

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

CA A168704

RESPONDENT LAND CONSERVATION AND DEVELOPMENT
COMMISSION'S ANSWERING BRIEF

Petition for Judicial Review of the Final Order of the
Land Conservation and Development Commission

MICHAEL J GELARDI #083347
Gelardi Law PC
P.O. Box 8529
Coburg, OR 97408
Telephone: (541) 412-9535
Email: mike@gelardilaw.com

Attorney for Petitioner
Multnomah Neighborhood Association

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
PHILIP THOENNES #154355
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
philip.thoennes@doj.state.or.us

Attorneys for Respondent
Land Conservation and Development
Commission

Continued...

LINLY FREES #945098
Portland Ofc of City Attorney
1221 SW 4th Ave Ste 430
Portland, OR 97204
Telephone: (503) 823-4047
Email:
Linly.Rees@portlandoregon.gov

Attorney for Respondent
City of Portland

STEVEN SHIPSEY #944350
DOJ Gen Counsel Nat Resources
100 SW Market St
Portland, OR 97201
Telephone: (503) 378-4409
Email: steve.shipsey@doj.state.or.us

Attorney for Respondent
Land Conservation and Development
Commission

TABLE OF CONTENTS

STATEMENT OF THE CASE	1
Summary of Argument	1
ANSWER TO FIRST ASSIGNMENT OF ERROR.....	2
Petitioner failed to preserve the first assignment of error and, in any event, LCDC’s order was not unlawful in substance.....	2
Preservation	3
Standard of Review	3
ARGUMENT	3
A. Periodic review and oversight of the periodic review process	4
B. Procedural History	8
C. Petitioner raises new arguments on review and failed to preserve its first assignment of error.....	10
1. LCDC’s scope of review in an appeal from DLCD	10
2. Petitioner’s appeals to LCDC	12
3. Petitioner raises new arguments on judicial review	13
D. LCDC’s Approval Order is not unlawful in substance.....	16
ANSWER TO SECOND ASSIGNMENT OF ERROR.....	20
LCDC’s order approving the city’s Task 5 work product was not unlawful in substance.	20
Preservation	20
Standard of Review	20
ARGUMENT	20
ANSWER TO THIRD ASSIGNMENT OF ERROR	22
LCDC correctly determined that Policy 5.6 was supported by an adequate factual base.	22
Preservation	22
Standard of Review	22
ARGUMENT	23
CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases Cited

<i>1000 Friends of Oregon v. City of North Plains</i> , 27 Or LUBA 372 (1994)	25
<i>1000 Friends of Oregon v. LCDC</i> , 244 Or App 239, 259 P3d 1021 (2011)	14, 16, 23
<i>Baker v. City of Milwaukie</i> , 271 Or 500, 533 P2d 772 (1975)	4
<i>Barkers Five, LLC v. LCDC</i> , 261 Or App 259, 323 P3d 368 (2014)	3, 23
<i>Marion County v. Federation For Sound Planning</i> , 64 Or App 226, 668 P2d 406 (1983)	14
<i>VanSpeybroeck v. Tillamook County</i> , 221 Or App 677, 191 P3d 712 (2008)	14
<i>Veselik v. SAIF</i> , 177 Or App 280, 33 P3d 1007 (2001), <i>rev den</i> , 334 Or 121 (2002)	14
<i>Younger v. City of Portland</i> , 305 Or 346, 752 P2d 262 (1988)	23

Constitutional & Statutory Provisions

ORS 197.010(1)	4
ORS 197.175(2)(a)	4
ORS 197.175(2)(d)	4
ORS 197.225	4
ORS 197.230	4
ORS 197.628 to ORS 197.651	5
ORS 197.628(1)	18
ORS 197.633	10
ORS 197.633(1)	5
ORS 197.633(2)(e)	10

ORS 197.633(3).....	7, 11
ORS 197.633(3)(a)-(c).....	11
ORS 197.650.....	14
ORS 197.650(2).....	8
ORS 197.651(10).....	3, 8, 20
ORS 197.651(10)(c).....	22

