IN THE COURT OF APPEALS OF THE STATE OF OREGON

MULTNOMAH NEIGHBORHOOD ASSOCIATION, Petitioner, v. LAND CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF OREGON, Respondent, and CITY OF PORTLAND, Respondent.	Land Conservation and Development Commission Order 18WKTSK001897 A168704

RESPONDENT CITY OF PORTLAND'S ANSWERING BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD

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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I. RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

Respondent City of Portland ("City") agrees the nature of the action is an appeal of the final order 18-WKTSK-001897 issued by Respondent Land Conservation and Development Commission of the State of Oregon ("LCDC"). The City asks the court to deny petitioner's requested relief and affirm LCDC's order.

B. Nature of the Final Agency Decision

The City generally does not dispute Petitioner Multnomah Neighborhood Association's ("petitioner") description of LCDC's order, but notes the order resolved an appeal of a Department of Land Conservation and Development ("DLCD") director's order under OAR 660-025-0150(6)(a). The director's order rejected objections filed in response to two City ordinances approving periodic review work tasks. LCDC's appellate review was limited to those appeal issues that clearly identified deficiencies in specific sections of a work task and the law allegedly violated. OAR 660-025-0150(6)(d)(B).

C. Jurisdiction

The City agrees the court has appellate jurisdiction under ORS 197.650(2).

D. Date of Judgment and Notice of Appeal

The City does not contest the timeliness or form of petitioner's appeal.

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E. Questions to Address on Appeal

1. Did LCDC correctly perform its appellate review when it decided DLCD appropriately approved the City's adoption of a comprehensive plan policy within a periodic review work task?

2. Did petitioner adequately preserve the argument that Work Task 4 conflicts with Work Tasks 2 and 3, and if so, did LCDC correctly determine there is no conflict?

3. Did LCDC correctly determine that the City completed Task 5 by sufficiently implementing the Plan?

4. Did LCDC correctly perform its appellate review when it determined an adequate factual base in the whole record supported the City's adoption of Policy 5.6?

F. Summary of Arguments

Petitioner fails to demonstrate its arguments were preserved in its appeal to LCDC. To the extent this court determines petitioner's claims are preserved, LCDC correctly performed its appellate review function in approving periodic review work Tasks 4 and 5.

Petitioner overstates the effect of the City's new housing policy adopted within Task 4. The policy is not self-executing. Only a subsequent legislative City decision could allow additional housing types in single-family zones as petitioner alleges. Petitioner has not demonstrated periodic review prohibits a municipality from adopting policies that are consistent with prior periodic review work, but not expressly evaluated in earlier periodic review work tasks. Work Task 4 is consistent with work Tasks 2 and 3.

LCDC correctly concluded that Task 5 sufficiently implements the comprehensive plan consistent with the City's adopted work program.

Petitioner has not demonstrated that the work program requires the City to implement any possible zoning amendment that could be supported by an individual policy. LCDC did not "cede any authority" to the City.

Finally, petitioner has not demonstrated that the City's new housing policy was adopted without an adequate factual base. Petitioner does not demonstrate that LCDC erred in its review function. LCDC, DLCD and the City all correctly found there was substantial evidence in the whole record to support the adoption of the middle housing policy.

G. Statement of Facts

Petitioner's summary provides mischaracterized facts, a number of presuppositions, and significant omissions. The City provides this clarifying summary and identifies petitioner's misstated facts.

1. The City's Approved Work Program

The City evaluated its comprehensive plan and determined updates were warranted under periodic review to ensure plan consistency with the Statewide Planning Goals. SER-52. Within periodic review, the City adopted the *2035 Comprehensive Plan* ("Plan") that includes a vision statement, guiding principles, goals and over 600 policies. SER-51; Rec 14791 to 15050. To guide Plan development, the City created a work program approved by DLCD in 2009, and subsequently revised in 2011 and 2014. SER-92, 102. The work program consisted of five tasks. The City's submittal of Task 4 (Policy Choice)

and Task 5 (Implementation) gave rise to the administrative appeal that is the subject of this judicial appeal. The City's Task 4 submittal includes the housing policy that petitioner contests:

> "**Policy 5.6 Middle housing** Enable and encourage development of middle housing. This includes multi-unit development 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."

