

IN THE COURT OF APPEALS  
OF THE STATE OF OREGON

MULTNOMAH NEIGHBORHOOD  
ASSOCIATION,

Petitioner;

v.

LAND CONSERVATION AND  
DEVELOPMENT COMMISSION OF  
THE STATE OF OREGON

and

CITY OF PORTLAND,

Respondents.

LCDC Order 18-WKTSK—001897

CA No. A168704

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

Pursuant to ORAP 7.55(4)(a), Petitioner Multnomah Neighborhood Association moves the court to reconsider the court commissioner’s Order Denying Motions to Supplement Record or Take Judicial Notice entered on January 2, 2019 (the “Order”). In the alternative, Petitioner moves the court for leave to present the documents at issue in the Order as additional evidence under ORAP 4.25.

This motion for reconsideration responds to a legal error in the Order. *See* ORAP 6.25(1) and 7.55(4)(a) (stating grounds for reconsideration). The court is required to take judicial notice of the facts at issue in Petitioner’s judicial notice motion (“Petitioner’s Motion”) under OEC 201(d) because Petitioner has demonstrated that these facts are not subject to reasonable dispute and are relevant to this case. The Order also unfairly denies

Petitioner the opportunity to present relevant evidence due to the evidentiary constraints of the periodic review process at issue in this case.

As described in Petitioner’s Motion, the documents at issue in the Order are land use policy documents issued by Respondent City of Portland (the “City”) for public review. These documents include the “2035 Comprehensive Plan: Urban Design Direction” (the “Urban Design” document) and three documents associated with the City’s Residential Infill Project (collectively, the “RIP Documents”). Petitioner refers to the Urban Design document and the RIP Documents in this motion collectively as the “Documents.”

Petitioner has conferred with counsel for both Respondent Land Conservation and Development Commission (“LCDC”) and Respondent City regarding this motion. LCDC objects to the motion and plans to file a response. The City also objects to the motion, and will decide whether to respond after reviewing this motion.

**A. Motion to Reconsider Petitioner’s Request for Judicial Notice**

The Order is contrary to law because judicial notice of the relevant facts in the Documents is mandatory under the Oregon Evidence Code. OEC 201 governs judicial notice of facts, and OEC 201(d) states that “[a] court shall take judicial notice if requested by a party and supplied with the necessary information” (emphasis added). Under OEC 201(b)(2), the “necessary information” in this case is a demonstration that the facts at issue are not subject to reasonable dispute because they are “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Petitioner must also demonstrate that the facts are relevant to this case. *See Spiess v. White*, 172 Or App 36, 43, 17 P3d 568 (2001).

Petitioner has demonstrated that the facts of which Petitioner seeks judicial notice are not subject to reasonable dispute under OEC 201. 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” (“RIP”) rather than through periodic review, and of the dates of the Documents as they relate to the City’s periodic review timeline. The City<sup>1</sup> created the Documents to inform the public of the City’s policy decisions. Petitioner has provided the Documents to the court, along with evidence of their presence on the City’s public website. (Pet’r Mot. at 2 n1, 4 n2 and exhibits.) Petitioner has also described the specific statements in the Documents that detail the City’s decision to implement middle housing policy through RIP. (Pet’r Mot. Reply at 1-7.) Pursuant to OEC 201(b)(2), the court can review these statements to make an accurate and ready determination of the facts Petitioner has identified, and the accuracy of these statements cannot reasonably be questioned because they are the City’s public statements about the City’s own actions. Petitioner has therefore supplied the court with the necessary information to take judicial notice under OEC 201(d).

Furthermore, Petitioner has demonstrated the relevance of the Documents to this case. Petitioner contends that LCDC violated state law by, among other things, allowing the City to implement middle housing policy outside of the periodic review process. Petitioner has explained that the Documents demonstrate the fact that RIP is the City’s policy vehicle for implementing middle housing policy. (Pet’r Mot. at 4; Pet’r Mot. Reply at 4-7.) The City has admitted that RIP is not part of periodic review (City Resp. at 3), and the record includes remarks by elected City commissioners, among others, about the City’s plans to implement middle housing policy through RIP. (*see, e.g.*, Rec. 22,375.) The Documents therefore serve to clarify facts that are already in the record in this case.

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<sup>1</sup> Three of the four Documents were created by the City’s Bureau of Planning and Sustainability. The other document was created by a stakeholder committee commissioned by the City’s mayor. See Petitioner’s Motion and Petitioner’s December 14, 2018 reply for explanation of the Documents.

Petitioner seeks to introduce the Documents to provide context for the court about RIP and how RIP relates to the periodic review decisions at issue in this case.

