



# Oregon

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February 22, 2018

TO: Land Conservation and Development Commission

FROM: Jim Rue, Director  
Anne Debbaut, Metro Regional Representative  
Gordon Howard, Community Services Division Manager

SUBJECT: **Agenda Item \_\_, March 15-16, 2018, LCDC Meeting**

**APPEAL OF DIRECTOR'S DECISION TO APPROVE  
CITY OF PORTLAND PERIODIC REVIEW TASKS 4 AND 5,  
POLICY CHOICES AND IMPLEMENTATION**

**I. AGENDA ITEM SUMMARY**

**A. Type of Action and Commission Role**

The matter before the Land Conservation and Development Commission (commission) is an appeal of the approval of the City of Portland's periodic review Tasks 4 and 5 submittal by the Director of the Department of Land Conservation and Development (director), consisting of several amendments to the city's comprehensive plan. The department received six appeals. One appeal is from an individual property owner appealing Tasks 4 and 5 regarding the land use designation of an individual property. Five appeals are from the Multnomah Neighborhood Association (MNA) in Southwest Portland, three of which are for Task 4 and two of which are for Task 5. The MNA appeal is regarding a number of items related to the 2035 comprehensive plan map, goals and policies related to housing, zoning map amendments and zoning code amendments.

The director did not receive any objections to the remainder of the city's Task 4 and 5 submittal, which included: two citizen involvement reports; a public facilities plan; a list of infrastructure projects (water, sewer and drainage); policies addressing Portland International Airport expansion, Portland Heliport and coordination with school facilities plans; goals and policies of the transportation system plan, street classifications, and list of transportation projects; and, comprehensive plan amendments and policy language to incorporate major public trails into the land use map. None of these other matters are before the commission for review.

On an appeal of a director's decision, the commission must make a decision pursuant to OAR 660-025-0160(7). Following the public hearing, the commission must either:

- (a) Approve the work task or a portion of the task;
- (b) Remand the work task, or a portion of the work task to the local governments, including a date for re-submittal;
- (c) Require specific plan or land use regulation revisions to be completed by a specific date.
- (d) Amend the work program to add a task authorized under OAR 660-025-0170(1)(b); or
- (e) Modify the schedule for the approved work program in order to accommodate additional work on a remanded work task.

## **B. Staff Contact Information**

If you have questions about this agenda item, please contact Anne Debbaut, DLCD Regional Representative, at (503) 725-2182 or [anne.debbaut@state.or.us](mailto:anne.debbaut@state.or.us).

## **II. RECOMMENDED ACTION**

The department recommends that the commission reject the six objections to the director's decision approving periodic review tasks 4 and 5, and approve the two work tasks.

## **III. BACKGROUND AND DESCRIPTION OF SUBMITTAL**

### **A. Background**

Portland's periodic review work program is organized to carry out the comprehensive plan update in several procedural phases rather than updating sections of the plan separately from each other. The work program includes the following tasks:

***Task 1, Community Involvement.*** This task includes appointment of a Citizen Involvement Committee (complete) and reliance on the committee to assist the city with completion of subsequent tasks. This task is also the subject of this decision as the task includes an evaluation of community involvement leading up to the adoption of each Task 2,3,4, and 5 products.

***Task 2, Inventory and Analysis.*** This task includes inventories and analyses establishing the factual basis for later tasks. The commission approved this task in LCDC order 14-WKTSK-001850 on June 11, 2014.

***Task 3, Consideration of Alternatives.*** This task includes updates of the inventories completed in task 2, adoption of an economic opportunities analysis (EOA), and identification of the consequences of alternative patterns of development. The department director approved this task in DLCD Order 001882 on April 25, 2017.

***Task 4, Policy Choices.*** Task 4 is a subject of this review. This task includes decisions related to the city's economic, housing, public facilities and transportation elements of the comprehensive plan as well as the comprehensive plan map. These decisions are informed by preliminary work

in tasks 2 and 3. The contents of this task submittal are listed in Section C of this report. The appeals concern only some of these elements.

**Task 5, Implementation.** Task 5 is also a subject of this review. This task is intended to carry out the policy decisions made in previous tasks. The contents of this task submittal are listed in Section C of this report. The appeals concern only some of these elements.

## **B. Procedural History**

The submittals before the department for review includes task 4, Ordinance No. 187831, adopted by Portland on June 15, 2016, and task 5, Ordinance No. 188177, adopted by Portland on December 21, 2016.

1. On April 28, 2017, pursuant to OAR 660-025-0140 (1), the city submitted task 4 to the department.
2. On May 18, 2017, pursuant to OAR 660-025-0150(3), the city submitted a waiver of the 120-day deadline for a department decision on task 4.
3. Pursuant to OAR 660-025-0140(2)(a), the deadline to file objections to the task 4 submittal was May 19, 2017. The department received 11 letters of objection.
4. On August 7, 2017, pursuant to OAR 660-025-0140(1), the city submitted task 5 to the department.
5. Pursuant to OAR 660-025-0140(2)(a), the deadline to file objections to the task 5 submittal was August 28, 2017. The department received six letters of objection.
6. On December 5, 2017, pursuant to OAR 660-025-140, the department issued Order 001892 approving both Task 4 and 5 submittals, and either rejecting or invalidating all of the objections.
7. Pursuant to OAR 660-025-0150(6)(c), the deadline to file an appeal of the director's decision was December 26, 2017. The department received 6 letters of appeal.

As part of department Order 001892 (December 5, 2017) and pursuant to OAR 660-025-140, the department determined that of the 11 Task 4 letters of objection, the following objections were determined to be invalid: Kenny (4-2), Rose City Park Neighborhood Association (4-3), Davis (4-4b), Root (4-5), Malcom (4-8) Goose Hollow, *et al.* (4-9) and James Peterson (4-11); and that of the 6 Task 5 letters of objection, the following objections were determined to be invalid: Mascott LLC, *et al* (5-1), Ramsour (5-2), Multnomah Neighborhood Association 5-6b and c, and the Rose City Park Neighborhood Association (5-7). The remaining objections were determined to be valid.

One of the 6 letters of appeal is from James Harries and 5 are from the Multnomah

Neighborhood Association. More specifically, 3 of the 5 are from Eben` Fodor, representing the association and 2 are from James Peterson and Carol McCarthy, also representing the association.

### **C. MAJOR LEGAL AND POLICY ISSUES**

The objections submitted to the department regarding the Portland Periodic Review Tasks 4 and submittal raise the following significant issues:

1. Whether the city complied with its community involvement work program, an implementation of Statewide Planning Goal 1: Citizen Involvement for the periodic review work program, and:

- Provided information that enables citizens to identify and comprehend the issues.
- Provided information necessary to reach decisions in a simplified, understandable form.
- Involved all citizens, and not just “communities,” in all phases of the planning process.
- Provided appropriate responses to citizen input to the periodic review planning process.

2. Whether the city complied with Statewide Planning Goal 2: Land Use Planning for the periodic review program, and:

- Established an appropriate policy framework as a basis for the periodic review decisions.
- Assured an adequate factual basis for the periodic review decisions.
- Coordinated periodic review plans and implementation measures with the plans of affected governmental units, including the city itself.

3. Whether the city has included all necessary implementation measures for the periodic review work program in its Task 5 submittal.

### **IV. REVIEW CRITERIA, PROCEDURAL REQUIREMENT & WRITTEN RECORD**

#### **A. Decision-making Criteria**

The substantive criteria for these periodic review tasks 4 and 5 include: Goal 1 (Citizen Involvement) and Goal 2 (Land Use Planning); those aspects of Goal 7 (Areas Subject to Natural Hazards) to the extent that they relate to policy and implementation; Goal 9 (Economic Development) as it relates to policy and implementation of economic needs; Goal 10 (Housing) as it relates to policy and implementation of housing needs; Goal 11 (Public Facilities and Services) as it relates to policy and implementation of infrastructure needs; Goal 12 (Transportation) as it relates to policy and implementation of transportation needs; and all of the applicable Oregon administrative rules. Some of these provisions include other goals and rules by reference.

## **B. Procedural Requirements and Validity of Appeal**

OAR 660-025-0150(6)(b) provides that persons who filed a valid objection may appeal a director's approval or partial approval of a work task to the commission.

