

Appeal to the Land Conservation and Development Commission on the Adoption of CM2 Zoning in Multnomah Village in the City of Portland Comprehensive Plan Early Implementation, Task 5

Filed: December 26, 2017

This is an appeal to the Land Conservation and Development Commission (LCDC) under OAR 660-025-0150(6) of the Department of Land Conservation and Development's (DLCD) formal review and rejection of all the objection issues we submitted on Tasks 4 and 5 of Portland's Periodic Review. This appeal is made on behalf of the Multnomah Neighborhood Association (MNA).

This Appeal is the third of three separate appeals to the LCDC.

- Part 1: Appeal of Middle Housing Policy 5.6 (Task 4)
- Part 2: Appeal of the Designation of the Multnomah Neighborhood as a "Neighborhood Center" (Task 4)
- **Part 3: Appeal of the Adoption of CM2 Zoning in Multnomah Village (Task 5)**

The original Objection has already been determined to be valid, as required by OAR 660-025-0150(6)(a). The standing of the appellant, the Multnomah Neighborhood Association, has already been established per OAR 660-025-0150(6)(d)(A) in the original Objection under the heading "Party of Record," and therefore is not repeated here. The DLCD has rejected all the valid objections that were filed with the Department.

In addition to restating some of the original Objection, we are including with

each issue the specific rules that have been violated so that it is clear what governs the decision. Key sections of the DLCD decision are quoted and responded to. The appeal issues are presented based on the Objection number (Part #) and sub-issue letter (alphabetical).

Part 3: Appeal of Adoption of CM2 Zoning in Multnomah Village

The Multnomah Neighborhood Association, its members, and others have participated extensively in the Periodic Review process related to the Task 5 implementation of appropriate zoning for Multnomah Village. Public testimony almost unanimously supported the use of CM1 zoning, rather than the CM2 zoning proposed by the City. The City made minor adjustments to the zoning which did not achieve the intent expressed in public testimony. The City failed to adequately justify the limited nature of its response. The issue of whether or not “design review” applied to development in the Village resulted in public confusion that unnecessarily affected participation in the Periodic Review process.

The appeal issues are organized based on the appeal part number (3) and alphabetically by specific appeal issue, as follows:

- Appeal Issue 3.A. Inadequate response to a long history of public input seeking to protect the character of Multnomah Village.
- Appeal Issue 3.B. Failure to perform planning actions in Multnomah Village based on facts and evidence.
- Appeal Issue 3.C. Failure to provide the public with adequate information and facts about the lack of adequacy of design review to protect neighborhood character.
- Appeal Issue 3.D. Failure to direct planning actions in a manner that would achieve local goals and be consistent with past planning efforts.

Appeal Issue 3.A. Inadequate response to a long history of public input seeking to protect the character of Multnomah Village.

The MNA has been working diligently for many years to achieve reasonable building height limits in the Village. At least as far back as February 18, 2003 the MNA wrote a letter from Martie Sucec, acting Chair, to Mayor Vera Katz and City

Commissioners expressing the MNA's concern about a proposed mixed use development at 7838 SW Capitol Highway (#LU 02-132261 DZ). The letter expresses concern about the height of the proposed four-story building and the fact the existing CS (Commercial Storefront) zoning does not adequately protect the character of the neighborhood. This letter mentions the problem of changing grade on the property, which has the effect of allowing a taller building from the reference of the lowest grade. Building heights need to be measured from the lowest elevation. The letter urges the City Council to employ *design review* to address building height as a significant design element.

In a July 6, 2015 letter from MNA Chair Carol McCarthy to Mayor Charlie Hales and City Commissioners, the MNA expressed concern about another new development proposed to be four stories in height and requested that the City meet the intent of the *Southwest Community Plan* and employ *design review* to help keep the scale compatible with the existing development in Multnomah Village. The letter advocates for a maximum three-story building with a setback on the third story.

