

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MULTNOMAH NEIGHBORHOOD  
ASSOCIATION,

Petitioner,

v.

LAND CONSERVATION AND  
DEVELOPMENT COMMISSION and  
CITY OF PORTLAND,

Respondents.

Land Conservation and Development  
Commission  
18WKTSK001897

A168704

**PETITIONER'S CORRECTED OPENING BRIEF**

Appeal from the Approval Order of the Land Conservation and Development  
Commission of the State of Oregon dated August 8, 2018

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## PETITIONER'S CORRECTED OPENING BRIEF

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### I. STATEMENT OF THE CASE

#### A. Nature of the Proceeding and Relief Sought

This case is an appeal of Respondent Oregon Land Conservation and Development Commission's ("LCDC") final order number 18-WKTSK—001897. Petitioner Multnomah Neighborhood Association seeks reversal or remand of LCDC's order on the grounds that the order is unlawful in substance under ORS 197.651(10)(a), and not supported by substantial evidence in the whole record as to facts found by LCDC under ORS 197.651(10)(c).

#### B. Nature of the Final Agency Decision Sought to be Reviewed

LCDC's order in this case affirmed the Oregon Department of Land Conservation and Development's ("DLCD") approval of Respondent City of Portland's (the "City") work product for the City's final two periodic review work tasks. State law requires local governments to periodically review their comprehensive plans and zoning regulations to respond to changed conditions and ensure continued compliance with the statewide planning goals. *See* ORS 197.628(1). DLCD and its governing commission, LCDC, oversee the periodic review process. *See* ORS 197.628 to 197.646.

There are two phases of periodic review. In the first phase, the local government evaluates its existing comprehensive plan and zoning regulations

and, if necessary, develops a “work program” to make needed changes. *See* ORS 197.633(1). DLCD is responsible for reviewing a local government’s phase one decision. DLCD must make its own independent decision regarding the sufficiency of the local government’s evaluation and whether to approve or require changes to the local government’s work program. *See* ORS 197.633(4); ORS 197.644(1); OAR 660-025-0100(4); OAR 660-025-0110(1). DLCD’s phase one decision is final and is not subject to appeal. ORS 197.633(4).

Phase two of periodic review requires a local government to implement its work program by completing the “work tasks” specified in the work program. *See* ORS 197.633; OAR 660-025-0130 to 0150. Completed work tasks must be approved by DLCD, and DLCD’s decisions regarding work tasks may be appealed to LCDC. *See* ORS 197.633(5) - (6); ORS 197.644(2); OAR 660-025-0150.

Petitioner challenges LCDC’s approval of a comprehensive plan policy the City adopted in its fourth work task. The policy at issue states:

**“Policy 5.6 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.”

(ER-126.)

Petitioner also challenges LCDC's approval of the City's decision not to implement this policy in the City's fifth work task.

**C. Jurisdiction**

The court has appellate jurisdiction over this case pursuant to ORS 197.650(2).

**D. Timeliness of Appeal**

ORS 197.651(3) requires the filing of a petition for judicial review of an LCDC order within 21 days after the date that LCDC mails or delivers its final order. In this case, LCDC delivered its final order on August 8, 2018. Petitioner filed its Petition for Judicial Review of LCDC's order on August 29, 2018. Petitioner's appeal is therefore timely.

**E. Questions Presented on Appeal**

1. Did LCDC violate state periodic review statutes by approving Policy 5.6 of the City's 2035 Comprehensive Plan concerning "middle housing" when the City did not study the implications of this policy and the policy was not among the policy alternatives evaluated by the City in periodic review?

2. Did LCDC violate state periodic review statutes by declining to require the City to implement middle housing policy through the periodic review process?

3. Did LCDC violate Statewide Planning Goal 2 and make a decision not supported by substantial evidence by approving the City's middle housing

policy despite a lack of factual basis demonstrating that the policy complies with applicable criteria?

## **F. Summary of Argument**

### **1. First Assignment of Error**

LCDC's decision cedes LCDC's authority over a major change in City land use policy in violation of LCDC's obligations under the state periodic review statutes. LCDC's decision enables the City to avoid review of the policy under the statewide planning goals and other provisions of the City's 2035 Comprehensive Plan when the City implements the policy.

In addition, LCDC's approval of the City's middle housing policy is contrary to state law because middle housing policy conflicts with the City's earlier periodic review work. LCDC also failed to ensure that middle housing policy will comply with Goal 11 and Goal 12, as required by the periodic review statutes.

### **2. Second Assignment of Error**

LCDC improperly allowed the City to divert implementation of middle housing policy to a process outside of periodic review. In doing so, LCDC failed to exercise oversight over the City's actions, as required by the periodic review statutes.

### **3. Third Assignment of Error**

LCDC's approval of middle housing policy violates Statewide Planning Goal 2 and is not supported by substantial evidence because the record does not

demonstrate that the City complied with the City's work program and the statewide planning goals. LCDC's findings repeat the City's findings, which reflect the City's aspirations for the policy rather than the factual base developed and the policy alternatives analyzed by the City in its prior periodic review work.

## **G. Summary of Facts**

### **1. The City's periodic review work program and policy analysis**

The City entered the periodic review process roughly ten years ago, though the City had been engaged in related planning efforts for some time prior to that through an effort known as the "Portland Plan." (Rec. 34130-0084.)<sup>1</sup> DLCD approved the City's initial periodic review work program in September 2009, and the City and DLCD subsequently revised the work program in 2011 and 2014. (Rec. 34130-1033.) The City's work program included five work tasks: (1) community involvement; (2) inventory and analysis; (3) consideration of policy alternatives; (4) policy choices; and (5) implementation. (ER-2 to 11.)

