

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

and

CITY OF PORTLAND,

Respondents.

LCDC Order 18-WKTSK—001897

CA No. A168704

**PETITIONER’S REPLY  
REGARDING PETITIONER’S MOTION FOR REVIEW OF AGENCY ORDER  
UNDER ORAP 4.22 AND TO TAKE JUDICIAL NOTICE**

Pursuant to ORAP 7.05(4), Petitioner Multnomah Neighborhood Association files this reply to clarify the facts of which Petitioner seeks judicial notice, that are stated in the City of Portland documents attached to Petitioner’s November 16 motion (the “City Planning Documents”). Petitioner also replies to Respondent Land Conservation and Development Commission’s (“LCDC”) issue preservation argument.

**A. Scope of Facts Proposed for Judicial Notice**

Respondent City of Portland (“City”) notes that the documents in question are “work products prepared by City staff” and argues that “Petitioner cannot show that every fact they mention is ‘not subject to reasonable dispute’” under OEC 201(b)(2). (City Resp.

at 12.) Petitioner agrees with the City on this point; Petitioner does not ask the court to accept the entire contents of the City Planning Documents as fact.

Instead, Petitioner asks the court to take notice of certain City planning processes and timelines explained in the City Planning Documents. Specifically, these documents show that that the City chose to implement the middle housing policy of the 2035 Comprehensive Plan (Policy 5.6) through a policy project known as the “Residential Infill Project.” Petitioner requests that the court recognize that the Residential Infill Project is separate from periodic review, and that the City developed zoning code changes to implement middle housing policy through the Residential Infill Project along a timeline similar to the City’s implementation of other, related elements of the 2035 Comprehensive Plan through Task 5 of periodic review.

These facts are not subject to reasonable dispute. The City acknowledges in its November 30 response that “[t]he Residential Infill Project is a legislative project to amend the Zoning Code and was not part of the periodic review tasks before LCDC or this court.” (City Resp. at 3.) The following subsections of this reply identify the relevant content in the City Planning Documents, and explain how this content relates to City policy decisions and timelines for periodic review that are detailed in the record before the court.

**1. 2035 Comprehensive Plan Urban Design Direction (Exhibit 1 to Petitioner’s Motion)**

This document states that “CENTERS provide the primary areas for growth and change in Portland over the next 25 years \* \* \* Centers transition in scale to surrounding lower density neighborhoods using ‘middle housing’ building types – rowhouses, duplexes, triplexes, etc. – at their edges.” (Pet’r Mot., Ex. 1 at 16.)<sup>1</sup> (emphasis in original).

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<sup>1</sup> Petitioner’s citations to “Pet’r Mot.” in this reply refer to Petitioner’s November 16 Motion for Review of Agency Order Under ORAP 4.22 and to Take Judicial Notice.

The City’s website states the Urban Design Direction document was issued in 2015. (*Id.* at 5.)

The record indicates that the City adopted the 2035 Comprehensive Plan in June 2016. (Rec. 14661-14665.) The plan includes an “Urban Design Framework” and the introduction to the plan states that “[f]or more information on the Urban Design Framework, see Chapter 3 [of the plan]: Urban Form as well as the Urban Design Direction document.” (Rec. 14799.) (emphasis added). The 2035 Comprehensive Plan therefore specifically refers to the Urban Design Direction document as guidance for the City’s comprehensive planning.

The 2035 Comprehensive Plan is City legislation that is the City’s work product for Task 4 of periodic review. Because the 2035 plan is in the record, and the plan explicitly relies on the Urban Design Direction document, it is beyond reasonable dispute under OEC 201(b)(2) that the City issued the Urban Design Direction before the 2035 plan, and that the Urban Design Direction informed the policies in the 2035 plan. The court should therefore take judicial notice of the middle housing discussion in the Urban Design Document as evidence that the City was engaged in development of middle housing policy as early as 2015.

**2. Residential Infill Project Stakeholder Advisory Committee Summary Report (Exhibit 2 to Petitioner’s Motion)**

This document explains that the purpose of the stakeholder advisory committee was to advise City planning staff regarding certain housing policies:

“[T]he Residential Infill Project Stakeholder Advisory Committee (SAC) was established by Mayor Charlie Hales in September 2015 to advise staff from the Portland Bureau of Planning and Sustainability in understanding the benefits, burdens and tradeoffs associated with different approaches to regulating residential infill in the city.”

(Pet'r Mot., Ex. 2 at 2.) Regarding middle housing policy, the document states that “we [the committee] expect that the multi-dwelling zoning update will provide an opportunity to implement the comprehensive plan policy calling for ‘middle’ housing.” (*Id.* at 17.) The document states that the committee issued the document in June 2016. (*Id.* at 1.)