The July 6, 2015 letter from the MNA also included initial results from a neighborhood petition begun on June 7, 2015. The petition was conducted online and on paper. The petition asks the Portland City Council to:

"Limit development in Multnomah Village to 2 or 3 stories, and mandate 1 parking space per rental unit."

The MNA updated the Mayor and City Council in a letter of July 19, 2015, reporting that the petition had 1,648 signatures and 630 individual comments in support of the petition, which were attached to the letter. The number of signatures gathered in a short span of time (less than six weeks), along with the many comments in support of the height limits, demonstrates the very strong and unified public sentiment on this topic.

In a September 13, 2015 letter to Mayor Charlie Hales, the Planning and Sustainability Commission (PSC), and other officials, MNA Chair Carol McCarthy specifically requests that the Mixed-Use Zoning Project of the 2035 Comprehensive Plan employ CM1 zoning (35 ft. height limit) to replace existing CS zoning in the Village, rather than using the CM2 zoning (45-55 ft. height) proposed by the City.

In addition to the direct correspondence from the MNA, and the responses from

the petition, the MNA analyzed the Task 5 Record Index of public testimony on the topic of CM1 versus CM2 zoning. Of 192 total comments received on this topic, 191 supported applying CM1 zoning to the Village. Only one supported the CM2 zoning. This can only be characterized as overwhelming public support for CM1 zoning and opposition to CM2 zoning.

Part of the record of public testimony on limiting building heights in Multnomah Village is in connection with the designation of the Village as a “Neighborhood Center” in Task 4 of Periodic Review. This testimony is described in the Appeal to the LCDC filed by the MNA on this topic.¹

The City did partially respond to public testimony by changing a small area of zoning on Capital Highway from CM2 to CM1. This is specifically addressed in the Mixed Use Zones Project – Recommended Draft of August 2016 on pages 44 and 45 under the heading “Low-rise Commercial Storefront Areas,” where it states:

The recommended draft includes new mapping and Zoning Code regulations intended to continue the scale and characteristics of a few older main street areas where low-rise (1 to 2 story) Streetcar Era storefront buildings are predominant. This responds to community interest in preserving the character of these areas, which are often the historic commercial cores of centers, while being applied strategically to retain ample capacity for growth in the majority of mixed use areas. Areas mapped for the new low-rise commercial storefront zoning approach are locations with contiguous concentrations of low-rise Streetcar Era storefront buildings extending for at least a 2-block or 400’ length of corridor, and are located in neighborhoods centers, which are intended to have less of an emphasis on growth than larger centers. They are located on portions of the following streets: SE Belmont Street in Sunnyside; SE 13th Avenue in Sellwood; and SW Capitol Highway in Multnomah.

However, it is unclear why the City’s response was so limited, leaving most of the Village commercial as CM2. The rationale for “strategically” retaining capacity for growth is not adequately justified. The City’s response did not meet the requests from citizens and the MNA to maintain and protect the quality, character and scale Multnomah Village.

DLCD’s response states (page 23):

¹ See: *Appeal to the Land Use and Development Commission of the “Center” Designation to Multnomah Village in the City of Portland Comprehensive Plan Update*, filed with the DLCD on December 26, 2017.

Goal 1 requires a program for consideration of citizen input and a fair process – it does not dictate a particular result.

This statement is true, however, the issue we are raising is whether the City adequately considered the citizen input received. As we have documented here, public sentiment was overwhelmingly in favor of CM1 zoning and opposed to CM2 zoning in Multnomah Village.

The failure of the City to adequately quantify, synthesize, and report public involvement on this topic is a violation of Statewide Goal 1, which requires:

A process for quantifying and synthesizing citizens' attitudes should be developed and reported to the general public.

The lack of an adequate response by the City to the extensive public testimony on this topic is also a violation of the Community Involvement Work Program, which states "Purpose:"

The purpose of community involvement in the periodic review work program is to provide open and meaningful opportunities for individuals and organizations to effectively influence Comprehensive Plan updates.

