

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

P1 In relevant part, the court remanded the Rural Reserve designation of Area 9D due to inadequate explanation:

P2 “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.

P. 3
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.

P. 4
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

P. 11
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).¹

P. 12
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.

¹ 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.

P. 13
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.

P. 14
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.

P. 16 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.

P. 17 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:

P. 18 “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).² 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.

² 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.

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**

OPENING BRIEF OF MULTNOMAH COUNTY

TABLE OF CONTENTS

I. Introduction	1
II. The Deficiency Identified by the Court: Inadequate Explanation.	1
III. LCDC's New Authority to Affirm a Rural Reserve Designation that is Clearly Supported by the Evidence.....	4
A. HB 4078 (2014)	4
B. Likely similarities between LCDC's new authority and LUBA's analogous authority.	5
C. Likely differences between LCDC's new authority and LUBA's analogous authority.	9
IV. The Record Evidence Clearly Supports the Rural Reserve Designation of Area 9D.	10
A. Acknowledging the dissimilarities.	11
B. It is "obvious" from the record evidence that both the northern and southern halves of Area 9D are suitable for rural reserve designation.	12
1. Farm and Forest Factors.....	13
2. Landscape Features Factors.	15
3. The Record is Sufficiently Compelling.	18
V. Conclusion	21

I. Introduction

With respect to the designation of reserves in Multnomah County, the Oregon Court of Appeals has asked LCDC to address the county's failure to meaningfully explain why, despite differences between the northern and southern halves of Area 9D, the county designated all of the land in that area as rural reserve.

To assist LCDC in this task, the county offers this brief of points and authorities organized into the following three discussion topics:

1. Explanation of the deficiency identified by the court (i.e., inadequate explanation);
2. Explanation of LCDC's new authority to affirm a rural reserve designation that is clearly supported by the evidence; and
3. Explanation that the evidence in the record does indeed clearly support the rural reserve designation of Area 9D.

Ultimately, the county respectfully requests that LCDC utilize its new authority to affirm the county's rural reserve designation of Area 9D instead of remanding the matter to the county.

II. The Deficiency Identified by the Court: Inadequate Explanation.

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 it did not explain why consideration of the pertinent factors yielded a designation of *all* of the land in Area 9D as rural reserve despite the fact that application of the reserve 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 description of how Area 9D "fared" under the factors, only a single sentence pertained to the southern land. *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 halves 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.

The court made three additional points relevant to this issue. First, where the evidence supports the designation of an area as either urban reserve or rural reserve, the local government gets to choose *and need not* demonstrate that it has chosen the designation that “better suits” the area. *Id.* at 309–311.

Second, the county *is not* required to justify the designation of the *Barker property itself*. *Id.* Instead, the county was obligated to meaningfully explain why its consideration and application of the factors yielded a rural reserve designation of *all of the land* in Area 9D, especially in light of the dissimilarities between the northern and southern halves of that Area. *Id.*

Third, the explanation “need not be elaborate” but should have *acknowledged* the dissimilarities and *explained* why, nonetheless, a rural reserve designation is suitable for *all* of the land in Area 9D. *Id.*

Thus, in summary, the county’s explanation of its rural reserve designation of Area 9D was inadequate because it failed to *acknowledged* the dissimilarities between the northern and southern halves 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 have sufficed: the explanation did not have to be elaborate; did not need to justify the designation of the *Barkers property itself*; and did not need to establish that the county chose the designation that “better suits” the area.

With these rules in mind, the discussion turns to LCDC's new authority on remand of this matter.

III. LCDC's New Authority to Affirm a Rural Reserve Designation that is Clearly Supported by the Evidence.

A. HB 4078 (2014)

During the 2014 regular session, the legislature granted new authority to LCDC to approve the urban and rural reserve designations despite certain shortcomings of the submittal from Metro and the counties as follows:

“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.”

HB 4078, Sec. 9 (2014) (*eff.* April 1, 2014).