Administrative Rules

OAR 660-012-0060(1).....	19
OAR 660-012-0060(2).....	19
OAR 660-015-0000 to 660-015-0010	4
OAR 660-018-0035	19
OAR 660-025-0090(1)(e)	5
OAR 660-025-0110	5
OAR 660-025-0130(1).....	5
OAR 660-025-0130(3).....	5
OAR 660-025-0140(1).....	9
OAR 660-025-0140(2).....	6, 7, 9
OAR 660-025-0140(5).....	17
OAR 660-025-0150	6
OAR 660-025-0150(1)(a)	9
OAR 660-025-0150(1)(a)-(d)	6
OAR 660-025-0150(5).....	6
OAR 660-025-0150(6).....	6, 7, 9
OAR 660-025-0150(6)(d)	6
OAR 660-025-0150(6)(d)(B).....	11, 15
OAR 660-025-0150(8).....	17
OAR 660-025-0160(2).....	7
OAR 660-025-0160(2)(a)	7, 22
OAR 660-025-0160(2)(a)-(c)	11

OAR 660-025-0160(2)(b)	7
OAR 660-025-0160(2)(c)	7
OAR 660-025-0160(3).....	7
OAR 660-025-0160(5).....	8, 9
OAR 660-025-0160(6).....	7
OAR 660-025-0160(7)(a)	10
OAR 660-025-0160(7)(a)-(d)	8
OAR 660-025-0170	8
OAR chapter 660, division 18	19
OAR chapter 660, division 25	5

Other Authorities

ORAP 5.45	14
ORAP 5.45(1)	14
<i>Oregon’s Statewide Land Use Planning Goals, available at</i> https://www.oregon.gov/lcd/OP/Pages/Goals.aspx (last accessed June 26, 2019)	4

**RESPONDENT LAND CONSERVATION AND DEVELOPMENT
COMMISSION'S ANSWERING BRIEF**

STATEMENT OF THE CASE

Respondent Land Conservation and Development Commission (LCDC) accepts petitioner's statement of the case but adopts respondent City of Portland's statement of facts as further supplemented in the argument below.

Summary of Argument

Petitioner seeks judicial review of an LCDC order that approved work tasks submitted by the City of Portland (city) as part of the periodic review of the city's comprehensive land use plan. Petitioner first argues that LCDC's order was unlawful in substance because LCDC failed to require the city to resolve conflicts between its work task submittals and prior periodic review work tasks and failed to ensure that the city complied with Statewide Planning Goals 11 and 12. Second, petitioner argues that LCDC's approval of the city's "middle housing policy" was unlawful in substance because the LCDC allowed the city to implement that policy outside of the periodic review process in contravention of the city's approved work program. Finally, petitioner argues that LCDC's order was not based on substantial evidence because LCDC erroneously concluded that the middle housing policy was supported by an adequate factual base in the local record.

None of petitioner's arguments provide this court with a basis for reversal. Petitioner failed to preserve its first assignment of error and, in any event, LCDC's order was not unlawful in substance because the city's submittals do not conflict with its prior periodic review work product. Second, LCDC's order is not unlawful in substance because LCDC correctly determined that the city could implement the middle housing policy at a later time, outside the confines of the final periodic review work task. Finally, substantial evidence supports LCDC's order because LCDC correctly determined that an adequate factual base supports the city's middle housing policy.

In responding to petitioner's assignments of error, LCDC focuses its attention on the procedural rules that govern review of a local government's periodic review work program and concomitant work tasks and explains why, based on the local record, LCDC correctly approved the city's work task submittals in accordance with those statutes and administrative rules. LCDC directs this court to the city's answering brief for a more fulsome discussion of the evidence contained in the local record and the history of the city's development of its middle housing policy.

This court should affirm LCDC's final order.

ANSWER TO FIRST ASSIGNMENT OF ERROR

Petitioner failed to preserve the first assignment of error and, in any event, LCDC's order was not unlawful in substance.

Preservation

As explained further below, petitioner did not preserve the first assignment of error.

Standard of Review

This court reviews LCDC's order to determine whether it is "unlawful in substance or procedure," "unconstitutional," or "not supported by substantial evidence in the whole record as to facts found by the commission."

ORS 197.651(10).¹

ARGUMENT

Petitioner seeks judicial review of an LCDC Approval Order that rejected various challenges to an order of the director of the Department of Land Conservation and Development (director or DLCD) and approved the city's periodic review work Tasks 4 and 5. Petitioner assigns error to LCDC's order on judicial review. Before addressing petitioner's first assignment of error, LCDC briefly describes the statutes and administrative rules that govern the periodic review process and the procedural history leading to this judicial review proceeding.