OAR 660-025-0150(6)(c) provides that appeals of a director's decision must be filed with the department's Salem office within 21 days of the date the director's action was mailed.

OAR 660-025-0150(6)(d) provides that a person appealing the director's decision must:

- (A) Show that the person participated in the local proceedings leading to adoption of the work task orally or in writing;
- (B) Clearly identify a deficiency in the work task sufficiently to identify the relevant section of the submitted task and the statute, goal, or administrative rule the local government is alleged to have violated; and
- (C) Suggest a specific modification to the work task necessary to resolve the alleged deficiency.

OAR 660-025-0160(6) and ORS 197.633(3) provide that the commission will hear appeals based on the local record.

OAR 660-025-0085(5)(c) provides that oral argument is allowed from the local governments and those who filed an appeal. The local governments may provide general information on the task submittal and address those issues raised in the department review and appeal. OAR 660-025-0085(5)(f). Persons who submitted an appeal may address only those issues raised in their appeal. *Ibid.* The commission may take official notice of certain laws, as specified in OAR 660-025-0085(5)(h).

OAR 660-025-0160(7) provides that, in response to an appeal, the commission must issue an order that does *one or more* of the following:

- (a) Approve the work task or a portion of the task;
- (b) Remand the work task, or a portion of the work task to the local governments, including a date for re-submittal;
- (c) Require specific plan or land use regulation revisions to be completed by a specific date.
- (d) Amends the work program to add a task authorized under OAR 660-025-0170(1)(b); or
- (e) Modifies the schedule for the approved work program in order to accommodate additional work on a remanded work task.

The department received six letters of appeal, one is from James Harries and five are from the Multnomah Neighborhood Association (MNA #1-5). Three of these five are from Eben Fodor, representing the neighborhood association and two from James Peterson and Carol McCarthy, on behalf of the Multnomah Neighborhood Association.

The department has determined that two of the four elements of the MNA 5 appeal (b and c) were previously determined in the Director's Decision (Order 001892) to be invalid as they did not identify the relevant section of the statute, goal, or administrative rule the local government is alleged to have violated.

### **C. Standard of Review**

ORS 197.633(3) and OAR 660-025-0150(9) provide the standard of review for the commission, which is expressed in OAR 660-025-0160(2):

- (a) For evidentiary issues, whether there is substantial evidence in the record as a whole to support the local government's decision.
- (b) For procedural issues, whether the local government failed to follow the procedures applicable to the matter before the local government in a manner that prejudiced the substantial rights of a party to the proceeding.
- (c) For issues concerning compliance with applicable laws, whether the local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations. The commission shall defer to a local government's interpretation of its comprehensive plan or land use regulation in the manner provided in ORS 197.829.... For purposes of this subsection, "complies" has the meaning given the term "compliance" in the phrase "compliance with the goals" in ORS 197.747.

### **D. Procedural Requirements**

OAR 660-025-0085(5) provides commission hearing procedures.<sup>1</sup>

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<sup>1</sup> Commission hearings will be conducted using the following procedures:

- (a) The chair will open the hearing and explain the proceedings;
- (b) The director or designee will present an oral report regarding the nature of the matter before the commission, an explanation of the director's decision, if any, and other information to assist the commission in reaching a decision. If another state agency participated in the periodic review under ORS 197.637 or 197.638, the agency may participate in the director's oral report.
- (c) Oral argument will be allowed. The local government or governments whose decision is under review and parties who filed objections or an appeal may present oral argument. Oral argument will not be an opportunity to present new evidence regarding the matter before the commission. The local government that submitted the task may provide general information on the task submittal and address those issues raised in the department review, objections and the appeal. Persons who submitted objections or an appeal may address only those issues raised in objections or the appeal. Other affected local governments may address only those issues raised in objections or the appeal.
- (d) The commission may request new evidence or information at its discretion and will allow the parties an opportunity to review and respond to the new evidence or information, subject to the time limits in section (2) of this rule.

### **E. The Written Record for This Proceeding**

OAR 660-025-0160(6) provides: “The commission shall hear appeals based on the local record. The written record shall consist of the submittal, timely objections, the director’s report, timely exceptions to the director’s report including materials described in section (5) of this rule, the director’s response to exceptions and revised report if any, and the appeal if one was filed.”

At the time of this report, the written record includes the following materials.

1. This DLCD staff report.
2. Three letters of appeal of director’s approval order filed by Eben Fodor, Fodor & Associates LLC, on behalf of the Multnomah Neighborhood Association, dated December 26, 2017 (Attachment B).
3. Two letters of appeal of director’s approval order filed by James Peterson and Carol McCarthy on behalf of the Multnomah Neighborhood Association, dated December 26, 2017 (Attachment B).
4. Appeal of director’s approval order filed by James Harries, dated December 15, 2017 (Attachment B).
5. DLCD Order 001892, dated December 5, 2017, approving the submittal, which includes responses to objections submitted by the appellants in this proceeding. (Attachment A).
6. Objections received to the City of Portland periodic review task 5 submittals.
7. Periodic Review Task 5 submittal, consisting of:

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(e) The director or commission may take official notice of law defined as:

(A) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States.

(B) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.

(C) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any state, territory or possession of the United States.

(D) Rules of court of any court of this state or any court of record of the United States or of any state, territory or other jurisdiction of the United States.

(E) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(F) An ordinance, comprehensive plan or enactment of any local government in this state, or a right derived therefrom.

(f) The commission must make a decision on the appeal or referral as provided in this division.

- Community Involvement Report for Task 5
- Zoning map amendments to implement the adopted 2035 Comprehensive Plan
- Zoning code amendments to implement the adopted 2035 Comprehensive Plan
- Task 4 transportation system plan amendments to add additional policies and update street classifications
- Task 4 comprehensive plan amendments to incorporate major public trails into the land use map, and corrections to policy language

8. Objections received to the City of Portland periodic review task 4 submittals

9. Periodic Review Task 4 submittal, consisting of:

- Community Involvement Report for Task 4 (submitted with Task 3)
- 2035 comprehensive plan map
- Goals and policies comprising the economic and housing elements of the 2035 comprehensive plan
- Public Facilities Plan – Citywide System Plan (submitted with Task 3)
- List of infrastructure projects: water, sewer and drainage
- Policies addressing Portland International Airport expansion, Portland Heliport and coordination with school facilities plans
- Goals and policies of the Transportation System Plan and list of transportation projects.

## **V. DEPARTMENT ANALYSIS AND RESPONSE TO APPEALS**

### **A. Content of Appeal**

The department's review of the original decision and objections are contained in the director's report attached to Order 001892 (Attachment A). The department received 6 letters of appeal to the director's order approving the submittal (Attachment B). The department's responses to the appeals use the numbering displayed below. We have retained the same identifying numbers from Order 001892 for clarity:

#### **1. Task 4 Appeals**

4-1 James Harries (indicated in his appeal letter that he was appealing 4 and 5. Previously appealed Task 4 only)

4-6 Multnomah Neighborhood Association #1, Eben Fodor

4-7 Multnomah Neighborhood Association #2, Eben Fodor

4-10 Multnomah Neighborhood Association #3, Carol McCarthy and James Peterson

#### **2. Task 5 Appeals**

5-5 Multnomah Neighborhood Association #4, Eben Fodor

5-6 Multnomah Neighborhood Association #5, Carol McCarthy and James Peterson

## **B. Department Response to Appeals – Tasks 4 and 5**

### **1. Appeal 4-1 – James Harries**

The director's decision included a response to the same Harries objection that has been raised in this appeal. Mr. Harries asserts again that the city has not properly evaluated his properties. He asserts that no one has bothered to visit or set foot in the area, and if planners and commissioners had come to the property, they would have discovered the vegetation is comprised of an invasive species and that further development would eliminate the invasive species as well as further a city and state environmental goal. He requests an error from a previous SW Neighborhood Plan (adopted prior to this proposed plan and referenced in his earlier objection) be corrected and the property returned to the pre-Southwest Neighborhood Plan R-10 designation from the current R-20 designation, which would allow the property to be subdivided. He contends that the alleged deficiency noted in the appeal is that the city has not followed "reasonable procedure", whereas his previous objection that local and statewide land use goals call for increasing density within city limits, is not repeated in the appeal letter. Attachment B at 1.