The record indicates that the City updated rules governing the City’s multi-dwelling zones as part of a package of zoning code amendments adopted in Task 5 of periodic review. (Rec. 1226-1230.) The only update to the multi-dwelling zoning rules in the Task 5 package, however, was the addition of a “Retail Sales and Service” use to these zones. (Rec. 1349; 1365-67.) The City did not otherwise implement middle housing policy in the Task 5 zoning code amendments. (Rec. 1349-1868.) The City adopted its Task 5 ordinance in December 2016. (Rec. 1226-33.)

Petitioner requests that the court take notice of the Stakeholder Advisory Committee’s commentary about middle housing policy as evidence that the committee anticipated that the City would implement the policy through amendments to the rules governing multi-dwelling zones. Petitioner also requests that the court take notice of the timing of the committee’s report. These facts are not subject to reasonable dispute under OEC 201(b)(2) because they are stated plainly in a public report available on the City’s website, and there is no reason to question the accuracy of these statements in the report.

**3. Residential Infill Project City Council Final Concept Report  
(Exhibit 3 to Petitioner’s Motion)**

This document defines the types of dwelling units that the City considers to be “middle housing” and it proposes a “Housing Opportunity Overlay Zone” to encourage middle housing. (Pet'r Mot., Ex. 3 at 14-15.) The document quotes the text of the middle housing policy in the 2035 Comprehensive Plan as the basis for the proposed overlay zone.

(Compare Rec. 14937-38 with Pet'r Mot., Ex. 3 at 15.) The document then summarizes the scope of the proposed overlay zone as follows:

“The Housing Opportunity Overlay Zone map on Page 14 shows a conceptual boundary that encompasses the quarter-mile distance (approximately five blocks or a 5-minute walk) from designated centers, corridors with frequent bus service and MAX stations. Also included are areas with higher opportunity neighborhoods that may be slightly farther from centers and corridors but are still close to downtown, have good transit access, include a well-connected street grid and are near schools, parks and jobs.”

(Pet'r Mot., Ex. 3 at 15.) The map on page 14 of the document (Pet'r Mot., Ex. 3 at 16) shows the proposed overlay zone as covering a large portion of the City.

The document states that the City Council approved an earlier version of the document on December 7, 2016 and that the final concept document was prepared by City staff in response to direction from the City Council. (*Id.* at 30.) The document states that the document was issued in January 2017. (*Id.* at 1.)

The record indicates that the City adopted its Task 5 ordinance on December 21, 2016, and that the City did not submit this ordinance and associated work product to the Oregon Department of Land Conservation and Development (“DLCD”) for approval until August 7, 2017. (Rec. 1085.)

Petitioner requests that the court take notice of the Residential Infill Project City Council Final Concept Report, as evidence of the City’s decision to implement middle housing policy through the Housing Opportunity Overlay Zone that was developed as part of the Residential Infill Project. Petitioner also asks the court to take notice of the fact that the City issued the final concept report within a month of adopting its Task 5 ordinance and approximately seven months before the City submitted its periodic review Task 5 work

product for state approval. The facts stated in the final concept report about the City's concept for the overlay zone and the timing of this concept are not subject to reasonable dispute under OEC 201(b)(2). These statements were made by City staff about the City's own actions, in a public report issued at the direction of City Council. These statements are therefore proper subjects of judicial notice.

**4. Residential Infill Project, Discussion Draft, Volume 2: Zoning Code Amendments (Exhibit 4 to Petitioner's Motion)**

This document includes proposed zoning code text for the Housing Opportunity Overlay Zone. The document summarizes the proposed overlay zone as follows:

“The 2035 Comprehensive Plan identifies the need for a diversity of housing types in high opportunity areas . . . In R2.5, R5, and R7 zoned areas that have the new ‘a’ overlay zone, additional types of housing are being allowed. Where a house is allowed today, a duplex will be allowed. Where a house with just one accessory dwelling unit (ADU) was allowed, two ADU's are allowed. Where a duplex was allowed on corner lots today, a triplex can be built.”

(Pet'r Mot., Ex. 4 at 124.) The document includes a map showing the overlay zone proposed across a large portion of the City. (*Id.*) The document states that the document was issued in October 2017. (*Id.* at 1.)

Petitioner asks the court to take judicial notice of this document as evidence of the City's implementation of the Housing Opportunity Zone concept. Petitioner also asks the court to take notice of the fact that the City proposed specific zoning code language for the overlay zone within three months of submitting Task 5 for state approval. DLCDC did not approve Task 5 until December 5, 2017, approximately two months after the City issued its proposed code amendments for the Housing Opportunity Overlay Zone. (Rec. 636-37.)

The text of the City’s proposed zoning code amendments for the Housing Opportunity Overlay Zone and the timing of this proposal are not subject to reasonable dispute under OEC 201(b)(2) because City staff proposed the amendments in a public report. The City’s proposed zoning code amendments for the overlay zone are therefore a proper subject of judicial notice.