¹ This court's standard of review under ORS 197.651(10) is "substantively akin to [the] standard of review of Land Use Board of Appeals orders." *Barkers Five, LLC v. LCDC*, 261 Or App 259, 285 n 18, 323 P3d 368 (2014).

A. Periodic review and oversight of the periodic review process

Oregon's land use planning system requires, among other things, the development of comprehensive plans at the local, regional, and statewide level. *See* ORS 197.010(1) (declaring policy). Local governments are required to adopt comprehensive plans "in compliance with [statewide land use planning] goals."² ORS 197.175(2)(a). Once LCDC acknowledges that a local government's comprehensive plan complies with the statewide land use planning goals, the local government must make land use decisions in compliance with its acknowledged comprehensive plan. ORS 197.175(2)(d); *see also Baker v. City of Milwaukie*, 271 Or 500, 506-08, 533 P2d 772 (1975) (explaining that the local comprehensive plan controls all subsequent land use decisions within a municipality, such as zoning ordinances).

The comprehensive planning process is not static. To ensure that comprehensive plans respond to changing conditions and continue to adequately provide for economic development, needed housing, transportation, public facilities and services, and urbanization, the legislature provided that, in

² The legislature directed LCDC to adopt statewide planning goals to guide land use planning in Oregon. ORS 197.225, ORS 197.230. The 19 statewide land use planning goals are identified in OAR 660-015-0000 to 660-015-0010. The text and guidelines for each goal are available on DLCD's website. *See DLCD, Oregon's Statewide Land Use Planning Goals, available at <https://www.oregon.gov/lcd/OP/Pages/Goals.aspx>* (last accessed June 26, 2019).

certain circumstances, comprehensive plans should be periodically reviewed.

See ORS 197.628 to ORS 197.651 (setting out periodic review framework).

LCDC has adopted rules that govern the periodic review process. *See*

OAR chapter 660, division 25.

“The periodic review process is divided into two phases. Phase one is the evaluation of the existing comprehensive plan, land use regulations and citizen involvement program and, if necessary, the development of a work program to make needed changes to the comprehensive plan or land use regulations. Phase two is the completion of work tasks outlined in the work program.”

ORS 197.633(1). At the first phase of periodic review, after considering input from interested persons, the local government adopts an evaluation and work program for conducting periodic review or decides that a work program is not required. OAR 660-025-0090(1)(e). DLCD then reviews the work program and any objections to the work program. OAR 660-025-0110. Once the work program is approved, the local government begins completing the work tasks detailed in the work program.

Following completion of a work task, the local government must submit the work task to DLCD for review. OAR 660-025-0130(1). A work task is considered complete when the submittal constitutes a final decision on the part of the local government and contains all of the required elements for the work task as set out in the work program. OAR 660-025-0130(3). “Persons who

participated orally or in writing in the local process leading to the final [work task] decision may object to the local government's submittal." OAR 660-025-0140(2). The director reviews the submitted work task and any objections to the submitted work task pursuant to OAR 660-025-0150. That rule provides that the director may approve the work task, remand the work task to the local government, refer the work task to LCDC for review, or approve in part and remand in part. *See* OAR 660-025-0150(1)(a)-(d). If DLCD receives objections to the work task, the director must issue an order or refer the work task to LCDC for review. OAR 660-025-0150(5).

If the director issues an order in response to work task objections, any person who filed a valid objection to the work task submittal under OAR 660-025-0140(2) may appeal the director's decision to LCDC. OAR 660-025-0150(6). The person appealing the director's decision on the work task objection must:

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

“(B) Clearly identify a deficiency in the work task or plan amendment sufficiently to identify the relevant section of the submittal 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 or plan amendment necessary to resolve the alleged deficiency.”

OAR 660-025-0150(6)(d).