The proposed remedy is to change the plan map and zoning from R-20 to R-10.

### **Department Response:**

The department recommends the commission reject this appeal. In a February 25, 2015 city staff Memorandum to the Planning and Sustainability Commission, beginning in Task 4 record at 19501 (Housing Affordability and Residential Capacity) there is a section titled "Proposed down-designations to address natural hazards, drainage concerns and infrastructure constraints." Task 4 Record at 19533-19538. The proposal summary states:

*"The Draft Comprehensive Plan proposes to reduce potential future residential development in areas that are characterized by natural hazard risks (e.g., landslide, wildfire, earthquake, flooding), and drainage challenges due to steep slopes, poorly draining soils, wetlands, seeps, springs, and /or vulnerable stream channels. Most of these areas also have existing infrastructure constraints, including limited storm water, water supply, or sanitary system capacity, and lack of street and/or sidewalk connectivity.*

*The amount of additional development allowed under the current Comprehensive Plan designation and zoning would increase impervious areas and remove trees on steep slopes, increasing existing hazard risks, drainage problems, and demand on limited infrastructure capacity. Reducing future development will not solve existing problems in these areas, however, it will help protect public health and safety by reducing future risks and impacts associated with new development"*

#### Task 4 Record at 19534

The memorandum identifies the location of the areas affected by the above analysis, one of which is the, “Southwest hills: Near Tryon Creek State Park or Marshall Park; along the west and northwest boundaries of the City and Multnomah County; near Council Crest; just north and south of the Sunset Hwy adjacent to the Hoyt Arboretum; and just South of West Burnside along SW Skyline”. Task 4 Record at 19534. The appellant’s property is located within this affected area in the Southwest hills near Tryon Creek State Park and Marshall Park.

The city further describes the methodology for their proposal and concludes with the following (note that a polygon is described as a cluster of contiguous dividable lots):

*“In conclusion it is important to emphasize that analysis was conducted and polygon boundaries drawn primarily using an area-scale focus, rather than a property-by-property focus. Some characteristics (e.g., steep slopes, landslide and wildfire hazard, storm water or water supply constraints) are shared across most polygons. However each polygon is unique in its location, character, and combination of issues and constraints that provide the basis for this draft proposal. The occurrence and severity of natural hazards and other constraints also vary within the individual polygons. The proposal as applied to each polygon is intended to reduce future natural hazard risks and infrastructure deficiencies and costs resulting from the cumulative impacts of development at an area scale. This analysis does not suggest that individual parcels could not be safely developed; instead, we are focused on **potential cumulative impacts** within the area in question.”*

#### Task 4 Record at 19534.

The Harries’ request also came before City Council on April 28, 2016, and the council concluded that the property is appropriately designated as R-20. Task 4 Record at 10677.

In conclusion, staff finds the city made an evaluation of an area including the appellant’s property and concluded there were sufficient natural hazards, drainage concerns or infrastructure constraints or some combination of that to support the retention of the R-20 zone on the subject property.

## **2. Appeal 4-6 – Multnomah Neighborhood Association #1**

The Multnomah Neighborhood Association objects to the process leading to, and the final result of, Middle Housing Policy 5.6, quoted here:

*Enable and encourage development of middle housing. This includes multi-unit or clustered residential buildings that provide relatively smaller, less expensive units; more units; and a scale transition between the core of the mixed use center and surrounding single family areas. Where appropriate, apply zoning that would allow this within a quarter mile of designated centers, corridors with frequent service transit, high capacity transit stations, and within the Inner Ring around the Central City.*

The appeal is divided into four issues: 1) Lack of Adequate Information to Inform Citizens; 2) Lack of Need and Factual Basis for Policy; 3) Lack of Plan Consistency and Failure to Plan in a Comprehensive Manner; and 4) Lack of Adequate Response to Public Input.

Before discussion of the specific issues raised in the appeal, it should be noted that the remedy proposed by the Multnomah Neighborhood Association is that the commission partially remand task #4 of the periodic review to allow for proper comprehensive planning and public involvement for the Middle Housing Policy 5.6. This would include the development of complete, neutral, and objective public information about the policy proposal. Specifically, the city would be directed to analyze the impact of the policy on housing costs, and disseminate needed information, such as maps of affected areas, to the city's citizenry. Attachment B at 25.

#### **a. Lack of Adequate Information to Inform Citizens**

The appeal asserts that the city first formally introduced what became the Middle Housing Policy as a "vague, generalized concept" in a February 2016 memo to Portland Mayor Hales from the city's planning bureau, more than six years after the periodic review work program was approved by LCDC in 2009. Attachment B at 3-4. The appeal notes that an earlier reference to the Middle Housing Policy in an October, 2015 staff report offered no notice to the public that such a policy was under consideration. Attachment B at 4-5. The appeal asserts that the February, 2016 memo itself, was an extremely non-specific proposal that did not provide any factual evidence or basis for its assertions. Attachment B at 5-6. The appeal notes that in March, 2016 the middle housing policy was formally introduced for consideration by the Portland City Council, again without a balanced staff report supported by factual evidence, and with information about the consequences if the middle housing policy were adopted. Attachment B at 6-9. The appeal notes that the middle housing policy was adopted in June, 2016, only three months after its introduction. The appeal asserts that maps of the areas affected by the policy, which impacts large swaths of the city's low density zoned neighborhoods, were not made available until 2 days before, and for many parts of the city, after, the Portland City Council adopted the policy. Attachment B at 9-13.

The appeal alleges that this series of events violates Goal 1, which states "the citizen involvement program shall be appropriate to the scale of the planning effort," and "the program shall provide for continuity of citizen participation and of information that enables citizens to identify and comprehend the issues." Attachment B at 7. The appeal notes that these Goal 1 provisions are implemented by the city's Community Involvement Work Program. Attachment B at 8-9. The appeal alleges that this series of events also violates Goal 2, which states that "sufficient time should be allotted for ... incorporation of citizen needs and desires and development of broad citizen support," and "inventories and other forms of data are needed as the basis for the policies and other decisions set forth in the plan." Attachment B at 9.

#### **Department Response**

The department recommends that this portion of the appeal be rejected by the commission. The

original objection regarding this issue focused on alleged procedural and technical violations of the city's own community involvement work program. The department decision rejected those assertions. However the appeal makes a more general attack on the city's process for disseminating public information and soliciting public involvement in the decision-making process for the Middle Housing policy.

This revised assertion is more difficult to judge against the city's adopted Community Involvement Work Program. Whereas determining whether a report was available at least 21 days before any City Council hearing is a reasonably straightforward matter, determining whether "information needed to make decisions [is] presented in a simplified and understandable form," and whether a report "contain[s] the facts and reasons necessary to make particular decisions," (both provisions in the city's Community Involvement Work Program adopted to comply with the city's Goal 1 obligations) are a much more subjective endeavor.

The February 2, 2016 memo to Mayor Hales from the Bureau of Planning and Sustainability can be found in the record for Task 4 at 11727-11730. Whether the memo is sufficient, by itself, to satisfy the city's commitments set forth in its adopted Community Involvement Work Program, is a matter of judgment. However this is not the only information in the record, or even in general public discourse regarding the issue of "middle housing." As stated in the department's decision, the issue actually arose earlier in the process, in a City Council work session on October 8, 2015. Task 4 Record at 11906 and 11916. The summary discussion presented to the Portland City Council at the February 2, 2016 work session where this memo was introduced states that the middle housing memo and presentation of policy options was written "in response to interest from several council offices, and recent hearing testimony." Task 4 Record at 11710. The February 2, 2016 materials also reference a report issued by Metro on Innovative Design and Development Codes and the "Eli Spevak proposal," Task 4 Record at 11720. Mr. Spevak is a well-known proponent of "missing middle" housing of the type contemplated by the city's adopted middle housing policy, and contributions from him prior to February, 2016 are contained in the compilation of testimony the Council received. See, e.g. Task 4 Record at 8059-8062. Given this additional information in the record, the department recommends that the commission find the city did satisfy the requirements of its adopted Community Involvement Work Program to provide information "in a simplified and understandable form" and containing "the facts and reasons necessary to make particular decisions." In addition to answering the Goal 1 violation allegations asserted in this appeal, the narrative of events described in this paragraph refutes a portion of the appeal's alleged Goal 2 violations, relating to "sufficient time ... allotted for ... incorporation of citizen needs and desires and development of broad citizen support."