The Community Involvement Work Program, requires under "Guiding Principles" that:

The Portland Bureau of Planning and Sustainability will provide effective tools and information in order to make effective public participation possible.

It also violated the "Citizen Involvement Objectives" of the Southwest Community Plan, which states:

4. Identify, strengthen, and use communication links between the Planning Commission, City Council, city staff, and citizens throughout the creation, development, and implementation of the Southwest Community Plan. Ensure that citizens receive responses from policymakers, including the rationale for decisions.

Appeal Issue 3.B. Failure to perform planning actions in Multnomah Village based on facts and evidence.

In spite of the extensive public testimony in support of three-story height limits in Multnomah Village and in favor of applying the new CM1 zone to commercial properties, the City has applied higher-density CM2 zoning without adequate justification or factual basis.

The Mixed Use Zones Project – Recommended Draft of August 2016 was originally missing from the City’s record for Task 5, but has been added as an Addendum on the City’s website. On page 10 of this report (Ord. 188177, Addendum, page A-10) it provides justification for the mixed use zone changes:

Why is this important?

Portland is expected to grow significantly over the next 20 years – in both new households and new jobs. The development produced by this growth, if located and designed correctly, will support and enhance the qualities that help make Portland an attractive place. As Portland’s population grows, its households will also change. In the next two decades the size of households is expected to decrease, and more Portlanders will live alone, and live longer. Accommodating this need, roughly 80% of new housing built over the next 20 years is expected to be multifamily development, much of it in centers and corridors within the mixed use zones.

This does not appear to be adequate justification for applying CM2 zoning to most of Multnomah Village, rather than CM1 requested by the MNA for the following reasons:

First, as noted in the Task 5 Findings, Portland has far more zoned capacity for residential development than required to meet the forecasted growth.² The City has existing capacity for 200,000 new units, while forecasted growth will require an estimated 123,000 new households (units). Therefore, the need for the increased density allowed by the CM2 zone is not justified by the growth forecast.

Second, the MNA and its residents are especially capable of determining the qualities that help make Multnomah Village “an attractive place” to live. They

² Further Findings of Fact, page 32 (Ord. 188177, Vol. 1.1.A, page 41).

have provided clear and extensive testimony that limiting height to three stories is an essential element for maintaining the character that residents value.

Third, the MNA has filed an Appeal to the LCDC on the Task 4 designation of the Village as a "Neighborhood Center," rather than the more-appropriate designation as a "Neighborhood Corridor." The issues raised in this Task 4 Appeal are included herein by reference.³ Assuming the LCDC is supportive of this Task 4 Appeal, the proposed intensity of future development in the Village should be adjusted accordingly and would be more consistent with the requested CM1 zoning.

Lastly, it is worth noting that the assumptions upon which these zoning changes are being made may be outdated. The U.S. Census reports that household size increased from 2010 to 2015 from 2.34 to 2.38 persons per household. Also the average life expectancy of Americans has decreased over the past two years.

The final, adopted description of the CM1 zone is found in the *2035 Comprehensive Plan Early Implementation – As-Amended Draft*, December 5, 2016 (Ord. 188177, Vol. 1.1.E, Record page 226):

Commercial/Mixed Use 1 zone. *The Commercial/Mixed Use 1 (CM1) zone is a small-scale zone intended for sites in dispersed mixed use nodes within lower density residential areas, as well as on neighborhood corridors and at the edges of neighborhood centers, town centers and regional centers. The zone is also appropriate in core commercial areas of centers in locations where older commercial storefront buildings of 1 to 2 stories are predominant. This zone allows a mix of commercial and residential uses. The size of commercial uses is limited to minimize impacts on surrounding residential areas. Buildings in this zone will generally be up to three stories tall. Development is intended to be pedestrian-oriented and compatible with the scale and characteristics of adjacent residentially zoned areas or low-rise commercial areas.*

Based on this description of the CM1 zone, it appears to be perfectly suitable for the Multnomah Village commercial areas.