Once a person files a valid objection to a work task submittal authorized by OAR 660-025-0140(2), and appeals the director's decision pursuant to OAR 660-025-0150(6), the work task moves to LCDC for review. LCDC resolves objections to a work task on appeal from the director's decision according to the three-part standard of review set out in ORS 197.633(3). *See* OAR 660-025-0160(2) (adopting the ORS 197.633(3) standard of review). When reviewing evidentiary objections, LCDC asks "whether there is substantial evidence in the record as a whole to support the government's decision." OAR 660-025-0160(2)(a). When reviewing procedural objections, LCDC asks "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." OAR 660-025-0160(2)(b). And, in reviewing objections based on the local government's alleged failure to comply with applicable laws, LCDC asks "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." OAR 660-025-0160(2)(c). The rules also provide that LCDC "shall hear appeals [from the director's decision] based on the local record." OAR 660-025-0160(6). The "written record" in an appeal "consist[s] of the submittal, timely objections, the director's report [under OAR 660-025-0160(3)], timely exceptions to the

director's report including materials described in [OAR 660-025-0160(5)]." *Id.* Finally, LCDC "must issue an order" that approves all or part of the work task, remands all or part of the work task, amends the work program to add a work task under OAR 660-025-0170, or modifies the work program schedule to accommodate additional work on a remanded work task. OAR 660-025-0160(7)(a)-(d).

This court has jurisdiction under ORS 197.650(2) to review an LCDC order approving or remanding a local government's work task. As noted above, this court reviews LCDC's order to determine whether it is "unlawful in substance or procedure," "unconstitutional," or "not supported by substantial evidence in the whole record as to facts found by the commission."

ORS 197.651(10).

B. Procedural History

The city began the process of periodic review about ten years ago. DLCD first approved the city's periodic review work program in 2009 and approved subsequent revisions in 2010, 2011, and 2014. (ER 1). The approved work program comprises five work tasks: (1) community involvement; (2) inventory and analysis; (3) consideration of alternatives; (4) policy choices; and (5) implementation. (ER 2-12). In June of 2016, the Portland City Council adopted Ordinance No. 187832, the city's Task 4 work product. In December of 2016, the Council adopted Ordinance No. 188177, the city's Task 5 work

product. (ER 150). Pursuant to OAR 660-025-0140(1), the city issued a notice of decision for Task 4 on April 28, 2017, and a notice of decision for Task 5 on August 7, 2017. DLCD received 11 written objections (comprised of 21 sub-objections) to the city's Task 4 work product and six written objections (comprised of 14 sub-objections) to the city's Task 5 work product. DLCD found that five written objections to the city's Task 4 work product and four written objections to the city's Task 5 work product were procedurally valid under OAR 660-025-0140(2). (ER 150-51).

On December 5, 2017, by written department Order 001892, the director rejected all of the objections and approved the city's Task 4 and 5 submittals in their entirety pursuant to OAR 660-025-0150(1)(a). On December 26, two objectors (including petitioner) timely filed six appeals from DLCD's order, pursuant to OAR 660-025-0150(6). Petitioner filed five of those appeals.³ DLCD analyzed the six appeal letters and, in a report issued pursuant to OAR 660-025-0160(5) in February of 2018, recommended that LCDC reject the appeals and approve the city's Task 4 and 5 submittals. DLCD further analyzed exceptions to its report but made no changes in the recommendations provided in its February report.

³ The other objector, Harries, is not a party to this appeal.

LCDC held a hearing on those appeals on March 15, 2018. After considering the appeals, recommendations, exceptions, and oral arguments presented at the public hearing, LCDC denied all of the appeals and authorized the director to issue an order approving the city's Task 4 and 5 submittals, pursuant to OAR 660-025-0160(7)(a). (ER 151). Petitioner then sought judicial review.

C. Petitioner raises new arguments on review and failed to preserve its first assignment of error.

Before turning to the merits, LCDC explains why petitioner failed to preserve the first assignment of error. Doing so requires a more detailed examination of LCDC's scope of review in an appeal from the director's decision on a work task submittal, the objections that petitioner raised in its appeal to LCDC, and the arguments that petitioner now makes on review from LCDC's approval order.

1. LCDC's scope of review in an appeal from DLCD

ORS 197.633 directs LCDC to "adopt rules for conducting periodic review[,]” including rules that address “[t]he preparation, review and approval of work tasks[.]” ORS 197.633(2)(e). The legislature provided that “[t]he rules adopted by the commission under this section may include, but are not limited to, provisions concerning standing, requirements to raise issues before local government as a precondition for commission review and other provisions concerning the scope and standard for commission review to simplify or speed

the review.” ORS 197.633(3). The legislature further specified that LCDC’s review in a work task submittal is confined to the evidence in the local record, ORS 197.633(3), and set out the applicable standards of review in such appeals. ORS 197.633(3)(a)-(c). Those standards of review are mirrored in LCDC’s rules governing review of a work task submittal. OAR 660-025-0160(2)(a)-(c).

