IN THE COURT OF APPEALS OF THE STATE OF OREGON

MULTNOMAH NEIGHBORHOOD ASSOCIATION, Petitioner, v. LAND CONSERVATION AND DEVELOPMENT COMMISSION and CITY OF PORTLAND, Respondents.	Land Conservation and Development Commission 18WKTSK001897 CA No. A168704 **CITY OF PORTLAND'S RESPONSE TO PETITIONER'S MOTION FOR REVIEW OF AGENCY ORDER UNDER ORAP 4.22**

On November 16, 2018, petitioner filed a motion for review of the Land Conservation and Development Commission's (LCDC) agency order on motions to correct the record. In its motion, petitioner asked the court to add several documents to the record that were not part of the local record and were never placed before LCDC. Respondent City responds to petitioner's motion as allowed by ORAP 7.05(3).

A. Respondent City's Opposition to Petitioner's Motion to Add the Urban Design Document to the Record

This case is an appeal of LCDC's approval of Tasks 4 and 5 of the City of Portland's periodic review. In periodic review, LCDC's review is confined to the local record. ORS 197.633(3); OAR 660-025-0085(5)(g). Petitioner seeks to introduce before this court an undated document entitled "2035 Urban Design Direction (Comprehensive Plan Update)" that petitioner claims appears on a City website. That document was not in the local record, nor does petitioner allege that the document was in the local record. Rather, a draft of that document dated July 21, 2014, appears in the record at pages 34027 through 34061. The fact that a draft appeared in the record and an amended version of the document was later prepared by City staff does not establish that the amended document was included in the local record or may be added to the record by this court.

Furthermore, even if petitioner believes the document was included in the local record, petitioner failed to preserve that issue for the court's review. Petitioner does not identify anything in the record demonstrating that it raised an objection before LCDC.

Petitioner is barred from raising this issue now. *Fraser v. Land Conservation and Development Commission*, 206 Or App 735, 738, 138 P3d 932 (2006) (holding that preservation requirements of ORAP 5.45 apply to judicial review of LCDC's actions).

There is no basis for concluding that this document was included in the local record and properly placed before LCDC. The court should deny petitioner's motion.

B. Respondent City's Opposition to Petitioner's Motion for Judicial Notice of the Urban Design Document and Residential Infill Project Documents

Petitioner's motion also asks in this court to take judicial notice of the website version of the "2035 Comprehensive Plan: Urban Design Direction" document discussed above and three documents prepared by City staff relating to the "Residential Infill Project." The 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. In fact, the Residential Infill Project is still in process and has not even been adopted by the City Council. The documents petitioner now seeks to include in the

record are City staff work products. The documents are not subject to judicial notice under Oregon law, and this court should therefore deny the motion.

As this court has explained, "judicial notice may be taken * * * on appeal" under OEC 201. *Thompson v. Tel. & Data Sys., Inc.*, 132 Or App 103, 106, 888 P2d 16 (1994). "Judicial notice typically refers to a court's ability to accept an *indisputable and well-known fact* without requiring proof from the parties, subject to the restrictions delineated in OEC 201." *State v. Branch*, 243 Or App 309, 321, 259 P3d 103 (2011) (emphasis added).

Under Oregon law, adjudicative facts can be judicially noticed only if they are "not subject to reasonable dispute" and are either:

> (1) Generally known within the territorial jurisdiction of the trial court; or
>
> (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

OEC 201(b). That rule is "based on Rule 201(b) of the Federal Rules of Evidence" and embodies the notion that "[t]raditional methods of proof, including rebuttal evidence, cross-examination

and argument, should only be dispensed with" when there can be no "reasonable dispute" about the facts at issue. OEC 201(b) Commentary (1981). Rule 201(b), however, did "not change Oregon law" on judicial notice as it existed before its codification. *Id.*

The types of undisputable facts that can be judicially noticed include matters such as the Oregon DMV being a branch of the Oregon Department of Transportation, *State v. Newman*, 179 Or App 1, 3, 39 P.3d 874 (2002), that "property of the United States Navy is property of the United States," *State v. Gwyther*, 4 Or App 473, 476, 479 P2d 248 (1971), that it is "common practice for [police officers] to seek, obtain and execute search warrants," *State v. Ronniger*, 7 Or App 447, 453, 492 P2d 298 (1971), that electric billboards often "are used for advertising purposes, " *Paldanius v. Strauss*, 100 Or. 497, 504, 198 P 253 (1921), and "that the population of Bend substantially exceeds 2,500." *Volny v. City of Bend*, 168 Or App 516, 520, 4 P3d 768 (2000)

By contrast, courts have declined requests to take judicial notice of matters that are not beyond all dispute—such as "the fact

that [a party's] house appreciated in value," *In re Anderson*, 54 Or App 959, 963, 637 P2d 615 (1981), that "modern women * * * customarily conduct their daily business in high-heeled shoes," *Vollstedt v. Vista-St. Clair, Inc.,* 227 Or 199, 211, 361 P2d 657 (1961), the existence and location of former buildings, *Burch v. Amity*, 92 Or 152, 158, 180 P 312 (1919), "variations of climate in particular places at particular times," *Simms v. Sullivan*, 100 Or 487, 494, 198 P 240, (1921), or the contents of "the Law Enforcement Data System (LEDS) Operating Manual." *State v. Weems*, 190 Or App 341, 347, 79 P3d 884 (2003).

Here, petitioner asks this court to take judicial notice of the contents of documents that were never submitted below, were never considered by the agency in reaching its decision—and, more importantly, are "subject to reasonable dispute." OEC 201(b). As noted above, the documents that petitioner seeks to introduce are city planning staff work products that appear on city websites. Under no circumstances can its contents be considered to be "facts" that are "capable of accurate and ready determination by resort to

sources whose accuracy cannot reasonably be questioned." OEC 201(b).