Regarding the allegations of Goal 2 violations, the one specific assertion is that the city did not provide maps of the properties affected by the proposed middle housing policy in a timely manner. These maps showed the areas that could potentially be rezoned during the implementation of the adopted middle housing policy. However, the objector reads too much into the city's decision – adoption of this policy did not result in any actual rezoning of low-density residential lands in the city that met the locational criteria for consideration under the policy. The policy commits the city to a future analysis and determination as to which specific areas and properties, if any, are suitable for redesignation to allow the housing types

contemplated in the adopted middle housing policy. Thus the maps that the city provided at the end of its plan adoption process, or afterward, were not necessary for the city to make its decision with an appropriate factual basis. They are certainly key to a subsequent city decision, which will undoubtedly include extensive citizen input, as to where (if anywhere) the city should actually apply zoning contemplated by the adopted middle housing policy.

#### **b. Lack of Need and Factual Basis for Policy**

The appeal asserts that there is a lack of any factual evidence or basis for a middle housing policy, with no support in the fundamental documents of the Comprehensive Plan such as the housing needs analysis. The appeal asserts that the housing needs analysis shows no need for additional residential housing capacity in the city, because more than adequate capacity is available to meet demand through the 20-year planning period. Attachment B at 14-15. The appeal asserts that the housing needs analysis shows that the diversity of housing type production provided by existing zoning is sufficient to produce housing units to meet future demand across of a variety of income levels, with the exception of low income housing groups. Attachment B at 16. The appeal cites two analyses of the middle housing designation, prepared in 2016, which show that the middle housing policy will actually reduce the supply of affordable housing by incentivizing redevelopment of smaller affordable older homes with new market-rate units. Attachment B at 16. The appeal notes that the city-adopted growth scenarios report discusses targeted rezones to higher density in selected refinement plans, not the wholesale rezoning resulting from the adopted middle housing policy. Attachment B at 16-17. The appeal asserts that the city made no mention of any study or consideration of a city-wide rezoning of residential land as will happen under the middle housing policy in its periodic review program. Attachment B at 17-19.

The appeal alleges that this lack of data or information to support the middle housing policy violates Goal 2, which requires a factual basis for the policies and other decisions. The appeal notes that the approved periodic review work program contains no mention of the middle housing policy, which means that the policy is not consistent with the city's adopted periodic review work program. The appeal alleges that the city did not provide notice of any change to the periodic review work program as required by OAR 660-025-0080. Attachment B at 19.

#### **Department Response**

The department recommends that this portion of the appeal be rejected by the commission. The city has provided findings and conclusions based on substantial evidence regarding reasons the city adopted Policy 5.6. The reasons for adoption of this policy, which received significant public input both for and against, are succinctly summarized as follows:

*The 2035 Comprehensive Plan provides enough zoned capacity to meet expected housing needs over the next 20 years. However, the 2035 Comprehensive Plan also highlights and addresses the need for more housing in the range between the single-family houses and units in larger multi-family or mixed-use buildings. There is growing demand for greater housing supply and choice in terms of price, size, location, tenure options and accessibility.*

- *Less expensive. Creating more middle housing opportunities with the plan may help relieve some price pressure. Generally, these forms of housing can be built using wood frame construction methods. They are less expensive to build than 4-6 story mixed use buildings, and are more land-efficient than detached single family homes. Middle housing can also serve as a transition between denser mixed-use development and abutting single dwelling neighborhoods.*
- *Home ownership. Although home ownership is generally beyond the reach of the lowest income groups, there is also a challenge in supplying enough entry-level homes to meet expected demand. Most of the City's single-family supply is single-family lots in the 5,000-7,000 square foot range, while most of the expected demand over the next 20 years is for more affordable lots in the 1,600 to 4,000 square foot range. Much of the available land for additional single-family construction is in East Portland and outer Southwest Portland, while demand is highest in the inner most neighborhoods. Construction of more attached homes could help meet this demand.*
- *Access to complete communities. The 2035 Comprehensive Plan promotes compact development within walking distance of neighborhood and town center locations. To achieve our "complete neighborhood" goals, we want to be able to have about 3,500 to 7,000 households within a walkable 1/2-mile distance of our commercial main streets. Many centers are not yet to this level of density. Zoning for more attached housing options near the edges of the identified centers could be a way to help achieve that goal.*
- *Choice. There is demand for greater range of housing types that are adaptable to different life stages, and multigenerational living. Surveys have also suggested that many apartment dwellers would prefer to live in their own home, if they can afford it. While it is prudent to supply enough multifamily housing to meet rising demand for that housing type, it may also be desirable to provide other options.*

Task 4 Record at 45-46.

The department also finds the argument proffered in the objection that allowing greater densities in some neighborhoods will result in the demolition of less expensive housing, resulting in a loss of affordability is not supported by any evidence in the record or provided in the objection. The two sources noted in the appeal do not appear in the record provided by the city, and thus are outside the scope of review for this decision. In any case, the city's findings on this topic address this issue generally as follows:

*State planning law requires that housing needs be analyzed and identified by affordability, and requires that land be made available in sufficient supply to accommodate the amount of affordable housing needed. Allowing for a robust supply of inherently more affordable housing types (small studio apartments, ADUs, small-lot single family, etc.) does not mean that these housing units will actually be affordable in practice. In a market economy, housing is allocated to the highest bidder. If supply is limited, the price of even the more affordable housing types can be bid up. In addition, new housing is typically more expensive than older housing. Not all new households will occupy new housing units. Higher income households will often occupy new*

*housing units, leaving older units to lower income households. If housing supply is tight, the price of older housing units can also be bid up. In light of these market dynamics, the primary impact of zoning on affordability will be the extent to which it allows for an adequate overall supply, and allows for a diverse mix of housing. The facts described above show that the Zoning Map adopted with this ordinance does this. Based on the facts and reasons stated above, the requirement to allow a diverse range of housing choices has been met.*

Task 5 Record at 45.

Goal 2 requires the city “[t]o establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.” Goal 2 further provides that “[a]ll land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs.” The summary provided above, and the additional material in the record upon which it is based, demonstrates that the city adopted Policy 5.6 with an adequate factual base, and made an “ultimate policy choice” based upon: (1) the need for more housing with higher densities than single-family houses and lower densities than larger multi-family or mixed use buildings, and (2) the positive impacts on housing expense, home ownership, access to complete communities and housing choice provided by the policy.

While the objectors do not agree with the city’s decision, the department’s review of the submittal for Goal 2 compliance is not whether the city made the “correct” decision, but rather whether the city’s decision is supported by an adequate factual base, which is the equivalent of the requirement in ORS 197.633(3)(a) that the decision is based upon substantial evidence in the record as a whole. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

Regarding the alleged violation of OAR 660-025-0080, the appeal misreads the purpose of this administrative rule. It requires that the actual amendments to a city’s comprehensive plan be included in notice to the department as provided in requirements for post-acknowledgment plan amendments. The department records indicate that this notice was received on August 7, 2014.

### **c. Lack of Plan Consistency and Failure to Plan in a Comprehensive Manner**

The appeal asserts that the impact of the late addition of the middle housing policy is greatly amplified and compounded by other policies in the comprehensive plan, and creates conflicts with other policies. The compounding of policies issue is described in a separate objection regarding the designation of Multnomah Village as a “center.” The appeal alleges that the middle housing policy is in conflict with another policy, promoting family-friendly housing options, because the middle housing policy will produce smaller units that are not conducive to larger families and therefore cannot be considered consistent with the policy promoting family-friendly housing options. Attachment B at 20. The appeal asserts that the term “family friendly” housing implies housing that can accommodate families with children, and this means generally housing

with three or more bedrooms. The appeal alleges that the middle housing policy also represents a significant deviation from the work program tasks as approved by the department in 2009, which call for meeting identified housing needs (middle housing is not an identified need) and preserving the existing stock of affordable housing (middle housing will result in the destruction of much of this stock). Attachment B at 20-21.

The appeal asserts that the result of these action is that the city's decision directly violates Goal 2 and ORS 197.015(5), which defines "comprehensive plan" in a manner that interrelates functional and natural systems and activities relating to the use of lands, and defines "coordinated" as occurring when the needs of all levels of governments and citizens have been considered and accommodated as much as possible. The appeal alleges that the last minute nature of the middle housing policy resulted in a failure to conduct comprehensive planning. Attachment B at 22.