Although not identical to LUBA's authority in ORS 197.835(11)(b), this new authority appears similar to LUBA's authority to affirm a decision clearly supported by the record. Accordingly, because the courts have not yet had an opportunity to interpret LCDC's new authority, LUBA's interpretations of its “clearly supports” authority provides a helpful source for insight into the operation of this standard of review. However, as explained further below, the circumstances in which LCDC is authorized to employ its “clearly supports”

standard differ from the typical circumstances in which LUBA is so authorized. Consequently, LCDC's application of this standard will differ to some degree from LUBA's application of the standard.

B. Likely similarities between LCDC's new authority and LUBA's analogous authority.

It seems likely that LCDC's "clearly supports" standard operates at least somewhat similarly to LUBA's analogous authority, especially in respect to the points set forth herein.

The "clearly supports" standard applies to "findings," which, in turn, are comprised of three components: (1) decision maker's determination of the approval standard; (2) decision maker's identification of the material facts; and, most relevant here, (3) the decision maker's *explanation* of how the material facts lead to the conclusion that the approval standard has (or has not) been satisfied - i.e., the "conclusions of law" referenced in LCDC's new authority, HB 4078, Sec. 9(1). *Doob v. City of Grants Pass*, LUBA No. 98-006, 34 Or LUBA 480, 483 (1998), *citing Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977).

The purpose of the "clearly supports" standard is to avoid delays resulting from purely technical objections, such as inadequate explanations in findings:

"We view [the "clearly supports" standard as authorizing] this Board to remedy minor oversights and imperfections in local government land use decisions, as a way to eliminate delays

resulting from purely technical objections to a written decision. [The standard does not] permit or require LUBA to perform the responsibilities assigned to local governments, such as the weighing of evidence, the preparation of adequate findings, and the interpretation of comprehensive plans and local land use regulations.”

Marcott Holdings, Inc. v. City of Tigard, LUBA No. 95-011, 30 Or LUBA 101, 122–123 (1995).

Further, the “clearly supports” standard is more demanding than the “substantial evidence” standard. *Beck v. City of Tillamook*, LUBA No. 89-096, 18 Or LUBA 587, 602 (1990). In point of fact, LUBA interprets “clearly supports” to mean “makes obvious” or “makes inevitable.” *Marcott Holdings*, 30 Or LUBA at 122.

In practical terms, LUBA implements the “clearly supports” standard through consideration of the following question:

“* * * the question is whether the evidence is sufficiently compelling to allow or require us under ORS 197.835(11)(b) to affirm the county's conclusions despite the inadequacy of its findings.”

Harcourt v. Marion County, LUBA No. 97-028, 33 Or LUBA 400, 405 (1997).

Thus, in summary, LUBA will not utilize the “clearly supports” standard to affirm a decision if affirmation would require LUBA to weigh evidence, engage in fact finding, or interpret regulations. In contrast, LUBA *will* employ the “clearly supports” standard to affirm a decision when the record is sufficiently developed and the evidence is sufficiently compelling (i.e.,

“obvious”) to allow LUBA to affirm a county’s conclusion despite the inadequacy of the county’s explanation of how it reached that conclusion.

By way of illustration, LUBA employed the “clearly supports” standard to affirm a city’s approval of a homeless shelter under a regulation authorizing “public facilities” even though the city failed to expressly determine that the shelter qualified as a “public facility” under the city code:

“Because it was disputed below whether the proposed homeless shelter was a public facility, the city erred in adopting no findings explaining why it concluded that the proposed homeless shelter is a public facility. However, if the parties identify evidence in the record which ‘clearly supports’ a finding that the proposed homeless shelter is necessary for the maintenance of public purposes (and therefore is a public facility), then we must affirm the city’s decision even though it made no explicit finding that the proposed shelter is a public facility. ORS 197.835(9)(b) [*currently* ORS 197.835(11)(b)].

“The city cites evidence that the proposed shelter is supported by public funds and that it provides shelter to families and individuals who have none. We conclude that this is evidence which clearly supports a finding that the proposed shelter is necessary for the maintenance of public purposes and is, therefore, a public facility within the meaning of the TCZO definition of that term.”

