

James F Peterson
Multnomah
Land Use Co-Chair
2502 SW Multnomah Blvd
Portland, OR 97219

March 5, 2018

Oregon Department of Land Conservation and Development Commission
Attention: Periodic Review Specialist
635 Capitol Street NE, Suite 150
Salem, OR 97301

Re: Exceptions to DLCD Director's Report of 2/22/18 of
Appeal OAR 660-025-0150(6)(a)
Objection Task 5 (Ordinance 188177)
DLCD 17. Objection 5-6 – Multnomah Neighborhood Association #5

The DLCD over review of the Appeal is followed with the DLCD Response with the Exception following

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 DLCDC cannot adequately review the merits of any objection and therefore violates OAR 660-025-0130(3)(b) ⁴ and Goal 1. Attachment B at 67-69.

⁴

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 DLCDC review in the DLCDC Order 001892. Attachment B at 69. And second, the appeal asserts that the DLCDC Order (001892) needs to be signed by the DLCDC 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 DLCDC.

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 DLCDC order: The city's response to a DLCDC 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.

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

The city of Portland submitted the record indexed by name only.
The record needs a detailed index as required under OAR 660-025-0130(3)(b).

The **detail index needs the minimum of the topic or subject** in order for anyone to find something in the record.

A detailed index is required to be consistent with provisions of Goal 1 of OAR 660-015-0000(1) (Goal 1) requires that **citizens** have a role in all phases of the planning process. Without a detailed index a citizen would have review the complete record to find testimony on a specific topic.

After the objections were submitted DLCD staffs requested the testimony under 660-025-0130(4)

660-025-0130

(4) A submittal includes only the materials provided to the department pursuant to section (3) of this rule. Following submission of objections pursuant to OAR 660-025-0140, the local government may:

(a) Provide written correspondence that is not part of the local record which identifies material in the record relevant to filed objections. The correspondence may not include or refer to materials not in the record submitted or listed pursuant to section (3) of this rule. The local government must provide the correspondence to each objector at the same time it is sent to the department.

(b) Submit materials in the record that were not part of the submittal under section (3) if the materials are relevant to one or more filed objections. The local government may not include or refer to materials not in the local record. The local government must provide the materials to each objector at the same time it is sent to the department.

The testimony the city provided under this request would have been difficult or impossible for the public or DLCD staff to locate with the name of the submitter index as the record is now. There is no way to tell how complete the testimony the city submitted without reading the complete record. Thus the record needs a **detailed index** as required under OAR 660-025-0130(3)(b) for the citizens to review the record in a timely manner when technical assistance has not been made available. The DLCD staff also needs a complete index in order to perform their review. This detailed index as stated above was also needed for the PSC and City Council to review the record.

The commentary that the city submitted with the DLCD request for is consistent with ORS 660-025-0130 and should be considered ex parte contact. The commentary from the city needs to be removed from the DLCD review in the DLCD Order 001892. A review of past LUBA decisions will show that past ex parte contact has been a problem with DLCD staff in the past.

The OAR requires the DLCD Order to be signed by the DLCD Director. 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. If the Director wants to delegate his authority to another person for signing the OAR rules need to be rewritten.

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."

Exception b. Densities in the Zoning Code Inappropriately Differing from the Map.

We take exception that Objection 5-6b is an invalid objection. The objection as submitted is followed by the DLCD response, appeal and then exception

Objection 5-6b

[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.](#)

The Multnomah Neighborhood Association put forward a proposal that is titled Truth in Zoning and the following will clarify the issue.

After the SW Plan blew up, the City of Portland decided that they would no longer do community plans but instead would change the development code to achieve more infill. The minimum lot size in the zoning code was reduced for each base zone. For example an R5 lot the minimum lot size was reduced to 3000sqft. They allowed corner lots to be duplex lots and later made changes to allow corner lots in R5 and R7 zones to be divided if the lot was over 50 x 100 for attached dwellings. This worked for a few years but now demolitions are at record levels, the character of neighborhoods are changing and what people value about Portland is now being destroyed. Over 150 requests have been submitted requesting the Truth in Zoning proposal be incorporated into the 2035 Comprehensive Plan it would remove the exception that allows for land divisions less than the base zone. With the adoption of the Comprehensive Plan the zoning code would then need to be amended to comply. If the language remains the size of lots in land divisions would be based on minimum lot size in the zoning code. The base zone lot size in the Comprehensive Plan would then be meaningless. The Comprehensive Plan is intended to be the governing document but with the proposed language the lot size would be governed by the zoning code