### **Department Response**

The department recommends that this portion of the appeal be rejected by the commission.

The "compounding" of the effect of different plan policies will also be addressed in the staff report in response to the separate objection regarding the designation of Multnomah Village as a "center."

The department does not agree that the objection has established that Policy 5.6 and Policy 5.5, Housing Centers, are in conflict regarding the provision of "family-friendly" housing. The term "family-friendly" is not defined in the Portland Comprehensive Plan, and could mean many different things to different people, not necessarily including the presence of children. The objection does not provide any evidence, nor does anything in the record provide any indication, that a "family," even a family with children, is less likely to live in a smaller housing unit, or a rental unit, than it is likely to live in a larger housing unit, or a unit owned by its occupant (especially if income constrains the choices of a particular "family" regarding unit size). The department does not perceive any conflict between the middle housing policy and the policy promoting family-friendly housing.

Finally the department does not perceive any conflict between the periodic review work program and the middle housing policy as adopted. Contrary to the assertions of the appeal, Portland has identified a need for middle housing as described above. Portland has also countered the assertions stated in the appeal that the middle housing policy will reduce housing affordability. Given the city's findings, the middle housing policy is an appropriate response to the periodic review work program.

#### **d. Lack of Adequate Response to Public Input**

The appeal asserts that, contrary to an assertion by the city that the middle housing policy was written in response to interest from several council offices and recent hearing testimony, a detailed search of the record indicates that only four individuals commented on this topic before

it was officially introduced on February 2, 2016. In contrast, the appeal notes, after the policy was introduced the city received 157 comments on the policy, 2/3 of which were negative, and in addition more than a quarter of the positive comments were generated by two individuals. Attachment B at 23. This despite the short period of time between February, 2016 and adoption of the policy later in the year by the Portland City Council, as noted in the appeal. The appeal notes that the council's response to the testimony in the findings for Task 4 consists of one sentence, which states "opponents of policy 5.6 viewed the policy as effectively rezoning land," and a follow-up sentence stating that the council disagreed with this statement. Attachment B at 24.

The appeal alleges that this sequence of events violates Goal 1, which requires a "feedback mechanism," or a process for quantifying and synthesizing citizens' attitudes that is developed and reported to the general public. Attachment B at 24.

### **Department Response**

The department recommends that this portion of the appeal be rejected by the commission. Whatever the specific origins of the middle housing policy, as the appeal documents, after the policy was introduced the city received a lot of testimony on the subject. It was the Portland City Council's prerogative to weigh the testimony and use the information as input into its decision, and it appears that, despite the majority of testimony being opposed to the policy, the city council considered the positive testimony and the information provided by its professional staff to be more persuasive. Characterization of a majority of testimony received as being opposed to the eventual result, as the appeal alleges, is not a basis for remand of a city decision under either Goal 1 or Goal 2. And the council's finding that the policy did not constitute a rezone of property is, in the considered judgment of the department, correct, as is discussed elsewhere in this report.

### **3. Appeal 4-7 – Multnomah Neighborhood Association #2**

The Multnomah Neighborhood Association objected to the designation of Multnomah Village, a community in Southwest Portland, as a neighborhood center. The neighborhood association, throughout the process which led to the completion of this task, requested that Multnomah Village be designated as a neighborhood corridor, instead of a neighborhood center, on the city's comprehensive plan map. After the director's decision rejected their objection the neighborhood association filed an appeal of that rejection. In this appeal, the neighborhood association is primarily concerned with the combined impact of the designation of Multnomah Village as a neighborhood center and the middle housing policy (subject of another objection) upon zoning in the single-family residential neighborhoods surrounding Multnomah Village. The association's objection to the specific zoning applied to the Multnomah Village neighborhood center area is the subject of a third, different, objection.

The appeal is divided into four issues: 1) Inadequate Response to Public Testimony; 2) Confusing and Uncoordinated Policies; 3) Inadequate Mapping of Centers; and 4) Compliance with Metro Code.

Before discussion of the specific issues raised in the appeal, it should be noted that the remedy proposed by the Multnomah Neighborhood Association is that the commission partially remand task #4 of the periodic review to allow for proper public involvement in the designation of centers and corridors and their boundaries, explaining the concept in its entirety with needed mapping, identifying the need for designating Multnomah Village as a neighborhood center, reevaluating the potential impacts of a neighborhood center designation for Multnomah Village, and demonstrating compliance with the Metro Code. Attachment B at 47.

#### **a. Inadequate Response to Public Testimony**

The appeal asserts that the city failed to adequately consider the weight of evidence and public testimony in making its designation. Attachment B at 28-30. The appeal alleges that the city failed to describe the basis for the Multnomah Neighborhood Association's opposition to the neighborhood center designation, failing to mention the association's desired alternative neighborhood corridor designation, with city staff presenting only its own "strident advocacy position favoring centers. Attachment B at 30. The appeal contends the city failed to quantify and synthesize citizens' attitudes for reporting to the general public, and did not provide open and meaningful opportunities for individuals and organizations to effectively influence comprehensive plan updates, as is required by Goal 1. Attachment B at 31. Additionally, the appeal asserts that the city ignored its own code and charter, which requires city agencies to include affected neighborhood associations in planning efforts which affect neighborhood livability. Attachment B at 31. While the appeal acknowledges that Goal 1 does not dictate a particular result, the city's lack of consideration of citizen input and the unfairness of the city's process must be called into question. Attachment B at 30.

#### **Department Response**

The department recommends that this portion of the appeal be rejected by the commission. While city decision-makers are required to have an open, fair, and transparent process for considering community involvement and input on amendments to its comprehensive plan, those decision-makers are not required to satisfy the demands of that input in their final decision. The objection itself documents that large amount of input provided by the Multnomah Neighborhood Association and its members to the city. Goal 1 requires creation and implementation of a plan for public process – it does not guarantee a particular result. Regarding the allegations that the city staff did not present a fair and balanced discussion of the issue, the record is replete with general discussions of the purpose of neighborhood centers within the city's comprehensive plan land use structure, for example, in a report to the Portland Planning & Sustainability Commission in 2014. Task 4 Record at 20033-20039. This section of the record also includes a brief comment on the request of the Multnomah Neighborhood Association to redesignate Multnomah Village as a corridor. Task 4 record at 20041-20042. As the association points out in its appeal, the City Council and Planning & Sustainability Commission heard voluminous testimony disagreeing with the staff recommendation. Neighborhood Center Appeal at 5. The City Council had access to all arguments relating to this issue prior to making its final decision on the matter.

#### **b. Confusing and Uncoordinated Policies**

The appeal asserts that the city adopted confusing and uncoordinated policies regarding the Multnomah Village Town Center. According to the appeal, Policy 5.5 (Housing in Centers) provides a generalized policy statement typical of comprehensive plans, but this policy was supplemented late in the process with Policy 5.6 (Middle Housing), which, when taken in combination with Policy 5.5, creates a large-scale re-designation, and eventual up-zoning, of the residential areas in and around neighborhoods designated as centers. Attachment B at 31-33. The appeal asserts that while Policy 5.6 sets a study area of one-quarter mile around neighborhood centers for rezoning, another, separate policy, Policy 3.15 (Housing in Centers), further expands the centers designation by implicitly allowing up-designation and up-zoning of residential areas within one-half mile of centers. Neighborhood Center Objection at 8. While the appeal acknowledges that the policies do not actually rezone property, they guide implementation of the rezones in Task 5 that actually took place. Attachment B at 33-34.

The appeal contends that the result of combining two disparate policies in different chapters of the comp plan (Policies 3.15 and 5.5) with a new policy (Policy 5.6) is a major policy change to a large, overlapping area affecting a large portion of the single-family residential land in the city. The appeal alleges that such a sweeping overhaul of residential areas, impacting so many people, could not have been reasonably anticipated until after the adoption of the comprehensive plan. Attachment B at 34. The appeal states that this constitutes a failure to provide information that enables citizens to identify and comprehend the issues, as required by Goal 1. The appeal states that it also constitutes a failure to present information needed to make decisions in a simplified and understandable form, and make those decisions open, transparent, and accessible, as required by the city's community involvement work program. Attachment B at 35-36.