**B. Petitioner Has Preserved Its Argument About Implementation of Middle Housing Policy**

LCDC argues that the City Planning Documents are not relevant to this case because Petitioner did not preserve an argument about implementation of middle housing policy. (LCDC’s Resp. at 5-6.) LCDC is incorrect because Petitioner specifically raised the issues to LCDC that the City’s actions on middle housing policy are inconsistent with the City’s DLCD-approved periodic review work program, and that the City’s implementation of the policy is inconsistent with other policies in the City’s 2035 Comprehensive Plan. For example, Petitioner’s appeal to LCDC states that:

“The Middle Housing Policy also represents a significant deviation from the Work Program Tasks as approved by DLCD [in the original and revised DLCD approval orders] \* \* \* the approved Work Program states:

**Adopt long-term policies and shorter term strategies for meeting identified housing needs. Consider alternative housing conservation policies, particularly policies aimed at preserving the existing housing stock of affordable housing. Identify sufficient vacant, partially developed, and re-developable land will be identified to meet expected employment needs.**

\* \* \* \*

The up-zoning that would result from the Middle Housing Policy creates the potential for a vast increase in the number of

allowable dwelling units in the City, which would not be consistent with any number of other Comprehensive Plan goals and policies, the Transportation System Plan, and other infrastructure planning, and therefore compromises other elements of the Plan.”

(Rec. 506.) (emphasis in original).

Moreover, Petitioner specifically told LCDC that the City was implementing middle housing policy through the Residential Infill Project, and Petitioner asserted to LCDC that the City’s interpretation of the policy in the Residential Infill Project was inconsistent with City policy adopted in the 2035 Comprehensive Plan:

“The Middle Housing Policy, as it is currently being interpreted in the Residential Infill Project (RIP), is intended to produce multiple smaller units to replace existing single-family homes [footnote omitted]. The smaller units would be in the form of duplexes, triplexes, cottage clusters, and accessory dwelling units (ADUs). Most of these units will be in the form of studios, one-bedroom, and two-bedroom rental units, which are not conducive to larger families, and therefore cannot be considered consistent with the family-friendly housing required by [2035 Comprehensive Plan] Policy 5.5. The City did not address how the housing needs of families with children would be met under the Middle Housing Policy.”

(Rec. 580.)

Petitioner’s arguments about implementation of middle housing policy are contained primarily in a section of Petitioner’s LCDC appeal titled “Appeal Issue I.C. Lack of Plan Consistency and Failure to Plan in a Comprehensive Manner.” (Rec. 504.) Petitioner was not represented by legal counsel either in the local City proceedings or in the appeal process before DLCD and LCDC. As a result, Petitioner’s arguments are not expressed in precise legal terms.

That said, Petitioner’s arguments before DLCD and LCDC encompassed both the lack of factual basis for middle housing policy in the City’s periodic review work product, and the City’s failure to implement the policy consistent with other elements of the 2035 Comprehensive Plan. The City and LCDC are both sophisticated parties that understand the nuances of Oregon land use law, and the implications of Petitioner’s arguments. The City and LCDC therefore had fair notice and an opportunity to address the issues that Petitioner raises before this court, when this case was before DLCD and LCDC. *See State v. Stevens*, 328 Or 166, 122, 970 P2d 215 (1998) (stating that the underlying purposes of issue preservation are “fairness and efficiency”).

Moreover, LCDC did in fact respond to Petitioner’s arguments quoted above in the challenged decision. Specifically, LCDC concluded that “nothing in the text of the polices identified by [Petitioner] preclude the City from applying them together in a future process to determine where application of Policy 5.6 is appropriate, in accordance with the express language of that policy.” (Rec. 20.) Petitioner asserts to this court that LCDC’s decision to allow the City to divert implementation of middle housing policy to a “future process” violates state law. This issue is therefore properly before this court.

DATED: December 14, 2018.

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## CERTIFICATE OF FILING AND SERVICE

Pursuant to ORAP 16.25, I certify that on December 14, 2018, I caused the foregoing PETITIONER'S REPLY REGARDING PETITIONER'S MOTION FOR REVIEW OF AGENCY ORDER UNDER ORAP 4.22 AND TO TAKE JUDICIAL NOTICE 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 REPLY REGARDING PETITIONER'S MOTION FOR REVIEW OF AGENCY ORDER UNDER ORAP 4.22 AND TO TAKE JUDICIAL NOTICE was electronically served on December 14, 2018, on the following through the Oregon Judicial Department's eFiling System:

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I further certify that, pursuant to ORAP 16.45, the foregoing PETITIONER'S REPLY REGARDING PETITIONER'S MOTION FOR REVIEW OF AGENCY ORDER UNDER ORAP 4.22 AND TO TAKE JUDICIAL NOTICE was served on December 14, 2018, on the following by first class mail, postage prepaid:

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