The City's inventory and analysis work task ("Task 2") was designed to provide the factual basis for the City's update to its comprehensive plan. (ER-3) Task 2 included evaluation of housing needs ("Subtask E"). The City completed

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<sup>1</sup> LCDC's record pagination uses a hyphen (-) to identify content that is in the supplemental portion of the record. Petitioner follows LCDC's convention when citing the record supplement. In order to prevent confusion, Petitioner uses the word "to" in its citations when citing a page range in the record.

Subtask E in October 2012 by adopting five housing studies via Ordinance 185657 (the “Housing Studies”). (Rec. 34130-01058.) LCDC approved the City’s Task 2 work in June 2014. (Rec. 21.)

Task 2, Subtask E required the City to “identify any provisions in its zoning and other codes that might serve as barriers to the provision of identified forms of needed housing.” (ER-6.) The City’s Task 2 Housing Studies did not identify any zoning barriers to housing development. On the contrary, one of the “Key Findings” of the City’s Household Demand and Supply Projections report was that existing zoning is adequate to ensure sufficient housing supply.

Specifically, the report states:

*“Currently zoned land ‘capacity’ in Portland is sufficient to meet housing demands - that is, enough land in Portland is currently zoned so as to be available to house the projected numbers of new households citywide and in each particular subarea.”*

(emphasis in original). (Rec. 34130-01678.)

None of the five Housing Studies contain any mention of “middle housing,” and the studies contain little discussion of the types of dwelling units that later became associated with the middle housing concept. (Rec. 34130-01510 to 34130-01721.) One of the five studies, entitled “Housing: Updates on Key Housing Supply and Affordability Trends,” includes a table showing the number of various types of housing units constructed in the City from 2001-2010, including “townhouse/rowhouse/duplex” and “ADU.” The “Key Finding”

under this table notes a large increase in recent construction of multi-family housing in the city:

“Also, noteworthy is the changing shares of various housing unit types - particularly, the declining share of single-family units that are being built in the City. In the past decade, the proportion of multi-family units (62%) was more than double the percent share (28%) of single-family units constructed.”

(Rec. 34130-01580.) The next bullet point notes that “[t]he construction activity also reveals [sic] that ‘Accessory Dwelling Units’ (ADUs) are poised to contribute to the overall housing supply in Portland due the affordable nature of these units.” (*Id.*)

The City’s third work task was an analysis of comprehensive plan policy alternatives to “identify the consequences of alternative patterns of development” (“Task 3”). (ER-7.) The City’s Task 3 study of alternative development patterns is called the “Growth Scenarios Report.” (Rec. 34130-0104.) The City first published the Growth Scenarios Report in 2013 and issued a revised version in July 2015 in order to incorporate a draft of the City’s 2035 Comprehensive Plan. (ER-19.)

The Growth Scenarios Report evaluated four different models for development: (1) a default scenario under the then-existing City comprehensive plan;<sup>2</sup> (2) growth focused in designated City neighborhood “centers;” (3)

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<sup>2</sup> This is the comprehensive plan that was in effect before the City adopted its 2035 Comprehensive Plan.

growth focused along transportation “corridors;” and (4) growth focused in the “Central City” and nearby “inner neighborhoods.” The report recommended an all-of-the-above approach that combines the latter three growth scenarios. The report states that this combined approach is consistent with the draft 2035 Comprehensive Plan that the City had proposed in July 2014. (ER-23; Rec. 14846.) The Growth Scenarios Report does not discuss middle housing and does not evaluate potential housing growth outside of designated centers and corridors. (ER-13 to 70; *see also* ER-71 (showing geographic scope of middle housing policy).)

## **2. The City’s development of middle housing policy and adoption of the 2035 Comprehensive Plan**

The 2035 Comprehensive Plan (the “2035 Plan”) was the focus of the City’s fourth periodic review work task (“Task 4”). (ER-74.) Although the City did not study middle housing policy in its Task 2 or Task 3 work, the City incorporated middle housing policy into its Task 4 work around the same time that the City issued its revised Task 3 Growth Scenarios Report. Specifically, the City introduced middle housing policy in a 2015 supporting document to its then-proposed comprehensive plan called the “2035 Comprehensive Plan: Urban Design Direction” (The “Urban Design” document). (Pet’r Mot. For Review of Agency Order, Nov. 16, Ex 1 at 5 and 16.) This document defined “middle housing” and promoted middle housing in residential areas outside of designated neighborhood centers:

“[neighborhood centers] provide the primary areas for growth and change in Portland over the next 25 years \* \* \* Centers transition in scale to surrounding lower density neighborhoods using “middle housing” building types – rowhouses, duplexes, triplexes, etc. – at their edges.”

(*Id.* at 16.)<sup>3</sup>

The City then proposed middle housing policy as an amendment to the draft 2035 Plan in March 2016. (Rec. 23358; 23379 to 23380.) The City accepted public comment on the proposed policy from March 18, 2016 to April 28, 2016. (Rec. 23358; 22473.) Public testimony to the City during this time indicated broad opposition to the policy. (*See, e.g.*, Rec. 15229 to 15230; 15367 to 15368; 15438; 15444; 15448 to 15449; 15215 to 15216; 15310 to 15311; 15682 to 15683; and 15705 to 15706.)

Neighborhood groups and members of the public in particular expressed concern about the lack of factual basis for middle housing policy and the widespread impact of the policy on residential neighborhoods in the City. For example, a leader of Sunnyside Neighborhood Association commented that “[w]e need to study and avoid having new Middle Housing set off a demolition wave \* \* \* We have to ascertain which market segments will purchase Middle Housing and how this might accelerate housing costs in a neighborhood.” (Rec. 15367.) Similarly, a coalition of southwest Portland neighborhood associations

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<sup>3</sup> The court has provisionally taken judicial notice of the Urban Design document. (Order, March 28, 2019.)

commented that “[w]e are concerned that an unintended consequence of [the middle housing amendment] would be the demolition of existing affordable housing in the name of affordable middle housing.” (Rec. 15312.)