Pursuant to its statutory authority to adopt “other provisions concerning the scope and standard for commission review to simplify or speed review,” ORS 197.633(3), LCDC has adopted an administrative rule that governs the breadth of LCDC review of a director’s decision in a work task appeal by imposing a preservation requirement. OAR 660-025-0150(6)(d)(B) provides that an appeal from the director’s decision must

“[c]learly identify the 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.”

Thus, in an appeal from the director’s decision in a work task review proceeding, LCDC does not review the director’s approval of a work task submittal anew or under a *de novo* standard of review. Rather, LCDC’s review is limited in scope to considering a deficiency in a local government’s work task submittal that is clearly identified by the appellant and constitutes a violation of a statute, goal, or administrative rule. With that in mind, LCDC

turns to the specific objections that petitioner raised in its appeals from the director's order.

2. Petitioner's appeals to LCDC

Petitioner submitted five appeals to LCDC. The first appeal related to the city's Task 4 submittal—specifically, petitioner challenged the director's approval of the city's "middle housing policy" (Policy 5.6)⁴—a policy that the city incorporated in its 2035 Comprehensive Plan. Petitioner raised four specific challenges to the director's approval of Policy 5.6: (1) the director erroneously concluded that the city satisfied public information and citizen involvement requirements in developing and promulgating Policy 5.6; (2) the director erroneously concluded that the city adequately developed a factual base and demonstrated a need for Policy 5.6, as required under Statewide Planning Goal 2; (3) the director erroneously concluded that petitioner failed to

⁴ The city's 2035 Comprehensive Plan includes numerous policies relating to housing. Housing Policy 5.6 provides that the city will:

“[e]nable and encourage the 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 126-27).

demonstrate that the 2035 Comprehensive Plan lacked consistency and failed to plan in a comprehensive manner; and (4) the director erroneously concluded that the city adequately responded to public input. (ER 134-49).

Petitioner's second appeal also focused on Task 4. Specifically, petitioner challenged the city's compliance with Statewide Planning Goals 1 and 2 in the process leading to the designation of Multnomah Village as a community center. (ER 168). Petitioner's third appeal contended that certain amendments to the 2035 Comprehensive Plan relating to community involvement failed to comply with Statewide Planning Goal 1. (ER 172-73). Petitioner's fourth appeal challenged the city's compliance with Statewide Planning Goals 1, 2, and 5 in designating portions of Multnomah Village as "commercial mixed use." (ER 175). Finally, petitioner's fifth appeal challenged various aspects of the director's order relating to both Task 4 and 5. (ER 179). LCDC rejected all of petitioner's appeals for the reasons stated in its Approval Order.

3. Petitioner raises new arguments on judicial review

In its first assignment of error, petitioner contends that LCDC's Approval Order 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[.]" (Pet Br 15). Petitioner also argues that the

order is unlawful in substance “because LCDC failed to ensure City compliance with statewide planning goals 11 and 12.” (Pet Br 15).

Neither argument is preserved for this court’s review. This court has explained that “the focus of our review [in an appeal from LCDC] is on the issues presented on [judicial review] that have been preserved before LCDC.” *1000 Friends of Oregon v. LCDC*, 244 Or App 239, 268, 259 P3d 1021 (2011). Thus, to preserve an issue for review in this court, an objector must “make an explicit and particular specification of error by the local government” in its appeal to LCDC. *Id.*; *see also Marion County v. Federation For Sound Planning*, 64 Or App 226, 237, 668 P2d 406 (1983) (“[a] petitioner seeking judicial review under the terms of [ORS 197.650] must base the arguments on the objections (or comments) filed with DLCD; those objections will therefore frame the issues on [review]”). Moreover, this court has recognized that the preservation requirement set out in ORAP 5.45(1) applies with equal force in judicial review of administrative proceedings. *See Veselik v. SAIF*, 177 Or App 280, 288, 33 P3d 1007 (2001), *rev den*, 334 Or 121 (2002) (“The preservation requirements of ORAP 5.45 for court cases apply with as much force in the administrative arena.”); *VanSpeybroeck v. Tillamook County*, 221 Or App 677, 690, 191 P3d 712 (2008) (applying preservation requirement in the context of judicial review of a LUBA order).

