

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 No. 18WKTSK001897

Appellate Court No. A168704

LCDC'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

Petitioner Multnomah Neighborhood Association has sought judicial review of a Land Conservation and Development Commission (LCDC) approval order (*See* Att-1–34). Petitioner filed a motion to correct the record with LCDC, which LCDC granted in part and denied in part. LCDC denied petitioner’s request to correct the record to add an undated version of a document titled: “2035 Comprehensive Plan: Urban Design Direction” (Urban Design Direction) because it was not part of the record before LCDC.

Petitioner sought review of that decision asking this court to add the Urban Design Direction to the record, or alternatively, to take judicial notice of it. Petitioner also asked the court to take judicial notice of several other documents from the City of Portland related to the Residential Infill Project.

The appellate commissioner denied petitioner’s requests. (Att-38 (Order

(1/2/19)). Petitioner has sought reconsideration of the commissioner’s decision not to take judicial notice of the documents and, alternatively, asks for leave to present additional evidence under ORAP 4.25.<sup>1</sup>

This court should affirm the appellate commissioner’s order and deny petitioner’s request to present additional evidence.

**A. The court should affirm the appellate commissioner’s order denying petitioner’s request to take judicial notice of the City’s documents.**

Petitioner sought judicial notice of the contents of four documents—the Urban Design Direction (undated); and three documents related to the Residential Infill Project (Residential Infill Project Stakeholder Advisory Committee Summary Report (June 17, 2016); Residential Infill Project City Council Final Concept Report (January 2017); and Residential Infill Project Discussion Draft Volume 2: Zoning Code Amendments (October 2017)). (Pet. Mot. for Review of Agency Order at 4; Att-38). The documents are city planning staff work product that appear on city websites.

---

<sup>1</sup> Petitioner does not appear to seek reconsideration of the appellate commissioner’s decision to deny its motion to correct the record to add the Urban Design Direction. In any event, the appellate commissioner’s decision on that point was correct—because the Urban Design Direction was not part of the record before the City of Portland and LCDC, it is not part of the record on judicial review.

On reconsideration, petitioner asks “the court to take notice of the City’s decision to implement the ‘middle housing policy’ of the City’s 2035 Comprehensive Plan (policy 5.6) through the ‘Residential Infill Project’ \* \* \* rather than through periodic review, and of the dates of the [City’s] Documents as they relate to the City’s periodic review timeline.” (Pet. Mot. Recons. 2–3). Petitioner asserts that judicial notice of the “facts in the [City’s] Documents is mandatory” under OEC 201. (Pet. Mot. Recons. 2). Petitioner is wrong because the facts (or inference petitioner asks the court to draw) are not subject to judicial notice under OEC 201(b)(2), and in any event, they are irrelevant to the matter.

**1. The asserted “facts” do not meet the requirements for judicial notice in OEC 201(b).**

OEC 201 provides that a judicially noticed fact must be “not subject to reasonable dispute” including a fact that is “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” OEC 201(b). Petitioner asserts that it has provided the court with the information the court needs to take judicial notice on the contents of the Urban Design Direction and the three Residential Infill Project documents. (Pet. Mot. Recons. 3).

LCDC adopts the City’s argument, made primarily in its response to the original motion to take judicial notice, about why the content of the documents at issue are not subject to judicial notice. (*See* City’s Resp. to Mot.to Take Judicial Notice at 3–12). Specifically, as the City explained, judicial notice is not appropriate because the contents of the documents are subject to reasonable dispute, and there is no exception for the contents of government documents. Just because a document is publicly available does not make its contents facts that are “beyond dispute.”

Moreover, petitioner is asking the court to draw an inference from the contents of the documents, not merely take notice of the contents. (*See* Pet. Mot. Recons. 2–3 (petitioner asking the court to take notice of the City’s decision to implement the middle housing policy outside of the periodic review process)). Such an inference is not a noticeable fact. *See State v. Almaraz-Martinez*, 282 Or App 576, 580, 385 P3d 1234 (2016) (where inferences to be drawn from a district attorney’s letter were not “capable of accurate and ready determination” from the mere existence of the letter, judicial notice *of the inferences* was inappropriate).

**2. Even if the documents are judicially noticeable, the court should not take judicial notice of them.**

In any event, a court need not take judicial notice of a document when it is not relevant to the case. *See Spiess v. White*, 172 Or App 36, 43, 17 P3d 568 (2001) (in case involving land transaction, judge not required to take judicial notice of court files in other pending cases between parties, where insufficient information provided to establish “why any portion of the court files in the other actions was relevant to a disputed issue in this action”); Laird C. Kirkpatrick, *Oregon Evidence*, § 201.03, 90 (6th ed. 2013) (“[J]udicial notice is mandatory only with respect to matters that are relevant to the case.”). Here, the documents are not relevant.

Petitioner appears to assert that it will use the documents to make an argument that is unpreserved and unsupported by the judicial review record. Specifically, petitioner says that the documents are relevant context to establish that LCDC “violated state law by, among other things, allowing the City to implement middle housing policy outside of the periodic review process.” (Pet. Mot. Recons. 3). But in order for petitioner to assert that argument on appeal, it needed to have made it to LCDC. *See 1000 Friends of Oregon v. LCDC*, 244 Or App 239, 268–69, 259 P3d 1021 (2011) (this court’s review is limited to

“the issues presented on appeal that have been preserved before LCDC” which

“requires objectors before LCDC to make an explicit and particular specification of error by the local government”).<sup>2</sup> Petitioner made no explicit and particular argument below that the City violated any law by failing to implement the Middle Housing Policy through the periodic review process.<sup>3</sup>

Not only did petitioners fail to preserve the argument they now apparently want to make, the documents at issue were not even in the record before LCDC. Again, LCDC’s review is based on the *local* record. ORS 197.633(3) (LCDC “shall confine its review of evidence to the local record”); OAR 660-025-0085(5)(g) (same). The City provides its work task record to the Department of Land Conservation and Development (DLCD) along with its final decision. OAR 660-025-0130. Persons who participated in the local

---

<sup>2</sup> LCDC’s review, as explained in its order denying petitioner’s motion to correct the record, was “limited in scope to considering a deficiency in a local government’s work task submittal, clearly identified by an appellant.”

<sup>3</sup> Rather, before LCDC, petitioner argued that the Middle Housing Policy (1) arose late in the periodic review process and afforded inadequate public discourse, (2) lacked maps showing the effect of the policy implementation, (3) did not comply with the notice to Neighborhood Associations provision of the Portland City Code section 3.96, (4) was unneeded and unsupported by the record, and (5) conflicts with other policies in the comprehensive plan. (Att-10–18). Petitioner also argued that the City failed to adequately respond to public comment on the Middle Housing Policy and failed to address the lack of infrastructure for the Middle Housing Policy. (Att-18–19).

process can object to the work task submittal. DLCD reviews the City's submittal on the work task. OAR 660-025-0140. Then LCDC reviews any appeal or referral of the work task. OAR 660-025-0085; OAR 660-025-0160. LCDC's reviews based on the local record along, any objections, and DLCD's report. OAR 660-025-0160(6) (LCDC "shall hear appeals based on the local record" and the written record includes the local government submittal, timely objections, the director's report, and any revisions to the report based on exceptions). Petitioner had the opportunity—when the matter was before the DLCD and LCDC—to *object* to the City's record submittal. It did not do so. LCDC made its decision based on the local record before it, which did not include the documents petitioner's now seek to rely upon. Petitioner cannot at this point rely on those documents to support any challenge to LCDC's decision.

Petitioner claims that the "City excluded documents regarding the [Residential Infill Project] policy development from the periodic review record." (Pet. Mot. Recons. 5). It is not clear if petitioner is trying to suggest it objected to the City's record. It did not. Petitioner never sought to have those records included in the City's record. If petitioner wanted to raise an issue based on those documents, it needed to ensure they were in the local record.

Petitioner also claims that it asked the DLCD and LCDC to consider “certain extra-record” documents related to the City’s development of the middle housing policy and that “DLCD and LCDC rejected this evidence based on ORS 197.633(3).” (Pet. Mot. for Recons. 5). Petitioner does not assert, however, that it ever asked DLCD or LCDC to consider the *particular* documents at issue. Petitioner cites to two pages of DLCD’s decision in which DLCD notes that its review is equivalent to ORS 197.633(3), and rejects objectors’ arguments that Policy 5.6 lacked an adequate factual basis, conflicts with the provision of “family-friendly” housing, or will lead to a loss of affordable housing. (Att-36–37 (Rec. p. 651, 654)). DLCD also declined to consider two academic sources and a map that were not part of the City’s record. (Att-36). Thus the record does not support that petitioner asked DLCD to consider the documents at issue.

Nor does the record support that petitioner asked LCDC to consider the documents. Petitioner appears to have attached to its exceptions before LCDC a number of documents related to the Residential Infill Project, but not those at issue here. (*See* Att-5). Even if petitioner had attached those documents, the document still would not have been part of the local record that LCDC could consider in making its decision. LCDC would have, however, included them in

the judicial review record as attachments to petitioner's exceptions. But again, petitioner did not include the documents at issue.

Ultimately, because LCDC's review did not include the documents at issue and petitioner cannot properly make an unpreserved assertion on review that relies on the documents, this court should decline to take judicial notice of them.

If the court decides to take judicial notice of the documents, it should clarify that the documents were not before LCDC and therefore cannot be a basis to challenge LCDC's order.

**B. The court should deny petitioner's request to present additional evidence under ORAP 4.25.**

In response to petitioner's motion to correct the record to add the undated Urban Design Direction, LCDC noted that petitioner appeared to be attempting to supplement, not correct the record. Now, petitioner has asked to supplement the record with the Urban Design Direction and the Residential Infill Project documents. ORAP 4.25 permits the court to give leave to supplement the record as provided in ORS 183.482(5). The rule and statute allow a party to supplement the evidence that was presented in a contested case before an agency, and then provides the agency the opportunity to revisit its decision in light of the additional evidence. The rule and statute do not apply because the

proceeding before LCDC was not a contested case hearing, and the record cannot be supplemented by LCDC. Rather, as explained, the record was made before the City.

Even if the rule applies, the court should deny the motion for two reasons. First, the documents are not material because they cannot be used to challenge the LCDC order for all the reasons described above. *See* ORS 183.182(5) (court may allow additional evidence “be taken before the agency” if, among other requirements, “the additional evidence is material”).

Second, petitioner could have, but did not, attempt to make the documents part of the record below. *See* ORS 183.182(5) (court may only allow additional evidence if there “were good and substantial reasons for failure to present it in the proceeding before the agency”); ORAP 4.25(1) (requiring party seeking leave to present additional evidence to submit an affidavit “specifying why the evidence was not produced at the agency and stating whether an extension of time was requested for the purpose of producing the evidence before the agency”).

Petitioner claims that it was reasonable for it never to have attempted to get the documents into the City’s local record because it “is a citizens’ neighborhood association that participated in an extremely complex local

legislative process without legal counsel.” (Pet. Mot. Recons. 5). Thus, petitioner asserts, it “cannot reasonably be expected to have made a formal request to the City to place the [Residential Infill Project] policy documents in the City’s periodic review record.” (Pet. Mot. Recons. 5). A lack of legal sophistication should not be a basis to allow a party to supplement the record at this late stage—there are specific procedures and other interested parties involved and taking additional evidence that requires an agency to revisit its decision is inefficient (and again, LCDC who makes the decision, does not make the record).

Petitioner also points out that some of the documents post-date the City’s periodic review record. (Pet. Mot. Recons. 6). Rather than supporting petitioner’s position, that is a reason to not supplement the record with the documents—if they could not have in issuing the decision, it is inappropriate to consider them at this time.

Petitioner next asserts that the “evidentiary constraints of ORS 197.633(3) are ‘good and substantial reasons’ under ORAP 4.25 for why the Documents are not in the record in this case.” (Pet. Mot. Recons. 6). But that actually underscores why the documents should not be made a part of the record after the fact—the legislature has limited LCDC’s review in ORS 197.633(3).

Petitioners are attempting to circumvent that express limitation, which this court should not allow.

Finally, petitioner asserts that allowing the additional evidence under ORAP 4.25 “will provide LCDC with an opportunity to review the Documents and determine whether the Documents change LCDC’s view of the City’s periodic review work product,” while also giving LCDC an opportunity to respond to the documents. (Pet. Mot. Recons. 7). While LCDC would have an opportunity to revisit its decision if additional evidence is submitted, because petitioners never made the argument it is now seeking to make, LCDC would not address that issue simply because there was additional evidence. And allowing additional evidence under ORAP 4.25, does not permit the parties—including the City—to introduce any evidence in response to the evidence that supplements the record.

To the extent petitioner is concerned that it has no avenue to seek review of the City’s Residential Infill Program, that seems to be incorrect. When the City takes legislative or quasi-judicial actions to implement the Residential Infill Project by plan or code amendments, zone changes, or map amendments, those would be land use decisions subject to challenge at the Land Use Board of Appeals.

