

CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS

Study Session Worksheet

Presentation Date: April 2, 2014 **Approx Start Time:** 9:00 AM **Approx Length:** 30 Min.

Presentation Title: *Barkers Five, LLC v. LCDC* Court of Appeals Decision

Department: County Counsel and DTD

Presenters: Nate Boderman, Assistant County Counsel
Dan Chandler, Strategic Policy Administrator
Mike McCallister, Planning Director

Other Invitees: Stephen Madkour, County Counsel
Barb Cartmill, Acting DTD Director

WHAT ACTION ARE YOU REQUESTING FROM THE BOARD? Direction as to how the BCC would like staff to proceed in response to the *Barkers* Court of Appeals decision and House Bill 4078.

EXECUTIVE SUMMARY: The purpose of this study session is to summarize the *Barkers Five, LLC* decision and the impact of the “Grand Bargain” legislation, and attempt to explain what options are available to the County for purposes of resolving the remaining Urban and Rural Reserve issues.

FINANCIAL IMPLICATIONS (current year and ongoing): N/A

LEGAL/POLICY REQUIREMENTS: N/A

PUBLIC/GOVERNMENTAL PARTICIPATION: The staff has not completed any public outreach on this issue as of this date. Depending on how the remand progresses, there will likely be future consideration and coordination with community stakeholders, cities, Metro and LCDC.

OPTIONS: The Board is asked to give direction to staff, or seek further information, on what steps to take next in reaction to the court decision and House Bill 4078.

RECOMMENDATION:

1. Direct staff to assist in the remand process, particularly as it applies to addressing these evidentiary issues associated with the Stafford Urban Reserve designation.
2. Direct staff to work towards proposing a solution during the 2015 legislative session that will set Clackamas County’s Urban and Rural reserves and address outstanding issues related to the Stafford Area designations.

ATTACHMENTS: Staff Memo dated March 26, 2014.

SUBMITTED BY:

Division Director/Head Approval _____

Department Director/Head Approval _____

County Administrator Approval _____

For information on this issue or copies of attachments, please contact Nate Boderman @ 503-655-8364



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MEMORANDUM

TO: Board of County Commissioners

FROM: Nate Boderman, Assistant County Counsel
Dan Chandler, Strategic Policy Administrator
Mike McCallister, Planning Director

DATE: March 26, 2014

RE: *Barkers Five, LLC v. LCDC* Court of Appeals Decision

The purpose of this memo is to summarize the *Barkers Five, LLC* decision and explain what options may be available to the County for purposes of resolving the remaining Urban and Rural Reserve issues.

Barkers Five, LLC Decision

This Oregon Court of Appeals case was an appeal of an order of the Oregon Land Conservation and Development Commission (LCDC) related to Metro and Clackamas, Multnomah, and Washington Counties' designation of particular land as either urban or rural reserves. According to the decision, twenty-two different petitioners sought judicial review of LCDC's order, raising twenty-five individual assignments of error.

The Court of Appeals rejected the majority of the assignments of error, including most of those assignments involving land in Clackamas County, such as whether the Maletis property was incorrectly designated as a rural reserve, whether Clackamas County

followed the correct procedures to adopt findings supporting the decision, and whether the County misapplied the rural reserve factors. All but one assignment of error which related specifically to Clackamas County's designations was rejected by the Court of Appeals.

Overall, the Court of Appeals sustained four assignments of error related to DLCD's order: 1) that LCDC erred by approving Washington County's application of the Rural Reserve factors; 2) that LCDC erred by finding Multnomah County adequately considered the rural reserve factors related to Area 9D (Barkers' Property); 3) that LCDC could not affirm a local government's decision where its findings are inadequate even if the evidence "clearly supports" the decision; and 4) that LCDC's acceptance of Metro and the counties' designation of Areas 4A and 4D (Stafford) as Urban Reserves was not based on substantial evidence. The Court of Appeals reversed and remanded LCDC's order to address the issues identified by the Court.

The "Grand Bargain"

House Bill 4078 was proposed in direct response to the *Barkers* decision. The most significant result of this bill expanded Metro's Urban Growth Boundary and effectively set Washington County's reserves. This bill eliminated the need to adjudicate the first assignment of error noted above and insulated Washington County's reserves from further appeal

Remand to LCDC

The "Grand Bargain" effectively left the resolution of Areas 4A/4D (Stafford) and Area 9D (Barkers' Property) as the remaining substantive issues for LCDC to resolve on remand.

As discussed above, the issue that the Court of Appeals found with the Stafford area was that the evidence, especially as it related to traffic, did not support the conclusion that this land should be designated Urban Reserve. The cities of Tualatin and West Linn argued that the findings did not adequately address the argument that the Regional Transportation Plan showed many of the facilities in the area as failing in 2035.

It is unclear whether and how the County will be invited to participate in the remand. It is possible that DLCD may attempt to simply revise its findings, using additional evidence in the existing record. However, it is also possible that Metro and/or the County will be asked to provide additional evidence through some local process. In any event, it is the opinion of our staff that the findings can be revised in such a way that can address the issues identified by the Court of Appeals.

There is no precedence to help determine what to expect exactly from the remand proceedings. Although the legislature resolved the most difficult issues in *Barkers* through HB 4078, the issues related to Clackamas County and Multnomah County still need to be resolved in their entirety before any individual issue may be affirmed. In other words, Multnomah County and Clackamas County will each need to resolve its own issue before either one may move forward, which realistically may include one or more additional appeals. Multnomah County is in a somewhat similar situation as Clackamas on remand, since they will also be required to work with DLCD to adopt revised findings to address those issues the Court of Appeals identified in its decision.

Parties have the right to petition the Oregon Supreme Court to review the Court of Appeals decision. The deadline to do so expires between the time this report is filed and the April 2nd study session. Staff has received no indication that an appeal will be filed. If an appeal is filed, however, we will plan to discuss the implications of the additional appeal.

Provided no appeal is filed, jurisdiction over the remand of the order will be with LCDC. While ORS 197.651(12) provides that LCDC shall respond to the Court's appellate judgment within 30 days where an order is remanded, as it was in this case, there has been no indication as to the specific procedures or timelines that will apply to the remand.

Legislative Options

As HB 4078 progressed, Clackamas County was clear that it wanted the legislature to make efforts to affirm the County's reserve designations and address the issues associated with the Stafford Area. While no specific accommodations were made for Clackamas County's reserves as part of the "Grand Bargain," there may be an opportunity to do so in the 2015 session.

Recommendation

The staff recommends that the BCC do the following:

1. Direct staff to assist in the remand process, particularly as it applies to addressing these evidentiary issues associated with the Stafford Urban Reserve designation.
2. Direct staff to work towards proposing a solution during the 2015 legislative session that will set Clackamas County's Urban and Rural reserves and address outstanding issues related to the Stafford Area designations.