Here, petitioner failed to present an argument to LCDC that Policy 5.6 “conflicts” with the city’s prior periodic review work tasks. In arguing that its first assignment of error is preserved, petitioner points to “Issue B” of its first appeal to LCDC. (Pet Br 15). “Issue B” does not raise the question whether Policy 5.6 conflicts with prior periodic review work tasks, however. Rather, that portion of petitioner’s appeal to LCDC raised the question whether Policy 5.6 was adequately supported by a factual base in the local record. (ER 138-45). Nor did petitioner present an argument in its appeal to LCDC that the city failed to comply with Statewide Planning Goals 11 and 12.

In sum, petitioner failed to preserve its first assignment of error because it did not raise those arguments in its appeal to LCDC. The preservation requirement applies with even greater force in the context of judicial review from an LCDC order on a work task submittal, because LCDC’s rules for conducting periodic review require persons who object to a work task submittal to file written objections that “[c]learly identify an alleged deficiency in the work task * * * sufficiently to identify the relevant section of the submittal and the statute, goal, or administrative rule the local government is alleged to have violated[.]” OAR 660-025-0150(6)(d)(B). That requirement helps define the scope of LCDC’s review of an appeal from the director’s decision on an objection to a work task submittal. That requirement also defines the scope of this court’s review in a judicial review proceeding, because “the focus of [this

court’s] review is on the issues presented on [judicial review] that have been preserved before LCDC.” *1000 Friends of Oregon*, 244 Or App at 268.

Because petitioner failed to clearly identify the alleged deficiencies in the Task 4 submittal in its appeal to LCDC—that is, that the Policy 5.6 conflicts with the city’s prior work tasks and does not comply with Goals 11 and 12—LCDC had no opportunity to address those concerns. For that reason, this court should decline to reach the merits of petitioner’s first assignment of error.⁵

D. LCDC’s Approval Order is not unlawful in substance.

In its first assignment of error, petitioner contends that LCDC’s order is unlawful in substance because LCDC failed to require the city to resolve conflicts with earlier periodic review works tasks—specifically, Tasks 2 and 3—and failed to ensure compliance with Goals 11 and 12.

Petitioner argues that LCDC erred in approving Task 4 because Policy 5.6 conflicts with prior work task submittals and statewide land use planning goals, and thus LCDC was required to direct the city to reconcile the alleged conflicts and ensure compliance with the goals. Petitioner notes that LCDC’s own 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[.]”

⁵ Petitioner does not ask this court to consider its first assignment of error as plain error.

(Pet Br 20). In support, petitioner points to OAR 660-025-0140(5), which provides:

“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. In such case, the director or commission may enter an order deferring acknowledgement of all, or part, of the work task until completion of the additional tasks.”

OAR 660-025-0150(8) contains an identical rule.

Petitioner’s reliance on OAR 660-025-0140(5) and 660-025-0150(8) presumes that the city’s Task 4 submittal “conflicts” with the city’s earlier periodic review work tasks. But LCDC explained that petitioner failed to establish any conflict between the city’s periodic review work program and Policy 5.6. (ER 167). At bottom, petitioner appears to assert that a local government *must* revisit prior periodic review work tasks any time it adopts a policy in a subsequent work task that was not explicitly analyzed in the prior work. But petitioner fails to point to any statute or administrative rule that requires a local government to revisit prior periodic review work tasks before adopting a policy that may not have been explicitly considered in an earlier work task, but is supported by findings and analysis contained in the earlier work tasks. To the contrary, LCDC explained that “under the city’s work program, [the city’s] 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.” (ER 162-63).⁶

Regarding compliance with Goals 11 and 12, petitioner argues that LCDC failed to ensure that the city’s Task 4 work product complies with the statewide land use planning goals, as required under ORS 197.628(1). Specifically, petitioner argues that “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.” (Pet Br 25). Setting aside petitioner’s failure to develop a clear argument in its appeal to LCDC concerning the city’s alleged failure to comply with Goals 11 and 12 in promulgating Policy 5.6, petitioner’s argument is premature. As explained in more detail in the city’s answering brief, Policy 5.6 is an aspirational policy that directs the city to “[e]nable and encourage development of middle housing.” (Rec 14937 to 14938). The policy is not self-executing and implementation of the policy will require the city to amend its zoning code to allow middle housing in areas zoned for single-family residential use. (Portland Resp Br 17).