This court should not allow petitioner to supplement the record at this time with evidence that is not material to any preserved argument and when petitioner made no effort to correct the local record before LCDC's review of the City's actions.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239  
Attorney General  
BENJAMIN GUTMAN #160599  
Solicitor General

/s/ Jona J. Maukonen  
\_\_\_\_\_  
JONA J. MAUKONEN #043540  
Assistant Attorney-In-Charge  
jona.j.maukonen@doj.state.or.us

Attorneys for Respondent Land  
Conservation and Development  
Commission

BEFORE THE  
LAND CONSERVATION AND DEVELOPMENT COMMISSION  
OF THE STATE OF OREGON

IN THE MATTER OF REVIEW )  
OF THE CITY OF PORTLAND ) APPROVAL ORDER  
PERIODIC REVIEW TASKS 4 AND 5 ) 18-WKTSK—001897

This matter came before the Land Conservation and Development Commission (“Commission”) on March 15, 2018, as an appeal of a decision of the director of the Department of Land Conservation and Development Order 001892 dated December 5, 2017. The Commission fully considered the written record and the written argument and oral presentations of the appellants, the City of Portland (“Portland” or “city”), and the Department of Land Conservation and Development (“department”).

**I. INTRODUCTION**

**A. Procedural History**

The submittals before the department for review included Task 4, Ordinance No. 187832, adopted by Portland on June 15, 2016, and Task 5, Ordinance No. 188177, adopted by Portland on December 21, 2016. The director approved Portland’s Task 4 and 5 submittals by written order. These appeals followed.

1. On April 28, 2017, Portland issued a notice of decision for Task 4 pursuant to OAR 660-025-0140(1) and submitted its comprehensive plan update for review pursuant to OAR 660-025-0130.
2. On May 18, 2017, Portland waived the 120-day deadline for a department decision on Task 4 pursuant to OAR 660-025-0150(3).
3. On May 19, 2017, the deadline to file objections for Task 4 pursuant to OAR 660-025-0140(2)(a), the department received a total of 11 written objections. The letters presented a total of 21 individual sub-objections. The department found five written objections to be procedurally valid under OAR 660-025-0140(2), with a total of 11 individual sub-objections.
4. On August 7, 2017, Portland issued a notice of decision for Task 5 pursuant to OAR 660-025-0140(1) and submitted its comprehensive plan update for review pursuant to OAR 660-025-0130.
5. On August 28, 2017, the deadline to file objections for Task 5 pursuant to OAR 660-025-0140(2)(a), the department received a total of six written objections. The letters presented a total of 14 individual sub-objections. The department found four written

- objections to be procedurally valid under OAR 660-025-0140(2) with a total of nine individual sub-objections.
6. On December 5, 2017, by written department Order 001892, the department director rejected all of the objections and approved Portland's Task 4 and 5 submittal in its entirety pursuant to OAR 660-025-0150(1)(a). The department found that the Portland Comprehensive Plan Map and supporting documents – goals and policies for the economic and housing elements, public facilities plan, list of infrastructure projects, policies addressing Portland International Airport and coordination with school facilities plans, Transportation System Plan goals and policies and list of transportation projects, and the Community Involvement Report for Task 4 – comply with applicable statewide planning goals, related statutes and implementing rules; and that the zoning map and zoning code amendments implementing the adopted 2035 Comprehensive Plan, the Transportation System Plan amendments to add additional policies and update street classifications, the comprehensive plan amendments to incorporate major public trails into the land use map, and corrections to policy language, and the Community Involvement Report for Task 5 also comply with the applicable statewide planning goals, related statutes and implementing rules. The department notified the city and the objectors of the director's decision, pursuant to OAR 660-025-0150(2).
  7. On December 26, 2017, two objectors timely filed six appeals of DLCD Order 001892 to the Commission as provided for in OAR 660-025-0150(6). The Multnomah Neighborhood Association objections were filed on behalf of the Association by three different individuals.
  8. On February 22, 2018, the department issued its report to the Commission and mailed a copy thereof to Portland and the two appellants pursuant to OAR 660-025-0160(3) and (4).
  9. On March 5, 2018, the department received timely exceptions to the department's report from the two appellants and Portland, pursuant to OAR 660-025-0160(5).
  10. On March 9, 2018, the department issued its response to exceptions and supplemental report to the Commission pursuant to OAR 660-025-0160(5), all of which were transmitted to the two appellants and Portland, pursuant to OAR 660-025-0160(4).
  11. On March 15, 2018, the Commission held a hearing on the appeals in Salem, Oregon. The Commission heard a staff report from the department and oral argument from the two appellants and from Portland. The Commission denied the appeals and upheld DLCD Order 001892. The Commission authorized the director to issue an order approving the Task 4 and 5 submittal, pursuant to OAR 660-025-0160(7)(a) and OAR 660-002-0010(6).

## **B. Description and Overview of Submittal**

The Portland periodic review Task 4 and 5 submittals included several amendments to the city's comprehensive plan.<sup>1</sup> The department received six appeals. One appeal is from an individual property owner appealing Tasks 4 and 5 regarding the land use designation of an individual property. Five appeals are from the Multnomah Neighborhood Association (MNA) in Southwest Portland, three of which are for Task 4 and two of which are for Task 5. The MNA appeals are regarding a number of items related to the 2035 Comprehensive Plan map, goals and policies related to housing, zoning map amendments and zoning code amendments.

This order is a review on the local record submitted by the city. OAR 660-025-0085(5)(g); OAR 660-025-0160(6).

## **C. The Written Record for This Proceeding**

OAR 660-025-0160(6) provides: "The Commission shall hear appeals based on the local record. The written record shall consist of the submittal, timely objections, the director's report, timely exceptions to the director's report including materials described in section (5) of this rule, the director's response to exceptions and revised report if any, and the appeal if one was filed."

The written record includes the following materials:

1. Written materials presented by the City of Portland and the appellants at the Commission's March 15, 2018 meeting, to the extent that they reflect materials already in the record.
2. Supplemental staff report responding to exceptions dated March 9, 2018.
3. Three letters of exception to staff report for the appeal of DLCD Order 001892 filed on behalf of the Multnomah Neighborhood Association by Fodor & Associates LLC, dated March 5, 2018.
4. Two letters of exception to staff report for the appeal of DLCD Order 001892, filed on behalf of the Multnomah Neighborhood Association by James Peterson and Carol McCarthy, dated March 5, 2018.

---

<sup>1</sup> The director did not receive any objections to the remainder of the city's Task 4 and 5 submittal, which included: two citizen involvement reports; a public facilities plan; a list of infrastructure projects (water, sewer and drainage); policies addressing Portland International Airport expansion, Portland Heliport and coordination with school facilities plans; goals and policies of the transportation system plan, street classifications, and list of transportation projects; and, comprehensive plan amendments and policy language to incorporate major public trails into the land use map. None of these matters are before the Commission on appeal.

5. Exception to staff report for the appeal of DLCD Order 001892, filed by James Harries, dated March 5, 2018.
6. Exceptions to staff report for the appeal of DLCD Order 001892, filed by Portland, dated March 5, 2018.
7. The staff report for the appeal of Director's decision to approve Portland's periodic review Tasks 4 and 5, policy choices and implementation, dated February 22, 2018.
8. Three letters of appeal of director's approval order filed on behalf of the Multnomah Neighborhood Association by Eben Fodor, Fodor & Associates LLC, dated December 26, 2017.
9. Two letters of appeal of director's approval order filed on behalf of the Multnomah Neighborhood Association by James Peterson and Carol McCarthy, dated December 26, 2017.
10. Appeal of director's approval order filed by James Harries, dated December 15, 2017.
11. DLCD Order 001892, dated December 5, 2017, approving the submittal, which includes responses to objections submitted by the appellants in this proceeding.
12. Emails from Eric Engstrom, City of Portland, dated October 23, 2017, October 26, 2017, two emails dated November 27, 2017, and February 5, 2018 identifying material in the record as authorized by OAR 660-025-0130(4)(a).
13. Objections received to Portland periodic review Task 5 submittals.
14. Periodic Review Task 5 submittal, consisting of:
  - a. Community Involvement Report for Task 5
  - b. Zoning map amendments to implement the adopted 2035 Comprehensive Plan
  - c. Zoning code amendments to implement the adopted 2035 Comprehensive Plan
  - d. Task 4 transportation system plan amendments to add additional policies and update street classifications, and
  - e. Task 4 comprehensive plan amendments to incorporate major public trails into the land use map, and corrections to policy language.
15. Objections received to Portland periodic review Task 4 submittals.
16. Periodic Review Task 4 submittal, consisting of:
  - a. Community Involvement Report for Task 4 (submitted with Task 3)
  - b. 2035 Comprehensive Plan map

- c. Goals and policies comprising the economic and housing elements of the 2035 Comprehensive Plan
- d. Public Facilities Plan – Citywide System Plan (submitted with Task 3)
- e. List of infrastructure projects: water, sewer and drainage
- f. Policies addressing Portland International Airport expansion, Portland Heliport and coordination with school facilities plans, and
- g. Goals and policies of the Transportation System Plan and list of transportation projects.

The Commission is statutorily directed to “confine its review of evidence to the local record.” ORS 197.633(3). Thus, where the parties have provided documents along with their objections, exceptions, or appeals, even though they constitute part of the “Written Record for This Proceeding,” the Commission does not consider it as evidence in deciding this appeal. Specifically, the Commission does not consider arguments that are in documents that are part of the written record for this proceeding, but that are based on materials not in the local record, including those found at:

1. Harries exception, Attachment B Subdivision Approval.
2. MNA Appeal #1 at 6 and 6 n 3 – information from *Residential Infill Project, An Update to Portland’s Single-dwelling Zoning Rules*, Discussion Draft, October 2017.
3. MNA Appeal #1 at 10 – Figure 1: Map provided to the MNA by BPS dated June 13, 2016.
4. MNA Appeal #1 at 15; MNA Appeal #1 exception at 11 – Testimony to the Portland City Council Hearing on Residential Infill Project Concept Report, November 16, 2016.
5. MNA Appeal #1 at 15; MNA Appeal #1 exception at 12 – *Economic Analysis of Proposed Changes to Single Dwelling Zone Development Standard*, Johnson Economics, October 17, 2016.
6. MNA Appeal #1 at 19 n 9 – *Residential Infill Project: Concept Report to City Council*, October 2016.
7. MNA Appeal #2 at 9 – Figure 1: *Residential Infill Project: Concept Report to City Council*, October 2016.
8. MNA Appeal #2 at 15 – Figure 4: Map provided to the MNA by BPS dated June 13, 2016.
9. MNA Appeal #3 at 2-3 – February 18, 2003 and July 19, 2015 letters from MNA.
10. MNA Appeal #1 exception at 5 –first paragraph.
11. MNA Appeal #1 exception at 10-11 – Residential Preference Study, by DHM Research for Portland METRO, May 2014.
12. MNA Appeal #1 exception Attachment #1 – 5 Page untitled staff report dated January 16, 2016.
13. MNA Appeal #1 exception Attachment #1 and Handout to the Commission at 3– Map of Middle Housing Study Areas, January 26, 2016.
14. MNA Appeal #1 exception Attachment #2 and Handout to the Commission at 4– Map of Proposed New “a” Overlay Zone (Additional Housing Opportunity), October 2017.

## II. COMMISSION'S DECISION ON APPEAL

### A. Scope of Review

The breadth of the Commission's review function for these appeals of DLCD Order 001892 is suggested in the requirement in OAR 660-025-0150(6)(d)(B) that an appeal:

“Clearly identify a deficiency in the work task sufficiently to identify the relevant section of the submitted task and the statute, goal, or administrative rule the local government is alleged to have violated;”

On an appeal of a director's decision, the Commission is not reviewing the director's approval of a work task submittal anew; the Commission engages in a clear error standard of review limited in scope to considering a deficiency in a local government's work task submittal, clearly identified by an appellant, that constitutes a violation of a statute, goal, or administrative rule.

A rather simplistic way to state the scope of review is that the Commission has two basic functions: (1) correction of error or declaration that no correction is required for issues raised on appeal of a particular work task submittal; and (2) declaration of legal principle, as to the proper application of a statute, goal, or administrative rule. However, it is worth noting that the Commission's standard of review, set out below, requires the Commission to consider allegations concerning compliance with applicable laws, in an overarching, on the whole analysis. That is, an appeal may clearly identify a violation of a statute, goal, or administrative rule, and the Commission may nevertheless approve the submittal.