The commissioner reasoned that taking judicial notice of the Documents “would deprive respondents of the opportunity to contest the relevance or import of the [D]ocuments or to offer additional evidence that might rebut the import of the [D]ocuments.” (Order at 1.) However, respondents have had opportunity to contest the relevance of the Documents, and LCDC did so in LCDC’s response to Petitioner’s Motion. Specifically, LCDC asserted that the Documents are not relevant because Petitioner did not preserve an issue regarding the City’s implementation of middle housing policy for appeal. (LCDC Resp. 5-7.) Petitioner replied with citations to the record showing that Petitioner did indeed raise this issue to LCDC, and that LCDC specifically considered and rejected Petitioner’s argument. (Pet’r Mot. Reply at 7-9.) Respondents therefore have had opportunity to respond to the facts in the Documents. Respondents will have further opportunity to contest the relevance and import of the Documents when they argue this case on the merits.

Moreover, nothing prevents the respondents from making their own motions for judicial notice or new evidence if they believe there is additional relevant context to the facts Petitioner highlights in the Documents. Respondents therefore are not prejudiced by judicial notice of the relevant facts in the Documents.

#### **B. Alternative Motion for Leave to Present Additional Evidence**

In the alternative, Petitioner requests that the court accept the Documents as additional evidence under ORAP 4.25. ORAP 4.25 refers to a section of the Oregon Administrative Procedures Act (ORS 183.482(5)) that governs additional evidence during judicial review of administrative agency contested cases. Although this case arises under the periodic review statutes at ORS 197.628-633 and 197.651, rather than ORS chapter

183, the court has recognized that this case is nevertheless subject to ORAP 4.05-4.40 governing judicial review of administrative agency proceedings. (*See* Case Management Order, Sept. 4, 2018.) If the court declines to take judicial notice of the Documents, the court should accept the Documents under ORAP 4.25 due to the evidentiary constraints of the periodic review process.

Petitioner has not had a fair opportunity to introduce the Documents because of the structure of the periodic review process. In a contested case under the Administrative Procedures Act, the record is developed through an adjudicative proceeding overseen by an administrative law judge after a state agency makes an initial decision. *See* ORS 183.411-471. This helps to focus fact-finding around the relevant issues. In a periodic review proceeding, by contrast, the record is developed in a local legislative proceeding before the local government makes a decision.

In addition, there is no opportunity to supplement the record during the administrative appeal process conducted by the Department of Land Conservation and Development (“DCLD”) and LCDC. *See* ORS 197.633(3) (limiting LCDC’s review to the local record). In this case, Petitioner asked DLCD and LCDC to consider certain extra-record documents about the City’s development of middle housing policy, but DLCD and LCDC rejected this evidence based on ORS 197.633(3). (Rec. 7; 651; 654.)

At the local level, the City excluded documents regarding its RIP policy development from the periodic review record. (City Resp. 2, 6.) Petitioner is a citizens’ neighborhood association that participated in an extremely complex local legislative process without legal counsel. Given this context, Petitioner cannot reasonably be expected to have made a formal request to the City to place the City’s own RIP policy documents in the City’s periodic review record. There was no practical reason to introduce RIP

documents at the local level given that the City was well aware of the City's own RIP efforts. (*see, e.g.*, Rec. 22,375.)

Moreover, Petitioner could not have introduced some of the Documents to the record because the City issued these documents after the City closed the periodic review record.<sup>2</sup> (*See* Pet'r Mot. Reply at 3-7.) For example, the City closed the periodic review Task 5 record to new written evidence on November 18, 2016. (Rec. 4,813). The City Council approved the City staff's RIP concept less than three weeks later on December 7, 2016, and the City staff then issued the RIP Final Concept Report in January 2017. (Pet'r Mot. Ex. 3 at 1, 30.) The City's process therefore precluded Petitioner from introducing the RIP Final Concept Report and other RIP documents into the periodic review record.

The City's local process and 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. *See* ORS 183.482(5) (stating the "good and substantial reasons" standard).<sup>3</sup> The Documents are also material to this case for the reasons stated above in part A of this motion. The court should therefore accept the Documents as additional evidence to ensure a complete and accurate record of the City's development of middle housing policy.

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<sup>2</sup> One of the Documents, the Urban Design document, was issued well before the City closed the periodic review record and is explicitly part of the City's periodic review work, though the City chose to exclude this document from the record. Petitioner could not reasonably have known that the City would exclude the Urban Design document from the periodic review record, given that a draft of this document is in the record and the document states on its face that it is "a supporting piece to the 2035 Comprehensive Plan." (Pet'r Mot. Ex. D at 2). This comprehensive plan is the City's work product for Task 4 of periodic review. (Rec. 34,130-1042.)

<sup>3</sup> Included with this motion is an affidavit from Petitioner Multnomah Neighborhood Association's Land Use Chair James Peterson that provides the information required by ORAP 4.25(1).

Finally, allowing the Documents as 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. *See* ORAP 4.25(2). This would resolve the commissioner's concern about LCDC's opportunity to respond to the Documents.

DATED: January 16, 2019.