⁶ The city’s answering brief provides a more detailed explanation of the city’s prior periodic review work tasks and how that work supports and is consistent with Policy 5.6. (Portland Resp Br 16-25).

If the city decides to amend the inventory and zoning map in its acknowledged comprehensive plan to allow middle housing, such a change will require the city to submit a post-acknowledgement plan amendment to DLCD for review. *See* OAR chapter 660, division 18 (setting out rules governing post-acknowledgement amendment process). Generally, all post-acknowledgment plan amendments must comply with the statewide land use planning goals. *See* OAR 660-018-0035 (process by which DLCD notifies local government if a proposed amendment to a comprehensive plan fails to comply with statewide land use planning goals). Further, if and when the city undertakes to implement Policy 5.6, the city must consider whether an amendment to its land use regulations or zoning map will significantly affect an existing or planned transportation facility. OAR 660-012-0060(1). If so, the city must implement measures to ensure that the allowed land uses are consistent with the function, capacity, and performance standards of the existing or proposed transportation facility. OAR 660-012-0060(2).

In sum, LCDC correctly determined that, based on the local record and the issues raised on appeal from the director's decision, the city's Task 4 submittal is consistent with and supported by the city's prior work task submittals.

ANSWER TO SECOND ASSIGNMENT OF ERROR

LCDC's order approving the city's Task 5 work product was not unlawful in substance.

Preservation

LCDC does not contest preservation.

Standard of Review

This court reviews LCDC's order to determine whether it is "unlawful in substance or procedure," "unconstitutional," or "not supported by substantial evidence in the whole record as to facts found by the commission."

ORS 197.651(10).

ARGUMENT

In its second assignment of error, petitioner contends that LCDC's approval of Task 5 was 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." (Pet Br 28). Petitioner argues that the city's approved periodic review work program requires the city to implement all Task 4 policy decisions in Task 5 (the implementation phase) of periodic review, and, because the city will implement Policy 5.6 at some future time outside the Task 5 implementation process, LCDC erred in approving the city's Task 5 submittal. (Pet Br 29). Not so.

As petitioner acknowledges, the city's work program states that "whatever policy decisions are made, they must be carried out by sufficiently robust implementation measures." (Rec 34130-1043). But, the city's work program goes on to clarify that "not all these [implementation] measures are regulatory. Funding an identified public works project is an example of plan implementation, as are programs carried out by government-to-government or public private partnerships." (Rec 34130-1043). Nowhere does the approved work program *require* the city to implement all policy choices *within* the context of its Task 5 work product.

Turning to Policy 5.6 itself, the city correctly notes that the city did partially implement "Policy 5.6 in Task 5 in a limited manner by rezoning some property to R2.5." (Portland Resp Br 28).⁷ Further, LCDC considered and rejected petitioner's contention that the city's work program required full implementation of all Task 4 policy choices in the context of its Task 5 work product. First, the work program specifies that the Task 5 work product shall be an "Ordinance of the City Council adopting regulations, projects, and agreements sufficient to carry out the amended Comprehensive Plan." (Rec 34130-1043). LCDC explained that "[t]he future adoption of implementation amendments may be dependent on the 2035 Comprehensive Plan but that does

⁷ The record demonstrates that the city considers additional R2.5 zoning to be a middle housing strategy. (Rec 23538).

not make them inappropriate or mandate that they are adopted as part of periodic review.” (ER 182). Finally, LCDC found that the city had already amended its zoning map and zoning code to implement the comprehensive plan map and housing and employment policies. (ER 182). Petitioner has the ability to challenge any future amendments to the city’s land use regulations that implement the middle housing policy, and petitioner failed to demonstrate in its appeal to LCDC that the city’s approved work program required all implementation of that policy within the context of Task 5. LCDC’s order was not unlawful in substance.

ANSWER TO THIRD ASSIGNMENT OF ERROR

LCDC correctly determined that Policy 5.6 was supported by an adequate factual base.

Preservation

LCDC does not contest preservation.