### B. Procedural Requirements

OAR 660-025-0150(6)(b) authorizes persons who filed a valid objection to appeal a director's approval of a work task to the Commission. The department received the appeals in this matter within the 21-day period allowed by OAR 660-025-0150(6)(c). As is required with the filing of objections, OAR 660-025-0150(6)(d) provides that a person appealing the director's decision must:

“(A) Show that the person participated in the local proceedings leading to adoption of the work task orally or in writing;

“(B) Clearly identify a deficiency in the work task sufficiently to identify the relevant section of the submitted task and the statute, goal, or administrative rule the local government is alleged to have violated; and

“(C) Suggest a specific modification to the work task necessary to resolve the alleged deficiency.”

The Commission conducted its March 15, 2018 hearing as provided in OAR 660-025-0085(5). OAR 660-025-0085(5)(c) provides that oral argument is allowed from the local government and those who filed a valid appeal. The local government may provide general information on the

task submittal and address those issues raised in the department review and appeal. OAR 660-025-0085(5)(f). Persons who submitted an appeal may address only those issues raised in their appeal. *Ibid.* The Commission may take official notice of certain laws, as specified in OAR 660-025-0085(5)(h). Portland requested that the Commission take official notice of two of its prior orders in this periodic review:

1. Work Program Approval: Order 001773 dated September 30, 2009
2. Community Involvement Program Approval: Order 001798 dated January 5, 2011

The Commission takes official notice of its decisional law in this matter as requested. OAR 660-025-0160(7) provides that, in response to an appeal, the Commission must issue an order that does *one or more* of the following:

“(a) Approves the work task or plan amendment or a portion of the task or plan amendment;

“(b) Remands the work task or plan amendment or a portion of the task or plan amendment to the local government, including, for a work task only, a date for resubmittal;

“(c) Requires specific plan or land use regulation revisions to be completed by a specific date. Where specific revisions are required, the order shall specify that no further review is necessary. These changes are final when adopted by the local government. The failure to adopt the required revisions by the date established in the order shall constitute failure to complete a work task or plan amendment by the specified deadline requiring the director to initiate a hearing before the commission according to the procedures in OAR 660-025-0170(3);

“(d) Amends the work program to add a task authorized under OAR 660-025-0170(1)(b);  
or

“(e) Modifies the schedule for the approved work program in order to accommodate additional work on a remanded work task.”

### **C. Standard of Review**

The Commission reviews issues raised on appeal under the standard of review provided in ORS 197.633(3) and OAR 660-025-0160(2). The standard of review for the Commission, is:

“(a) For evidentiary issues, whether there is substantial evidence in the record as a whole to support the local government’s decision.

“(b) For procedural issues, whether the local government failed to follow the procedures applicable to the matter before the local government in a manner that prejudiced the substantial rights of a party to the proceeding.

“(c) For issues concerning compliance with applicable laws, whether the local government’s decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations. The Commission shall defer to a local government’s interpretation of its comprehensive plan or land use regulation in the manner provided in ORS 197.829 \* \* \*. For purposes of this subsection, ‘complies’ has the meaning given the term ‘compliance’ in the phrase ‘compliance with the goals’ in ORS 197.747.”

For periodic review submittals under ORS 197.628 to 197.650, “compliance with the goals” means the submittal “on the whole, conform[s] with the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature.” ORS 197.747; ORS 197.633(3)(c).

The issues raised on appeal focused the Commission review on Goal 1 and whether the city complied with its community involvement work program, an implementation of Statewide Planning Goal 1, the Goal 2 requirements of an adequate factual base and on the relevant portions of those goals and administrative rules, whether the city established an appropriate policy framework as a bases for the periodic review decisions, and whether the city coordinated periodic review plans and implementation measures with affected governments.

### **III. CONSIDERATION OF OBJECTIONS RAISED ON APPEAL**

The department analyzed the six appeal letters submitted and, in the February 22, 2018 report issued pursuant to OAR 660-025-0160(5), recommended that the Commission reject these objections on appeal and approve Portland’s Task 4 and 5 submittals. The department analyzed the exceptions submitted and responded in the March 9, 2018 supplemental staff report pursuant to OAR 660-025-0160(5). The department made no changes in the recommendations provided in the February 22, 2018 report. After considering the appeals, recommendations, exceptions, and the oral arguments presented at the public hearing, the Commission rejects each objection on appeal for the reasons set forth below.

#### **A. James Harries (Harries) – Request to re-map and re-zone property**

Mr. Harries’ appeal asserts that the city has not properly evaluated certain properties. He asserts that no one has bothered to visit or set foot in the area, and if planners and Commissioners had come to the property, they would have discovered the vegetation is comprised of an invasive species and that further development would eliminate the invasive species as well as further a city and state environmental goal. Mr. Harries’ March 5, 2018 exception requests that an error from a previous SW Neighborhood Plan (adopted prior to this proposed plan and referenced in his earlier objection) be corrected and the property returned to the pre-Southwest Neighborhood Plan R-10 designation from the current R-20 designation, which would allow the property to be subdivided. Harries contends that the alleged deficiency noted in the appeal is that the city has not followed “reasonable procedure.” Harries Appeal at 1. The proposed remedy is to change the plan map and zoning from R-20 to R-10.

The Commission rejects this appeal. In a February 25, 2015 city staff Memorandum to the Planning and Sustainability Commission there is a section titled “Proposed down-designations to address natural hazards, drainage concerns and infrastructure constraints.” Task 4 Record at 19533-19538. The proposal summary states:

“The Draft Comprehensive Plan proposes to reduce potential future residential development in areas that are characterized by natural hazard risks (e.g., landslide, wildfire, earthquake, flooding), and drainage challenges due to steep slopes, poorly draining soils, wetlands, seeps, springs, and /or vulnerable stream channels. Most of these areas also have existing infrastructure constraints, including limited storm water, water supply, or sanitary system capacity, and lack of street and/or sidewalk connectivity.

“The amount of additional development allowed under the current Comprehensive Plan designation and zoning would increase impervious areas and remove trees on steep slopes, increasing existing hazard risks, drainage problems, and demand on limited infrastructure capacity. *Reducing future development will not solve existing problems in these areas, however, it will help protect public health and safety by reducing future risks and impacts associated with new development.*” Task 4 Record at 19533.

The memorandum identifies the location of the areas affected by the above analysis, one of which is the, “Southwest hills: Near Tryon Creek State Park or Marshall Park[.]” Task 4 Record at 19534. The appellant’s property is located within this affected area in the Southwest hills near Tryon Creek State Park and Marshall Park.

The city further describes the methodology for their proposal and concludes with the following (note that a polygon is described as a cluster of contiguous dividable lots):

“In conclusion it is important to emphasize that analysis was conducted and polygon boundaries drawn primarily using an *area-scale focus*, rather than a *property-by-property* focus. Some characteristics (e.g., steep slopes, landslide and wildfire hazard, storm water or water supply constraints) are shared across most polygons. However each polygon is unique in its location, character, and combination of issues and constraints that provide the basis for this draft proposal. The occurrence and severity of natural hazards and other constraints also vary within the individual polygons. The proposal as applied to each polygon is intended to reduce future natural hazard risks and infrastructure deficiencies and costs resulting from the cumulative impacts of development at an area scale. This analysis does not suggest that individual parcels could not be safely developed; instead, we are focused on potential cumulative impacts within the area in question.” Task 4 Record at 19535.

Mr. Harries’ request also came before City Council on April 28, 2016, and the council concluded that the property is appropriately designated as R-20. Task 4 Record at 10677.

In its exception to the staff report, Portland explained that the rezoning of Mr. Harries property occurred in 2000 through the adoption of the Southwest Community Plan. Portland

points the Commission to seven acknowledged maps that include Mr. Harries property and that support the current R-20 designation. The maps establish that: (1) most of the property is within an environmental conservation zone; (2) the entire property is within a wildfire hazard area; (3) the property is served by substandard streets, (4) the property is in an area with limited facilities for the conveyance of stormwater, (5) the property contains significant natural resources, (6) the entire property is within a landslide hazard area, and (7) no part of the property was designated vacant or developable land suitable for needed housing. The Commission concludes that nothing in the appeal or exception establishes that Portland violated a statute, rule or goal by maintaining the zoning of Mr. Harries property that is consistent with provisions of its acknowledged comprehensive plan maps.

In conclusion, the Commission finds the city affirmed its previous evaluation of an area including the appellant's property and concluded there were sufficient natural hazards, drainage concerns or infrastructure constraints or some combination of that to support the retention of the R-20 zone on the subject property. This constitutes "substantial evidence in the record as a whole to support the local government's decision." OAR 660-025-0160(2)(a). Mr. Harries' appeal is rejected.

#### **B. Multnomah Neighborhood Association (MNA) #1**

MNA appeals the approval in DLCD Order 001892 of Task 4. Specifically, MNA contests Portland's compliance with Statewide Planning Goals 1 and 2 in the process leading to, and the final result of a specific component of Task 4: Policy 5.6. That policy provides:

**"Middle housing.** Enable and encourage development of middle housing. This includes multi-unit or clustered residential buildings that provide relatively smaller, less expensive units; more units; and a scale transition between the core of the mixed use center and surrounding single family areas. Where appropriate, apply zoning that would allow this within a quarter mile of designated centers, corridors with frequent service transit, high capacity transit stations, and within the Inner Ring around the Central City." Task 4 Record at 277-278.

MNA divided this appeal into four issues: 1) Lack of Adequate Information to Inform Citizens; 2) Lack of Need and Factual Basis for Policy; 3) Lack of Plan Consistency and Failure to Plan in a Comprehensive Manner; and 4) Lack of Adequate Response to Public Input. The exception filed by MNA to the department's staff report to the Commission expounds on issue 3) the lack of infrastructure for new middle housing, which the Commission addresses separately below as a fifth issue. MNA Appeal #1 at 20-21; MNA Appeal #1 exception at 14.

As a remedy, MNA proposes that the Commission partially remand Task 4 to allow for comprehensive planning and public involvement for Policy 5.6, Middle housing. MNA envisions that this would include the development of complete, neutral, and objective public information about the policy proposal. Specifically, MNA asks the Commission to direct the city to analyze the impact of the policy on housing costs, and disseminate needed information, such as maps of affected areas, to the city's citizenry. MNA Appeal #1 at 24.

#### **1. Lack of adequate information to inform citizens**

The MNA appeal starts by recounting its understanding of the evolution of Policy 5.6, Middle housing. MNA asserts that the city first formally introduced what became that policy as a “vague, generalized concept” in a February 2016 memo to Portland Mayor Hales from the city’s planning bureau, more than six years after approval of the periodic review work program in 2009. MNA Appeal #1 at 2-3. MNA acknowledges an earlier reference to middle housing in an October 2015 staff report, but contends that it did not suggest to the public that a policy was under consideration. MNA Appeal #1 at 3-4; MNA Appeal #1 exception at 2-3. MNA characterizes the February 2016 memo as introductory in nature. MNA Appeal #1 at 4. MNA states that when the middle housing policy was formally introduced for consideration by the Portland City Council in March 2016, there was a lack of information about the consequences if the middle housing policy were adopted. MNA Appeal #1 at 5-8. MNA notes that the middle housing policy was adopted in June 2016, only three months after its introduction. Contending that mapping is essential to understand the implications of implementation of Policy 5.6, MNA asserts that maps of the areas affected by the policy, alleged to be large swaths of the city’s low density zoned neighborhoods, were not made available until two days before, and for many parts of the city, after, the Portland City Council adopted the policy. MNA Appeal #1 at 8-12.

MNA alleges that this series of events violates Goal 1, specifying the portions that provide “the citizen involvement program shall be appropriate to the scale of the planning effort,” and “the program shall provide for continuity of citizen participation and of information that enables citizens to identify and comprehend the issues.” MNA Appeal #1 at 11. MNA intertwines those allegations with contentions that this series of events also violates Goal 2, specifying the guidelines related to plan preparation portions that state “sufficient time should be allotted for ... incorporation of citizen needs and desires and development of broad citizen support,” and the plan content guideline that specifies “Inventories and other forms of data are needed as the basis for the policies and other decisions set forth in the plan.” MNA Appeal #1 at 8.

As a matter of law, the Commission concludes that for the reasons provided below neither the Goal 1 nor the Goal 2 arguments presented in this appeal provide a basis for the Commission to provide the requested remand. First, there is a very narrow basis for asserting a valid Goal 1 violation, not met here.<sup>2</sup> Second, asserting that a submittal violates one or more of the *guidelines* to a goal does not establish a goal violation because those guidelines are not mandatory provisions.

First, Statewide Planning Goal 1 is to “develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.” OAR 660-015-0000(1). The Task 4 submittal does not amend or affect Portland’s citizen involvement program. Under that circumstance, Portland’s submittal is in violation of Goal 1 only if the submittal includes comprehensive plan provisions that are inconsistent with Portland’s citizen involvement program. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176, 196-197 *aff’d* *Homebuilders Assn. of Metropolitan Portland v. Metro*, 184 Or App 663, 669, 57 P3d 204

---

<sup>2</sup> In its exception, MNA concedes that there is no “overt” Goal 1 requirement that a local government provide only public information that is “neutral, objective, or balanced” but suggest that the Commission might wish to announce such a requirement. MNA Appeal #1 exception at 3. The Commission declines to do so in this order.

