

**Reasons for Designating Areas in Multnomah County as Urban Reserves or Rural Reserves:****Supplemental findings of fact, statements of reasons and conclusions, and conclusions of law.**

These supplemental findings of fact, statements of reasons and conclusions, and conclusions of law relating to the designation of Multnomah County Area 9D as Rural Reserve (“Supplemental Findings”) are adopted in response to the remand order in *Barkers Five, LLC et al. v LCDC*, 261 Or App 259, 323 P.3d 368 (2014) and Remand Order 14-ACK-001867, Oregon Land Conservation and Development Commission (LCDC).

Because LCDC remanded this matter for “further action consistent with the principles expressed in [*Barkers Five*],” the remand order in *Barkers Five* serves as the basis for these Supplemental Findings.

In *Barkers Five*, the Oregon Court of Appeals reviewed the designation of urban and rural reserves in Washington, Multnomah and Clackamas Counties. With respect to Multnomah County, the court denied all challenges to the reserve designations, except for a challenge to the designation of Area 9D as rural reserve.

With respect to Area 9D, the court held that the County failed to meaningfully explain why, in light of certain dissimilarities between the northern and southern portions the Area, the County’s consideration of the rural reserve factors yields a rural reserve designation of all land in Area 9D. *Barkers Five*, 261 Or App at 345–347, 364.

In addition, the court held that, on remand, a determination must be made regarding the effect of the foregoing error on the designations of reserves in Multnomah County in its entirety. *Barkers Five*, 261 Or App at 364.

**A. Area 9D – Meaningful Explanation****1. The Remand Order**

In relevant part, the court remanded the Rural Reserve designation of Area 9D due to inadequate explanation:

“We conclude that, because the county failed to meaningfully explain why its consideration of the rural reserve factors yields a rural reserve designation of all land in Area 9D, LCDC erred in concluding that the county’s ‘consideration’ of the factors was legally sufficient.”

*Barkers Five, LLC v. LCDC*, 261 Or App 259, 345 (2014).

The court concluded that the County's explanation was not meaningful because the County had not explained why consideration of the Rural Reserve factors yielded a designation of *all* of the land in Area 9D as Rural Reserve in light of the fact that application of the factors often yielded different results as to the land in the area *north* of Skyline Boulevard and the land in the area *south* of Skyline. *Barkers Five*, 261 Or App at 345.

In addition, the court noted that, in the County's explanation of how Area 9D fared under the factors, only a single sentence pertained to land in the southern portion in Area 9D. *Id.* Similarly, the court noted that the description of "why" Area 9D was designated Rural Reserve consisted of a single paragraph with broad, unqualified declarations appearing to relate to some of the natural landscape features factors in OAR 660-027-0060(3). *Id.* at 345–346.

From the foregoing assessment, the court concluded that the County should have explained its designation of the entire area in light of the differences between the northern and southern portions of Area 9D:

“a meaningful explanation as to why Area 9D, in its entirety, was designated as rural reserve would have acknowledged that application of the factors failed to yield similar results as to all of the land in the area but explained, nonetheless, why the entire area should be designated as rural reserve.”

*Barkers Five*, 261 Or App at 346.

Importantly, the court made three additional rulings relevant to this issue. First, the required explanation “need not be elaborate;” instead such explanation must acknowledge the dissimilarities and explain why, nonetheless, a Rural Reserve designation is suitable for all of the land in Area 9D. *Id.*

Second, the County *is not* required to justify the inclusion of any particular lot or parcel within a Rural Reserve. *Id.* Instead, the County is obligated to meaningfully explain why its consideration and application of the factors yield a Rural Reserve designation of *all of the land* in a given Rural Reserve, such as Area 9D. *Id.*

Third, where the evidence supports the designation of an area as either Urban Reserve or Rural Reserve, the local government may choose either designation *and need not* demonstrate that it has chosen the designation that “better suits” the area. *Id.* at 309–311.

Thus, in summary, the County's explanation of its Rural Reserve designation of Area 9D was inadequate because it failed to acknowledge the dissimilarities between the northern and southern portions of that Area and explain why, nonetheless, a Rural Reserve designation is suitable for all of the land in Area 9D. Simple acknowledgement and explanation would suffice: the explanation need not be elaborate; does not need to justify the designation of any particular lot or parcel; and does not need to establish that the County has chosen the designation that “better suits” the area.

With these rules in mind, the discussion turns to acknowledgement of the dissimilarities between the northern and southern portions of Area 9D and further explanation of why, nonetheless, consideration of the factors yields a Rural Reserve designation for all of the land in Area 9D.