Beck, 18 Or LUBA at 592–593.

In contrast, LUBA declined to utilize the “clearly supports” standard to affirm a city’s approval of certain signs under a regulation requiring signs to be “appropriate to the character of the neighborhood” because the evidence in the record was not sufficiently compelling - the evidence gave “nothing more than

an idea of what the signs will look like.” *Hubenthal v. City of Woodburn*, LUBA No. 2000-050, 39 Or LUBA 20, 50 (2000).

Turning to the present matter, the analytical posture here is similar to the circumstances in *Beck* described above. As in *Beck*, because the Barker’s disputed the inclusion of their property in the designation of Area 9D as rural reserve, the Court of Appeals determined that the county erred in failing to meaningfully explain its conclusion, particularly in light of the dissimilarities between the northern and southern halves of Area 9D (the Barker property is in the southern half).

Further, as in *Beck*, LCDC’s new authority allows LCDC to overlook the county’s error and affirm the rural reserve designation of Area 9D if the county cites evidence in the record that is sufficiently compelling to allow LCDC to affirm the county’s designation. More specifically, under LCDC’s new authority, LCDC may affirm the rural reserve designation of Area 9D if LCDC finds that it is “obvious” from the record evidence that both the northern and southern halves of Area 9D are suitable for rural reserve designation.

As explained in Section IV below, the evidence in the record does indeed clearly support the rural reserve designation of both halves of Area 9D.

/// /// ///

/// /// ///

/// /// ///

C. Likely differences between LCDC's new authority and LUBA's analogous authority.

In at least one respect, LCDC's application of its "clearly supports" standard is likely to differ from LUBA's application of the standard.

Typically, LUBA is asked to employ its "clearly supports" standard to affirm a local government conclusion that a land use standard has or has not been *satisfied*. Accordingly, LUBA will decline to affirm a decision pursuant to its "clearly supports" authority where evidence is conflicting or provides a reasonable basis for different conclusions. *See Doob*, 34 Or LUBA at 484, quoting *Waugh v. Coos County*, LUBA No. 93-129, 26 Or LUBA 300, 307 (1993).

Here, LCDC is in a very different position because there is no land use standard that must be *satisfied*. Instead, Metro and the counties were required to consider, weigh and balance various *factors*, which do not operate as criteria that must be satisfied. *Barkers Five*, 261 Or App at 295-301. This is why, as explained above, the choice of designation is left to Metro and the counties in those instances where an area is suitable for designation as either urban and rural reserve.

Therefore, LCDC does not have the same "conflicting evidence" concerns expressed by LUBA in *Doob* and *Waugh*. That is, here, even if the record clearly supports, for instance, an urban reserve designation, LCDC may

still employ its “clearly supports” standard to affirm a rural designation if the record clearly supports such designation as well.

Thus, two points are being made here. First, not all of the jurisprudence regarding the operation of LUBA’s “clearly supports” standard is applicable to LCDC’s new authority.

Second, although Area 9D actually ranks very low for suitability as an *urban* reserve (see below), even if the record showed that Area 9D was highly suitable for urban reserve designation, LCDC may still employ its “clearly supports” authority to affirm the county’s *rural* reserve designation if LCDC finds that it is “obvious” from the record evidence that both the northern and southern halves of Area 9D are suitable for rural reserve designation.

As explained in the next section, the evidence in the record does indeed clearly support the rural reserve designation of both halves of Area 9D.

IV. The Record Evidence Clearly Supports the Rural Reserve Designation of 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 commissioned for this task. *Barkers Five*, 261 Or App at 345; Rec at 2894–3031 (Mult. Co. Resolution 09-153 adopting CAC Report); *more specifically* Rec at 2993–3003 (excerpt from CAC report setting forth the analysis of Area 9D, referred to as Area 6 in the CAC

Report).¹ For convenience, the relevant excerpt from the CAC Report is appended to this brief.