(2002). The appeal does not attempt to establish that Policy 5.6 includes provisions that are inconsistent with Portland’s citizen involvement program.

Second, in adopting the Statewide Planning Goals, the Commission provided guidelines for planning and implementation of Goal 2. However, the guidelines are suggestions – possible approaches provided by the Commission – for carrying out the goals. Goal 2, Part III; ORS 197.015(9).<sup>3</sup> The two Goal 2 provisions that MNA asserts the submittal violates are guidelines. The guidelines to the Statewide Planning Goals are not standards that must be satisfied to approve a plan amendment. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181, 187-188, *aff’d* 208 Or App 495, 143 P3d 775 (2006).

Having concluded that as a matter of law the MNA appeal does not establish a violation of Goal 1 or 2 under ORS 197.633(3)(c) and ORS 197.747, the Commission also considers whether this part of the appeal raise procedural issues. *See 1000 Friends of Oregon v. Jackson County*, 292 Or App 173, 192, \_\_ P3d \_\_ (2018) (Goals 1 and 2 pertain to the process for adopting plans and implementing measures). The Commission reviews to determine whether the appeal establishes that Portland failed to follow a process in Goal 1 or Goal 2 for adopting plans and implementing measures in a manner that prejudiced the substantial rights of MNA. ORS 197.633(3)(b).

MNA does not specifically cast its appeal as a substantial prejudice challenge.<sup>4</sup> The Commission gathers from its appeal that MNA contends Policy 5.6: (1) arose late in the periodic review process and afforded inadequate public discourse, (2) lacked maps showing the effect of the policy implementation, and (3) did not comply with the notice to Neighborhood Associations provision of the Portland City Code section 3.96.

---

<sup>3</sup> ORS 197.015(9) provides:

“‘Guidelines’ means suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with goals and to aid state agencies and special districts in the preparation, adoption and implementation of plans, programs and regulations in compliance with goals. Guidelines shall be advisory and shall not limit state agencies, cities, counties and special districts to a single approach.”

Goal 2 provides in part:

“PART III -- USE OF GUIDELINES

“Governmental units shall review the guidelines set forth for the goals and either utilize the guidelines or develop alternative means that will achieve the goals. All land-use plans shall state how the guidelines or alternative means utilized achieve the goals.

“Guidelines -- are suggested directions that would aid local governments in activating the mandated goals. They are intended to be instructive, directional and positive, not limiting local government to a single course of action when some other course would achieve the same result. Above all, guidelines are not intended to be a grant of power to the state to carry out zoning from the state level under the guise of guidelines. (Guidelines or the alternative means selected by governmental bodies will be part of the Land Conservation and Development Commission’s process of evaluating plans for compliance with goals.)”

<sup>4</sup> Generally, in order to prevail on a claim of procedural error, a petitioner must identify the procedure allegedly violated. *Stoloff v. City of Portland*, 51 Or LUBA 560, 563 (2006). The Commission understands the appeal, although not expressed as such, to raise procedural error.

MNA pinpoints February 2, 2016, the date of the Bureau of Planning and Sustainability memo to Mayor Hales, as the first mention of middle housing. Portland and the department disagree with the MNA development narrative for Policy 5.6 recounted above, concluding that the policy responds to housing supply concerns initially identified in Tasks 2 and 3. In its exception, Portland traced the identification of the middle housing issue back to the inventory and alternatives analysis and considerations of alternatives phases of the work program:

“Task Two – Transportation and Housing Costs. A background report entitled ‘Housing and Transportation Cost Study’ (2010) notes that single family rental opportunities will become harder to find over time, and location-efficient housing can lessen the cost burden for households (Task 2, item 114, pages I, 30).

“Task Two – Housing Needs. Background reports entitled “Housing Supply, and “Housing: Updates on Key Supply and Affordability Trends” (2011) notes the trend toward replacing garages with new housing, especially ADUs (Task 2, item 115, pages 10, 21; item 116, page 26). This reinforces the role of accessory dwellings and small scale multifamily infill in the housing supply.

“Task Three – Growth Scenario Analysis. A report entitled ‘Growth Scenarios Report’ (2015) contains a summary of housing supply/demand analysis. In that analysis, the supply of different types of housing is compared with the types of expected households, by household size and income. The analysis produced several conclusions that are directly related to the eventual development of Policy 5.6 (Task 3, Vol. 1.1.K, page 219):

“Producing a diverse supply of housing creates diverse communities with the opportunity for households to remain in their neighborhood as their lifestyles and housing needs change, especially in allowing older adults to age within their community.

“Changing household needs and preferences will create demand for new and different housing types. Recently, Portland has seen the development of innovative housing types such as cohousing, micro-apartments and accessory dwelling units.

“. . . adding more R2.5 or R2 zoning near neighborhood centers could increase the supply of small lot single family homes, duplexes, townhomes, and low density multifamily development types. This should be a consideration as refinement plans are developed for centers and corridors.

“Although the term ‘middle housing’ had not yet been coined, the substance is clearly an early reference to the issues that eventually became the middle housing discussion and later manifested as Policy 5.6 in Task Four.” Portland exception at 7.

The Commission finds that under the city’s work program, its work on prior work tasks was intended to lead to the policy choices in the Task 4 submittal. Periodic review is iterative by

nature, with later tasks dependent on the earlier tasks. *Hummel v. LCDC*, 152 Or App 404, 409-411, 954 P2d 824 (1998). As the city identified in its exception, its work on Tasks 2 and 3 provided the foundation for the policy choices made in Task 4, including Policy 5.6.

The Commission observes that the general public discourse regarding the issue of “middle housing” commenced before February 2, 2016. As stated in the department’s decision, the issue arose earlier in the process, in a City Council work session on October 8, 2015. Task 4 Record at 11906 and 11916. The summary discussion presented to the City Council at the February 2, 2016 work session states that the middle housing memo and presentation of policy options was written “in response to interest from several council offices, and recent hearing testimony.” Task 4 Record at 11710. The February 2, 2016 materials also reference a report issued by Metro on Innovative Design and Development Codes and the “Eli Spevak proposal.” Task 4 Record at 11720. Mr. Spevak is a well-known proponent of “missing middle” housing of the type contemplated by the city’s adopted middle housing policy, and contributions from him prior to February 2016 are contained in the compilation of testimony the City Council received. *See, e.g.* Task 4 Record at 8059-8062.

The Commission agrees with the department and Portland. The Commission concludes that the narrative from MNA that Policy 5.6 emerged out-of-the blue three months before the City Council adopted it does not find factual support in the record. However, although when the issues that led to Policy 5.6 arose may be probative, in a substantial prejudice analysis the Commission considers whether the appeal establishes that the appellant was unable to participate in the adoption of Policy 5.6 in some manner in which they had a right to.<sup>5</sup> Because it is clear that MNA was an active participant in the discourse around Policy 5.6 – of the 157 comments to the city council on Policy 5.6 MNA tabulated for its appeal, several were from MNA – the Commission turns to the MNA concern regarding the lack of maps showing the effect of policy implementation.

MNA specifically asserts that the city did not provide maps of the properties affected by the proposed middle housing policy in a timely manner. MNA argues “[b]ecause the policy goes far beyond creating a land use designation, and into the actual implementation of the proposed designation, far more information and public involvement is required by Goal 1.” MNA Appeal #1 at 12. As noted, the city provided maps that generally showed areas that could *potentially* be rezoned during the subsequent implementation of the adopted middle housing policy. However, MNA consistently overstates the effect of the submittal. The Commission finds that adoption of this policy did not result in any actual rezoning of low-density residential lands in the city that met the locational criteria for consideration under Policy 5.6. The “where appropriate” language of the policy commits the city to a future analysis and determination as to which specific areas and properties, if any, are suitable for application of a zone that would allow the housing types contemplated in the adopted middle housing policy. Policy 5.6 does not have a specific map

---

<sup>5</sup> There is another component of the MNA “notice” argument: that the time from the issuance of the compiled comprehensive plan amendments to the time of City Council adoption precluded participation by “many neighborhood associations.” MNA Appeal #1 at 12. Assuming for purposes of analysis that that is accurate, the Commission finds that the appeal would not present a procedural violation requiring remand. That is because, to show the requisite substantial prejudice, the prejudice has to be to the party asserting the claim, not other people or organizations. *See Mackenzie v. City of Portland*, 71 Or LUBA 155, 164 (2015) (petitioner must demonstrate that the error prejudiced the substantial rights of the petitioner).

associated with it in the adopted comprehensive plan. Thus, the maps that the city provided were not for the purposes of policy implementation, but for information. Because there is a subsequent process to apply the policy which will afford an opportunity for citizen input, the commission rejects the appeal that there was lack of adequate information to inform citizens in the process of adopting Policy 5.6

Finally, the Commission considers the MNA argument that the city did not comply with City Code Section 3.96.050(C), which provides in part:

“Notice of pending policy decisions affecting neighborhood livability shall be given to the Neighborhood Association(s) affected at least 30 days prior to final action on the decision by a City agency.”

Portland explains to the Commission that City Code Section 3.96 is not applicable to the City Council’s decision. The City interprets City Code Section 3.96.050 to apply to city agency responsibilities, but the code definition of “city agency” does not include the City Council.<sup>6</sup> The City argues that the Community Involvement Program applicable to the city’s periodic review is based on other sections of the City Code and that the city complied with the notice provisions of those requirements. Portland exception at 4-6. Under ORS 197.633(3)(c), the Commission is required to defer to Portland’s interpretation of its land use regulations unless the interpretation is inconsistent with the express language or purpose of the regulation. The Commission concludes that the city’s explanation is consistent with the language of City Code Sections 33.740.020 and 33.740.030.

The Commission rejects this portion of the appeal.

## **2. Lack of need and factual basis for policy**

MNA asserts that there is a lack of any factual evidence or basis for a middle housing policy, with no support in the fundamental documents of the 2035 Comprehensive Plan such as the housing needs analysis. MNA asserts that the housing needs analysis shows no need for additional residential housing capacity in the city, because more than adequate capacity is available to meet demand through the 20-year planning period. MNA Appeal #1 at 13-14. MNA asserts that the housing needs analysis shows that the diversity of housing type production provided by existing zoning is sufficient to produce housing units to meet future demand across of a variety of income levels, with the exception of low income housing groups. MNA Appeal #1 at 15. MNA cites two analyses of the middle housing designation, prepared in 2016 and not part of the record, which show that the middle housing policy will actually reduce the supply of affordable housing by incentivizing redevelopment of smaller affordable older homes with new market-rate units.<sup>7</sup> MNA Appeal #1 at 15. MNA notes that the city-adopted growth scenarios

<sup>6</sup> PCC 3.96.020(F) defined “City agency” as:

“Includes all departments, bureaus, offices, boards and commissions of the City of Portland.”

<sup>7</sup> The Commission must confine its review of evidence to the local record under ORS 197.633(3). Therefore, the Commission does not consider these reports offered as “empirical evidence in the City’s domain that contrasts directly with the anecdotal information on middle housing presented to the public by the City.” MNA Appeal #1 at

report discusses targeted rezones to higher density in selected refinement plans, not the wholesale rezoning it contends results from Policy 5.6. MNA Appeal #1 at 15-16. MNA asserts that the city made no mention of any study or consideration of a city-wide rezoning of residential land in its periodic review program as MNA contends will happen under the middle housing policy. MNA Appeal #1 at 16-18.

MNA alleges that this lack of data or information to support the middle housing policy violates Goal 2, which requires a factual basis for the policies and other decisions. MNA notes that the approved periodic review work program contains no mention of the middle housing policy, and thereby contends that the policy is not consistent with Portland's adopted periodic review work program. MNA alleges that the city did not provide notice of any change to the periodic review work program as required by OAR 660-025-0080. MNA Appeal #1 at 18.

The Commission rejects this portion of the appeal. The Commission again finds MNA's premise on appeal – that Portland has proceeded to a wholesale citywide rezoning – overstates the effect of adopting Policy 5.6, which is not self-executing in the manner MNA contends and must be implemented through future public processes.<sup>8</sup> The city has provided findings and conclusions based on substantial evidence regarding reasons the city adopted Policy 5.6. The reasons for adoption of this policy, which received significant public input both for and against, are succinctly summarized in the record as addressing “a growing demand for greater housing supply and choice in terms of price, size, location, tenure options, and accessibility,” by providing “middle housing” that is less expensive, promotes home ownership, provides access to complete communities, and promotes housing choice. Task 4 Record at 45-46.