Public testimony also expressed concern about the lack of transportation and other infrastructure planning to accommodate residential density increases associated with middle housing. For example, a representative of United Neighborhoods for Reform told the City it would be “unwise to encourage such widespread increases [in] density” without the appropriate transportation infrastructure. (Rec. 15706.) These concerns echoed a proposal by City staff in February 2016 to study middle housing only in a few limited areas of the City that would avoid “areas with significant infrastructure gaps or other significant physical or environmental constraints.” (Rec. 23558; 23564.)

In response to public concerns and uncertainty about the proposed policy, City Commissioner Amanda Fritz stated on April 27, 2016 that “[t]here are several things in there, people are like, what does this mean? We don’t know what it means. We have the board policy and then a follow up” (emphasis added). (Rec. 22463.)

Two weeks later, on May 12, 2016, the City Council considered an amendment to the proposed middle housing policy that would allow the City to implement the policy “where appropriate” within a quarter mile of designated City centers and corridors around the City. (Rec. 22374.) Commissioner Fritz

again noted public concerns about the policy and suggested that the City study where the policy should apply rather than give the City broad discretion in determining where to impose the policy:

“We heard a lot of testimony that folks were not comfortable with what this even meant. I myself I’m not comfortable with the term ‘middle housing.’ And we assured folks that the there [sic] would be a further process to decide where this goes, what it means and such. So, I’m not sure why we’re even specifying. ‘Where appropriate’ means where appropriate, and I prefer to just delete the last sentence [of the policy] saying specifically [where] -- and even more so, now that we’re specifying more and more things -- why don’t we look at where is it appropriate and direct the bureau to come back with us with a package and have full neighborhood engagement of is it a quarter mile, half mile, is it dispersed, is it here, there, or everywhere?”

(Rec. 22375.) City Commissioner Steve Novick responded that he “strongly disagree[d]” with Commissioner Fritz’s proposal (*Id.*) City Mayor Charles Hales agreed with Commissioner Novick, noting that City staff were already working to implement middle housing policy and that the policy would “get in effect meshed with what we are doing in the residential infill project and the mixed use zoning project.” (Rec. 22375.) The City Council then voted to approve the policy as amended. (Rec. 22376.)

Three days later, City staff produced a map for City Council showing the portions of the City potentially subject to middle housing policy. This area encompasses the majority of the City, including nearly all residential

neighborhoods east of the Willamette River. (ER-71.) The next month, the City adopted the 2035 Plan, including Policy 5.6 concerning middle housing. (ER-74.)

The City then undertook various measures to implement the 2035 Plan as required by the fifth work task in its periodic review work program (“Task 5”). The City did not implement middle housing policy in Task 5. Instead, the City is implementing the policy through its “Residential Infill Project.” (Rec. 197; 22375.) The City’s attorney has explained to the court that “[t]he Residential Infill Project is a legislative project to amend the Zoning Code and was not part of the periodic review tasks before LCDC or this court.” (City Resp. to Pet’r Mot., Nov 30, 2018, at 3.)

### **3. Petitioner’s challenge to the City’s periodic review decisions**

The City submitted its Task 4 work product to DLCD in April 2017, nearly a year after the City adopted its Task 4 ordinance that includes the 2035 Plan. The City submitted its Task 5 work product to DLCD a few months later in August 2017. (Rec. 1085.) Petitioner and others filed objections to the City’s Task 4 and Task 5 work product. DLCD denied these objections and approved the City’s work. (Rec. 636.) Petitioner and others then filed appeals of DLCD’s decision with LCDC. LCDC affirmed DLCD’s decision and Petitioner then appealed to this court. (ER-150.)

## **H. Significant Motions**

### **1. Motion for Scheduling Determination**

On the day that Petitioner filed its Petition for Judicial Review, Petitioner moved the court for a determination that this case is not subject to the expedited schedule required in most land use cases in order to secure access to the record in advance of briefing. (Pet'r Mot. For Record Review and Scheduling Determination, Aug 29, 2018.) The court agreed with Petitioner's characterization of the case and issued an order clarifying that the briefing schedule would not begin until after the record had been settled. (Case Management Order, Sept 4, 2018.)

### **2. Motions to LCDC to Correct the Record**

After LCDC filed the record with the court, Petitioner and the City each filed motions pursuant to ORAP 4.22 requesting that LCDC add certain documents to the record. Petitioner requested that LCDC add to the record the City's periodic review work program document, the City's Task 2 and Task 3 work product, and the 2015 Urban Design document. (Pet'r Mot. to Correct the Record, Oct 9, 2018.) The City moved LCDC to include certain indices, mailing notices and video recordings of City Council deliberations. (City Mot. to Correct the Record, Oct 9, 2018.)

In response to these motions, LCDC agreed to add all of the requested documents to the record except the Urban Design document. LCDC reasoned that it lacked authority to include the Urban Design document in the record

because Petitioner had not demonstrated that the document was included in the record that the City had delivered to DLCDC. (LCDC Order on Motions to Correct the Record, Nov 6, 2018.)

### **3. Additional Record-Related Motions**

Following LCDC's record order, Petitioner moved the court to add the Urban Design document to the record or to take judicial notice of the document. Petitioner also requested that the court take judicial notice of several other City policy documents related to implementation of the City's middle housing policy. (Pet'r Mot. For Review of Agency Order, Nov 16, 2018.) The appellate commissioner denied Petitioner's motion to add the Urban Design document to the record on the grounds that the document was not made part of the record when the case was before LCDC. The appellate commissioner also declined to take judicial notice of the City documents, reasoning that noticing the documents would deprive LCDC and the City of the opportunity to contest the relevance of the documents or offer evidence in response. (Order, Jan 2, 2019.)