### **Department Response**

The department recommends that this portion of the appeal be rejected by the commission. The policies do not accomplish what the objection claims they do. They do not rezone large areas of the city that are currently zoned for single-family detached residential development. These policies commit the city to a process of studying whether the specified areas should be rezoned. Task 4 Record at 45. Any subsequent rezones to implement these policies will require additional notice and action by the city, and will be subject to requirements for public notice and subject to appeal. The city has rezoned portions of the actual Multnomah Village center area, which is a subject of a separate appeal of Task 5 from the Multnomah Neighborhood Association and is discussed under that appeal.

#### **c. Inadequate Mapping of Centers**

The appeal asserts that the city inadequately mapped neighborhood centers. The appeal alleges that the city provided inaccurate and misleading information about the ultimate boundaries of proposed centers and the inclusion of single-family neighborhoods. The appeal notes that a map provided near the beginning of the planning process – in January 2015 – show the Multnomah Village center as limited to the existing commercial areas of Multnomah Village. Attachment B at 36-38. The appeal cites a September 2015 map showing radius circles around centers such as

Multnomah Village which, according to the city, were intended to be a symbol for centers, not a map boundary. Attachment B at 38-39. However, the appeal asserts that a map provided to the Multnomah Neighborhood Association in June 2016 shows a different and expanded neighborhood center designation. Attachment B at 39-40.

The appeal contends that this violates ORS 197.010(1)(c), which requires that comprehensive plans “be the basis for more specific rules and land use regulations which implement the policies expressed through the comprehensive plans,” because the vague and overly flexible nature of the plan policies and map designations related to centers does not sufficiently define and guide implementation through the zoning code in a manner that is clear, understandable, and predictable to the public. Attachment B at 41. Similarly, the appeal asserts that this violates Goal 2, which states that “the various implementation measures which will be used to carry out the plan should be considered during each of the planning phases.” Attachment B at 42.

### **Department Response:**

The department recommends that this portion of the appeal be rejected by the commission. The city has adopted plan policies that may result in future changes to zoning in the vicinity of neighborhood centers. Task 4 Record at 277. Such future changes would result from subsequent study and analysis to see where the adopted Middle Housing policy is best applied in candidate areas. The Multnomah Neighborhood Association, and other individuals and groups, will have an opportunity to provide input into that process, and potentially object to or appeal any city actions to implement Policy 5.6. The city did not adopt any Task 5 rezoning of the neighborhoods around the Multnomah Village neighborhood center area related to the confluence of the neighborhood center designation and the middle housing policy.

Regarding the two maps in question raised in the objection, the first map is part of a grouping that is prefaced with a statement that “The following maps reflect adopted local plans, and are in effect today. All other center boundaries are provisional for planning and analysis purposes, and are pending further future refinement planning.” The subsequent list of centers with adopted local plans does not include Multnomah Village. Task 4 Record at 20077. The second map referenced by the objector does not appear to be in the record and thus is outside the scope of review for this decision, but in any event is illustrating a different idea – the areas within one-quarter mile of the preliminary neighborhood center boundaries that could be potentially affected by adoption of Policy 5.6. The fact that this latter map does not appear to be in the record makes it outside the scope of review, but in any event the maps are intended to show two different concepts.

#### **d. Compliance with Metro Code**

The appeal asserts that, in designating Multnomah Village as a neighborhood center, the city failed to comply with prior regional planning, including the Metro Code and the Metro 2040 Growth Concept Map. Attachment B at 42-44. The appeal notes that the Metro 2040 Growth Concept Map shows that Multnomah Village is not designated as a center, but that the primary thoroughfares in the neighborhood have been designated as “main streets.” The appeal asserts

that the department's rejection of the Multnomah Neighborhood Association's objection regarding this matter is mis-applying a different section of the Metro Code. Attachment B at 46. The appeal alleges that this represents a violation of Goal 2, which requires coordination between Portland and Metro.

### **Department Response:**

The department recommends that this portion of the appeal be rejected by the commission. The "neighborhood center" designation on the Portland Comprehensive Plan Map does not implement a Metro town center designation, it implements a Metro "main street" designation. Task 4 Record at 85. The city recognizes that Multnomah Village is not a Metro "Town Center" designation, and the implementation of Metro's Title 6 for Multnomah Village actually achieves a lower jobs-and-residents-per-acre figure than is set forth in Metro's Title 6 for this area. Task 4 Record at 103. The department is unclear regarding the appeal's statements relating to the director's decision, but in any case, if the city's projections for development are at lower densities than for Metro's designation of this area as a "main street," then the assertion that the city is somehow violates the Metro Growth Concept Plan with its designation of Multnomah Village as a neighborhood center is an elevation of form over substance.

### **4. Appeal 4-10 – Multnomah Neighborhood Association #3**

This is an appeal of a previous three-part objection to chapter 2 of the city's comprehensive plan (Community Involvement) alleging non-compliance with Goal 1.

1. The first part of the appeal asserts that the term "community groups" and "community" fail to meet the requirements of Goal 1 because it is not clear whether community groups are the same as the general public and that the use of the term "community" has inappropriately replaced "citizen". Attachment B at 49.
2. The second part of the appeal asserts that the city, by partnering with a "community" has the potential for excluding "citizens" (as required by Goal 1) who do not belong to a clearly identified "community." Attachment B at 50.
3. The third part of the appeal asserts that Policy 2.14 of the comprehensive plan<sup>2</sup> does not use the more general term "public involvement", and instead uses the term "community involvement", which is a more restrictive term than the Goal 1 term of "citizen involvement". The appeal alleges that this violates Goal 1, Part 3 because it reduces a "citizen's" ability to influence each stage of the planning process, .Attachment B at 50.

To correct the deficiencies, the appellant requests the commission partially remand Task #4 with

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<sup>2</sup> Policy 2.14 provides: "At each stage of the process, identify which elements of a planning and investment process can be influenced or changed through community involvement. Clarify the extent to which those elements can be influenced or changed." Task 4 Record at 214.

instructions to the city to revise chapter 2, “to recognize the citizen’s role in the planning process,” and to define a process requiring public meetings and official status for all groups participating in the planning process, and to remove Policy 2.14.

### **Department Response:**

The department recommends this appeal be rejected by the commission. If the city engages communities in the planning process, citizens will be provided the opportunity to participate; broadening the city’s program to involve “communities” does not exclude citizens.

Note Chapter 2 of the comprehensive plan, Community Involvement, Policy 2:

*Representation. Facilitate participation of a cross-section of the full diversity of affected Portlanders during planning and investment processes. This diversity includes individuals, stakeholders, and communities represented by race, color, national origin, English proficiency, gender, age, disability, religion, sexual orientation, gender identity, and source of income.*

Task 4 Record at 216.

Also, in Chapter 2, Community Involvement, Policy 2.24 Representation, the city describes:

*Portland benefits when community members are meaningfully involved in planning and investment decisions. By building and maintaining partnerships with individuals and a wide range of formal and informal organizations that represent a variety of interests, the City of Portland government will have a better understanding of various communities’ diverse needs and concerns. These policies support building and maintaining strong and supportive relationships with an increasingly diverse and growing Portland population.*

Task 4 Record at p.216

And further, city Policy 2.1 – Partnerships and coordination, (Record p. 211) identifies who the city intends to coordinate and engage with in their community involvement program:

*2.1.a. Individual community members.*

*2.1.b. Communities of color (including those whose families have been in this area for generations such as Native Americans, African Americans, and descendants of immigrants), low-income populations, Limited English Proficient (LEP) communities, Native American communities, immigrants and refugees, and other under-served and under-represented communities.*

*2.1.c. District coalitions, Neighborhood Associations, watershed councils, and business district associations as local experts and communication channels for place-based projects.*

*2.1.d. Businesses, unions, employees, and related organizations that reflect*

*Portland's diversity as the center of regional economic and cultural activity.*

*2.1.e. Community-based, faith-based, artistic and cultural, and interest-based non-profits, organizations, and groups.*

*2.1.f. People experiencing disabilities.*

*2.1.g. Institutions, governments, and Sovereign tribes.*

Task 4 Record at p. 211

Policy 2.14 commits the city to identifying actions that could be affected by public involvement. The objection appears to assume that the city is unable or unwilling to correctly identify those actions, resulting in lost opportunities for public involvement. Policy 2.14 resides in a section of chapter 2 that includes four policies implementing comprehensive plan goal 2.D, "Transparency and accountability," related to improving the quality of communication during the planning process. The plan also includes six other goals with implementing policies, and considering this larger context, Policy 2.14 refines and informs, and does not limit, the city's plan to involve the public in the planning process. See, especially, goal 2.E.<sup>3</sup>

The objection does not demonstrate that the city's citizen involvement program fails to comply with Goal 1.