The Commission also finds the argument proffered by MNA, that allowing greater densities in some neighborhoods will result in the demolition of less expensive housing, resulting in a loss of affordability is not supported by evidence in this record. The two sources noted in the appeal do not appear in the record provided by the city, and thus are beyond the purview of this Commission. ORS 197.633(3). In any case, the city's findings on this topic address this issue generally by noting that, assuming some newer housing units are more expensive, the increase of supply results in older, more affordable housing units being “opened up” to lower income households as higher income households occupy the newer units. Task 5 Record at 45.

Goal 2 requires the city “[t]o establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.” Goal 2 further provides that “[a]ll land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs.”<sup>9</sup> The summary provided above, and the additional material in the record upon which it is based, demonstrates to the Commission that the city adopted Policy 5.6 with an adequate factual base, and made an “ultimate policy choice” based upon: (1) the need for more housing with higher

---

15.

<sup>8</sup> In its exception, MNA concedes that Policy 5.6 “did not implement zoning.” MNA Appeal #1 exception at 4.

<sup>9</sup> MNA also cites a guideline to Goal 2 regarding the factual basis for the plan. MNA Appeal #1 at 16. The Commission notes that as described above, as a matter of law, the guidelines do not provide a basis for remand.

densities than single-family houses and lower densities than larger multi-family or mixed use buildings, and (2) the positive impacts on housing expense, home ownership, access to complete communities and housing choice provided by the policy.

While MNA does not agree with the city's decision, the Commission's review of the submittal for Goal 2 compliance is not whether the city made the "correct" decision, but rather whether the city's decision is supported by an adequate factual base, which is the equivalent of the requirement in ORS 197.633(3)(a) that the decision is based upon substantial evidence in the record as a whole. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

Finally, regarding the alleged violation of OAR 660-025-0080, MNA misreads the purpose of this administrative rule. It requires that the actual amendments to a city's comprehensive plan be included in notice to the department as provided in requirements for post-acknowledgment plan amendments. The department received this notice on August 7, 2014.

The Commission rejects this portion of the appeal because the city's findings provide sufficient factual evidence to support the decision.

### **3. Lack of plan consistency and failure to plan in a comprehensive manner**

Conceding that a middle housing land use designation may be a legitimate comprehensive plan policy, MNA nevertheless asserts that the impact of the late addition of the middle housing policy is greatly amplified and compounded by other policies in the comprehensive plan, and creates conflicts with other policies. The compounding of policies issue is described in a separate objection regarding the designation of Multnomah Village as a "center."<sup>10</sup> MNA alleges that the middle housing policy is in conflict with another policy, promoting family-friendly housing options, premised on the contention that the middle housing policy will produce smaller units that are not conducive to larger families and therefore cannot be considered consistent with the policy promoting family-friendly housing options. MNA Appeal #1 at 19. MNA asserts that the term "family friendly" housing implies housing that can accommodate families with children, and that this means generally housing with three or more bedrooms. MNA alleges that the middle housing policy also represents a significant deviation from the work program tasks as approved by the Commission in 2009, which call for meeting identified housing needs (middle housing is not an identified need) and preserving the existing stock of affordable housing (middle housing will result in the destruction of much of this stock). MNA Appeal #1 at 19-20.

MNA asserts that the result of these actions is that the city's decision directly violates Goal 2 and ORS 197.015(5), which defines "comprehensive plan" in a manner that interrelates functional and natural systems and activities relating to the use of lands, and defines "coordinated" as "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."

---

<sup>10</sup> The Commission also addresses the "compounding" of the effect of different plan policies in considering the appeal regarding the designation of Multnomah Village as a "center" below, Section C.2.

MNA alleges that the last minute nature of the middle housing policy resulted in a failure to conduct comprehensive planning. MNA Appeal #1 at 21.

The Commission rejects this portion of the appeal. The Commission finds that MNA has not established that Policy 5.6 and Policy 5.5, Housing Centers, are necessarily in conflict regarding the provision of “family-friendly” housing. The term “family-friendly” is not defined in the Portland Comprehensive Plan, and there is no material in the record to support the MNA’s assertion. MNA provides no more than conjecture, nor does anything in the record provide any indication, that a “family,” even a family with children, is less likely to live in a smaller housing unit, or a rental unit, than it is likely to live in a larger housing unit, or a unit owned by its occupant (especially if income constrains the choices of a particular “family” regarding unit size).

The Commission does not perceive any outright conflict between the middle housing policy and the policy promoting family-friendly housing. It is not uncommon for comprehensive plan policies, like the Goals themselves, to state separate objectives that a city has to reconcile in their application of the policies. The Commission finds that nothing in the text of the policies identified by MNA 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.

The appeal does not establish any conflict between the periodic review work program and the middle housing policy as adopted. Contrary to the assertions of MNA, Portland has identified a need for middle housing as described above. Portland has also countered the assertions stated in the appeal that the middle housing policy will reduce housing affordability. Given the city’s findings, the middle housing policy is an appropriate response to the periodic review work program.

#### **4. Lack of adequate response to public input**

MNA asserts that, contrary to an assertion by the city that the middle housing policy was written in response to interest from several council offices and recent hearing testimony, a detailed search of the record indicates that only four individuals commented on this topic before it was officially introduced on February 2, 2016. In contrast, MNA notes, after the policy was introduced the city received 157 comments on the policy, two-thirds of which were negative, and in addition more than a quarter of the positive comments were generated by two individuals. MNA Appeal #1 at 22. This despite the short period of time between February 2016 and adoption of the policy later in the year by the City Council, as noted by MNA. MNA also notes that the council’s response to the testimony in the findings for Task 4 consists of one sentence, which states “opponents of policy 5.6 viewed the policy as effectively rezoning land,” and a follow-up sentence stating that the City Council disagreed with this statement. MNA Appeal #1 at 23.

MNA alleges that this sequence of events violates Goal 1, which suggests that a citizen involvement program should develop a “feedback mechanism,” or a process for quantifying and synthesizing citizens’ attitudes that is developed and reported to the general public. MNA Appeal

#1 at 23. MNA also cites a Goal 2 guideline for plan preparation that states “Sufficient time should be allotted for: \* \* \* (3) incorporation of citizen needs and desires and development of broad citizen support.”

The Commission rejects this portion of the appeal as a matter of law because MNA has not established a violation of either Goal 1 or 2. The Commission also finds that the appeal documents that the city received significant testimony on the policy after its introduction. The Portland City Council, as a politically accountable decision maker, has the responsibility of weighing both the public testimony and the information provided by staff in making its policy decision. Characterization of a majority of testimony received as being opposed to the eventual result, as MNA alleges, is not a basis for remand of a city decision under either Goal 1 or Goal 2. And the City Council’s finding that the policy did not constitute a rezone of property is correct, as is discussed above.

## **5. Lack of Infrastructure Planning**

MNA asserts that the city has not properly addressed the lack of infrastructure for middle housing. As stated in the appeal, “[t]he 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 Portland, which would not be consistent with ... the Transportation System Plan, and other infrastructure planning, and therefore compromises other elements of the Plan.” MNA Appeal #1 at 20-21. This deficiency is alleged to violate Goal 2 provisions for comprehensive planning, as exemplified in the statutory language in ORS 197.015(5) which defines a comprehensive plan as a document that includes consideration of functional systems relating to the use of land, such as public facilities and transportation. MNA Appeal #1 at 20-21.

The Commission rejects this portion of the appeal. Task 2 of its periodic review work program, approved in order 14-WKTSK-001850 on June 11, 2014 includes Exhibit B.6., consisting of an Infrastructure Condition and Capacity Report discussing condition and capacity of Portland’s water, sewer, stormwater, parks, and transportation systems. The report summarizes existing infrastructure deficiencies, including deficiencies specific to Southwest Portland (location of Multnomah Village). Ordinance 185657, Exhibit B.6. at 10-15. Recommendations to address these deficiencies are found in the report. Ordinance 185657, Exhibit B.6. at 16-18. The report goes on to discuss all of these infrastructure issues in more detail. Some of these issues, most notably transportation, present difficult problems for Portland to resolve, but the city has sufficiently addressed them and thus shown consideration of infrastructure issues when adopting comprehensive plan policies such as Policy 5.6.

### **C. Multnomah Neighborhood Association (MNA) #2**

MNA appeals the approval in DLCD Order 001892 of Task 4. Specifically, MNA contests Portland’s compliance with Statewide Planning Goals 1 and 2 in the process leading to, and the designation of Multnomah Village, a community in Southwest Portland, as a neighborhood center. MNA primarily expressed concern with the combined impact of the designation of Multnomah Village as a neighborhood center and the middle housing policy upon zoning in the single-family residential neighborhoods surrounding Multnomah Village.

The appeal is divided into four issues: 1) Inadequate Response to Public Testimony; 2) Confusing and Uncoordinated Policies; 3) Inadequate Mapping of Centers; and 4) Compliance with Metro Code.

The remedy proposed by MNA is that the Commission partially remand Task 4 of the periodic review to allow for proper public involvement in the designation of centers and corridors and their boundaries, explaining the concept in its entirety with needed mapping, identifying the need for designating Multnomah Village as a neighborhood center, reevaluating the potential impacts of a neighborhood center designation for Multnomah Village, and demonstrating compliance with the Metro Code. MNA Appeal #2 at 22.

### 1. **Inadequate response to public testimony**

MNA asserts that the city failed to adequately consider the weight of evidence and public testimony in making its designation. MNA Appeal #2 at 3-5. MNA alleges that the city failed to describe the basis for the Multnomah Neighborhood Association's opposition to the neighborhood center designation, failing to mention the association's desired alternative neighborhood corridor designation, with city staff presenting only its own "strident advocacy position favoring centers." MNA Appeal #2 at 5. MNA contends the city failed to quantify and synthesize citizens' attitudes for reporting to the general public, and did not provide open and meaningful opportunities for individuals and organizations to effectively influence comprehensive plan updates, as is required by Goal 1. MNA Appeal #2 at 6. Additionally, MNA asserts that the city ignored its own code and charter, which requires city agencies to include affected neighborhood associations in planning efforts which affect neighborhood livability. MNA Appeal #2 at 6. While acknowledging that Goal 1 does not dictate a particular result, MNA argues that the city's lack of consideration of citizen input and the unfairness of the city's process must be called into question. MNA Appeal #2 at 5, MNA Appeal #2 exception at 4-5.

The Commission rejects this portion of the appeal. The appeal cites statewide planning goal provisions that as the Commission discussed under the MNA appeal #1 above do not as a matter of law provide a basis for remand. Additionally, the appeal cites a Portland City Code section that Portland construes as inapplicable, a determination that the Commission must defer to as described above. ORS 197.633(3)(c). While the Community Involvement Work Program includes in its guiding principles that the city will "value and record all comments received," and "every public recommendation made orally or in writing for a Planning and Sustainability Commission or City Council hearing will receive an official city response," the principles go on to state that the city will provide an explanation "how the recommendation was considered and accommodated or why accommodation was not possible." Task 1, 13PDXPR at 3. The appeal and the exception do not recognize a distinction between providing an opportunity to provide input and making a policy decision. MNA itself documents that large amount of input provided by MNA and its members to the city. Goal 1 requires creation and implementation of a plan for public process – it does not guarantee a particular result. Regarding the allegations that the city staff did not present a fair and balanced discussion of the issue, the record is replete with general discussions of the purpose of neighborhood centers within the city's comprehensive plan land use structure, for example, in a report to the Portland Planning and Sustainability Commission in

2014. Task 4 Record at 20033-20039. This section of the record also includes a brief comment on the MNA request to redesignate Multnomah Village as a corridor. Task 4 record at 20041-20042. As MNA points out in its appeal, the City Council and Planning and Sustainability Commission heard voluminous testimony disagreeing with the staff recommendation. Neighborhood Center Appeal at 5.

The Commission finds that the record show the city accepted and considered community input. The City Council had access to all arguments relating to this issue prior to making its final decision on the matter. Contrary to the assertion of the objection, the city followed its community involvement work program in considering the recommendations of the Multnomah Neighborhood Association, and ultimately following a different policy course. Therefore, the Commission rejects this portion of the appeal.

## **2. Confusing and uncoordinated policies**

MNA asserts that the city adopted confusing and uncoordinated policies regarding the Multnomah Village Town Center. According to MNA, Policy 5.5 (Housing in Centers) provides a generalized policy statement typical of comprehensive plans, but this policy was supplemented late in the process with Policy 5.6 (Middle Housing), which, when taken in combination with Policy 5.5, creates a large-scale re-designation, and eventual up-zoning, of the residential areas in and around neighborhoods designated as centers. MNA Appeal #2 at 6-8. MNA asserts that while Policy 5.6 sets a study area of one-quarter mile around neighborhood centers for rezoning, another, separate policy, Policy 3.15 (Housing in Centers), further expands the centers designation by implicitly allowing up-designation and up-zoning of residential areas within one-half mile of centers. MNA Appeal #2 at 8. While MNA acknowledges that the policies do not actually rezone property, they guide implementation of the rezones in Task 5. MNA Appeal #2 at 8-9.