Re: Truth in Zoning

The specific language shown struck below needs be removed from the general description of land use designations on page GP10-3 the 2035 Comprehensive Plan. This would preserve neighborhood character and would reduce the number of demolitions. This would remove the exceptions that allow land divisions less than the base zone. A Comprehensive map amendment would then be required for a land division less than the base zone. The approved work order for Task 4 requires a product of a Land Use Map depicting a property-specific locations and intensity of housing. The map is impossible to produce if the base zones are not defined. The City of Portland has put forth implementing the Middle Housing Amendment Policy 5.6 (P45) by proposing changing the definition of the base zone of a 100,000 single family zoned properties to multifamily. This would increase the capacity of these 100,000 properties 300%. This excess capacity would be considered Market Factor which case law has not allowed. ORS 197.015 (5) defines the comprehensive plan as coordinating land use with everything associated with it. Thus allowing an exception to base zones to be defined in the zoning is inconsistent with the definition.

The remedy is that the exception struck below be removed from the 2035 Comprehensive Plan so that the base zone defined and mapped governs. The zoning code would be required to be changed so that the base defined in the comprehensive plan governs. If the city wants to allow corner lots to be divided, the base zone should be changed or other land divisions less than size permitted in the base zone a zone change would be required. New Comprehensive Plan Map consistent 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.

Land use designations - Amendment

The Comprehensive Plan is one of the Comprehensive Plan's implementation tools. The Map includes land use designations, which are used to carry out the Comprehensive Plan. The land use designation that best implements the plan is applied to each area of the city. This section contains descriptions of the land use designations. Each designation generally includes:

- Type of place or Pattern Area for which the designation is intended.
- General use and intensity expected within the area. ~~In some cases, the alternative development options allowed in single dwelling residential zones (e.g. duplexes and attached houses on corner lots; accessory dwelling units) may allow additional residential units beyond the general density described below.~~
- Level of public services provided or planned.
- Level of constraint.

197.015 Definitions for ORS chapters 195, 196, 197 and ORS 197A.300 to 197A.325

(5) “Comprehensive plan” means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. “Comprehensive” means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. “General nature” means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is “coordinated” when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. “Land” includes water, both surface and subsurface, and the air.

Department Response.

ORAR 660-025-0140(2) provides, among other things, that for an objection to be valid it must “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.” See section IV.B. The objection cites the comprehensive plan map as the relevant section of the final decision at issue. The department’s review of the map (Task 5 Record at 113) does not reveal any provision that allows varying of densities. The objection does not identify what portion of task 4 with which the task 5 submittal conflicts. The department finds that this objection fails to satisfy the minimum requirements of a valid objection and is therefore invalid.

The deficiency as stated above is as follows:

The Comprehensive Plan Map in Task 5 is inconsistent with the approved work order for Task 4 and requires a product of a Land Use Map depicting a property-specific locations and intensity of housing.

The Comprehensive Plan Map in Task 5 is also inconsistent with ORS 197.015 (5) that defines the comprehensive plan as coordinating land use with everything associated with it. Thus allowing an exception to base zones to be defined in the zoning is inconsistent with the definition.

The remedy is that the exception struck below be removed from the 2035 Comprehensive Plan so that the base zone defined and map governs. The zoning code would be required to be changed so that the base defined in the comprehensive plan governs. If the city wants to allow corner lots to be divided, the base zone should be changed or other land divisions less than size permitted in the base zone a zone change would be required. New Comprehensive Plan Map consistent 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.

Land use designations - Amendment

The Comprehensive Plan is one of the Comprehensive Plan's implementation tools. The Map includes land use designations, which are used to carry out the Comprehensive Plan. The land use designation that best implements the plan is applied to each area of the city. This section contains descriptions of the land use designations. Each designation generally includes:

- Type of place or Pattern Area for which the designation is intended.
- General use and intensity expected within the area. ~~In some cases, the alternative development options allowed in single-dwelling residential zones (e.g. duplexes and attached houses on corner lots; accessory dwelling units) may allow additional residential units beyond the general density described below.~~
- Level of public services provided or planned.
- Level of constraint.