In the CAC report, the Citizen Advisory Committee 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 (a.k.a., Study Area 6) 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 results of the CAC Report clearly establish that application of the rural reserves factors yields a rural reserve designation for *each* half of Area 9D and, thereby, *all of the land* in Area 9D.

A. Acknowledging the dissimilarities.

Dissimilarities exist between the northern and southern halves of Areas 9D. The northern half of Area 9D 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

¹ All citations to the record (i.e., “Rec at xxxx”) refer to the record as submitted to the Oregon Court of appeals.

at 2993, 2995, 2997. This northern half is subject to little risk of urbanization. *Id.* at 2993, 2995.

In contrast, the southern half 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. This southern half *is* subject to a risk of urbanization. *Id.* at 2994, 2995.

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

B. It is “obvious” from the record evidence that both the northern and southern halves of Area 9D are suitable for rural reserve designation.

Despite the dissimilarities between the northern and southern halves of Area 9D, the record reflects that application of the rural reserves factors yields a rural reserve designation for *each* half and, thereby, *all of the land* in Area 9D.

1. *Farm and Forest Factors.*

Except for a few instances noted below, application of the farm and forest protection factors in OAR 660-027-0060(2) to Area 9D yielded a conclusion that this area ranks “high” for rural reserve designation with respect to *both* the northern and southern halves of the area. Rec at 2993–2995. That is, the county determined that *both* halves 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 (the county ranked this latter sub-factor as “medium-high” in acknowledgment 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, the county explained that forest use predominates in the northern portion of Area 9D and 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 area “includes few nonfarm uses, limited urban edges, and adequate ‘block’ size to maintain long-term agriculture.” Rec at 2994.

In addition, the county explained that all of Area 9D includes parcels suitable for both small and large scale farm and forest management and that, in the northern half, a buffer exists between resource and non-resource uses in the northern half (except in a few instances) and that very substantial buffers are present in the southern half, 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 half 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 necessarily agree: the CAC Report notes the existence of irrigated fields in the area). Rec at 2994. With respect to these same points, the northern half 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.*

In addition, whereas the northern half 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.

Based on the foregoing analysis, the county concluded that “[t]his area is suitable for both farm and forest reserve, as indicated by the ‘important’ farm land and ‘wildland’ and ‘mixed’ forest designations.” Rec at 2995. In particular, with respect to the southern half of Area 9D, the county concluded:

“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. (emphasis added). Indeed, the CAC then recommended, and the county adopted, a rural reserve designation for Area 9D, *particularly* for the *southern* half of Area 9D. Rec at 2993.

Thus, in summary, the record reflects that a rural reserve designation is appropriate for both the northern and southern halves of Area 9D, with the southern half ranking *slightly higher* for rural reserve designation than the northern half.

2. *Landscape Features Factors.*

As with the farm and forest factors above, and except for a few instances noted below, application of the landscape feature factors in OAR 660-027-0060(3) to Area 9D yielded a rural reserve designation for *each* half of Area 9D and, thereby, *all of the land* in Area 9D.

Both halves ranked “high” for rural reserve as providing a sense of place and easy access to recreational opportunities. Rec at 2997. As explained by the county, “[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 halves ranked “high” for rural reserve protection, with the exception that that the Kaiser Road and east-of-abbey creek areas ranked “medium” - although these areas are identified locally by both Metro and the county as important habitat areas, they are not mapped by the state or other regional entities. Rec at 2996.

Area 9D did receive some “low” rankings, but not with respect to qualities that dissuaded the CAC, staff or the county from designating this area as rural reserve. For instance, although the northern half of Area 9D ranks high for landslide hazard, the southern half ranks low for landslide or flood hazards. Rec at 2996.