HERSHNER HUNTER, LLP

By /s/ *Michael J. Gelardi*

Michael J. Gelardi, OSB 083347

mgelardi@hershnerhunter.com

180 E. 11<sup>th</sup> Avenue

Eugene, OR 97401

Telephone: (541) 686-8511

Attorney for Petitioner

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**AFFIDAVIT OF PETITIONER IN SUPPORT OF PETITIONER’S MOTION FOR  
LEAVE TO PRESENT ADDITIONAL EVIDENCE  
UNDER ORAP 4.25**

STATE OF OREGON                    )  
  ) ss.  
COUNTY OF MULTNOMAH        )

I, James Peterson, Land Use Chair of Petitioner Multnomah Neighborhood Association (“Petitioner”), having been first duly sworn, hereby depose and state:

1. Petitioner seeks to present the following additional evidence, attached to Petitioner’s November 16, 2018 Motion for Review of Agency Order Under ORAP 4.22 and to Take Judicial Notice:

1.1. The document entitled “2035 Comprehensive Plan: Urban Design Direction” and a screenshot from the City of Portland’s website that states the date of this document and provides a link to the document;



1.2. The Residential Infill Project Stakeholder Advisory Committee Summary Report (June 17, 2016);

1.3. The Residential Infill Project City Council Final Concept Report (January 2017); and

1.4. The Residential Infill Project Discussion Draft Volume 2: Zoning Code Amendments (October 2017).

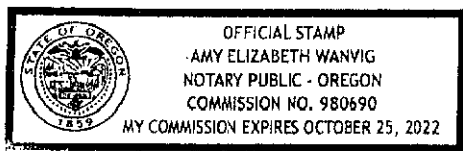
2. Petitioner did not produce the above documents before the City of Portland (the "City") at the City's local periodic review hearings because Petitioner was unaware of the need to present the City's own planning documents to the City to ensure that these documents would be considered part of the periodic review record. Also, the City closed the periodic review record before the City issued the January 2017 and October 2017 documents described above.

3. Petitioner did not request an extension of time to present the documents described above to Oregon Department of Land Conservation and Development or the Land Conservation and Development Commission. Both of these administrative bodies determined that review of the City's periodic review decisions was limited to the evidence in the City's local record.

DATED: January 16, 2019.

James Peterson  
By: James Peterson, Land Use Chair  
(Multnomah Neighborhood Association  
Southwest Neighborhoods, Inc.  
7688 SW Capitol Highway  
Portland, OR 97219  
Telephone: (503) 823-4592  
Petitioner

SUBSCRIBED AND SWORN to before me on January 16, 2019 by James Peterson, Land Use Chair of the Multnomah Neighborhood Association.



Amy Wanvig  
Notary Public for Oregon  
My commission expires: 10/25/2022

## CERTIFICATE OF FILING AND SERVICE

Pursuant to ORAP 16.25, I certify that on January 16, 2019, I caused the foregoing PETITIONER'S MOTION FOR RECONSIDERATION UNDER ORAP 7.55(4)(a) OR FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE UNDER ORAP 4.25 and AFFIDAVIT OF PETITIONER IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE UNDER ORAP 4.25 to be filed with the Court of Appeals through the Oregon Judicial Department's eFiling System.

I further certify that, pursuant to ORAP 16.45, the foregoing PETITIONER'S MOTION FOR RECONSIDERATION UNDER ORAP 7.55(4)(a) OR FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE UNDER ORAP 4.25 and AFFIDAVIT OF PETITIONER IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE UNDER ORAP 4.25 were electronically served on January 16, 2019, on the following through the Oregon Judicial Department's eFiling System:

Linly F. Rees, OSB 945098  
Office of the City Attorney  
City of Portland  
1221 SW 4th Avenue, Ste. 430  
Portland, OR 97204  
linly.rees@portlandoregon.gov

Jona J. Maukonen, OSB 043540  
DOJ Gen Counsel Nat Resources  
100 SW Market Street  
Portland, OR 97201  
jona.j.maukonen@doj.state.or.us  
*Of Attorneys for Land Conservation and  
Development Commission*

I further certify that, pursuant to ORAP 16.45, the foregoing PETITIONER'S MOTION FOR RECONSIDERATION UNDER ORAP 7.55(4)(a) OR FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE UNDER ORAP 4.25 and AFFIDAVIT OF PETITIONER IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE UNDER ORAP 4.25 were served on January 16, 2019, on the following by first class mail, postage prepaid:

Steven Shipsey, OSB 944350  
DOJ Gen Counsel Nat Resources  
100 SW Market Street  
Portland, OR 97201  
steve.shipsey@doj.state.or.us  
*Of Attorneys for Land Conservation and  
Development Commission*

Attorney General for the State of Oregon  
Office of the Solicitor General  
400 Justice Building  
1162 Court Street NE  
Salem, Oregon 97301-4096

[Signature on the following page]

HERSHNER HUNTER, LLP

By /s/ *Michael J. Gelardi*

Michael J. Gelardi, OSB 083347

mgelardi@hershnerhunter.com

180 E. 11<sup>th</sup> Avenue

Eugene, OR 97401

Telephone: (541) 686-8511

Attorney for Petitioner