Petitioner then moved the court to reconsider the appellate commissioner's judicial notice decision, or for leave to present the City documents as additional evidence under ORAP 4.25. (Pet'r Mot. For Reconsideration, Jan 16, 2019.) The court agreed, provisionally, to take judicial notice of the Urban Design document, but declined to notice the other

documents. The court also denied Petitioner's request to add the City documents to the record under ORAP 4.25. (Order, March 28, 2019.)

Separately, the City moved the court to add the City Council videos to the record because LCDC's record supplement failed to include these items. (City Mot. For Review of Agency Order, Nov 20, 2018.) LCDC filed the additional record supplement videos with the court on December 7, 2018. (LCDC Supplemental Corrected Judicial Review Record package, Nov 6, 2018.)

## **II. FIRST ASSIGNMENT OF ERROR**

LCDC's approval of the City's middle housing policy is unlawful in substance because LCDC failed to require the City to resolve conflicts between the City's middle housing policy and the City's earlier periodic review work and because LCDC failed to ensure City compliance with statewide planning goals 11 and 12.

### **A. Preservation of Error**

Under "Issue B" of Petitioner's appeal to LCDC of the City's middle housing policy, Petitioner argued that the policy is not supported by the City's prior periodic review work product. DLCD had concluded that the City's policy was adequately supported by findings about housing choice and affordability that accompany the City's Task 4 ordinance. Petitioner challenged DLCD's conclusion, noting that the City's Task 4 middle housing findings are not

supported by the City's Task 2 Housing Studies or Task 3 analysis of policy alternatives. Specifically, Petitioner argued that "the [2035] Comp Plan is to be based on a record of research, studies and public input developed in Tasks 1, 2 and 3, and not upon itself." (ER-140.) LCDC rejected Petitioner's argument. (ER-164 to 166.)

Petitioner also argued to LCDC that the City failed to address needed infrastructure for middle housing. LCDC addressed and rejected this argument. (ER-168.) Petitioner has therefore preserved for appeal the issues presented in this First Assignment of Error.

#### **B. Standard of Review**

This court reviews LCDC's periodic review decision for errors of law. ORS 197.651(10)(a). This includes review of whether LCDC's approval of the City's final periodic review work product upholds LCDC's legal obligation to ensure that the City's work product is internally consistent and complies with state land use laws. *See Hummel v. LCDC*, 152 Or App 404, 410, 954 P2d 824 (1998).

#### **C. Argument**

LCDC's decision to approve the City's middle housing policy has broad implications for the future of the City and the future of the state periodic review program. The policy allows the City to approve a large increase in housing units throughout most single-family residential neighborhoods in the City. LCDC's

decision to approve middle housing policy in periodic review enables the City to avoid review of the policy under the statewide planning goals and other provisions of the City's 2035 Plan when the City implements the policy. LCDC's decision cedes LCDC's authority over a major change in City land use policy in violation of LCDC's obligations under the state periodic review statutes.

In addition, LCDC's approval of the City's middle housing policy is contrary to state law because middle housing policy conflicts with the City's Task 2 and Task 3 decisions. LCDC also failed to ensure that middle housing policy will comply with Goal 11 and Goal 12 as required by the periodic review statutes.

**1. Middle housing policy could dramatically change residential neighborhoods throughout the City**

Middle housing policy could lead to a vast increase in housing units in most residential neighborhoods in the City. The City has "Single-Dwelling" residential zones and "Multi-Dwelling" residential zones.<sup>4</sup> As the name suggests, the purpose of Single-Dwelling zones is "to create, maintain and promote single-dwelling neighborhoods." (App-1.) Consistent with this purpose, the City's current zoning code generally limits housing to one single-

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<sup>4</sup> The City also has mixed use and employment zones that allow for larger multi-unit residential buildings as described in Part IIC(3) below.

family home per lot in Single-Dwelling zones.<sup>5</sup> (App-7.) Middle housing policy, by contrast, allows the City to permit multi-unit residential buildings throughout all single-family residential zones within one quarter mile of a designated City center or corridor:

**“Policy 5.6 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.”

(ER-126.) Middle housing policy therefore allows the City to convert Single-Dwelling residential zones into de facto multi-dwelling zones without a zone change procedure.

Maps produced by the City indicate that most Single-Dwelling neighborhoods in the City are within a quarter mile of a designated center or corridor. This includes residential neighborhoods in northwest and southwest Portland and nearly all single-family residential areas east of the Willamette River. (ER-71.) Middle housing policy, therefore, potentially impacts a large swath of the City. (*Compare* ER-72 to 73 showing current designations of centers and corridors *with* ER-71 showing reach of middle housing policy.)

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<sup>5</sup> There are exceptions to this rule, such as accessory dwelling units (ADUs), and duplexes that are allowed in some limited locations. (App-7.)

Although the scale of the density increases allowed by middle housing policy is unknown, the housing types allowed by the policy suggest that housing units could at least double or triple. The policy itself describes middle housing as “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.” (ER-126.) The Urban Design document, which is part of the 2035 Plan, more specifically defines middle housing as “rowhouses, duplexes, triplexes, etc.” (Pet’r Nov 16 Mot. Ex 1 at 5 and 16.) The policy therefore potentially allows all single-family dwellings throughout most of the City to be replaced by buildings with two, three or more housing units.

**2. LCDC has improperly ceded the state’s authority over development of middle housing policy**

State law requires periodic review of local comprehensive plans and land use regulations “to ensure that the plans and regulations remain in compliance with the statewide planning goals \* \* \* and to ensure that the plans and regulations make adequate provision for economic development, needed housing, transportation, public facilities and services and urbanization.” ORS 197.628(1). In order to achieve this purpose, DLCD and LCDC are required to ensure that a local government’s periodic review work product “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.” ORS 197.633(3)(c).

