the fact that there is weighty evidence in the record that conflicts with Metro's determination, the applicable factors are far from clear and objective.

OAR 660-027-0050 requires Metro to base its decision identifying and selecting lands for designation as urban reserves on eight factors (the "Factors"). There was much argument in Barkers Five regarding how the Factors should be applied. The Barkers Five court agreed with LCDC that the Factors were intended to apply in the same manner as the boundary location factors of Statewide Land Use Planning Goal 14. Barkers Five, 261 Or App at 295 to 301. The court agreed with LCDC that:

""[C]onsideration' of the factors requires that the local government (a) apply and evaluate each factor, (b) weigh and balance the factors as a whole, and (c) meaningfully explain why a designation as urban or rural reserves is appropriate. As we succinctly explained in Ryland Homes,⁹ 'consideration' means that a local government 'has an obligation to consider each of the [applicable] factors and to articulate its thinking regarding the factor and the role that each factor played in balancing all of the factors.' 174 Or App at 416." Barkers Five, 261 Or App at 300.

October 13, 2009, the City submitted testimony to the Reserve Steering Committee, including the CH2M Hill studies, along with a point-by-point response to Metro's prior analysis contesting and refuting most of the conclusions based on the CH2M Hill studies. Based on this evidence and testimony, the Cities argued that the evidence in the record did not support a determination that Stafford can be developed, as envisioned in Factors 1 and 3. Metro Record -21(RR) -964 to 984; full testimony, including the complete CH2M Hill analyses at Clackamas County Record -4578 to 4638. In addition to testimony regarding the CH2M Hill report, the Cities' second assignment of error examined every piece of evidence cited by Metro in support of its analysis and argued that if such evidence was speculative, it did not support the proposition for which it was cited, or was so outweighed by the CH2M study or other evidence submitted by the Cities that it would be relied on by a reasonable person. The Metro Decision completely failed to address this conflicting evidence and therefore the Cities argued that LCDC misapplied the substantial evidence test by affirming this decision.

⁹ 1000 Friends of Oregon v. Metro, 174 Or App 406, 26 P3d 151 (2001) ("Ryland Homes").

This consideration requires the application of a considerable amount of discretion and policy judgment. In addition, the court agreed with LCDC that Metro and the Counties have to make this determination "concurrently and in conjunction" with one another, and further agreed with LCDC that if Metro and the Counties properly consider and apply the factors, the decision whether to designate particular land as urban reserves or rural reserves or leave it undesignated is left to the local government. *Barkers Five*, 261 Or App 308 to 311.

c. Metro's Decision involved an Error of Law.

LCDC essentially adopted Metro's transportation analysis with regard to Stafford without further explanation. *Barkers Five*, 261 Or App at 361. The court concluded that this analysis was "unlawful in substance." *Barkers Five*, 261 Or App at 362. This conclusion not only requires that the particular finding be reconsidered and explained, it also requires a reconsideration of the balance of the factors as a whole, but Metro fundamentally misapplied the law. This is an analysis that must be conducted in the first instance by Metro and Clackamas County, concurrently and in conjunction with one another, and it is not a determination that LCDC can or should make for the local governments under the "clearly supports" standard. See *West Coast Media LLC*, supra.

d. Conclusion.

The Metro Decision analysis of the Stafford transportation issues under Factors 1 and 3 is not supported by substantial evidence as a matter of law. In the absence of HB 4078 § 9, LCDC would have no choice but to remand the decision back to Metro and Clackamas County. See *Ryland Homes*, 174 Or App at 410-11 (it is not appropriate for a reviewing body to draw inferences from other parts of the decision in order to surmise the decision behind a defective finding); *1000 Friends of Oregon v. LCDC and City of Woodburn*, 237 Or App 213, 224-26, 239 P3d 272 (2010) (remanding the LCDC decision for failure to explain analysis and reasoning). HB 4078 § 9 does not

save the Metro Decision from remand. Given the significant conflicting evidence in the record, the discretion inherent in the analysis under the factors, and the error of law made by Metro and the Counties, the record does not even remotely "clearly support" Metro's otherwise inadequate decision within the meaning of HB 4078 § 9. The decision must be remanded.

2. Second Issue: The Changes made by HB 4078 to the Metro Decision and the Clarification of the Interpretation of ORS 197.137 to ORS 197.45 require reconsideration of the weight and balance of the factors with regard to Stafford.