Indeed, petitioner's motion does not even attempt to satisfy the criteria for judicial notice under Oregon law. Instead, petitioner cites to three readily distinguishable decisions and argues that, because the records they offer are "official government documents," their contents are necessarily judicially noticeable under OEC 201(b)(2). But petitioner misunderstands the rules governing judicial notice, and OEC 201(b)(2) does not contain an exception for "official government documents."

Petitioner first cites *Fort Vannoy Irr. Dist. v. Water Resources Comm'n*, 345 Or 56, 84-85 and n19, 188 P3d 277 (2008), for the proposition that the court could take "notice of water rights certificates and related documents to conclude that an irrigation district took certain actions to acquire water rights." But *Fort Vannoy* does not hold as much, and its holding is much more limited than petitioner suggests. The issue in that case was whether the petitioner was the holder of certain water rights. *Fort Vannoy*, 345

Or at 59. The court took judicial review of two official certificates showing that the Fort Vannoy Irrigation District, not the petitioner, was the holder of the relevant water rights. *Id.* at 84 n 19. The court explained that those two records were on file with the Water Resources Department and were "not subject to reasonable dispute." *Id*. Put differently, the court took notice of official records demonstrating title.

Here, by contrast, the documents that petitioner asks this court to take notice of are city staff work products. These documents that do not conclusively establish any "fact" capable of judicial notice. They are not a judgment. They are not title documents. Their contents are therefore not subject to judicial notice under OEC 201(b)(2), and petitioner cannot show otherwise.

Petitioner next cites *Hughes v. Aetna Cas. & Sur. Co.*, 234 Or 426, 439, 383 P2d 55 (1963), for the proposition that a court could take judicial notice of the contents of a Child Welfare Commission report to conclude that a child had been abandoned by his parents. But again, the holding in that case was a narrow one. The issue was

whether past adoption proceedings had been instituted under a statute pertaining to "children committed to an institution," or under a different statute pertaining to children abandoned by their parents. *Hughes*, 234 Or at 439. The court took judicial notice of a report from the Child Welfare Commission stating that "this proceeding is instituted" under the abandonment statute. *Id*. Under the circumstances, and given that the petitioner admitted in court documents that he was "a foundling," the fact of his abandonment was "not subject to reasonable dispute.

Again, nothing in *Hughes* stands for the proposition that OEC 201(b)(2) empowers courts to generally take judicial notice of the contents of hundreds of pages of documents, without even specifying which particular fact petitioner wishes to prove through those contents.

Perhaps recognizing the weakness of its arguments, petitioner finally cites *Arlington Education Ass'n v. Arlington School Dist. No 3*, 177 Or App 658, 667, 34 P 3d, for the proposition that "public records qualify for judicial notice under OEC 201(b)(2)." Because the

records they seek to produce here are "official government documents," petitioner argue that they necessarily qualify for judicial notice under OEC 201(b)(2). That argument has no merit.

This court has never held—and *Arlington* does not stand for the proposition that—any public record automatically qualifies for judicial notice under OEC 201(b)(2). Indeed, such a rule would lead to absurd results: under petitioner's interpretation, if a public record stated, "the moon is made of cheese," then a court would be bound to accept as fact that the moon is made of cheese. Nothing in OEC 201(b)(2) compels such an absurd result. Rather, as explained previously, a fact is subject to judicial notice if it is "not subject to reasonable dispute" and is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Arlington* is consistent with that common-sense rule.

Indeed, in *Arlington*, this court *rejected* a request to take judicial notice of a public record. In that case, the Employment Relations Board ("ERB") had taken judicial notice of the contents of

a letter from the district's attorney, which was part of the official record of the proceedings but, crucially, not in evidence. *Arlington Educ. Ass'n*, 177 Or App at 666. This court held that the fact that the letter from the district's attorney was public did not make its contents "beyond dispute" under OEC 201(b):

> A distinction must be drawn between noticing the existence of court records or information in court records and noticing the truth of that information. *The fact that* certain records or entries exist *or certain statements were made may be indisputable. However, the truth of those statements may be disputable, and hence will not be subject to judicial notice*.

Id. (emphasis in original) (quoting *Petersen v. Crook County*, 172 Or App 44, 51, 17 P3d 563 (2001). Because "[t]he letter from the district's attorney is not a source whose accuracy cannot reasonably be questioned under OEC 201(b)(2)," ERB abused its discretion in taking judicial review of its contents. *Id*. at 669.

Here, petitioner asks this court to take judicial notice of the contents of a document, without any attempt to explain why they believe that "the truth of the statements" made in that document is

"indisputable." *Arlington Educ. Ass'n*, 177 Or App at 666. Petitioner has not, and cannot, meet that burden.

As explained previously, those documents are work products prepared by City staff. Petitioner cannot show that the accuracy of their contents is "undisputable," let alone that every fact they mention is "not subject to reasonable dispute" and "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The "2035 Comprehensive Plan: Urban Design Direction" and the Residential Infill Project documents are therefore not subject to judicial notice under OEC 201(b), and this court should deny petitioner's motion.

DATED: November 30, 2018.

Respectfully submitted,

s/ Linly F. Rees

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing **CITY OF PORTLAND'S RESPONSE TO PETITIONER'S MOTION FOR REVIEW OF AGENCY ORDER UNDER ORAP 4.22** with the State Court Administrator, Appellate Court Records Section, 1163 State Street, Salem Oregon 97301, by electronic filing on November 30, 2018.

I further certify that I served the foregoing **CITY OF PORTLAND'S RESPONSE TO PETITIONER'S MOTION FOR REVIEW OF AGENCY ORDER UNDER ORAP 4.22** on:

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