The City cites 11 pages of Comprehensive Plan Goals and Policies that the City considers to support the proposed mixed use zoning in the Mixed Use Zones

³ See: *Appeal to the Land Use and Development Commission of the "Center" Designation to Multnomah Village in the City of Portland Comprehensive Plan Update*, filed with the DLCD on December 26, 2017.

Project – Recommended Draft. However, many of these Goals and Policies apply to designated “centers” and would not apply to Multnomah Village if it were designated a “Neighborhood Corridor.”

The 2035 Comprehensive Plan states in Policy 3.36 that Neighborhood Centers are intended to have at least 3,500 households.

Policy 3.36 Housing. Provide for a wide range of housing types in Neighborhood Centers, which are intended to generally be larger in scale than the surrounding residential areas, but smaller than Town Centers. There should be sufficient zoning capacity within a half-mile walking distance of a Neighborhood Center to accommodate 3,500 households.

However, the City’s data shows that Multnomah Village will only have 2,553 housing units within ½ mile of the Village core under the proposed Comprehensive Plan by 2035.⁴ This would seem to disqualify the Village from the “neighborhood center” designation. No explanation for the conflict with this Policy is provided by the City.

Therefore, the City has failed to comply with Goal 2, which requires a factual basis for planning:

**1. Factual Basis for the Plan
Inventories and other forms of data are needed as the basis for the policies and other decisions set forth in the plan.**

The Community Involvement Work Program states:

Decisions will be open, transparent and accessible. Reports containing the facts and reasons necessary to make particular decisions will be available at least twenty-one days before any Planning and Sustainability Commission or City Council hearing, and these reports will be retained for the life of the plan. All hearings venues will be accessible.

The City has failed to adequately justify the need for CM2 zoning in Multnomah Village and has failed to provide the “facts and reason necessary” for the zoning,

⁴ Attachment to email from Barry Manning, Senior Planner at BPS dated June 16, 2016 in response to an inquiry from James Peterson dated June 7, 2016. Attachment is labeled “Comp Plan update - Multnomah Neighborhood Center details” and is from Joan Frederiksen and dated September 9, 2014.

as required by the Community Involvement Work Program.

Appeal Issue 3.C. Failure to provide the public with adequate information and facts about the lack of adequacy of design review to protect neighborhood character.

The Design Overlay Zone that applies to Multnomah Village is described in Title 33, Planning and Zoning Chapter (7/24/15). Under *Section 33.420 Design Overlay Zone*, it states:

33.420.010 Purpose

The Design Overlay Zone promotes the conservation, enhancement, and continued vitality of areas of the City with special scenic, architectural, or cultural value. The Design Overlay Zone also promotes quality high-density development adjacent to transit facilities. This is achieved through the creation of design districts and applying the Design Overlay Zone as part of community planning projects, development of design guidelines for each district, and by requiring design review or compliance with the Community Design Standards. In addition, design review or compliance with the Community Design Standards ensures that certain types of infill development will be compatible with the neighborhood and enhance the area.

This code language clearly implies that design review will protect the character of the area and ensure compatibility. Residents of Multnomah neighborhood believed that the “d” Design Review Overlay protected them from overly tall, bulky, and poorly designed developments that could potentially be constructed under the CS, Commercial Storefront zoning. As noted in Appeal Issue 3.A of this Appeal, the MNA letter of February 18, 2003 requested the City Council use design review to address building height for a proposed 4-story development. The City Council declined to take any action. A similar request from the MNA was made in a July 6, 2015 letter to the Mayor and City Council asking that they apply design review to another four-story development proposal.

The Mayor responded in an August 11, 2015 letter to the MNA in which he consulted the City Attorney and states “State law limits our ability to impose Design Review where there is not already a discretionary review underway.” This response created further confusion for the MNA, since the review for this project was not yet “underway.”

What the City failed to clearly state is that the “needed housing” statute of ORS 197.303 and ORS 197.307 requires “clear and objective” standards for all developments containing “needed housing.” Since the City of Portland has interpreted “needed housing” to mean any housing, all mixed use development will be subject only to the base zone requirements and the Community Design Standards. This correspondence from the Mayor clearly communicates that the City precluded any consideration of addressing the Neighborhood’s concerns.