LCDC’s rules further refine LCDC’s obligations in reviewing local periodic review decisions. Specifically, LCDC rules forbid the agency from approving a local government’s final periodic review work product until the local government’s periodic review decisions are internally consistent and in compliance with state land use law:

“When a subsequent work task conflicts with a work task that has been deemed acknowledged, or violates a statewide planning goal, applicable statute or administrative rule related to a previous work task, the director or commission shall not approve the submittal until all conflicts and compliance issues are resolved.”

OAR 660-025-0140(5). *See also Hummel*, 152 Or App at 410 (summarizing LCDC’s periodic review responsibilities).

LCDC’s approval of middle housing policy allows the City near-total discretion in applying the policy. Under the Oregon Supreme Court’s decision in *Siporen v. City of Medford*, 349 Or 247, 253 P3d 776 (2010) courts must defer to any plausible interpretation by a local governing body of the local government’s own land use plans and regulations. Policy 5.6 calls for middle housing “where appropriate.” This is a broad standard that requires the exercise of judgment by City leaders.<sup>6</sup> Under the *Siporen* standard of review, the City

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<sup>6</sup> As City Commissioner Fritz stated, “‘Where appropriate’ means where appropriate.” (Rec. 22375.)

Council may determine what is “appropriate” in any plausible way. The policy language combined with *Siporen* deference therefore results in few or no meaningful boundaries on the City’s decision-making.

Moreover, LCDC’s decision allows the City to circumvent the statewide planning goals when it implements middle housing policy. Generally, once a local comprehensive plan is “acknowledged” by DLCD or LCDC, then the statewide planning goals no longer directly apply to land use decisions made under the plan. As the Supreme Court explained in *Foland v. Jackson County*, 311 Or 167, 807 P2d 801 (1991), “[i]f the local government's action is merely an action under its acknowledged comprehensive plan, then that action only need comply with the plan.” *See also* ORS 197.835(7) (providing Land Use Board of Appeals with authority to review whether a new land use regulation is consistent with the statewide planning goals only if “the comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation.”)

Here, because 2035 Plan Policy 5.6 specifically allows middle housing where the City deems appropriate, the City will not have to evaluate compliance with otherwise-relevant statewide planning goals when the City adopts changes to its zoning map to implement the policy. As described in Part IIC(4) below, LCDC’s decision fails to ensure that the policy itself complies with Goal 11 concerning public facilities and services and Goal 12 regarding transportation.

LCDC's approval of middle housing policy therefore effectively exempts the City from the statewide planning goals in both the adoption and implementation of the policy.

Finally, LCDC's decision relieves the City of the need to reconcile potentially conflicting policies in the 2035 Plan. There are a number of 2035 Plan policies that potentially conflict with the increased density and redevelopment called for by middle housing policy. For example, Policy 4.50 is to "protect historic resources from demolition." (Rec. 14927.) Policy 5.14 calls for preserving established communities, (Rec. 14939), and Policy 9.63 seeks to prevent transportation impacts from new development and redevelopment, (Rec. 15033.) However, because Policy 5.6 is specific to middle housing and explicitly allows this housing in Single-Dwelling neighborhoods, the policy likely trumps more general policies that could weigh against application of middle housing policy in a particular area. *See* ORS 197.835(7); *Tongue v. Marion Cnty.*, 8 Or LUBA 264, 1983 WL 400557, at \*18 (1983). As a result, the City will likely be able to implement middle housing amendments to the Single-Dwelling zone regulations and to the City's zoning map regardless of whether the City's implementation of middle housing policy conflicts with other City policy goals in the 2035 Plan.

**3. LCDC's approval of middle housing policy is contrary to state periodic review statutes because the policy conflicts with the City's prior periodic review work**

The periodic review statutes require a local government's final work product to be consistent with the local government's work in prior work tasks. If work product from a later work task conflicts with the local government's work from an earlier work task, then DLCD and LCDC must require the local government to revisit its prior work. *See Hummel*, 152 Or App at 410 (citing OAR 660-025-0140(5)).

In this case, the City's Task 4 decision to adopt middle housing policy conflicts with the City's Task 2 and Task 3 work product. The City's work program specifically required the City to use its Task 2 Housing Studies to identify any provisions in its zoning code that might serve as barriers to providing needed housing. (ER-6.) The City's Task 2 Housing Studies concluded that the City's existing zoning is adequate to ensure sufficient housing supply. (Rec. 34130-01678.) LCDC therefore violated the state periodic review statutes by not requiring the City to revisit its Task 2 Housing Studies before adopting a middle housing policy that calls for changes in residential zoning regulations. *See Hummel*, 152 Or App at 410.

Middle housing policy also conflicts with the City's Task 3 work because the policy promotes a new development pattern that is different than the patterns analyzed and recommended in the Growth Scenarios Report. The

Growth Scenarios Report evaluated housing growth in designated neighborhood “centers,” along transportation “corridors” and in the “central city.” (ER-24.) These areas are generally zoned “Commercial/Mixed Use” or “Employment,” which allow for larger multi-unit residential buildings. (ER-23; App-8.) The Growth Scenarios report recommended a combination of housing growth in all three of these areas. The report states that its recommended development pattern is based on the “Proposed [2035] Comprehensive Plan” that was released in July 2014 (ER-23; Rec. 14846.) This draft of the 2035 Plan predates the City’s proposal for middle housing policy in March 2016. (Rec. 23358; 23379 to 23380.)

By definition, middle housing policy applies in residential areas outside of centers and corridors. (Rec. 14937-38; Pet’r Nov, 16 Mot. Ex 1 at 16; *see also* ER-71.) Housing growth associated with middle housing policy is therefore outside of and in addition to the growth scenarios that the City evaluated in Task 3.