MNA contends that the result of combining two disparate policies in different chapters of the comprehensive plan (Policies 3.15 and 5.5) with a new policy (Policy 5.6) is a major policy change to a large, overlapping area affecting a large portion of the single-family residential land in the city. MNA alleges that such a sweeping overhaul of residential areas, impacting so many people, could not have been reasonably anticipated until after the adoption of the comprehensive plan. MNA Appeal #2 at 9. MNA states that this constitutes a failure to provide information that enables citizens to identify and comprehend the issues, as required by Goal 1. MNA states that it also constitutes a failure to present information needed to make decisions in a simplified and understandable form, and make those decisions open, transparent, and accessible, as required by the city's community involvement work program. MNA Appeal #2 at 10-11. MNA renews those claims in its exception. MNA Appeal #2 exception at 6-8.

The Commission rejects this portion of the appeal. This appeal and exception presents the same basic reasoning and arguments that the Commission rejected in the appeal of Policy 5.6 above in Section B. The policies do not accomplish what MNA claims they do; they do not rezone large areas of the city that are currently zoned for single-family detached residential development.<sup>11</sup> These policies commit the city to a process of studying whether the specified

---

<sup>11</sup> MNA concedes as much in its exception, but argues that it is a “‘fait accompli’ or ‘done deal’ in terms of the

areas should be rezoned. Task 4 Record at 45. Any subsequent rezones to implement these policies will require additional notice and action by the city, and will be subject to requirements for public notice and subject to appeal. The city has rezoned portions of the actual Multnomah Village center area, which is a subject of a separate appeal and is discussed under that appeal.

MNA has not established any issues concerning compliance with applicable laws that provide the Commission a basis for remand under ORS 197.633(3). The Commission rejects this appeal.

### **3. Inadequate mapping of Centers**

MNA asserts that the city inadequately mapped neighborhood centers. MNA alleges that the city provided inaccurate and misleading information about the ultimate boundaries of proposed centers and the inclusion of single-family neighborhoods. MNA notes that a map provided near the beginning of the planning process – in January 2015 – show the Multnomah Village center as limited to the existing commercial areas of Multnomah Village. MNA Appeal #2 at 11-13. MNA cites a September 2015 map showing radius circles around centers such as Multnomah Village which, according to the city, were intended to be a symbol for centers, not a map boundary. MNA Appeal #2 at 13-14. However, MNA asserts that a map provided to the Multnomah Neighborhood Association in June 2016 shows a different and expanded neighborhood center designation. MNA Appeal #2 at 14-15.

MNA contends that this violates ORS 197.010(1)(c), which requires that comprehensive plans “be the basis for more specific rules and land use regulations which implement the policies expressed through the comprehensive plans,” because the vague and overly flexible nature of the plan policies and map designations related to centers does not sufficiently define and guide implementation through the zoning code in a manner that is clear, understandable, and predictable to the public. MNA Appeal #2 at 16. Similarly, MNA asserts that this violates a provision of Goal 2, which states that “the various implementation measures which will be used to carry out the plan should be considered during each of the planning phases.” MNA Appeal #2 at 17; MNA Appeal #2 exception at 9.

The Commission rejects this portion of the appeal. The city has adopted plan policies that may result in future changes to zoning in the vicinity of neighborhood centers. Task 4 Record at 277. Such future changes would result from subsequent study and analysis to determine where the adopted Middle Housing policy is appropriate to apply in candidate areas. The MNA, and other individuals and groups, will have an opportunity to provide input into that process to implement Policy 5.6.

Regarding the two maps raised in the MNA appeal, the first map is part of a grouping that is prefaced with the statement “The following maps reflect adopted local plans, and are in effect today. All other center boundaries are provisional for planning and analysis purposes, and are pending further future refinement planning.” The subsequent list of centers with adopted local plans does not include Multnomah Village. Task 4 Record at 20077. The second map

---

eventual outcomes.” The eventual outcomes, whatever they may be, are not in the record before the Commission.

referenced by MNA does not appear to be in the record and thus is outside the scope of review for this decision.

MNA cites two provisions of Goal 2, both guidelines. MNA Appeal #2 at 17. As noted, the guidelines are not mandatory, but “suggested directions that would aid local governments in activating the mandated goals.” Thus, the Commission disagrees that the cited provisions *require* that consideration of implementation measures in this phase of the planning process entails providing maps showing the center boundaries. Instead, the Commission agrees with Portland that establishing goals and policies before developing more detailed implementing actions is consistent with the goals. Nevertheless, the adopted plan map clearly shows the adopted boundaries of neighborhood centers. Task 4 Record at 438.

#### **4. Compliance with Metro Code**

MNA asserts that, in designating Multnomah Village as a neighborhood center, the city failed to comply with prior regional planning, including the Metro Code and the Metro 2040 Growth Concept Map. MNA Appeal #2 at 17-19. MNA notes that the Metro 2040 Growth Concept Map shows that Multnomah Village is not designated as a center, but that the primary thoroughfares in the neighborhood have been designated as “main streets.” MNA alleges that this represents a violation of Goal 2, which requires coordination between Portland and Metro.

The Commission rejects this portion of the appeal. The “Neighborhood Centers” designation on the Portland Comprehensive Plan Map does not implement a Metro “Centers” designation, it implements a Metro “Main Streets” designation. Task 4 Record at 85. The city recognizes that Multnomah Village is not designated a Metro “Centers”, and the implementation of Metro’s Title 6 for Multnomah Village actually achieves a lower jobs-and-residents-per-acre figure than is set forth in Metro’s Title 6 for this area. Task 4 Record at 103. The city’s projections for development are at lower densities than for Metro’s designation of this area as a “main street;” therefore the MNA assertion that the submittal somehow violates the Metro Urban Growth Management Functional Plan with its designation of Multnomah Village as a neighborhood center is an elevation of form over substance.

In its exception, MNA observes that Metro Code 3.07.820(a) provides that the Chief Operating Officer may submit comments on the proposed amendments by a city changing its comprehensive plan. MNA Appeal #2 exception at 11. The Chief Operating Officer has commented on the proposed 2035 Comprehensive Plan, stating “Title 6 is largely voluntary and the city has worked diligently to achieve the activity levels recommended in Title 6.” Record Ord. 187832, Vol. 1.3.A, at 3369. Thus, the record contains evidence that the procedures in the Metro Code have been followed in making this change. On substance, because the Commission understands Portland’s “Neighborhood Centers” designation to be an implementation of Metro’s Main Streets, not Metro Centers, the Commission concludes that the appeal provides no basis for remand.

#### **D. Multnomah Neighborhood Association #3 – Community involvement compliance with Goal 1**

MNA also appeals DLCD Order 001892 approving Task 4 and specifically the rejection of its objection that the amendments to Chapter 2 of the 2035 Comprehensive Plan providing the goals and policies on “Community Involvement” do not comply with Goal 1. MNA asserts that the term, “community groups” and “community” used in the plan fail to meet the requirements of Goal 1 because it is not clear whether those terms are coterminous with the general public and the use of the term “community” has inappropriately replaced “citizen.” MNA also asserts that the term “community” has the potential for excluding “citizens” who do not belong to a clearly identified “community.” Finally, MNA asserts that because Policy 2.14 does not use the more general term “public involvement”, and instead uses the term “community involvement”, it is more restrictive than the Goal 1 term of “citizen involvement”. MNA Appeal #3 at 2-3. MNA requests that the Commission partially remand Task 4 with instructions to the city to revise Chapter 2, “to recognize the citizen’s role in the planning process,” and to define a process requiring public meetings and official status for all groups participating in the planning process, and to remove Policy 2.14. MNA Appeal #3 at 3.

The Commission rejects this appeal. If the city engages communities in the planning process, citizens will be provided the opportunity to participate; MNA does not establish that broadening the city’s program to involve “communities” has the corollary effect of excluding citizens. MNA argues, as defined, “community” “clearly excludes any citizen who does not share a sense of identity or belonging with any group of people.” MNA Appeal #3 at 2. However, Portland explained that it employed the wording choice of “community” because multiple participants expressed concern that the term “citizen” might imply that non-citizen immigrants and refugee Portlanders would not be welcome to participate in City decision making. Thus, Portland construes the term “community” to welcome more inclusive public participation, not less. That interpretation is consistent with the 2035 Comprehensive Plan provisions discussed below and the Commission defers to Portland’s interpretation of it comprehensive plan. ORS 197.633(3)(c) and 197.829.

Chapter 2 of the comprehensive plan, Community Involvement, Policy 2.24 provides:

**“Representation.** Facilitate participation of a cross-section of the full diversity of affected Portlanders during planning and investment processes. This diversity includes individuals, stakeholders, and communities represented by race, color, national origin, English proficiency, gender, age, disability, religion, sexual orientation, gender identity, and source of income.” Task 4 Record at 216 (2035 Comprehensive Plan at GP2-10).

Also, in Chapter 2, Community Involvement, the city prefaces its enumerated policy with an overall statement:

“Portland benefits when community members are meaningfully involved in planning and investment decisions. By building and maintaining partnerships with individuals and a wide range of formal and informal organizations that represent a variety of interests, the City of Portland government will have a better understanding of various communities’ diverse needs and concerns. These policies support building and maintaining strong and supportive relationships with an increasingly diverse and growing Portland population.” Task 4 Record at 216 (2035 Comprehensive Plan at GP2-7).

And further, Policy 2.1 – Partnerships and coordination, identifies who the city intends to coordinate and engage with in their community involvement program: individual community members, communities of color, district coalitions, economic activity groups, non-profits, persons experiencing disabilities, institutions, governments, and sovereign tribes. Task 4 Record at 211(2035 Comprehensive Plan at GP2-7).

Policy 2.14 commits the city to identifying actions that could be affected by public involvement. MNA appears to assume that the city is unable or unwilling to correctly identify those actions, resulting in lost opportunities for public involvement. Policy 2.14 resides in a section of chapter 2 that includes four policies implementing comprehensive plan goal 2.D, “Transparency and accountability,” related to improving the quality of communication during the planning process. The plan also includes six other goals with implementing policies, and considering this larger context, Policy 2.14 refines and informs, and does not limit, the city’s plan to involve the public in the planning process. See, especially, goal 2.E.<sup>12</sup>

In its exception, MNA argues that Goal 1 has a “geographic representation” requirement that Chapter 2 does not incorporate. MNA Appeal #3 exception at 3. MNA contends that Goal 1 requires “geographically-based citizen participation.” MNA Appeal #3 exception at 7. The Commission concludes that MNA is misreading the cited provision of Goal 1, which pertains to the make-up of the Committee for Citizen Involvement component of a citizen involvement program.<sup>13</sup> By Order 001798, the Commission approved Portland’s Community Involvement Program, which directly quotes the footnoted language of Goal 1 under its “Officially Recognized Citizen Involvement Advisory Committee” heading. Amended Community Involvement Program at 1. MNA’s argument that Chapter 2 does not mention geographic considerations does not establish that Portland is in violation of Goal 1. Portland has an approved program.

The Commission concludes that the MNA appeal does not demonstrate that the Task 4 submittal violates Goal 1, and therefore the Commission rejects the appeal.

#### **E. Multnomah Neighborhood Association (MNA) #4 – CM1 and CM2 Zoning**

---

<sup>12</sup> Portland 2035 Comprehensive Plan Goal 2.E provides:

“Community members have meaningful opportunities to participate in and influence all stages of planning and decision making. Public processes engage the full diversity of affected community members, including under-served and under-represented individuals and communities. The City will seek and facilitate the involvement of those potentially affected by planning and decision making.” Task 4 Record at 209 (2035 Comprehensive Plan at GP2-5).

<sup>13</sup> Goal 1 provides in part:

“The citizen involvement program shall involve a cross-section of affected citizens in all phases of the planning process. As a component, the program for citizen involvement shall include an officially recognized committee for citizen involvement (CCI) broadly representative of geographic areas and interests related to land use and land use-decisions. Committee members shall be selected by an open, well-publicized public process.”

MNA appeals the approval in DLCD Order 001892 of Task 5. Specifically, MNA contests Portland's compliance with Goals 1, 2, and 5 with regard to the zoning of portions of Multnomah Village area of Portland as Commercial Mixed-Use 2 (CM2). MNA objected to the application of the CM2 zoning in Multnomah Village, which the association asserts allows densities, intensities, and building heights that are excessive for the Multnomah Village Neighborhood Center Area.

The appeal is divided into four issues: 1) Inadequate Response to a Long History of Public Input Seeking to Protect the Character of Multnomah Village; 2) Failure to Perform Planning Actions in Multnomah Village Based upon Facts and Evidence; 3) Failure to Provide the Public with Adequate Information and Facts About the Lack of Adequacy of Design Review to Protect Neighborhood Character; and 4) Failure to Direct Planning Actions in a Manner That Would Achieve Local Goals and Be Consistent With Past Planning Efforts.