## **5. Appeal 5-5 – Multnomah Neighborhood Association #4**

The Multnomah Neighborhood Association objected to the City of Portland's decision to rezone much of the Multnomah Village Neighborhood Center area to the CM2 zoning district, which the association asserts allows densities, intensities, and building heights that are excessive for the Multnomah Village Neighborhood Center Area. After the director's decision rejected this objection, the association filed an appeal of that decision.

The appeal is divided into four issues: 1) Inadequate Response to a Long History of Public Input Seeking to Protect the Character of Multnomah Village; 2) Failure to Perform Planning Actions in Multnomah Village Based upon Facts and Evidence; 3) Failure to Provide the Public with Adequate Information and Facts About the Lack of Adequacy of Design Review to Protect Neighborhood Character; and 4) Failure to Direct Planning Actions in a Manner That Would Achieve Local Goals and Be Consistent With Past Planning Efforts.

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<sup>3</sup> Portland 2035 Comprehensive Plan goal 2.E provides: "Community members have meaningful opportunities to participate in and influence all stages of planning and decision making. Public processes engage the full diversity of affected community members, including under-served and under-represented individuals and communities. The City will seek and facilitate the involvement of those potentially affected by planning and decision making." Task 4 Record at 209.

Before discussion of the specific issues raised in the appeal, it should be noted that the remedy proposed by the Multnomah Neighborhood Association is that the commission partially remand Task 5 of the periodic review to reconsider application of the CM1 zoning district in the Multnomah Village area to reflect the community character issue and topography and also apply a zoning district with clear and objective standards addressing the association's concerns. Attachment B at 66.

**a. Inadequate Response to a Long History of Public Input Seeking to Protect the Character of Multnomah Village**

The appeal asserts that the city made an inadequate response to public input seeking to protect the character of Multnomah Village. The appeal notes that since at least 2003 the Multnomah Neighborhood Association has expressed concerns about the height and general compatibility of new development in Multnomah Village, concerns that have been supported by large numbers of individuals in the area. Attachment B at 54-55. The appeal notes that this culminated in a request that the Multnomah Village area be zoned CM1, a lower intensity zoning district, rather than CM2, in task 5 of periodic review. CM2 Zoning Objection at 4. However, as noted in the appeal, the city only zoned a small portion of the Multnomah Village area as CM1, with the rest being zoned CM2. Attachment B at 55. The appeal alleges that this constitutes a failure of the city to adequately quantify, synthesize, and report public involvement, and is a violation of Statewide Goal 1, which requires that "a process for quantifying and synthesizing citizens' attitudes should be developed and reported to the general public." The appeal contends that this also violates the city's community involvement work program, which commits the city to providing "open and meaningful opportunities for individuals and organizations to effectively influence comprehensive plan updates." Also a violation of the citizen involvement objectives of the Southwest Community Plan, according to the appeal. Attachment B at 56.

**Department Response:**

The department recommends that this portion of the appeal be rejected by the commission. While city decision-makers are required to have an open process for considering community involvement and input on amendments to its comprehensive plan, those decision-makers are not required to satisfy the demands of that input in their final decision. The objection itself documents that large amount of input provided by the Multnomah Neighborhood Association and its members to the city. Goal 1 requires creation and implementation of a plan for public process – it does not guarantee a particular result.

**b. Failure to Perform Planning Actions in Multnomah Village Based upon Facts and Evidence**

The appeal asserts that the city has failed to perform planning actions in Multnomah Village based on facts and evidence. According to the appeal, the stated reason the city has rezoned central Multnomah Village to the more intensive CM2 district is that changing housing needs require more high-density and multi-family housing in centers and corridors within Portland. The appeal contends the city's analysis of capacity shows that the existing residential buildable lands

inventory provides a sufficient 20-year supply of such housing. Attachment B at 57. Therefore, the appeal alleges that the city has violated Goal 2's provision that "inventories and other forms of data are needed as the basis for the policies and other decisions set forth in the plan."

**Department Response:**

The department recommends that this portion of the appeal be rejected by the commission. The reason for the department's recommendation are the same as found in the discussion of the Multnomah Neighborhood Association Appeal to Objection 4-6, sub-issue b.

**c. Failure to Provide the Public with Adequate Information and Facts About the Lack of Adequacy of Design Review to Protect Neighborhood Character**

The appeal asserts that the city has failed to provide the public with adequate information about the lack of adequacy of design review to protect neighborhood character. The appeal asserts that the design review overlay is inadequate because the city must provide an alternative set of standards which are clear and objective, and do not provide for discretionary community input into design of development which is at least partially residential. Attachment B at 60-61. The appeal alleges that is a violation of Goal 1, which requires a citizen involvement program to provide "information that enables citizens to identify and comprehend the issues" and the city's community involvement work program, which commits the city to providing "effective tools and information in order to make effective public participation possible."

**Department Response:**

The department recommends that this portion of the appeal be rejected by the commission. The Multnomah Neighborhood Association is correct that such design review overlays, if they contain discretionary standards, may be avoided by applicants for residential development standards who insist on review of their projects under clear and objective standards. However, the appellant is mistaken in its assumption that Portland's design review overlay is not implemented with standards that are clear and objective. The city's submittal indicates that "in keeping with Goal 10, the Community Design Standards offer a clear and objective path to implement this overlay, as an alternative to discretionary review." Task 5 Record at 45. Therefore, the city did provide the information needed to the appellant regarding this issue, as required by the city's own community involvement work program.

**d. Failure to Direct Planning Actions in a Manner That Would Achieve Local Goals and Be Consistent With Past Planning Efforts.**

The appeal asserts that the city failed to direct planning actions in a manner that would achieve local goals and be consistent with past planning efforts. The appeal notes that the 2000 Southwest Community Plan (SWCP) planned for a "small-town" atmosphere for Multnomah Village, with height and design of buildings appropriate for the neighborhood, with a mix of residential and neighborhood-scale commercial development. The appeal contends the SWCP is

not mentioned in the recommended draft for Mixed Use Zoning Districts, which applies the CM2 district to Multnomah Village. Attachment B at 62-63. The appeal also contends this action violates the citizen involvement provisions of the SWCP, which state, “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.” Attachment B at 63. In addition, as noted by the appellant, Multnomah Village has been identified in the past as worthy of a historic district designation, which makes it a Goal 5 resource; the CM2 zoning ignores this history, and thus violates Statewide Planning Goal 5. Attachment B at 64-65.

### **Department Response:**

The department recommends that this portion of the appeal be rejected by the commission. The city is not bound by the language or contents of the 2000 Southwest Community Plan. The purpose of periodic review is to update and, where appropriate, modify the city’s previously adopted comprehensive plan and implementing land use regulations. In any case, the city’s decision to mix the CM1 and CM2 districts in Multnomah Village, with the CM1 district being applied to a part of the village core area, is consistent with the excerpts from the 2000 community plan for Multnomah Village provided in the appeal.

Regarding the Goal 5 issue, the appellant has not demonstrated that Multnomah Village is a significant historic resource in the city’s comprehensive plan. The city is not obligated by the provisions of Goal 5 to protect any particular historic character within an area unless the resource has been found to be significant and the city has decided to protect it under its historic preservation ordinance.

### **6. Appeal 5-6 – Multnomah Neighborhood Association #5**

The appeal asserts four issues similar to those objected to previously and addressed in the Director’s Decision, with two additional assertions included in the first issue and additional argument in the first and second issue. The appeal asserts the following: 1) The index of the record is not sufficiently detailed, the city provided inappropriate commentary to DLCD, and the DLCD order needs to be signed by the DLCD Director; 2) “The Comprehensive Plan Map in Task 5 is inconsistent with the approved work order for Task 4 requires a product of a Land Use Map depicting a property-specific locations and intensity of housing.”; 3) “In the recent EG Zones in Mass Shelter and Housing Zoning Code Update the city of Portland changed the zoning code title 33 to allow Mass Shelters in EG zones.”; and 4) “The city of Portland since the adoption of Task 5 has had a number of major implementation projects going on after the approval of Task 5”, and thus the Task 5 submittal is incomplete. Attachment B 67-72.