Middle housing policy directly conflicts with the City’s conclusions in the Growth Scenarios Report about single family residential neighborhoods. The Growth Scenarios Report states that “Portland’s predominantly single family residential neighborhoods (the areas outside of the centers and corridors) will see limited new housing development, and will remain single family residential neighborhoods.” (Rec. 34130-0249.) Middle housing policy conflicts

with this analysis because the policy allows a large volume of residential development in Single-Dwelling zones in most of the City. As practical matter, this development would not allow these areas to remain single family neighborhoods.

LCDC therefore violated the periodic review statutes and its own rules by approving a Task 4 policy that conflicts with the City's Task 3 conclusions. LCDC was required to direct the City to revisit the Growth Scenarios Report and analyze the consequences of the middle housing development pattern alongside the other development alternatives in the report. *See Hummel*, 152 Or App at 410.

#### **4. LCDC failed to ensure compliance with Goal 11 and Goal 12**

The periodic review statutes require DLCD and LCDC to ensure that a local government's periodic review work product complies with the statewide planning goals, specifically including goals related to "transportation, public facilities and services." ORS 197.628(1); *see also* ORS 197.633(3)(c). LCDC's approval of middle housing policy does not ensure compliance with Goal 11 (public facilities and services) and Goal 12 (transportation). This is because the City's periodic review work under Goal 11 and Goal 12 predates the City's development of middle housing and does not account for the additional housing development associated with middle housing policy.

The implementation requirements of Goal 11 state that “[t]he level of key facilities that can be provided should be considered as a principal factor in planning for various densities and types of urban and rural land use.” Goal 11, Implementation (B)(3) (App-16.) In order to meet this requirement, the City adopted a “Citywide Systems Plan” through the City’s Task 3 ordinance. (Rec. 34130-0644.)

The City’s Goal 11 systems plan does not account for residential density increases associated with middle housing policy. The systems plan is based on the centers and corridors development scenarios in the Task 3 Growth Scenarios Report. (Rec. 34130-0667 to 0670.) None of the City, DLCD and LCDC considered the impact of additional development associated with middle housing policy on public facilities and services under Goal 11. (*See* ER-159 to 168; Rec. 467 to 473; Rec. 14708 to 14710.)<sup>7</sup>

LCDC responded to Petitioner’s middle housing infrastructure argument by citing a precursor to the Citywide Systems Plan that was included in the City’s Task 2 work product. LCDC asserted that because the City identified infrastructure deficiencies in this report, the City had sufficiently addressed infrastructure issues when adopting 2035 Plan policies:

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<sup>7</sup> DLCD’s only report on the City’s Task 4 and Task 5 work is a response to the specific objections raised by the various opponents. (Rec. 459.) DLCD did not independently review the City’s work product for its overall compliance with the statewide planning goals, the City’s work program and other relevant law as required by ORS 197.628(1) and 197.633(3)(c).

“Some of these [infrastructure] 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.”

(ER-168).

There are several problems with LCDC’s reasoning. First, identifying existing problems is a far cry from planning sufficient infrastructure to meet the City’s planned future increase in housing density. Second, LCDC’s response focuses primarily on transportation rather than the types of public health and safety infrastructure addressed by Goal 11 (e.g. sewer, stormwater, police and fire). Third and most notably, the Task 2 study cited by LCDC predates the City’s development of middle housing policy and therefore does not consider the impact of additional density in residential neighborhoods on public facilities and services. LCDC’s decision therefore fails to ensure the City’s compliance with Goal 11 in violation of ORS 197.628(1) and 197.633(3)(c).

The City’s periodic review transportation planning under Goal 12 suffers from a similar deficiency. Goal 12 requires the City to inventory transportation needs in coordination with land use planning and minimize adverse impacts associated with the transportation system. (*See* App-17 to App-18) Like the Citywide Systems Plan, the City’s transportation needs assessment and alternatives analysis are based on the Task 3 Growth Scenarios Report and the draft 2035 Plan that predates middle housing policy (Rec. 14718 to 14723.) The

City thus did not evaluate potential transportation impacts associated with middle housing policy. LCDC therefore violated ORS 197.628(1) and 197.633(3)(c) by failing to ensure that the policy will comply with Goal 12.

In sum, LCDC's order violates state periodic review statutes because LCDC failed to require the City to resolve conflicts between middle housing policy and the City's Task 2 and Task 3 work. Relatedly, LCDC failed to ensure that middle housing policy will comply with statewide planning goals 11 and 12 because LCDC did not require the analysis necessary to evaluate compliance with these goals.

### **III. SECOND ASSIGNMENT OF ERROR**

LCDC's approval of middle housing policy is unlawful in substance because LCDC allowed the City to implement middle housing policy outside of periodic review in contravention of the City's work program.

#### **A. Preservation of Error**

Petitioner explained to LCDC that the City is implementing middle housing policy outside of the periodic review process through the so-called "Residential Infill Project." (Rec. 580.) Petitioner argued to LCDC that implementation of the policy outside of periodic review is inconsistent with the City's DLCD-approved work program. (Rec. 506.) LCDC rejected this argument, concluding that "nothing in the text of the polices identified by [Petitioner] 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.” (ER-167.)

Petitioner therefore has preserved this issue regarding the City’s method for implementing middle housing policy.

## **B. Standard of Review**

As explained in Part IIB above, the court reviews LCDC’s periodic review decision for errors of law. ORS 197.651(10)(a). Under state law, LCDC is responsible for ensuring that a local government’s periodic review work complies with the periodic review statutes. *See* ORS 197.633(3)(c). This court therefore reviews whether LCDC has met LCDC’s legal obligations in overseeing the City’s periodic review process.

## **C. Argument**

The City’s periodic review work program requires the City to implement the City’s Task 4 policy decisions in Task 5 of periodic review. LCDC improperly allowed the City to divert implementation of middle housing policy to a process outside of periodic review. In doing so, LCDC failed to exercise oversight over the City’s actions as required by the periodic review statutes.