The City of Portland failed to provide the public with the facts about the lack of adequacy of “design review” to protect and preserve desirable neighborhood qualities. This includes a failure to inform residents of Multnomah, and the general public, about the fact that design review will not apply to mixed use development involving any amount of residential development, unless the developer specifically requests it.⁵ In other words, the design review overlay provides no assurance that the local community will have any influence regarding the nature of future development in the mixed uses zones.

As such, design review cannot be considered to offer value or benefit to local residents of Portland communities, such as Multnomah. Instead it must be viewed as a device for giving developers greater flexibility, if they find they cannot meet the clear and objective code language.

Therefore, the “d” Design Review Overlay in Multnomah Village cannot be viewed as a response to the extensive public testimony submitted by the Multnomah Neighborhood Association (MNA) and by the highly-supportive public in Portland and beyond.

Since the design review overlay has little or no functional benefit to residents of Multnomah neighborhood and the Village, the City of Portland should have focused on achieving the desired results (as expressed clearly in public testimony) through clear and objective code language that conforms with state law. This could have been accomplished through the Mixed Use Zones Project or through other means, as described in the “Action Requested” section of this Appeal.

If the public had understood that design review would not play a role in limiting building heights, then it is reasonable to assume that the public input would have been more focused on other solutions to protect the character of Multnomah Village during the Periodic Review process.

⁵ Central City and Gateway are the only exceptions.

The lack of accurate information about design review is a violation of Goal 1, which requires:

The citizen involvement program shall be appropriate to the scale of the planning effort. The program shall provide for continuity of citizen participation and of information that enables citizens to identify and comprehend the issues.

It is also a violation of the Community Involvement Work Program, which requires under “Guiding Principles” that:

The Portland Bureau of Planning and Sustainability will provide effective tools and information in order to make effective public participation possible.

Information needed to make decisions will be presented in a simplified and understandable form. Assistance will be provided to interpret and effectively use technical information. Copies of technical information will be available on the Internet, at public libraries, at neighborhood coalition offices and at other locations open to the public. Translations of key documents will be available.

Appeal Issue 3.D. Failure to direct planning actions in a manner that would achieve local goals and be consistent with past planning work.

The Southwest Community Plan: Vision, Policies and Objectives, adopted by the City Council in July 2000, provides the most contemporary planning process for the area that includes Multnomah Village. In the *Introduction* to the SWCP, the lengthy process required to adopt the Plan is described. It states:

In endorsing the revised process, the Planning Commission and the City Council believed that successful completion of the policy phase of the *Southwest Community Plan* was a vital prerequisite for continuing on with any subsequent phases of the plan, such as the Comprehensive Plan/zoning map. This set of policies provides the foundation upon which any additional plan components will be built.

While the SWCP process was not fully implemented as a local refinement plan, the Periodic Review process was the logical place to achieve this implementation.

The SWCP envisioned that Multnomah Village would grow, but also that its historical and cultural essence would remain intact. In the Plan's "Vision for Southwest Portland," it states:

Multnomah Village has retained its charm, partially through an historic district designation, even as merchants expand and new businesses begin. The village area has continued to prosper and attract neighborhood and community residents. Local gathering spots offer opportunities for friends and neighbors to meet, providing a small town atmosphere that residents continue to treasure.

The SWCP states under "C. Main Street Objectives:"

Main streets are a part of and provide services to the neighborhoods within which they are located. Generally linear in form, main streets contain buildings whose height, scale, and designs are appropriate for their neighborhoods and uses which are a mix of residential and neighborhood-scale commercial. While main streets typically serve the surrounding community, they may develop a regional specialization. They may have a village or urban character. Their growth and development will occur in tandem with changes to the surrounding neighborhood. Main streets in Southwest Portland are Garden Home, Macadam, and Multnomah.

