

STAFF REPORT

IN CONSIDERATION OF THE REMAND BY THE OREGON COURT OF APPEALS AND LCDC REGARDING THE DESIGNATION OF URBAN AND RURAL RESERVES IN THE METRO REGION

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PROPOSED ACTION

Hold a public hearing regarding the remand by the Oregon Court of Appeals and the Land Conservation and Development Commission (LCDC) of urban and rural reserves in the Metro region. The specific purpose of this proceeding is to adopt supplemental findings addressing two state rule requirements that apply to the amount of urban reserves region-wide, and the “balance” of those designations, in light of the Oregon legislature’s reduction of urban reserve acreage in 2014 via the “Grand Bargain” (HB 4078), and the Metro Council’s adoption of the current Urban Growth Report in 2015. The two applicable state rules are:

1. A requirement that the amount of land designated as urban reserve must be sufficient to accommodate urban growth in the region for between 40 and 50 years after Metro’s adoption of the most recent Urban Growth Report; and
2. A requirement that the balance in the designation of urban and rural reserves across the region “best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents.”

PROCEDURAL SUMMARY

In 2014, the Oregon Court of Appeals issued its opinion in *Barkers Five v. LCDC et al.*, remanding to LCDC the joint decision of Metro and the three counties that designated urban and rural reserves around the region. Shortly following the Court of Appeals decision, the Oregon legislature enacted HB 4078, which legislatively adopted revisions to the reserves map and the UGB in Washington County. In 2015, LCDC issued a remand order formally remanding the reserves decision back to Metro, Clackamas County, and Multnomah County for further proceedings and action consistent with the Court of Appeals opinion. In response to the remand regarding the designation of urban reserves in Clackamas County, the Metro Council adopted Ordinance No. 16-1368 on February 4, 2016.

OVERVIEW

A detailed description of the history of urban and rural reserves in the Metro region since the 2007 enactment of Senate Bill 1011 is set forth in the staff report to the Metro Council dated September 30, 2015 regarding Ordinance No. 16-1368. That ordinance and all supporting materials should be re-adopted and incorporated into the record of this proceeding.

The purpose of the current proceeding is neither to revisit the regionally agreed-upon map of urban and rural reserves, nor to reconsider the findings adopted by the Metro Council in 2016 in support of the designation of Stafford and other reserve areas in Clackamas County. Rather, the purpose of this proceeding is to consider two region-wide issues that must be addressed under applicable state rules governing urban and rural reserves:

1. Whether the existing amount of urban reserves across the region is sufficient to accommodate estimated urban growth for between 40 and 50 years after the Metro Council's adoption of the most recent Urban Growth Report in 2015; and
2. Whether the balance of designated urban and rural reserves across the region "best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents."

Metro and the three counties considered and addressed these two regional issues in the joint findings supporting the urban and rural reserve designations in 2011. However, two relatively recent occurrences call for reconsideration of these two standards. First, in enacting the "Grand Bargain" legislation (HB 4078) in 2014, the Oregon legislature changed the urban and rural designations of several thousand acres of land in Washington County, resulting in a net reduction of approximately 3,210 acres of urban reserves. Second, the projected 50-year need for urban reserves in 2011 was based on the regional growth forecast set forth in Metro's previous Urban Growth Report (UGR), adopted in 2010. The Metro Council adopted the current UGR in 2015, which provides new residential and employment growth projections for the region. The applicable state rule requires that the estimated need for urban reserve acreage must be based on the analysis in the most recent UGR.

ANALYSIS

A. Amount of Land Designated Urban Reserve in the Metro Region

In 2011, Metro and the three counties adopted ordinances designating a total of 28,256 acres of urban reserves in the Metro region. Later that year, Metro adopted Ordinance No. 11-1264B, which expanded the UGB onto approximately 2,000 acres of urban reserves located in Washington County. In 2014, the Oregon legislature enacted House Bill 4078, which legislatively approved Metro's 2011 UGB expansion, and made the following changes to the reserves map in Washington County:

- Converted 2,449 acres of urban reserves to rural and undesignated
- Converted 417 acres from rural reserve to urban reserve
- Added 1,178 of urban reserve to the UGB

Thus, HB 4078 resulted in the net reduction of 3,210 acres of urban reserves. When combined with urban reserves that were included in the 2011 UGB expansion, the current acreage of urban reserves in the entire Metro region is now 23,031.

The state rules governing the designation of urban and rural reserves require that the amount of land designated as urban reserves must be planned to accommodate estimated urban population and employment growth in the Metro region for between 20 and 30 years beyond the 20-year period for which Metro has demonstrated a buildable land supply inside the UGB in its most recent Urban Growth Report. OAR 660-027-0040(2). The Metro Council adopted the current UGR in December 2015,

In order to update the 50-year need analysis for urban reserves to 2065 by applying the most current growth projections, Metro planning staff has prepared the attached memorandum. That memorandum provides an updated assessment of potential long-term demand for urban reserves, and concludes that the existing 23,031 acres of urban reserves across the region, combined with buildable land already inside the UGB, are an appropriate size for accommodating expected urban growth for between 40 and 50 years.

Specifically, the attached memorandum includes an analysis of projected long-term need for residential, commercial, and employment land, and concludes that there is a potential 50-year demand for 24,827 acres of urban reserves. Assuming an equal amount of urban reserve acreage is converted annually over 50 years, the existing 23,031 acres of urban reserves would provide a 46-year supply of land for urban growth in the Metro region.

