

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

MULTNOMAH NEIGHBORHOOD
ASSOCIATION;

Petitioner,

v.

LAND CONSERVATION AND
DEVELOPMENT COMMISSION OF
THE STATE OF OREGON;

Respondent.

LCDC Order 18-WKTSK—001897

CA A _____

**EMERGENCY MOTION UNDER
ORAP 7.35**

PETITIONER’S MOTION – OTHER

FOR RECORD REVIEW AND SCEHDULING DETERMINATION

Pursuant to ORAP 7.05 and 7.35, Petitioner Multnomah Neighborhood Association moves the court for a determination of the schedule for settling the record and filing briefs in this case. This case is an appeal of the Land Conservation and Development Commission’s (“LCDC”) approval of certain decisions made by the City of Portland through the periodic review process set forth in ORS 197.628-633. *See* LCDC Approval Order, attached to Petition for Judicial Review. This is an emergency motion because the court must consider and decide this motion before issuing a scheduling order in this case.

A. Statement Regarding Opposing Counsel’s Position On This Motion

Petitioner’s attorney conferred with LCDC’s Oregon Department of Justice attorney Steven Shipsey by phone on August 29. Mr. Shipsey reported that LCDC needs further

time to develop its position in response to this motion. Petitioner has served Mr. Shipsey with this motion.

B. Request for Opportunity to Settle Record Pursuant to ORAP 4.22 and Determination of Case Timeline

LCDC's decision in this case is not subject to the expedited treatment that applies to most land use cases under ORS 197.651(8) and (11) (certain LCDC decisions), and ORS 197.850(7) and (10) (Land Use Board of Appeals decisions). This is because the challenged LCDC periodic review decision is "a final order of the commission under * * * 197.628 to 651." ORS 197.651(2). LCDC decisions that the court reviews under ORS 197.651(2) are excluded from the time requirements set forth in subsections 8 and 11 of that section. *See* ORS 197.651(2) (stating that judicial review "is as provided in subsections (3) to (7), (9), (10) and (12) of this section."). *Compare with* ORS 197.651(1) (stating that judicial review of LCDC decisions regarding urban reserves and rural reserves "is as provided in subsections (3) to (12) of this section.").

Consistent with the exceptions from land use timelines stated in ORS 197.651(2), the Court of Appeals excludes LCDC periodic review decisions from the definition of a "land use case" in ORAP 4.60(1)(b). The ORAPs, however, do not provide explicit timelines to settling the record and filing briefs in an LCDC case that is not a "land use case."¹

¹ ORS 197.651(7) states that briefs must be filed within the time period set forth in the court's rules in cases involving appeals of LCDC decisions.

Clarification of the timeline for this case is critical to ensure that Petitioner has access to a complete, settled record before Petitioner prepares its brief. In an ordinary land use case on appeal from the Land Use Board of Appeals (“LUBA”), the record of local proceedings is settled before LUBA. *See* OAR 661-010-0025 and 0026. Following a petition for judicial review of LUBA’s decision, LUBA has seven days to deliver the record to the Court of Appeals and the petitioner’s brief is due within 21 days of filing the petition. *See* ORAP 4.64(1)(a) and 4.66(1)(a). Therefore, although the briefing timeline is short, the petitioner has access to the settled record while preparing the petitioner’s brief.²

In this case, by contrast, LCDC’s record is due within 21 days, and Petitioner does not currently have access to the complete record. *See* ORS 197.651(6); ORAP 4.64(1)(b). Petitioner’s lack of access is due to the nature of the periodic review proceeding before LCDC and volume of materials in the record. Petitioner needs access to the complete or stipulated record to prepare its brief, and the court and parties need a common understanding of the organization of the record in order to locate materials in the record. Petitioner therefore should not be required to file a brief in this case within 21 days as would be required if this were a “land use case” subject to ORAP 4.66.

ORAP 4.22 provides time to settle the record of a challenged administrative agency decision before briefing commences. LCDC is an administrative agency, and this is not a land use case under the ORAPs. Petitioner therefore requests that the court apply ORAP

² Moreover, a petitioner has access to a settled record before preparing petitioner’s brief in other types of appeals before the court. *See* ORAP 5.80(1).

4.22 in this case. Petitioner may be willing to stipulate to a shortened record, and Petitioner would like to work with LCDC's counsel to identify relevant materials and limit the record to these materials. Because the record in this case is undoubtedly voluminous, Petitioner believes that a streamlined record would aid the court's review of this case.

C. Conclusion

For the reasons described above, Petitioner respectfully requests that the court determine that briefing will not commence in this case until the record is settled pursuant to ORAP 4.22.

DATED: August 29, 2018.

HERSHNER HUNTER, LLP

By /s/ *Michael J. Gelardi*

Michael J. Gelardi, OSB 083347

mgelardi@hershnerhunter.com

180 E. 11th Avenue

Eugene, OR 97401

Telephone: (541) 686-8511

Attorney for Petitioner

CERTIFICATE OF FILING AND SERVICE

Pursuant to ORAP 16.25, I certify that on August 29, 2018, I caused the foregoing **PETITIONER'S MOTION – OTHER FOR RECORD REVIEW AND SCEHDULING DETERMINATION** to be filed with the Court of Appeals through the Oregon Judicial Department's eFiling System.

I further certify that, pursuant to ORAP 16.45, the foregoing **PETITIONER'S MOTION – OTHER FOR RECORD REVIEW AND SCEHDULING DETERMINATION** was served on August 29, 2018, by first class mail, postage prepaid, on the following:

Steven Shipsey, OSB 944350
DOJ Gen Counsel Nat Resources
100 SW Market Street
Portland, OR 97201
*Of Attorneys for Land Conservation and
Development Commission*

Linly F. Rees, OSB 945098
Office of the City Attorney
City of Portland
1221 SW 4th Avenue, Ste. 430
Portland, OR 97204

James R. Harries
10500 SW 25th Avenue
Portland, OR 97219

Attorney General for the State of Oregon
Office of the Solicitor General
400 Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096

HERSHNER HUNTER, LLP

By /s/ *Michael J. Gelardi*
Michael J. Gelardi, OSB 083347
mgelardi@hershnerhunter.com
180 E. 11th Avenue
Eugene, OR 97401
Telephone: (541) 686-8511
Attorney for Petitioner