In the context of periodic review, a local government must complete the tasks set forth in its DLCD-approved work program. *See Hummel*, 152 Or App at 410 (citing ORS 197.633(1)). LCDC’s rules require DLCD to determine whether a work task submitted by a local government is complete. *See OAR*

660-025-0130(2). In order for a work task to be complete, the local government's work product must contain "all required elements identified for that task in the work program." OAR 660-025-0130(3).

The City's work program states that "whatever policy decisions are made, they must be carried out by sufficiently robust implementation measures." (Rec. 34130-1042.) The work program specifies that the City's Task 5 work product must be an "[o]rdinance of City Council adopting regulations, projects, and agreements sufficient to carry out the amended comprehensive plan" (emphasis in original). (Rec. 34130-1043.)

As described in Part IIC(1) above, the City's decision to adopt middle housing policy is a significant policy decision that could bring sweeping change to most of the City's residential neighborhoods. The City made this decision in the context of Task 4 of periodic review and then codified the policy in its 2035 Plan. The City's work program therefore required the City to implement middle housing policy in Task 5 of periodic review.

The City, nevertheless, did not incorporate its middle housing policy implementation into Task 5. (*See* Rec. 1226 to 1243.) LCDC therefore erred in approving the City's Task 5 work product in contravention of the City's work program.

LCDC's decision not to require the City to implement middle housing policy in Task 5 also means that LCDC has ceded its authority to review the

City's future ordinances implementing the policy. LCDC and DLCD do not have direct authority over local land use legislation adopted outside of periodic review. Although the City must notify DLCD of proposed changes to its zoning regulations, DLCD must actively choose to participate in the City's local process to exercise influence over these decisions. *See* ORS 197.610 to 197.615. If DLCD is dissatisfied with the City's zoning decisions, then DLCD must appeal to the Land Use Board of Appeals rather than LCDC. *See* ORS 197.620. LCDC's approval of the City's Task 5 work therefore significantly changes the review process for the City's implementation of middle housing policy.<sup>8</sup>

Relatedly, LCDC's Task 5 approval fails to meet LCDC's responsibility to ensure that the City's periodic review work complies with other relevant laws. *See* ORS 197.628(1); 197.633(3)(c). As described in Part IIC(4) above, LCDC improperly approved middle housing policy without ensuring that middle housing policy complies with Goal 11 and Goal 12. This decision is exacerbated by LCDC's failure to oversee implementation of the policy because LCDC will not have authority to require the City to modify its zoning rules or zoning map if the City's implementation decisions are inconsistent with the statewide planning goals.

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<sup>8</sup> As described in Part IIC(2) above, this procedural posture also generally allows the City to avoid demonstrating compliance with the statewide planning goals when the City adopts a zoning map amendment to apply middle housing policy geographically.

The same is true for conflicts between middle housing policy and other elements of the City's comprehensive plan approved by LCDC in periodic review. Because the City has broad discretion in interpreting middle housing policy, the City will be able to prioritize that policy over other potentially competing 2035 Plan policies. LCDC will not have oversight on these decisions. *See* Part IIC(2), *supra*.

LCDC's treatment of the City's development of middle housing policy changes the balance of land use authority between the City and the state. It also sets a precedent throughout the state that a local government may dictate to LCDC which policy development and policy implementation the local government will allow LCDC to review.<sup>9</sup> This dynamic is inconsistent with the oversight responsibility that the legislature has allocated to LCDC in the periodic review statutes. *See* ORS 197.628(1); 197.633(3)(c).

In sum, LCDC improperly allowed the City to divert implementation of middle housing policy from the periodic review process, in violation of the City's work program. This decision cedes LCDC's authority over the policy, which abdicates LCDC's responsibility to ensure that the City's periodic review work is consistent with state and local land use law. LCDC's decision undermines the purpose of the periodic review statutes because it allows local

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<sup>9</sup> LCDC has argued to the court that it lacks authority over City actions that the City has chosen not to reveal in the periodic review record. (LCDC Resp. to Mot., Dec 7, 2018.)

governments to avoid state oversight by shielding key facts and policy decisions from LCDC.

#### **IV. THIRD ASSIGNMENT OF ERROR**

LCDC's approval of the City's middle housing policy is unlawful in substance under Statewide Planning Goal 2 and is not based on substantial evidence in the record because the record does not support the City's compliance with legal criteria applicable to the policy.

##### **A. Preservation of Error**

Petitioner argued to LCDC that the City's middle housing policy lacks the adequate factual base that is required by Statewide Planning Goal 2. (ER-138 to 144.) LCDC rejected this argument, concluding that the City's middle housing policy is adequately supported by the City's Task 4 findings "and the additional material in the record upon which [the City's findings] are based." (ER-165.) Petitioner has therefore preserved this issue for appeal.

##### **B. Standard of Review**

This court reviews LCDC's periodic review decision for errors of law pursuant to ORS 197.651(10)(a), and also to ensure that LCDC's decision is "supported by substantial evidence in the whole record as to facts found by [LCDC]." ORS 197.651(10)(c). Statewide Planning Goal 2 requires "an adequate factual base" for land use decisions. (App-9.)

Oregon courts have held that the Goal 2 requirement for an adequate factual base is equivalent to the substantial evidence standard of review. *See*

*Columbia Pac. Bldg. Trades Council v. City of Portland*, 289 Or App 739, 755, 412 P3d 258 (2018). Substantial evidence is evidence that a reasonable person would rely upon in making a finding of fact. See *Citizens for Responsibility v. Lane Cnty.*, 218 Or App 339, 344-45, 180 P3d 35 (2008). The court therefore reviews whether LCDC's findings are reasonably supported by evidence in the record that relates to the criteria governing the City's periodic review decisions.

