

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 ON RECONSIDERATION GRANTING IN PART AND DENYING IN PART  
REQUEST TO TAKE JUDICIAL NOTICE**

Petitioner moves for reconsideration of the Appellate Commissioner's order of January 2, 2019, affirming respondent LCDC's order denying petitioner's motion to supplement the record with the updated version of a document entitled "2035 Comprehensive Plan: Urban Design Direction." That order also denied petitioner's request to take judicial notice of three other documents related to the Residential Infill Project (RIP). In the alternative, petitioner requests that the court allow petitioner, under ORAP 4.25, to present the Urban Design Direction and RIP documents as additional evidence.

The request to present additional evidence under ORAP 4.25 is denied. ORAP 4.25 implements ORS 138.082(5); ORAP 4.25 is not an independent grant of authority for the court to allow additional evidence to be offered and received for the first time while a case is on judicial review. As petitioner concedes, judicial review of LCDC decisions respecting land use matters are not subject to ORS 138.082(5). Therefore, there is no authority for this court to receive additional evidence or to remand to LCDC to receive and consider additional evidence.

Petitioner's request for reconsideration of the part of the Commissioner's order affirming LCDC's motion to supplement the record with the updated version of the Urban Design Direction document is denied, because LCDC has no authority to supplement the record on judicial review with a document that was never part of the agency record.

Petitioner's request for reconsideration of the part of the commissioner's order denying petitioner's request to take judicial notice is granted, but only as to the updated

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version of the Urban Design Direction document. Further, the motion is granted provisionally. On reconsideration, the court adheres to the part of the Commissioner's order denying petitioner's request to take judicial notice of the three RIP documents because petitioners had the opportunity to offer those documents when this matter was before LCDC and failed to avail itself of that opportunity. Specifically, the documents dated June 2016 and January 2017 existed before the May 2017 and August 2017 deadlines, respectively, for petitioner to file its objections to the City's submittals for Tasks 4 and 5; the document dated October 2017 existed before LCDC held its hearing on March 15, 2018.

It may be that the updated Urban Design Direction document came into existence while this matter was pending before LCDC, but that is less likely because the City made an earlier version of the document part of the record it submitted to LCDC. The request to take judicial notice as to the Urban Design Direction document is granted provisionally, without deciding whether the department of this court that decides this judicial review on its merits properly may consider the document. The court has serious doubt whether the document is relevant to any of petitioner's challenges to LCDC's order.<sup>1</sup> The court's merits department will be in a better position to determine the relevance of the documents after the parties have fully briefed the case and the court has had the opportunity to review the entire record.

Petitioner's opening brief is due 28 days from the date of this order.



JAMES C. EGAN  
CHIEF JUDGE, COURT OF APPEALS  
3/28/2019 8:18 AM

c: Michael J Gelardi  
Steven Shipsey  
Linly F Rees  
Jona Jolyne Maukonen

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<sup>1</sup> That is, it appears that what petitioner really wants to do is challenge the validity of the Urban Design Direction document as not being within the scope of the periodic review of Tasks 4 or 5. However, the subject of this judicial review is the validity of the periodic review of Tasks 4 and 5 and petitioner has not articulated how that document supports petitioner's contention that the period review of Tasks 4 and 5 is invalid because of the existence of the document. But, perhaps petitioner can do so in its brief.

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