The remedy proposed by MNA is that the Commission partially remand Task 5 of the periodic review to reconsider application of the CM1 zoning district in the Multnomah Village area to reflect the community character issue and topography and also apply a zoning district with clear and objective standards addressing the association's concerns. MNA Appeal #4 at 15.

### **1. Inadequate Response to Public Input**

MNA asserts that the city made an inadequate response to public input seeking to protect the character of Multnomah Village. MNA notes that since at least 2003, it has expressed concerns about the height and general compatibility of new development in Multnomah Village, concerns that have been supported by large numbers of individuals in the area.<sup>14</sup> MNA Appeal #4 at 3-4; MNA Appeal #4 exception at 2-4. MNA notes that this culminated in a request that the Multnomah Village area be zoned CM1, a lower intensity zoning district, rather than CM2, in Task 5 of periodic review. MNA Appeal #4 at 4. However, as noted by MNA, the city only zoned a small portion of the Multnomah Village area as CM1, with the rest being zoned CM2. MNA Appeal #4 at 4. MNA alleges that this constitutes a failure of the city to adequately quantify, synthesize, and report public involvement, and is a violation of Goal 1, which advises that in developing a citizen involvement program "a process for quantifying and synthesizing citizens' attitudes should be developed and reported to the general public." MNA contends that this also violates the city's community involvement work program, which commits the city to providing "open and meaningful opportunities for individuals and organizations to effectively influence comprehensive plan updates." Also the city violated the citizen involvement objectives of the Southwest Community Plan, according to MNA. MNA Appeal #4 at 5.

The Commission rejects this portion of the appeal. As a matter of law, MNA has not demonstrated a Goal 1 violation, as discussed above. The cited provision of Goal 1 is not a mandate, but instead reflects the Commission's advice related to the recommended "Feedback Mechanism" for a citizen involvement program. Further, the Commission finds that the MNA appeal does not contend that the city decision-makers did not consider community input on amendments to its comprehensive plan, but instead contends that the citizen input received was

---

<sup>14</sup> MNA supports this point with references to items that are not in the record. The Commission does not consider such items as evidence in reviewing this appeal. ORS 197.633(3).

inadequately considered, presumably because the city council did not act in complete accordance with that input in their final decision. That the city modified some of the zoning to the requested CM1 evidences that the City Council balanced public input with policy objectives in adopting the submittal. MNA itself documents the large amount of input provided by the Multnomah Neighborhood Association and its members to the city. Goal 1 requires creation and implementation of a plan for public process – it does not prescribe any particular result. Goal 1, the Community Involvement Work Program, and the Southwest Community Plan provisions cited by MNA do not lead the Commission to conclude that in order for a response to opposition to a particular zoning designation to be adequate there must be a quantified, synthesized report on public testimony on the issue. Nevertheless, the Commission finds that as a matter of fact, Portland did describe public involvement for decision makers, *e.g.*, the Community Involvement Committee Report and the Evaluation of Community Engagement in Task 5. The appeal provides no basis for the requested remand.

## **2. Failure to Perform Planning Actions in Multnomah Village Based upon Facts and Evidence**

MNA asserts that the city has failed to perform planning actions in Multnomah Village based on facts and evidence. According to MNA, the stated reason the city has zoned the central portion of Multnomah Village to the more intensive CM2 zone is that changing housing needs require more high-density and multi-family housing in centers and corridors within Portland. Reasoning that the city’s analysis of capacity shows that the existing residential buildable lands inventory provides a sufficient 20-year supply of such housing, MNA contends there “does not appear to be adequate justification” for the CM2 zone. MNA Appeal #4 at 6; MNA Appeal #4 exception at 6. Therefore, MNA alleges that the city has violated Goal 2’s provision that “inventories and other forms of data are needed as the basis for the policies and other decisions set forth in the plan.” Additionally, MNA argues that—assuming the Commission upholds their appeal of the “neighborhood center” designation—the CM2 zoning is inappropriate. Finally, MNA argues that based on the description of CM1 zone in the 2035 Comprehensive Plan, “it appears to be perfectly suitable for the Multnomah Village commercial areas.” MNA Appeal #4 at 6.

The Commission rejects this portion of the appeal. Taking the last argument first, that the CM1 zoning may be an apt zone for Multnomah Village commercial areas as MNA contends provides the Commission no basis to remand the submittal. On appeal, the Commission reviews to determine whether an appeal has established that a submittal is in violation of planning law, not whether some other submittal might be perfectly suitable as well or instead. The Commission rejected the MNA appeal #2 of the “neighborhood center” designation under Task 4; therefore, the appeal arguments here based on the assumption that that appeal is upheld are unfounded. Turning to the appeal, the Commission notes that, while the city has an overall supply of residential buildable lands greater than the amount needed for the city’s estimated share of Portland Metro’s 20-year residential land supply, the city has made findings that an increasing share of the new housing demand and supply will be in the form of multi-dwelling units, mainly for reasons of affordability. Task 5 Record at 42-45.

Goal 2 requires the city “[t]o establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.”<sup>15</sup> Goal 2 further provides that “[a]ll land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs.” The city’s findings that an increasing share of the new housing demand and supply will be in the form of multi-dwelling units demonstrate to the Commission that the city applied CM2 zoning in Multnomah Village with an adequate factual base, and made an “ultimate policy choice” based upon its identified need and demand for more multi-dwelling housing in Portland.

### **3. Failure to Provide the Public the Adequate Information and Facts to Protect Neighborhood Character**

MNA asserts that the city has failed to provide the public with adequate information about the ability of design review to protect neighborhood character. MNA asserts that the design review overlay is inadequate because the city must provide an alternative set of standards which are clear and objective, and do not provide for discretionary community input into design of development which is at least partially residential. MNA Appeal #4 at 9-10. MNA alleges that is a violation of Goal 1, which requires a citizen involvement program to provide “information that enables citizens to identify and comprehend the issues” and the city’s community involvement work program, which commits the city to providing “effective tools and information in order to make effective public participation possible.”

MNA is correct that such design review overlays, if they contain discretionary standards, may be avoided by applicants for residential development who insist on review of their projects under clear and objective standards. However, MNA is mistaken in its assumption that Portland’s design review overlay is not implemented with standards that are clear and objective. The city’s submittal indicates that “in keeping with Goal 10, the Community Design Standards offer a clear and objective path to implement this overlay, as an alternative to discretionary review.” Task 5 Record at 45. Therefore, the city did provide the information needed to the MNA regarding this issue, as required by the city’s community involvement work program.

Turning to its exception, MNA argues “The Community Design Standards are not a comparable alternative to design review and provide no assurances that the community will have any influence regarding the nature of future development in the mixed use zones.” MNA Appeal #4 exception at 7. The Commission understands the concern to ultimately be with ORS 197.307(4), which requires all local governments to adopt and apply only clear and objective, standards, conditions, and procedures regulating the development of housing. Indeed, a developer of housing has a statutory development path that does not involve design review. The Commission rejects the premise that by informing residents that a housing development may not go through design review that would have allowed residents to act to “assure suitable replacement measures were adopted” because that essentially ignores that that objective would require a change in state law that is outside the periodic review process. The Commission also

---

<sup>15</sup> MNA Appeal #4 only cites to a guideline to Goal 2, which provides no basis to sustain an appeal. The Commission considers whether the appeal nonetheless adequately establishes a Goal 2 violation.

finds the assertion the Portland “caused the public to continue to rely on design review as an effective tool for managing the impacts of future development” to be without foundation. MNA Appeal #4 exception at 7. The Commission finds that Portland provided information that the Community Design Standards include clear and objective path to implement the design overlay that is an alternative to design review. Task 5 Record at 45. That this information did not evoke a greater response that MNA describes does not establish that Portland violated Goal 1.

As a matter of law, the Commission additionally finds that the appeal provides no basis for remand. MNA has not established a violation of Goal 1. The Commission rejects this portion of the appeal.

#### **4. Failure to Direct Planning Actions in a Manner That Would Achieve Local Goals**

MNA asserts that the city failed to direct planning actions in a manner that would achieve local goals and be consistent with past planning efforts. MNA notes that the 2000 Southwest Community Plan (SWCP) planned for a “small-town” atmosphere for Multnomah Village, with height and design of buildings appropriate for the neighborhood, with a mix of residential and neighborhood-scale commercial development. MNA Appeal #4 at 11-12. MNA also contends this action violates the citizen involvement provisions of the SWCP, which state, “use the Southwest Community Plan policies and objectives to create, develop, implement or evaluate new citywide policies, programs, or project proposals to ensure that the concerns of the Southwest community are addressed.” MNA Appeal #4 at 12. In addition, as noted by MNA, Multnomah Village has been identified in the past as worthy of a historic district designation, which makes it a Statewide Planning Goal 5 resource; the CM2 zoning ignores this history, and thus violates Goal 5. MNA Appeal #4 at 13-14.

The Commission rejects this portion of the appeal. Assuming for purposes of discussion that the appeal is correct that Task 5 failed to address and implement the SWCP in the adopted zoning for Multnomah Village, the appeal has not established that the submittal is required to be consistent with the language or contents of the SWCP. Policy 1.19.c. of the 2035 Comprehensive Plan expressly provides:

“Community, area, neighborhood, and other area specific plans that were adopted by ordinance prior to [effective date of this 2035 Comp Plan] are still in effect. However, the elements of this Comprehensive Plan supersede any goals or policies of a community, area, or neighborhood plan that are inconsistent with this Plan.” 2035 Comprehensive Plan, Page GP1-10.

That provision is consistent with the purpose of periodic review, which is to update and, where appropriate, modify the city’s previously adopted comprehensive plan and implementing land use regulations.

Regarding the Goal 5 issue, MNA has not demonstrated that Portland has inventoried Multnomah Village as a significant historic resource in the city’s comprehensive plan. Thus, the Commission rejects the appeal on factual grounds. Additionally, as a matter of law, the city is not obligated by the provisions of Goal 5 to protect any particular historic character within an

area unless the city has first found the resource to be significant and second has decided to protect it under its historic preservation ordinance. Finally, MNA secondarily cites to a Goal 5 implementing guideline that is not a basis for the Commission to conclude there is a goal violation. Therefore, MNA has not established that the Task 5 submittal violates Goal 5 and the Commission rejects this appeal.

#### **F. Multnomah Neighborhood Association #5**

The appeal presents four issues similar to those objected to previously and addressed in DLCD Order 001892, 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 the department, and DLCD Order 001892 needs to be signed by the 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.

##### **1. Failure to Provide a Complete Index, Inappropriate City Commentary, and Improper Signature on Director’s Decision**

MNA asserts that Portland’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. MNA 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. MNA asserts that without a sufficiently detailed index to the public record, the public and the department cannot adequately review the merits of any objection and therefore violates Goal 1 and OAR 660-025-0130(3)(b).<sup>16</sup> MNA Appeal #5 at 1-3. MNA’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 MNA, 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 department for review.

In addition, MNA 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 MNA is for the commentary from the

---

<sup>16</sup> OAR 660-025-0130(3)(b) provides: “If the local record exceeds 2,000 pages, a submittal must include adopted ordinances, resolutions, and orders; any amended comprehensive or regional framework plan provisions or land use regulations; findings; hearings minutes; materials from the record that the local government deems necessary to explain the submittal or cites in its findings; and a detailed index listing all items in the local record and indicating whether or not the item is included in the submittal. All items in the local record must be made available for public review during the period for submitting objections under OAR 660-025-0140. The director or Commission may require a local government to submit any materials from the local record not included in the initial submittal;”

city to be removed from the department review in DLCD Order 001892. MNA Appeal #5 at 3. And second, the appeal asserts that DLCD Order 001892 needs to be signed by the Director. The remedy MNA proposed is to properly sign and send out the decision again for another 21 days for the objectors to respond.

The Commission rejects this portion of the appeal. The Commission understands MNA to raise a procedural issue. The Commission considers whether the concerns regarding the compliance of the index with OAR 660-025-0130(3) demonstrate MNA has suffered substantial prejudice. ORS 197.633(3)(b). MNA identifies the mischief that their index concerns presents are that the Planning and Sustainability Commission and the City Council would not be able to effectively review the public testimony. The Commission finds that whether Portland's index follows division 25 has no bearing on the local government's review and decision regarding the submittal. The index and local government record submittal to the department occurs *after* the local government decision is made. 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 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 in order to be "detailed" an index must link individual testimony with the specific elements of the staff report and findings to which it is related. The Commission does not construe OAR 660-025-0130(3)(b) to include such a requirement. 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 Commission finds that 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 Commission finds 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. MNA has not demonstrated either substantial prejudice or a violation of OAR 660-025-0130(3)(b).