## **2. Response: Consideration of the Factors Yields a Rural Reserve Designation for all of the Land in Area 9D**

As noted by the Court of Appeals, in considering the required factors, the County adopted and relied upon a report prepared by County staff and the County's Citizen Advisory Committee (CAC) commissioned for this task. *Barkers Five*, 261 Or App at 345; Rec Att. C, 2894–3031 (Mult. Co. Resolution 09-153 adopting CAC Report); *more specifically* Rec Att. C, 2993–3003 (excerpt from CAC report setting forth the analysis of Area 9D, referred to as Area 6 in the CAC Report; *attached for convenience as Appendix A*).<sup>1</sup>

In the CAC report, the CAC and County staff applied each of the Rural Reserve factors to evaluate all of the land in what is now referred to as Area 9D and then ranked how the land in that study area fared under each of the factors. *Barkers Five*, 261 Or App at 345. As noted by the court, the application of the reserve factors to this study area often yielded different results as to the land in the area that is north of Skyline Boulevard and the land that is south of Skyline. *Id.*

Nevertheless, as described in further detail below, the findings in the CAC Report clearly establishes that application of the Rural Reserves factors yields a Rural Reserve designation for both the northern and southern portions of Area 9D and, thereby, all of the land in Area 9D.

### **a. Acknowledging the Dissimilarities.**

Dissimilarities exist between the northern and southern portions of Area 9D. The northern portion is “primarily forested,” has been mapped by the Oregon Department of Agriculture as containing “wildland forest” and “mixed forest,” “consists of a large block of forest land with few non forest [*sic*] uses,” and contains “high-value habitat, access to recreation, and other values that define the area as a landscape feature important to the region.” Rec at 2993, 2995, 2997. Further, this northern portion is subject to little risk of urbanization. *Id.* at 2993, 2995.

In contrast, the southern portion of Area 9D is “primarily farm area,” has been mapped by the Oregon Department of Agriculture as containing “important” farmland, has certain farming limitations but “good integrity” overall, has “few non-farm uses” and edges compatible to farming, and contains the “stream features of Abbey Creek mainstream, north fork, and headwaters areas that are mapped as important regional resources and that separate urban from rural lands.” Rec at 2993, 2995, 2997. Further, this southern portion *is* subject to a risk of urbanization. *Id.* at 2994, 2995.

Both portions “rank high for sense of place” and, like the northern portion, the southern portion encompasses important upland habitat areas, albeit of lesser regional value overall than the habitat present in the northern portion. *Id.* at 2997.

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<sup>1</sup> All citations to the record refer to the record of proceedings before LCDC in the 2011 acknowledgment review resulting in LCDC Order 12-ACK-001819 as submitted to the Oregon Court of Appeals (the “LCDC Record”).

**b. Despite the dissimilarities, consideration of the factors yields a Rural Reserve designation of all of the land in Area 9D.**

Despite the dissimilarities between the northern and southern portions of Area 9D, the record reflects that application of the Rural Reserves factors yields a Rural Reserve designation for *each* portion of the Area and, thereby, *all of the land* in Area 9D.

**(i) Farm and Forest Factors.**

Except for a few instances noted below, application and consideration of the farm and forest protection factors in OAR 660-027-0060(2) with respect to Area 9D yields the conclusion that this Area ranks “high” for Rural Reserve designation with respect to *both* the northern and southern portions of the Area. Rec at 2993–2995. That is, *both* portions are highly capable of sustaining long-term agriculture or forestry operations due to the availability of large blocks of land and the clustering of farm or forest operations, adjacent land use patterns, and the sufficiency of agricultural or forestry infrastructure (this latter sub-factor ranked as “medium-high” in recognition of some limitation on the movement of farm equipment on rural roads due to traffic). Rec at 2994–2995.

Delving into the details of these “high” rankings: forest use predominates in the northern portion of Area 9D; farm use (hay, pasture, Christmas trees, nursery stock, and orchard) predominates in the southern portion; “[n]o limitations to long-term forestry have been noted for areas north of Skyline Blvd;” and the southern portion “includes few nonfarm uses, limited urban edges, and adequate ‘block’ size to maintain long-term agriculture.” Rec 2994.

In addition: all of Area 9D includes parcels suitable for both small and large scale farm and forest management; a buffer exists between resource and non-resource uses in the northern portion of the Area (except in a few instances); and very substantial buffers are present in the southern portion, including “the Powerline area and Abbey Creek headwaters, the east-west lower Abbey Creek drainage, and Rock Creek running north-south immediately west of the county line.” Rec at 2995.