Standard of Review

This court asks whether substantial evidence supports LCDC’s determination that Policy 5.6 was itself supported by substantial evidence in the record. *See* ORS 197.651(10)(c) (this court’s standard of review); OAR 660-025-0160(2)(a) (LCDC’s standard of review of evidentiary issues). When an agency is tasked with determining whether particular facts satisfy the substantial evidence standard, if the agency properly understood and applied

that standard, “a reviewing court should affirm its order, notwithstanding the reviewing court’s disagreement with [the agency] as to whether the evidence is ‘substantial.’” *Younger v. City of Portland*, 305 Or 346, 358, 752 P2d 262 (1988); *see also 1000 Friends*, 244 Or App at 267-68 (“[i]n connection with substantial evidence review,” this court’s role “is to determine whether LCDC applied the correct legal test”) (internal quotations and brackets omitted); *Barkers Five, LLC v. LCDC*, 261 Or App 259, 348, 323 P3d 368 (2014) (citing *Younger* for the proposition that this court’s review of LCDC’s application of the substantial evidence test is limited to “whether LCDC understood and applied the substantial evidence standard correctly”).

This court need not “blindly accept” LCDC’s substantiality finding, however, if the evidence is “so at odds” with the agency’s conclusion “that a reviewing court could infer that [the agency] had misunderstood or misapplied” the substantial evidence standard. *Younger*, 305 Or at 359.

ARGUMENT

Petitioner contends that LCDC’s order was not supported by substantial evidence and thus violates Goal 2. In sum, petitioner argues that the city failed to develop an adequate factual base in its Task 2 and 3 work products to support Policy 5.6 and LCDC erred in concluding otherwise. (Pet Br 34).

In rejecting petitioner’s Goal 2 argument, LCDC noted that the argument proceeds from a faulty premise. That is, petitioner’s argument that Policy 5.6

lacks an adequate factual base in the record presumed that Policy 5.6 results in a wholesale city-wide rezoning. But LCDC noted that that Policy 5.6 must be implemented through future public processes. Further, the city provided LCDC with “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.” (ER 165).⁸

Turning to the legal requirement, LCDC explained that Goal 2 requires the city “[t]o establish a land use planning process and policy framework as a basis for all decisions 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,

⁸ The city’s answering brief provides a more detailed recitation of the evidence in the local record that supports the adoption of Policy 5.6. (Portland Resp Br 34-39).

taking into consideration social, economic, energy and environmental needs.”

LCDC concluded that the city adopted Policy 5.6 with an adequate factual base as required under Goal 2, and the city’s ultimate policy choice was based on:

“(1) the need for more housing 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.” (ER 165-66).

In determining whether the city’s policy was supported by an adequate factual base, LCDC does not ask whether the city made the “correct” choice as a matter of policy, but rather whether the city’s decision was based on substantial evidence in the whole record. *See 1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994) (slip op at 5-9) (explaining that city’s decision was permissible as a policy matter but was not based on substantial evidence). Here, LCDC correctly determined that, based on its review of the evidence in the local record, the city demonstrated that its policy decision in adopting Policy 5.6 in the 2035 Comprehensive Plan was supported by an adequate factual base. LCDC’s correctly applied the substantial evidence standard in making that determination.

CONCLUSION

LCDC's order was lawful in substance and supported by substantial evidence. This court should affirm.

Respectfully submitted,

ELLEN F. ROSENBLUM

Attorney General

BENJAMIN GUTMAN

Solicitor General

/s/ Philip Thoennes

PHILIP THOENNES #154355

Assistant Attorney General

philip.thoennes@doj.state.or.us

Attorneys for Respondents

Land Conservation and Development

Commission

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 2, 2019, I directed the original Respondents' Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Michael J. Gelardi, attorney for petitioner, and Linly F. Rees, attorney for respondent, by using the electronic filing system.

I further certify that on July 2, 2019 I directed the Respondents' Answering Brief to be served upon Steven Shipsey, attorney for respondent, by mailing two copies, with postage prepaid, in an envelope addressed to:

Steven Shipsey
DOJ Gen Counsel Nat Resources
100 SW Market St
Portland OR 97201

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,513 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Philip Thoennes

PHILIP THOENNES #154355
Assistant Attorney General
philip.thoennes@doj.state.or.us

Attorney for Respondents

PT4:bmg/9711285