The proposed remedies provided by the appellant are: 1) send the Task 5 product back to the city for a detailed index of the public record and to revise the staff reports and findings to reference the new index, “...remove the city commentary from the DLCD review in the DLCD Order 001892”, and, “The Order needs to be signed by the Director and the DLCD Order 001892 needs to be sent out for again with another 21 days for the objectors to respond.”; 2) strike the language

from the 2035 Comprehensive Plan so that allows flexibility in the zoning code so that the 2035 Comprehensive Plan base zone governs residential density; 3) amend the zoning code title 33 not to allow Mass Shelters in EG zones; and 4) require the city to incorporate a list of plan and code amendments in task 5 or to amend the work plan and add Task 6 for these and other projects that are required to carry out the Comprehensive Plan.

Each of the four issues is discussed further below.

**a. Failure to Provide a Complete Index, Inappropriate City Commentary, and Improper Signature on the Director's Decision**

The appeal asserts that the city's record index for this task is incomplete because it only provides the name of the submitter/testifier and this level of detail is inadequate, that some testimony was submitted by individuals on behalf of organizations or groups and these groups and organizations are not identified in the index. The appeal questions whether the Portland Planning and Sustainability Commission and city council reviewed all the testimony as the staff reports and findings are not linked to individual testimony. The appeal asserts that without a sufficiently detailed index to the public record, the public and the DLCD cannot adequately review the merits of any objection and therefore violates OAR 660-025-0130(3)(b)<sup>4</sup> and Goal 1. Attachment B at 67-69.

In addition, the appeal asserts two items that were not included in the initial objections. First, the appeal alleges that the city provided inappropriate commentary under OAR 660-025-0130(4) when the department requested record locations and this commentary should be considered ex parte contact. The proposed remedy from the appellant is for the commentary from the city to be removed from the DLCD review in the DLCD Order 001892. Attachment B at 69. And second, the appeal asserts that the DLCD Order (001892) needs to be signed by the DLCD Director. The proposed remedy from the appellant is to properly sign and send out the decision again for another 21 days for the objectors to respond.

The appellant's proposed remedy is to send the Task 5 record back for the index to be detailed and referenced to the staff reports and findings. Then, according to the appellant, the public, Planning and Sustainability Commission and City Council need time to then review the record and then have hearings before it is submitted back to the DLCD.

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<sup>4</sup> OAR 660-025-0130(3)(b) provides: "If the local record exceeds 2,000 pages, a submittal must include adopted ordinances, resolutions, and orders; any amended comprehensive or regional framework plan provisions or land use regulations; findings; hearings minutes; materials from the record that the local government deems necessary to explain the submittal or cites in its findings; and a detailed index listing all items in the local record and indicating whether or not the item is included in the submittal. All items in the local record must be made available for public review during the period for submitting objections under OAR 660-025-0140. The director or commission may require a local government to submit any materials from the local record not included in the initial submittal;"

## **Department Response**

The department recommends the commission reject this appeal. OAR 660-025-0130(3) requires an index of the entire record partially because the city is not required to submit the contents of the entire record if it exceeds 2,000 pages, and an index enables participants to and the department to identify those materials that were not part of the submittal. The index also enables participants and the department to identify where in the submittal relevant materials were included. The rule requires a “detailed” index.

The appeal appears to allege that a detailed index should link individual testimony with the specific elements of the staff report and findings to which it is related. For example, if there is testimony regarding the middle housing policy, then the index should link all testimony regarding this topic to the staff report and findings on this same topic. No reasonable reading of OAR 660-025-0130(3)(b) would lead to this conclusion.

OAR 660-025-0130(3)(b) identifies what a submittal must include, one of which is a detailed index listing all items in the local record and indicating whether the item is included in the submittal. The city has provided a master index and a table of contents, both of which provide a detailed list of items in the local record.

The department concludes that the city has submitted the required elements of a record exceeding 2,000 pages, including a detailed index of the items in the local record and the oral and written testimony from the public hearings.

Regarding the assertion of “inappropriate commentary” in the letter from the city identifying record locations at the request of the department and the comment that the Director must sign the DLCD order: The city’s response to a DLCD request for record locations is not part of the record and thus is outside the scope of review, and specific department staff have the authority to sign for the department director, including the community services division manager.

### **b. Densities in the Zoning Code Inappropriately Differing from the Map.**

#### **Department Response**

The department recommends the commission reject this appeal. Per OAR 660-025-015 (6)(a), a work task may be appealed to the commission only by a person who filed a valid objection. The Director’s decision (Order 001892) found this objection to be invalid based on the OAR 660-025-0140(2) requirement that an objection must, among other things, “clearly identify an alleged deficiency in the submittal sufficiently to identify the relevant section of the final decision and the statute, goal, or administrative rule the task submittal is alleged to have violated.”

### **c. Incomplete Task 5 Implementation.**

#### **Department Response**

The department recommends the commission reject this appeal. Per OAR 660-025-015 (6)(a), a work task may be appealed to the commission only by a person who filed a valid objection. The Director's decision (Order 001892) found this objection to be invalid based on the OAR 660-025-0140(2) requirement that an objection must, among other things, "clearly identify an alleged deficiency in the submittal sufficiently to identify the relevant section of the final decision and the statute, goal, or administrative rule the task submittal is alleged to have violated."

**d. Current City Implementation Projects Should Have Been Included in Task 5.**

This appeal asserts that the city has undertaken a number of implementation projects after the city adopted Task 5, and states that these should have been included as part of Task 5. The appellant's conclusion is that the Task 5 submittal is thus incomplete and limits appeal opportunities, which is inconsistent with provisions of Goal 1 to provide the opportunity for citizens to be involved in all phases of the planning process. The appeal notes the relative ease and no cost, to file an objection to a work task compared to filing a LUBA appeal. Attachment B at 73-75.

The proposed remedy is to send these projects back to be included in Task 5 or amend the work plan and add Task 6 for these and other projects that are required to carry out the Comprehensive Plan. Attachment B at 74.

**Department Response**

The department recommends the commission reject this appeal. The work program for task 5 states, "whatever policy decisions are made, they must be carried out by sufficiently robust implementation measures." Further, the work program identifies "possible new implementation measures," and lists those items. The product required is: "Ordinance of City Council adopting regulations, projects, and agreements sufficient to carry out the amended Comprehensive Plan."

The future adoption of implementation amendments may be dependent on the 2035 comprehensive plan but that does not make them inappropriate or mandate that they should have been adopted as part of periodic review. The city has amended the zoning map and zoning code to implement the comprehensive plan map and housing and employment policies. ORS 197 establishes the jurisdiction of the commission and the Land Use Board of Appeals (see ORS 197.644 and 197.825). The appellant is certainly able to participate in all phases of the adoption of future comprehensive plan implementation and amendment projects.

**VI. DEPARTMENT RECOMMENDATION AND DRAFT MOTIONS**

**A. Recommendation**

The department recommends that the commission deny these appeals and approve the city of Portland's Task 4 and 5 submittals.

## **B. Motions**

***Recommended Motion:*** I move that the commission deny the Harries and Multnomah Neighborhood Association appeals and approve the City of Portland's Task 4 and Task 5 submittals, based on the information contained in the director's order, the department's report on the appeal, and argument at the hearing.

***Alternative Motion:*** I move that the commission uphold the Harries and/or the Multnomah Neighborhood Association appeals and remand [*a portion or all*] the City of Portland's adopted Task 4 and 5 submittals, and uphold the approval of [*remaining elements*] of the Task 4 and 5 submittals. The remand is based on [*findings*]. On remand the city shall [*nature of additional work needed on remand*].

## **ATTACHMENTS**

- A. Director's Approval Order 001892
- B. Appeal letter from James Harries and 5 appeal letters from Eben Fodor, representing the Multnomah Neighborhood Association and from Carol McCarthy and James Peterson, also representing Multnomah Neighborhood Association