Both Metro's and LCDC's decisions acknowledged the high cost of service and significant development constraints with regard to the urbanization of Stafford under the individual Factors, but conclude that the Factors "as a whole" or "on balance" support the designation of Stafford as urban reserve. The only articulated basis for this conclusion was the following finding:

"Designation of this 4,700 acre area as an Urban Reserve avoids designation of other areas containing Foundation or Important Agricultural Land. It would be difficult to justify designation of Foundation Farm Land in the region, if this area, which is comprised entirely of Conflicted Agricultural Land, were not designated as Urban Reserve (see OAR 660-027-0040(11))."

HB 4078 legislatively designates urban and rural reserves in Washington County, which contains the majority of Foundation Agricultural Land in the Metro region. Failure to designate Stafford will therefore have no effect on the designation of Foundation Agricultural Land, at least in Washington County. The decision should be remanded for Metro and Clackamas County to rebalance the factors as applied to Stafford, in light of this significant change to the decision.

In addition, the description of the legislative intent behind ORS 195.137 to ORS 195.145 in Barkers Five indicates that one of the primary purposes for enactment of

this alternative urban/rural reserve process in 2007 was to get away from the strict hierarchy for inclusion of lands in ORS 197.298 so that the designation of urban reserves would be "based principally on the suitability of land for eventual urban development," rather than whether it was less suitable for farming than other candidate lands. Barkers Five, 261 Or App at 270 n. 5; see also, 261 Or App at 266, 272, n. 8 (quoting testimony by Metro). The trade-off under the statute for this greater flexibility was the designation of rural reserves to protect significant farmland from urbanization for the fifty-year planning period. See ORS 195.143(3); Barkers Five, 261 Or App at 276, 276 n. 10. That other, better farmland might have to be designated as urban reserve does not justify the designation of a territory such as Stafford that is unsuitable for urbanization based on consideration of the Factors. The LCDC/Metro finding is not consistent with the legislative intent behind ORS 195.137 to ORS 195.145.

The Metro Decision with regard to Stafford should be remanded to address these changes.

3. Third Issue: The changes to the Metro Decision made by HB 4078 require remand to Metro and the Counties to readdress the "best achieves" standard.

OAR 660-027-0005(2) (the "best achieves" standard) states the objective of the urban/rural reserves process is "a balance in the designation of urban and rural reserves that, in its entirety, best achieves livable communities, the viability and vitality of agricultural and forest industries and protection of the important natural landscape features that define the region for its residents."

The proper application of this standard was one of the hotly contested issues before LCDC and the Court of Appeals. The Barkers Five court essentially affirmed what it understood LCDC's interpretation to be. 216 Or App 311 to 318. Material to LCDC's consideration on remand, the court concluded that the "best achieves" standard requires a qualitative balancing of the three competing objectives that

underscore the designation of urban and rural reserves listed in OAR 660-027-0005(2) with regard to the designation of urban and rural reserves "in its entirety." Barkers Five, 261 Or App at 312 to 316.

The problem with the "best achieves" determination in the Metro Decision is that HB 4078 changed the designation in two material ways. First, and most obviously, HB 4078 significantly changed the urban and rural reserve designations in Washington County. See HB 4078 § 3; compare maps at App-1 (Metro Decision Designations) and App-2, attached. Second, HB 4078 commands LCDC to ignore the employment capacity of certain lands subject to the changes made by HB 4078 at the time of first legislative review of the UGB following passage of HB 4078. HB 4078 § 3(5), (6). This could cause LCDC to add more land than is actually needed for employment use under Goals 9 and 14 and change the urban reserve needs.

HB 4078 does not address the question of whether the amended designations "best achieves" the balance of the factors in HB 660-027-0005(2). The Metro Decision must therefore be remanded to Metro and the Counties to review of the designation as modified by HB 4078 "in its entirety" to determine if the modified decision continues to "best achieve" the qualitative balance required by the rule.

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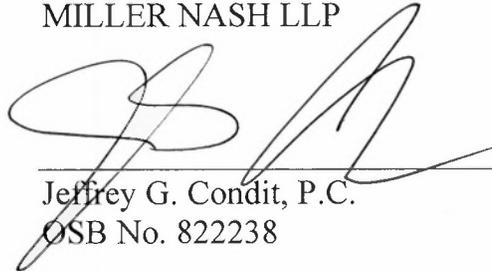
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IV. CONCLUSION

For these reasons, the Metro Decision should be remanded to Metro and the Counties for further consideration.

DATED this 25th day of September, 2014.

MILLER NASH LLP

A handwritten signature in black ink, appearing to read 'JG Condit', is written over a horizontal line. The signature is stylized and cursive.

Jeffrey G. Condit, P.C.

OSB No. 822238

HB 4078 Amendments to Metro Reserves Decision February 25, 2014