The Mixed Use Zone Project was a logical place to implement the SWCP's Vision and Objectives as they relate to Multnomah Village. However the SWCP is not even mentioned in the Mixed Use Zones Project – Recommended Draft.

Therefore, Task 5 failed to address and implement the SWCP in the adopted zoning for Multnomah Village. It also violated the Citizen Involvement Objectives of the SWCP, cited below:

5. Use the Southwest Community Plan policies and objectives to create, develop, implement or evaluate new citywide policies, programs, or project proposals to ensure that the concerns of the Southwest community are addressed.

The historic character of Multnomah Village has made it a top candidate for historic designation and protection in the past. In a 1978 report by the Portland Bureau of Planning titled *Potential Historic Conservation Districts*, Multnomah Village was selected as one of the top 16 sites in the City from an initial group of 50 candidate sites.⁶ The report states:

These areas were selected primarily as collections of individual properties and features, which although often singularly unremarkable, are combined in an ensemble representative of a distinctive period in Portland's history or which typify a unique Portland quality.

Around the same time as the *Southwest Community Plan* was being developed, the MNA was encouraged by State officials and the City Planning Bureau to pursue the creation of an historic district. However, after a two-year process by a MNA subcommittee that involved historical documentation of every property and the consultation of a PSU historian in extensive interviews with a variety of property owners and elder residents of the area, a proposal submitted by the MNA was ultimately rejected by the Planning Bureau.

In the City's partial response to public input in the Mixed Use Zones Project – Recommended Draft, cited previously under **Issue 3.A.**, the City acknowledges the historic character of this area:⁷

The recommended draft includes new mapping and Zoning Code regulations intended to continue the scale and characteristics of a few older main street areas where low-rise (1 to 2 story) Streetcar Era storefront buildings are predominant. This responds to community interest in preserving the character of these areas, which are often the historic commercial cores of centers, while being applied strategically to retain ample capacity for growth in the majority of mixed use areas.

The CM2 zoning fails to comply with Statewide Goal 5 (OAR 660-015-0000(5)), which requires protection of historic areas like Multnomah Village. Goal 5 states:

Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces

⁶ See:

http://www.oregon.gov/oprd/HCD/OHC/docs/multnomah_portland_potentialconservationdistricts.pdf

⁷ Mixed Use Zones Project – Recommended Draft of August 2016 on pages 44 and 45 under the heading "Low-rise Commercial Storefront Areas."

To protect natural resources and conserve scenic and historic areas and open spaces.

Local governments shall adopt programs that will protect natural resources and conserve scenic, historic, and open space resources for present and future generations. These resources promote a healthy environment and natural landscape that contributes to Oregon's livability.

Under "Guidelines for Goal 5," "Planning," it states:

4. Plans providing for open space, scenic and historic areas and natural resources should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided for by such plans should not exceed the carrying capacity of such resources.

Action Requested

OAR 660-025-0140(2)(c) Suggest specific revisions that would resolve the objection;

The MNA is requesting that Task 5 be partially remanded to include specific actions to protect the character of Multnomah Village through clear and objective standards. These standards should limit building heights to three stories to help assure the compatibility of new development. The Village is on a hillside with a large number of lots with streets on opposite sides. The measurement of height of new development on lots with more than one street frontage, the building height should be measured from the street frontage with the lowest elevation. The City should achieve this through either a plan district or through a base zone that preserves the historic neighborhood character.

Extensive public testimony supports using the new CM1 zone to replace the old CS zoning. The City instead elected to apply CM2 zoning to most of the commercial property in Multnomah Village. We are requesting that all CS commercial storefront in the Village be designated CM1 zoning.

According to Title 33, Planning and Zoning, Plan Districts in General, Section 33.500.010 Purpose: "Plan districts address concerns unique to an area when other zoning mechanisms cannot achieve the desired results." Therefore, a plan district could be a suitable alternative to zoning for limiting heights and assuring development is compatible with the neighborhood.