Regarding the assertion of "inappropriate commentary" in the letter from the city, OAR 660-025-0130 provides, in part:

"(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."

The Commission finds that the City provided written correspondence as contemplated by the rule. Emails from Eric Engstrom, City of Portland, dated October 23, 2017, October 26, 2017, two emails dated November 27, 2017, and February 5, 2018 identifying material in the record.

The appeal assertion of “inappropriate commentary” was not raised in MNA’s initial objection and the appeal does not identify any particular example of such commentary. The Commission understands this appeal to assert a procedural error for review under ORS 197.633(3)(b); the Commission finds that MNA has not established any substantial prejudice because MNA has been afforded the opportunity to present in its appeal of DLCD Order 001892 any arguments refuting the “inappropriate commentary” and has done so. Furthermore, the asserted error is that Portland erred not in the procedures before the local government, but in the procedures before the department, which is not a stated basis for remand under ORS 197.633(3)(b). This aspect of the appeal has not established a basis for the Commission to remand the submittal.

Finally, MNA argues that it “appears” that DLCD Order 001892 must be signed by the director, but cites to no specific requirement. The appeal does not demonstrate that there is any applicable delegation prohibitions on the department that preclude the authority of the community services division manager to sign for the department director. The Commission understands this appeal to assert a procedural error for review; the Commission finds that MNA has not established any substantial prejudice because MNA has been afforded the opportunity to present its appeal of DLCD Order 001892 regardless of by whom that order was signed. Additionally, the asserted error is by the department, not the local government in the local proceedings, so it is not a basis for remand under ORS 197.633(3)(b). Because there is no evidence of applicable delegation prohibitions on the department, the MNA was afforded the opportunity to present its appeal in any event, and asserted error is by the department, not the local government, the Commission rejects this appeal.

## **2. Densities in the Zoning Code Inappropriately Differing from the Map**

The department found this objection to be invalid in DLCD Order 001892 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.” The appeal and exception reiterate the objection – that the Task 5 map is inconsistent with the approved Task 4 work task. The Commission concurs, under OAR 660-025-0150(6)(d)(B), that the appeal and exception, like the department’s determination regarding the objection, is invalid because it does not identify the statute, goal or administrative rule that the Task 5 map is alleged to violate. The Commission rejects this appeal.

## **3. Incomplete Task 5 Implementation**

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.” The same standard applies to an appeal. OAR 660-025-0150(6)(d)(B). The Commission concurs in the department’s determination that the issue relates to an amendment to the zoning code previously made as a plan amendment outside of periodic review; the collateral challenge to that amendment, now an acknowledged land use regulation under ORS 197.625, is

not part of the submittal before the Commission. The appeal does not establish a violation related to the submitted task and the Commission rejects the appeal.

#### **4. City Should Include Current Implementation Projects in Task 5**

MNA argues 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. MNA'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. MNA notes the relative ease and no cost, to file an objection to a work task compared to filing a LUBA appeal. MNA Appeal #5 at 7-9. The proposed remedy is to send the submittal back to include these projects 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. MNA Appeal #5 at 9.

The Commission rejects this portion of the 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 are adopted as part of periodic review. The Commission finds that the city has amended the zoning map and zoning code to implement the comprehensive plan map and housing and employment policies. ORS chapter 197 establishes the respective jurisdiction of the Commission and the Land Use Board of Appeals. *See* ORS 197.644 and 197.825. MNA contends that this all violates Goal 1, because "Implementation done outside of a Task limits the citizen's ability to appeal." MNA Appeal #5 at 9. The Commission finds that although there may be a difference of venue, a citizen has the potential to appeal to either the Commission or the Land Use Board of Appeals any amendment to, or adoption of, a land use regulation. Because MNA has the opportunity to participate in all phases of the adoption of future comprehensive plan implementation and amendment projects, this appeal does not establish a Goal 1 violation. The Commission rejects this appeal.

#### **V. CONCLUSION**

The Commission has rejected each and every appeal of DLCD Order 001892, and approves the Periodic Review Work Tasks 4 and 5 submittal from the City of Portland as provided in OAR 660-025-0160(7)(a).

All rulings made on objections and motions during the Commission hearings are hereby affirmed. Any objections or motions not ruled upon during the Commission hearings are hereby overruled. This is a final order of the Commission. ORS 197.633(6).

**THEREFORE, IT IS ORDERED THAT:**

City of Portland Ordinance No. 187832 and Ordinance No. 188177 adopting Portland's periodic review Tasks 4 and 5 are approved.

DATED THIS 8<sup>th</sup> DAY OF AUGUST 2018.

FOR THE COMMISSION



---

Jim Rue, Director  
Department of Land Conservation and Development

NOTE: You may be entitled to judicial review of this order. Judicial review may be obtained pursuant to ORS 197.651(3) by filing a petition for review within 21 days from the service of this final order. Judicial review is pursuant to the provision of ORS 197.650 and 197.651.

Copies of all exhibits are available for review at the department's office in Salem.

**DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

**REPORT ON THE CITY OF PORTLAND  
PERIODIC REVIEW TASKS 4 AND 5**

**DLCD Order 001892**

December 5, 2017

**I. SUMMARY OF DECISION**

The Department of Land Conservation and Development (department) finds that the actions of the city of Portland (city) to complete tasks 4 and 5 of the city's periodic review work program comply with the statewide planning goals, related statutes, and implementing administrative rules, based on the findings and conclusions contained in this report. These tasks are approved.

**II. REVIEW PROCEDURES AND CRITERIA**

**A. Director Review**

OAR 660-025-0150(1) provides that, in response to a periodic review task submittal, the director may take action as follows:

- (a) Issue an order approving the completed work task;
- (b) Issue an order remanding the work task to the local government including a date for resubmittal;
- (c) Refer the work task to the [Land Conservation and Development Commission (commission)] for review and action; or
- (d) The director may issue an order approving portions of the completed work task provided these portions are not affected by an order remanding or referring the completed work task.

OAR 660-025-0150(9) provides that the director's standard of review is the same as that for the commission, which is expressed in ORS 197.633(3) and OAR 660-025-0160(2):

- (a) For evidentiary issues, whether there is substantial evidence in the record as a whole to support the local government's decision.
- (b) For procedural issues, whether the local government failed to follow the procedures applicable to the matter before the local government in a manner that prejudiced the substantial rights of a party to the proceeding.
- (c) For issues concerning compliance with applicable laws, whether the local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations. The

the record upon which it is based,<sup>1</sup> demonstrates that the city adopted Policy 5.6 with an adequate factual base, and made an “ultimate policy choice” based upon: (1) the need for more housing with higher densities than single-family houses and lower densities than larger multi-family or mixed use buildings, and (2) the positive impacts on housing expense, home ownership, access to complete communities and housing choice provided by the policy.

While the objectors do not agree with the city’s decision, the department’s review of the submittal for Goal 2 compliance is not whether the city made the “correct” decision, but rather whether the city’s decision is supported by an adequate factual base, which is the equivalent of the requirement in ORS 197.633(3)(a) that the decision is based upon substantial evidence in the record as a whole. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

The department also does not agree that the objection has established that Policy 5.6 and Policy 5.5, Housing Centers, are in conflict regarding the provision of “family-friendly” housing. The term “family-friendly” is not defined in the Portland Comprehensive Plan, and could mean many different things to different people. The objection does not provide any evidence, nor does anything in the record provide any indication, that a “family” is less likely to live in a smaller housing unit, or a rental unit, than it is likely to live in a larger housing unit, or a unit owned by its occupant.

The department also finds the argument proffered in the objection that allowing greater densities in some neighborhoods will result in the demolition of less expensive housing, resulting in a loss of affordability is not supported by any evidence in the record or provided in the objection. The two footnoted sources provided in the objection, from Professor Emeritus Lutzenhiser and Johnson Economics (Attachment A at 12) do not appear in the record provided by the city. In any case, the city’s findings on this topic address this issue generally as follows:

State planning law requires that housing needs be analyzed and identified by affordability, and requires that land be made available in sufficient supply to accommodate the amount of affordable housing needed. Allowing for a robust supply of inherently more affordable housing types (small studio apartments, ADUs, small-lot single family, etc.) does not mean that these housing units will actually be affordable in practice. In a market economy, housing is allocated to the highest bidder. If supply is limited, the price of even the more affordable housing types can be bid up. In addition, new housing is typically more expensive than older housing. Not all new households will occupy new housing units. Higher income households will often occupy new housing units, leaving older units to lower income households. If housing supply is tight, the price of older housing units can also be bid up. In light of these market dynamics, the primary impact of zoning on affordability will be the extent to which it

---

<sup>1</sup> Task 4 Record at 11527-11530

which requires that comprehensive plans “be the basis for more specific rules and land use regulations which implement the policies expressed through the comprehensive plans,” because the vague and overly flexible nature of the plan policies and map designations related to centers does not sufficiently define and guide implementation through the zoning code in a manner that is clear, understandable, and predictable to the public. Similarly, it violates Goal 2, which provides that “the various implementation measures which will be used to carry out the plan should be considered during each of the planning phases.”

**Department Response.** The department rejects this objection. The city has adopted plan policies that may result in future changes to zoning in the vicinity of neighborhood centers. Task 4 Record at 277. Such future changes would only occur as a result of subsequent study and analysis to determine where the adopted middle housing policy is best applied in candidate areas. The Multnomah Neighborhood Association, and other individuals and groups, will have an opportunity to provide input into that process, and potentially object to or appeal any city actions to implement Policy 5.6.

Regarding the two maps described in the objection, the department found the first in materials for a January 27, 2015 (not 2014) Planning and Sustainability Commission workshop, among a group of all Portland neighborhood center maps. Task 4 Record at 20098. The map grouping is prefaced with the statement: “The following maps reflect adopted local plans, and are in effect today. All other center boundaries are provisional for planning and analysis purposes, and are pending further future refinement planning.” The subsequent list of centers with adopted local plans does not include Multnomah Village. Task 4 Record at 20077. The second map referenced by the objector does not appear to be in the record, but in any event is illustrating a different idea – the areas within one-quarter mile of the preliminary neighborhood center boundaries that could be potentially affected by adoption of Policy 5.6.<sup>2</sup> In any event, the department concludes that any discrepancy is not relevant because the two maps are intended to show two different concepts.

**Objection 4-7d.** This sub-objection alleges that, in designating Multnomah Village as a neighborhood center, the city failed to comply with prior regional planning, including the Metro Code and the Metro 2040 Growth Concept Map. Attachment A at 76-78. The Metro 2040 Growth Concept Map shows that Multnomah Village is not designated as a center, but that the main streets in the neighborhood have been designated as “main streets.”

**Department Response.** The department rejects this objection. The “neighborhood center” designation on the comprehensive plan map does not implement a Metro Town Center designation, it implements a Metro “main street” designation. Task 4 Record at 85. The city recognizes that Multnomah Village is not a Metro “Town Center” designation. Task 4 Record at 103.

---

<sup>2</sup> The fact that this latter map does not appear to be in the local record renders the map outside the department’s scope of review under ORS 197.633(3).

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 No. 18WKTSK001897

Court of Appeals No. A168704

**ORDER DENYING MOTIONS TO SUPPLEMENT RECORD OR TAKE JUDICIAL NOTICE**

Petitioner moves for review of LCDC's order ruling on petitioner's motion to correct the record for the purpose of supplementing the record with a document entitled "2035 Comprehensive Plan: Urban Design Direction." In the alternative, petitioner moves the court to take judicial notice of that document together with these documents:

- Residential Infill Project Stakeholder Advisory Committee Summary Report (June 17, 2016)
- Residential Infill Project City Council Final Concept Report (January 2017)
- Residential Infill Project Discussion Draft Volume 2: Zoning Code Amendments (October 2017).

The motions are denied. The Urban Design document was not made part of the agency record when the matter was before the agency; therefore, it is not properly part of the record on judicial review. The court declines to take judicial notice of any of the documents because taking judicial notice now would deprive respondents of the opportunity to contest the relevance or import of the documents or to offer additional evidence that might rebut the import of the documents.

Petitioner's opening brief is due 49 days from the date of this order.



JAMES W. NASS  
APPELLATE COMMISSIONER  
1/2/2019 9:14 AM

c: Michael J Gelardi  
Steven Shipsey

Linly F Rees  
Jona Jolyne Maukonen

ej

**ORDER DENYING MOTION TO SUPPLEMENT RECORD OR TAKE JUDICIAL NOTICE**

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,  
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 6, 2019, I directed the original LCDC'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 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Michael J. Gelardi, attorney for petitioner, and upon Linly F. Rees, attorney for respondent City of Portland, using the court's electronic filing system.

/s/ Jona J. Maukonen

---

JONA J. MAUKONEN #043540  
Assistant Attorney-In-Charge  
jona.j.maukonen@doj.state.or.us

Attorney for Respondent Land  
Conservation and Development  
Commission