

**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 RECONSIDERATION  
UNDER ORAP 7.55(4)(a) OR  
FOR LEAVE TO PRESENT  
ADDITIONAL EVIDENCE  
UNDER ORAP 4.25**

On October 9, 2018, Petitioner Multnomah Neighborhood Association filed a motion under ORAP 4.22(1) to correct the record. The motion requested that the Land Conservation and Development Commission (LCDC) add to the record an undated version of a document titled: "2035 Comprehensive Plan: Urban Design Direction" (Urban Design Direction). By order dated November 6, 2018, LCDC denied petitioner's motion because the Urban Design Direction was not part of the record before LCDC.

On November 16, 2018, petitioner filed a motion requesting this court take judicial notice of the Urban Design Direction and

three other documents associated with the City of Portland's Residential Infill Project (collectively, the "Documents"). On January 2, 2019, the Appellate Commissioner denied petitioner's motions.

Now petitioner moves this court to reconsider the Appellate Commissioner's Order Denying Motions to Supplement Record or Take Judicial Notice. Additionally, petitioner makes a new motion requesting this court take additional evidence pursuant to ORAP 4.25. The court should deny these motions.

**A. This court should deny petitioner's motion to reconsider the Appellate Commissioner's Order.**

This court may take judicial notice of facts "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." OEC 201(b)(2); ORS 40.065(2). Petitioner asserts the Appellate Commissioner's Order denying its request to take judicial notice is contrary to law under ORAP 6.25(1)(e). Petitioner makes no new arguments in its motion for reconsideration but continues to misstate the law on judicial notice. In response, the City restates and adheres to its November

30, 2018 response to petitioner's original motion to take judicial notice.

Petitioner's argument again relies on its assertion that the Documents are relevant. Relevance has no bearing on whether the Documents may be judicially noticed in periodic review proceedings. Nothing in petitioner's motion demonstrates legal error in the Appellate Commissioner's Order, and this court should therefore deny reconsideration.

**B. This court should deny petitioner's new motion to present additional evidence.**

Petitioner also now requests, for the first time, that this court receive the Documents as additional evidence under ORAP 4.25. This court should deny that new motion for numerous, independently sufficient reasons.

First, the motion is based on a misreading of ORAP 4.25. Specifically, petitioner appears to argue that *this court* can receive additional evidence. This misconstrues ORAP 4.25 and ORS 183.482(5). Those provisions empower this court to issue a limited remand for *the agency* to take additional evidence *in a contested-*

*case hearing* and issue new findings and conclusions—when a party has shown that the evidence is material and that there were substantial reasons for the party’s failure to present the evidence in the contested-case hearing. ORS 183.482(5) and ORAP 4.25 do not allow this court to take new evidence.

Moreover, this case is an appeal of LCDC’s approval of Tasks 4 and 5 of the City’s periodic review, not an appeal of a contested case—and ORAP 4.25 is inapplicable for that additional reason. In periodic review, LCDC’s review is confined to the local record. ORS 197.633(3); OAR 660-025-0085(5)(g). Petitioner was entitled to introduce evidence into the local record before the City but failed to do so. Furthermore, even if petitioner believed the Documents should have been included in the local record, petitioner did not preserve that issue for the court’s review. Petitioner does not identify anything in the record demonstrating it raised an objection before LCDC that the Documents were improperly omitted from the record.

Finally, even if this were a contested case—which it is not—petitioner has failed to make the necessary showing for remand to

the agency under ORAP 4.25 and ORS 183.482(5). Petitioner asserts that it was unable to include the Documents in the record because: 1) the evidentiary constraints of periodic review prevent supplementing the record; 2) it is a complex process and petitioner was not previously represented by counsel; and 3) some of the Documents were created after the record was closed. Those assertions, even if true, do not satisfy the requirements for remand under ORAP 4.25 and ORS 183.482(5). The motion for additional evidence must therefore be denied.

In sum, petitioner provides this court with no legal or factual basis under which this court may receive new evidence or remand this matter to the agency. For these reasons, as discussed above, this court should deny petitioner's new motion to present additional evidence under ORAP 4.25.

Respectfully submitted,

*s/ Linly F. Rees*

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on January 28, 2019, I electronically filed the foregoing **CITY OF PORTLAND’S RESPONSE TO PETITIONER’S MOTION FOR RECONSIDERATION OR FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE** with the State Court Administrator, Appellate Court Records Section, 1163 State Street, Salem Oregon 97301, by electronic filing on January 28, 2019.

I further certify that I served the foregoing **CITY OF PORTLAND’S RESPONSE TO PETITIONER’S MOTION FOR RECONSIDERATION OR FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE** on:

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