No particular formula or methodology is suggested or required under state law for estimating a 50-year need for urban reserves. As explained by LCDC in its 2012 order regarding Metro's compliance with the requirement to provide a 40 to 50-year supply of urban reserves, the statutes and rules provide Metro "a substantial degree of discretion concerning... the methods and policy considerations that Metro uses to project future population and employment." (LCDC Compliance Acknowledgment Order 12-ACK-001819, page 26).

With that in mind, it is important to note that preparing this type of 50-year estimate requires multiple levels of assumptions; therefore, minor changes in the underlying assumptions would necessarily change the results. Metro's ability to precisely forecast growth and development trends 50 years into the future is necessarily limited.

It is also important to recall that the intergovernmental agreements between Metro and each of the three counties regarding the designation of reserves provide for a review of existing urban reserves in each county 20 years after the date of adoption, or sooner if agreed to by Metro and all three counties. Therefore, the adequacy of the amount of land designated for future urbanization can and will be revisited, and additional lands may be added if necessary, much sooner than 2065.

B. Balance in the Designation of Reserves that "Best Achieves" Certain Goals

Included among the state rules governing urban and rural reserves is a requirement that Metro and the counties must explain how the urban and rural reserve designations achieve the following objective:

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

The meaning and application of this rule was the subject of considerable debate in the appeals filed with LCDC in 2011 and with the Court of Appeals in 2012. Ultimately, in the *Barkers Five* opinion, the Court of Appeals agreed with the positions taken by LCDC and Metro that the "best achieves" standard provides significant discretion to Metro and the counties, and is satisfied through their site-specific findings concerning the application of the urban and rural reserve factors. Specifically, the Court of Appeals identified and agreed with the following four legal premises regarding the application of the standard:

First, the best achieves standard is a qualitative standard, rather than a quantitative one. The court agreed with LCDC that the standard "is not a balance in terms of the quantitative *amount* of urban and rural reserve acreage, but a balance between encouraging further urban expansion versus land conservation." The court explained that Metro and the counties are not required to justify a quantitative "balance" in the specific amount of acreage of urban reserves and rural reserves.

Second, the best achieves standard applies to Metro and the counties' designation of reserves "in its entirety" and not to the designation of individual properties or areas as urban or rural reserves.

Third, the best achieves standard allows for a range of permissible designations, and not a single “best” outcome. The court agreed with LCDC and Metro that the standard does not require a ranking of alternative areas from worst to best. The court specifically rejected arguments presented by the cities of West Linn and Tualatin that the word “best” requires a comparative analysis that identifies a single highest-ranked designation.

Fourth, the court held that Metro and the counties must explain how the designation satisfies the best achieves standard through their findings concerning the application of the urban and rural reserve factors to specific areas. The court agreed with LCDC that there is a close relationship between the “factors” that Metro and the counties must consider for urban and rural reserve designations and the overall “best achieves” objective, and that the best achieves standard is satisfied through findings explaining why particular areas were chosen as urban or rural reserves.

Applying the four legal premises identified by the Court of Appeals in *Barkers Five*, it is clear that Metro and the counties have broad discretion in reaching a conclusion regarding whether the region-wide balance of urban and rural reserves achieves the identified objectives of creating livable communities while protecting farms, forest, and natural landscape features.

During the proceedings before LCDC regarding its adoption of the remand order in 2015, several parties argued that the reduction in urban reserve acreage in Washington County via House Bill 4078 necessarily created a shift in the “balance” of urban reserves that runs afoul of the best achieves standard. However, under the above-stated first premise of the Court of Appeals, that is incorrect. The court held that the best achieves standard does not require quantitative balancing of the specific amount of urban reserve acreage in one county or another. Thus, the reduction of urban reserves in Washington County by 3,210 acres does not inherently raise concerns under this standard.

Metro and the counties adopted detailed findings in their decisions in 2011 regarding the consideration of all urban and rural reserve factors, explaining why particular areas were chosen as urban or rural reserves, and explaining how the regional partners came to agree that the overall package of urban and rural reserves reflects a balance that best achieves the objectives of creating livable communities while protecting farms, forest, and natural landscape features. Those findings are consistent with the fourth premise identified by the Court of Appeals regarding compliance with the best achieves standard.

Importantly, Metro and the three counties expressly recognized that the adoption of urban and rural reserves reflect the region’s decision regarding the long-term limits of urbanization in the Metro area, as well as its commitment to stewardship of farm and forest, and its respect for the natural landscape features that give the people of the region their sense of place. Urban reserves, if and when added to the UGB, will necessarily take some land from the farm and forest base. However, the regional partners also recognized that some of the same characteristics that make an area suitable for agriculture also make it suitable for livable communities under the best achieves standard, including mixed-use pedestrian and transit-supportive urban development, as well as industrial uses. The region concluded, acting together, that the designations adopted in 2011 will best achieve a balance between livability and protection of farms, forests, and natural features. The prior findings adopted by Metro and the three counties would be re-adopted as part of any decision by the Metro Council resulting from this proceeding, and would be correctly relied upon to support a conclusion that the best achieves standard is still met.

CONCLUSION

The Metro Council will take evidence and testimony at the public hearing on March 2, 2017; at the close of the hearing the Council should continue the hearing to March 16 or March 23 in order to allow sufficient time to accept and consider additional evidence submitted by interested parties and staff.