Similarly, regarding the provision of separation between cities, the county adopted a “low” ranking because it understood this factor as applying to separation between Metro UGB cities and cities outside that area. Rec at 2997. That said, the county noted that the southern half of Area 9D is important in

providing separation of urban unincorporated areas to the west and the City of Portland. *Id.*

Further, regarding the area serving as a buffer of conflicts between urban and rural uses, the northern half of the area ranked “low” because such conflicts are not prevalent in that area; however, the southern half of Area 9D ranked “high” for rural reserve protection under this factor due to substantial natural and human-made buffers between urban and rural resources in this area. Rec at 2997.

Similarly, while the county determined that a rural reserve designation is not necessary to protect water quality in the northern half of Area 9D, the southern half ranked “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 half of Area 9D, but “high” for the southern half.

Based on the foregoing analysis, and as explained in the following summary and conclusion, the county found that its consideration and application of the landscape feature factors to Area 9D yielded a rural reserve designation for *each* half of Area 9D and, thereby, *all of the land* in Area 9D:

“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, like the record for the farm and forest factors, it is “obvious” from the record for the landscape features factors that a rural reserve designation is appropriate for both the northern and southern halves of Area 9D, with, again, the southern half ranking *slightly higher* for rural reserve designation than the northern half.

3. *The Record is Sufficiently Compelling.*

In overall conclusion, the record reflects a much more thorough analysis by the county with respect to both the northern and southern halves of Area 9D than can be gleaned from the explanation that the Court of Appeals found inadequate. For instance, as noted by the court, the county’s explanation tends to rely on the landscape features analysis. Indeed, such analysis did in fact yield

a rural reserve designation. However, the record reflects that the consideration and application of the farm and forest factors clearly yielded a rural reserve designation as well.

Moreover, as set forth above, the record of the county's consideration and application of both sets of factors reflects that *both* the northern and southern halves ranked "high" or "medium" for most rural reserve factors and, if there was any difference at all, the southern half appears to rank *slightly higher* for rural reserve than the northern half.

Importantly, this evidence *is* sufficiently compelling to allow LCDC to affirm the rural reserve designation of *all* of the land in Area 9D. The high/medium overall ranking for rural reserve of all of the land in this area is demonstrated in the county's factor-by-factor analysis and explanation and does not leave any question regarding the propriety of a rural reserve designation for either the northern or the southern half of Area 9D.

In point of fact, the compelling nature of this evidence and the absence of ambiguity therein is highlighted through comparison to the county's consideration and application of the urban reserve factors to this same area. In contrast to the high/medium overall ranking of Area 9D for rural reserve, the CAC Report reflects a "medium/low" overall ranking for Area 9D as urban reserve. More specifically, the northern half of Area 9D was found to be not suitable for urban reserve at all. The southern half of Area 9D was found to

have low suitability to the east and a split between “low” and “medium/low” suitability to the west.

Now, hypothetically, to make the point here, suppose the county was asking LCDC to utilize the “clearly supports” standard to affirm an *urban* reserve designation for this area. LCDC could not do this. The record evidence on the urban factors consists of a suite of “low” rankings bolstered only by the “medium/low” suitability of the southwest corner of the area. Such evidence does not make the propriety of such designation “obvious.”

In contrast, no such uncertainty exists in the county’s consideration and application of the rural reserve factors to Area 9D - both the northern and southern halves of Area 9D were found to have “high” suitability under most of the factors and “medium” suitability under the remaining factors (with the exception of a few unremarkable “low” rankings for the northern half of Area 9D).

In short, it is “obvious” from the record evidence that *all of the land* in Area 9D is suitable for rural reserve designation.

/// /// ///

/// /// ///

/// /// ///

/// /// ///

/// /// ///

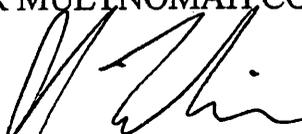
V. Conclusion

For the foregoing reasons, the county respectfully requests that LCDC utilize its new authority to affirm the rural reserve designation of Area 9D instead of remanding the matter to the county.

DATED this 25th day of September, 2014.

Respectfully submitted,

JENNY M. MADKOUR, COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON



Jed Tomkins, OSB No. 065290
Assistant County Attorney
Of Attorneys for Multnomah County