Where Area 9D did not receive a “high” ranking, it received, with one exception noted below, a “medium” ranking. For instance, with respect to the suitability of the soils and water, the southern portion of Area 9D ranked “medium” for Rural Reserve designation because of its range in soils from Class II to IV and because of some uncertainty on the part of the Oregon Department of Agriculture regarding the abundance of groundwater (the County does not agree: the CAC Report notes the existence of irrigated fields in the area). Rec at 2994. With respect to these same points, the northern portion of the area ranked “high” for soils suitable to forestry and was not ranked for water as water is not understood to be a limitation for forestry. *Id.*

Lastly, whereas the northern portion of Area 9D is not subject to a risk of urbanization, and, therefore, received a “low” ranking for that factor, the southern half ranked “high” for this factor, meaning it ranked “high” for protection through Rural Reserve designation. Rec 2993.

Based on the foregoing analysis, the County concludes that “[Area 9D] is suitable for both farm and forest reserve, as indicated by the ‘important’ farm land and ‘wildland’ and ‘mixed’ forest designations.” Rec at 2995.

Further, in particular respect to the northern portion of Area 9D, a Rural Reserve designation is appropriate because, in summary, “[t]he primarily forested area north of Skyline Blvd. consists of a large block of forest land with few non forest uses, mainly associated with McNamee Rd. This area is not however, potentially subject to urbanization based on urban suitability assessments to date.”

Similarly, in particular respect to the southern portion of Area 9D, a Rural Reserve designation is appropriate because, in summary:

“The primarily farm area south of Skyline, while containing soils and topography that present limitations to intensive cultivation and uncertain groundwater resources, maintains good integrity, has compatible edges, and few non-farm uses. This area is within an area potentially subject to urbanization based on analysis of key urban services. The area south of Skyline Blvd./Cornelius Pass Rd. intersection should be considered as highly suitable for rural reserve to protect farm and forest resources.”

*Id.*

Thus, in summary, application and consideration of the farm and forest protection factors in OAR 660-027-0060(2) with respect to Area 9D yields a Rural Reserve designation of all of the land in Area 9D (i.e., both the northern and southern portions of that Area).

#### **(ii) Landscape Features Factors.**

As with the farm and forest factors above, and except for a few instances noted below, application and consideration of the landscape feature factors in OAR 660-027-0060(3) with respect to Area 9D yields a Rural Reserve designation for *both* the northern and southern portions of the Area and, thereby, *all of the land* in Area 9D. Rec at 2996–2998.

Both portions of Area 9D rank “high” for Rural Reserve as providing a sense of place and easy access to recreational opportunities. Rec at 2997. In particular, “[t]he southwest side of the Tualatin Mtns [*sic*] is a large-scale landscape feature that provides a green connection between Portland and the Coast Range.” *Id.* In addition, the Area contains Metro’s Ancient Forest Preserve as well as bicycling and hiking opportunities. *Id.*

With respect to important fish, plant and wildlife habitat, both portions ranked “high” for Rural Reserve protection, with the exception that the Kaiser Road and East-of-Abbey Creek subareas ranked “medium”—however, although not mapped by the state or other regional entities, these areas are identified locally by both Metro and the County as important habitat areas. Rec at 2996.

Area 9D did receive some “low” rankings. For instance, while some areas in the northern portion of the area rank high for natural hazard risks, “[t]he significant majority of the area rates ‘low’ for relative hazard on the regional composite hazard map.” Rec at 2996.

Similarly, as applied to Area 9D, consideration of the factor concerning separation between cities yields a “low” ranking because this factor applies to the separation between Metro UGB cities and cities outside that area, which is not a concern in this location. Rec at 2997. That said, the County noted that the southern portion of Area 9D is important in providing separation between the City of Portland and urban unincorporated areas to the west. *Id.*

In addition, as applied to Area 9D, consideration of the factor concerning whether the Area serves to buffer conflicts between urban and rural uses, yields a “low” ranking for the northern portion of the Area because such conflicts are not prevalent in that area, but, in contrast, yields a “high” ranking for Rural Reserve protection with respect to the southern portion of Area 9D due to substantial natural and human-made buffers between urban and rural resources in this area. Rec at 2997.

Further, although a Rural Reserve designation is not necessary to protect water quality in the northern portion of Area 9D, the southern portion ranks “medium” for Rural Reserve designation to protect Rock Creek and Abbey Creek, which are situated in a way that renders typical planning tools ineffective in protecting these resources if urban development were to occur here. Rec at 2996–2997.

A similar pattern occurs with respect to the risk of urbanization—the risk is “low” for the northern portion of Area 9D, but “high” for the southern portion.

Notwithstanding this selection of “low” rankings, the record reflects that, upon application and consideration of all of the landscape feature factors, a Rural Reserve designation is appropriate for both the northern and southern portions of Area 9D and, thereby, all of the land in Area 9D for the following reasons:

“Areas north of Skyline Blvd. rank high for sense of place; they contain high-value habitat, access to recreation, and other values that define the area as a landscape feature important to the region. This area is not however, being studied for urban reserve because it ranks low for efficiency to provide key urban services.