### **C. Argument**

Under Statewide Planning Goal 2, a legislative land use decision must be supported by an adequate factual base that responds to applicable legal criteria and evaluates alternative policies. LCDC's findings in support of middle housing policy summarize the City's findings regarding housing choice and affordability as support for LCDC's decision. The City's findings, however, are based on aspiration rather than the factual base the City developed in Task 2 and the policy alternatives the City's analyzed in Task 3. The City's Task 2 and Task 3 work also does not provide substantial evidence to demonstrate that middle housing policy complies with Goal 11 and Goal 12. LCDC's approval of middle housing policy therefore violates Goal 2 and is not supported by substantial evidence in the record.

#### **1. The facts supporting the City's policy choice must relate to the legal criteria that govern the City's decision-making**

Compliance with Goal 2 and the substantial evidence standard requires facts in the record that address the legal criteria applicable to a land use

decision. LUBA has stated that the Goal 2 requirement for an adequate factual base to a legislative decision “does not exist in a vacuum.” *OCAPA v. City of Mosier*, 44 Or LUBA 452, 462 (2003). Rather, the facts in the record must be “adequate to demonstrate that the challenged legislative decision complies with applicable legal standards.” *Redland/Viola/Fischer’s Mill Cmty. Planning Org. v. Clackamas Cnty.*, 27 Or LUBA 560, 1994 WL 1726825 at \*3 (1994).

As explained in Part IIC(2) above, the applicable approval criteria for the City’s middle housing policy include the periodic review statutes and the statewide planning goals. The periodic review statutes require the City to comply with the work program approved by DLCD. *See Hummel*, 152 Or App at 410 (citing ORS 197.633(1)). The City’s work program required the City to complete Task 2 to develop “research and analysis necessary to provide a solid factual base for [comprehensive] plan update.” This “solid factual base” specifically included identification of “[e]xpected surpluses and deficiencies in different housing types and affordability ranges” through the Housing Studies. (ER-6.)

**2. The City did not develop the factual base required by the City’s periodic review work program and the statewide planning goals**

The City did not identify a lack of middle housing types in single-family neighborhoods as a housing deficiency in its Task 2 Housing Studies. On the contrary, the City concluded that housing supply in the City is adequate, that

there has been a sharp rise in the construction of multi-family residential buildings in recent years, and that ADUs are poised to contribute to affordable housing supply. (Rec. 34130-01574 to 34130-01576.)

The City also found that existing zoning is adequate to ensure sufficient housing supply. (Rec. 34130-01678.) The City specifically touted its “successful implementation of new construction at higher densities” in mixed use zones along transit corridors as evidence that its existing zoning rules are appropriate. (Rec. 34130-01716.)

The City’s Housing Studies show that the City did not comply with the requirement in its work program to build the factual base in Task 2 for the City’s later Task 4 middle housing policy choice. As a result, there is not substantial evidence in the record to support LCDC’s finding that the City appropriately developed the policy.

The City’s Task 3 work similarly fails to demonstrate compliance with the City’s work program as it relates to middle housing policy. In the City’s work program, Task 3 was specifically designed to meet the Goal 2 requirement for an analysis of policy alternatives. Goal 2 requires an alternatives analysis that considers “social, economic, energy and environmental needs.” (App-9.) The City’s work program incorporates this requirement and directs the City to apply this analysis to “alternative patterns of development.” (Rec. 34130-1039.) As described in Part IIC(3) above, however, the City did not apply the Goal 2

needs analysis to middle housing policy in its Task 3 work. Thus, there is not substantial evidence in the record to support LCDC's finding that the City complied with Goal 2.

The Goal 2 needs analysis requirement also relates to Goal 11 regarding public facilities and services and Goal 12 regarding transportation. The City conducted Goal 11 and Goal 12-related analysis in Task 3, but this work did not consider the impact of middle housing policy on public facilities, services and transportation. *See* Part IIC(4), *supra*. The record therefore does not include substantial evidence that middle housing policy will comply with Goal 11 and Goal 12.

**3. The facts found by the City and LCDC do not demonstrate compliance with the criteria that govern the City's policy choice**

The City's Task 4 findings regarding middle housing policy are aspirational and are not grounded in the City's work program requirements or the statewide planning goals. The City's Task 4 findings state that the City's decision to amend the 2035 Plan to include middle housing policy was "the result of responding to testimony." (ER-96.) The City's findings justify the policy in several ways. First, the findings state that middle housing is "less expensive to build than 4-6 story mixed use buildings, and are more land-efficient than detached single family homes." Second, the City states that middle housing "could help meet [the] demand" for home ownership. Third, the

findings say that zoning changes to promote middle housing “could be a way to help achieve” the City’s goal of “complete communities.” Finally, the City states that “it may also be desirable to provide other options” for housing. (ER-118 to 119.) None of these reasons address the City’s work program requirements or the statewide planning goals. The City’s middle housing findings simply express the City’s hopes for the policy and do not relate to the approval criteria for the City’s policy choice.

LCDC improperly reviewed the City’s findings in a vacuum rather than consider how the City’s findings relate to the legal criteria governing the City’s policy decision. LCDC’s findings summarize the above City findings and conclude that the City’s reasons “and the additional material in the record upon which [the reasons are] based, demonstrates to [LCDC] that the city adopted Policy 5.6 with an adequate factual base \* \* \*” (Rec. 18.) Neither LCDC’s findings nor the City’s findings identify additional material in the record that supports their findings. The relevant material in the record does not support LCDC’s findings. Specifically, the City’s Task 2 and Task 3 work shows that the City did not build the factual base required by the City’s work program and the statewide planning goals to support the City’s policy choice. LCDC’s decision to approve middle housing policy is therefore inconsistent with Goal 2 and not supported by substantial evidence.

## V. CONCLUSION

For the reasons described above, Petitioner respectfully requests that the court reverse or remand LCDC's approval of the City's periodic review Task 4 and Task 5 decisions insofar as they relate to Policy 5.6 of the City's 2035 Plan.

Respectfully submitted,

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