Exception

Objection 5-6b is a valid objection

The deficiencies are clear and are as followed

- 1) 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.
- 2) The Comprehensive Plan Map in Task 5 is also inconsistent with ORS 197.015 (5) that defines the comprehensive plan as coordinating land use with everything associated with it. Thus allowing an exception to base zones to be defined in the zoning is inconsistent with the definition.

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."

Exception c. Incomplete Task 5 Implementation.

The adopted work plan for Task 5 requires adopting regulations sufficient to carry out the amended Comprehensive Plan.

197.015 Definitions for ORS chapters 195, 196, 197 and ORS 197A.300 to 197A.325

(5) “Comprehensive plan” means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. “Comprehensive” means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. “General nature” means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is “coordinated” when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. “Land” includes water, both surface and subsurface, and the air.

2035 Comprehensive Plan

Page GP -7

Policy 1.3 Implementation tools subject to the Comprehensive Plan. Maintain Comprehensive Plan implementation tools that are derived from, and comply with, the Comprehensive Plan. Implementation tools include those identified in policies 1.4 through 1.9.

Policy 1.4 Zoning Code. Maintain a Zoning Code that establishes the regulations that apply to various zones, districts, uses, and development types.

Policy 1.5 Zoning Map. Maintain a Zoning Map that identifies the boundaries of various zones, districts, and other special features.

Task 5 Products

Ordinance of City Council adopting regulations, projects and agreements sufficient to carry out the amended Comprehensive Plan

Title 33 the city of Portland’s zoning needs to be amended to be consistent with the implementation policy of the 2035 Comprehensive Plan as part of the Task 5 Products.

The remedy is that in amending the zoning code title 33 to be consistent with the 2035 Comprehensive Plan as part of the Task 5 Products is to include changing the zoning code title 33 not to allow Mass Shelters in EG zones.

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.

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

The adopted work plan for Task 5 requires adopting regulations sufficient to carry out the amended Comprehensive Plan.

197.015 Definitions for ORS chapters 195, 196, 197 and ORS 197A.300 to 197A.325

(5) “Comprehensive plan” means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. “Comprehensive” means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. “General nature” means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is “coordinated” when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. “Land” includes water, both surface and subsurface, and the air.

2035 Comprehensive Plan

Page GP -7

Policy 1.3 Implementation tools subject to the Comprehensive Plan. Maintain Comprehensive Plan implementation tools that are derived from, and comply with, the Comprehensive Plan. Implementation tools include those identified in policies 1.4 through 1.9.

Policy 1.4 Zoning Code. Maintain a Zoning Code that establishes the regulations that apply to various zones, districts, uses, and development types.

Policy 1.5 Zoning Map. Maintain a Zoning Map that identifies the boundaries of various zones, districts, and other special features.

Task 5 Products

Ordinance of City Council adopting regulations, projects and agreements sufficient to carry out the amended Comprehensive Plan

Title 33 the city of Portland's zoning needs to be amended to be consistent with the implementation policy of the 2035 Comprehensive Plan as part of the Task 5 Products.

The City of Portland is adopting a new Comprehensive Plan. The projects listed are significant projects in amending the Comprehensive Plan and changing the zoning code to comply with the new Comprehensive Plan. The Residential Infill Project is implementing Policy 5.6. The Draft of the Residential Infill project increases the capacity almost 170,000 housing units. This almost doubles the capacity of the 2035 Comprehensive Plan. The city of Portland is shifting to implementation of the 2035 Comprehensive Plan at this link <https://www.portlandoregon.gov/BPS/article/661511> and transitioning to the new plan at this link <https://www.portlandoregon.gov/bps/72977> . Task 5 has fallen profoundly short of adopting regulations sufficient to carry out the new comp plan as required by the work order. Thus the submittal of Task 5 is incomplete.

Implementation done outside of a Task limits the citizen's ability to appeal. To file an objection to a Work Task is a relatively inexpensive and easy process compared to filing a LUBA APPEAL. This is inconsistent with provisions of Goal 1.

The 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.

James F Peterson
Multnomah
Land Use Co-Chair