“Areas south of Skyline rank high for sense of place; they contain stream features of the Abbey Creek mainstream, north fork, and headwaters areas that are mapped as important regional resources and that separate urban from rural lands. Upland habitat areas also exist, however there are patches in the landscape features mapping indicating lesser regional value. All areas south of Skyline Blvd. continue to be studied for urbanization. On balance, and considering that the broad objective of the Landscape Features factors is to protect areas that define natural boundaries to urbanization and help define the region for its residents, the

entire south-of-Skyline area should be considered as highly suitable for rural reserve.”

Rec at 2997–2998 (emphasis added).

Thus, in summary, application and consideration of the landscape feature factors in OAR 660-027-0060(3) with respect to Area 9D yields a Rural Reserve designation of all of the land in Area 9D (i.e., both the northern and southern portions of that Area).

### **3. Conclusion**

For the foregoing reasons, although application of the factors failed to yield similar results as to the northern and southern portions of Area 9D, the record reflects that application and consideration of both sets of Rural Reserve factors, the farm and forest protection and landscape features factors, yields a Rural Reserve designation for *each* portion of the Area and, thereby, *all of the land* in Area 9D.

#### **B. No Effect on the Designations of Reserves in Multnomah County in its Entirety**

As noted above, in addition to identifying the meaningful explanation error with respect to Area 9D discussed above (“Error”), the court held that, on remand, a determination must be made regarding “the effect of that [E]rror on the designations of reserves in Multnomah County in its entirety.” *Barkers Five*, 261 Or App at 364.

The Error had no effect on the designations of reserves in Multnomah County in its entirety. The Error is corrected through adoption of these Supplemental Findings. Adoption of these Supplemental Findings bolsters the County’s prior actions in this matter and fulfills the County’s obligations to consider the factors, but does not alter any prior, ultimate determination or conclusion.

More specifically, correcting the Error through adoption of these Supplemental Findings does not result in any change to any reserve designation in Multnomah County, does not require any change in analysis or analytical approach with respect to application and consideration of the factors and designation of reserves, does not require the consideration of new evidence, and does not impact any other material aspect of the designation of reserves in Multnomah County beyond correcting an error specific and internal to Area 9D.

To explain, if correction of the Error had resulted in a change in the reserve designation of Area 9D (or any other area), then, due to the coordinated manner in which reserves are designated (e.g., ORS 195.143 (the designation of Rural Reserves is coordinated with the designation of Urban Reserves)), it is possible that there could be some cascading effect on the designation of reserves in Multnomah County or the Metro region in their entirety. However, here, because correction of the Error does not result in any change to any reserve designation, there is no effect on the designations of reserves in Multnomah County in its entirety of the nature contemplated in this paragraph.

Similarly, if correction of the Error had prompted a change in analysis or analytical approach with respect to application and consideration of the factors and designation of reserves, then, depending on the nature of that change, the propriety of apply such changed analysis or analytical approach to other areas in Multnomah County is conceivable (albeit quite hypothetical at present). However, here, because no such change in analysis or analytical approach has occurred, there is no effect on the designations of reserves in Multnomah County in its entirety of the nature contemplated in this paragraph.

Likewise, if correction of the Error had required consideration of new evidence and such evidence related in some way to areas beyond Area 9D, then, depending on the nature of such evidence, an effect on other reserve designations is conceivable (albeit, again, quite hypothetical at present).<sup>2</sup> However, here, because correction of the Error did not require consideration of new evidence there is no effect on the designations of reserves in Multnomah County in its entirety of the nature contemplated in this paragraph.

In conclusion, the Error had no effect on the designations of reserves in Multnomah County in its entirety because, as it turns out, the Error is capable of correction in a manner that is wholly specific and internal to Area 9D. Consequently, there is no effect on any other material aspect of the designation of reserves in Multnomah County—the Error was a failure to explain circumstances specific to Area 9D; that explanation is now provided in full without any reference to or reliance upon any other aspect of the designations of reserves in Multnomah County beyond the specific circumstances of Area 9D.

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<sup>2</sup> Of note, none of the contingencies contemplated here (change in designation, change in analysis or analytical approach, and consideration of new evidence) would, if they occurred, *necessarily* have an effect on the designations of reserves in Multnomah County in their entirety. Instead, these specific contingencies, as well as any other change to a material aspect of the designation of reserves in Multnomah County, merely *could* conceivably, under certain circumstances, have an effect on other reserve designations. The converse is true as well—even if one or more of these contingencies occurred, there still might not be any effect on the designations of reserves in Multnomah County in their entirety.