SER-73 – 74.

Prior work tasks informed the development of this policy. The work program's Task 2 (Inventory and Analysis) directed the City to develop "[r]esearch and analysis necessary to provide a solid factual base for [the] plan update[.]" SER-103. Within that task, Sub-Task E "Identifications of Housing Needs" noted that "[e]xisting and expected housing stock will be characterized by type and affordability." SER-104. Task 2 required consideration of metropolitan housing data, examination of needed housing and housing potential lost or gained since the last periodic review, and identification of zoning code provisions that could serve as barriers to housing. *Id*. The work program identified the expected Task 2 product to be a City ordinance "adopting at least the following[,]" listing required inventory maps, a housing needs analysis, and estimates of housing capacity, effectively setting a floor for the expected product. *Id*.

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Similarly, the work program's Task 3 (Consideration of Alternatives) required the City to "identify the consequences of alternative patterns of development" with an expected ordinance that adopted analyses of economic opportunities, remaining employment capacity, and the social, economic, energy and environmental consequences of "at least three alternative spatial deployments of the housing and employment needs as a Comprehensive Plan background document." SER-105 – 106. The work program set a floor for deliverables and alternatives to be evaluated. Petitioner's representation that Task 3 was "an analysis of comprehensive plan policy alternatives" is not grounded in the work program's text, as the word "policy" does not appear within the program's discussion of Task 3. *Compare* Petition at 7 *with* SER-105 to SER-106. Petitioner's faulty premise that the work program constrains the City from passing Plan policies that align with and are supported by prior periodic review work, but not specifically studied in earlier work, may stem from this misinterpretation.

Petitioner also errs in its statements that the "2035 Comprehensive Plan: Urban Design Direction" document is a "supporting document" or part of the Plan. Petition at 8, 19; *see* SER-68 (list of supporting documents). Petitioner cites an extra-record document not placed before LCDC that City staff developed after City Council's ("Council['s]") adoption of the ordinances. *See* City's Response to Petitioner's Motion for Review of Agency Order Under

ORAP 4.22 at 3 to 4. Although an earlier version of this document is included at SER-79 to 86, it does not include the quote in petitioner's brief. The court should disregard petitioner's extra-record discussion at Petition 8-9 and 19.[1]

2. The Development of the Middle Housing Policy and Adoption of Work Tasks 4 and 5

Over the past decade of periodic review, the City assembled a factual base to support its housing policy choices through community testimony and reports and analysis developed during Tasks 2 and 3. The City determined Policy 5.6 was a logical culmination of findings initially identified in Tasks 2 and 3, as early as 2010, citing work task reports that discuss the emerging trend of the middle housing accessory dwelling unit building type, projected reductions in single-family rental opportunities, and strategies to reduce the cost burden that households face. SER-34 – 35. While the housing types collectively referred to as "middle housing" were not consistently referred to as such in Tasks 2 and 3, these housing types were being considered as strategies to provide a range of housing. Petitioner acknowledges that a Task 2 housing study discussed dwelling types that are part of the middle housing concept. Petition at 6. Similarly, the City explained that Task 3's Growth Scenarios

[1] Petitioner's extra-record analysis contradicts petitioner's representation that the document was relevant for the court to be able to "take notice of certain City planning processes and timelines explained in the City Planning Documents." Petitioner's Reply Regarding Petitioner's Motion for Review of Agency Order and Judicial Notice at 2. The City objects to consideration of this document because LCDC's review is limited to the administrative record. ORS 197.633(3).

report produced several conclusions directly related to the development of Policy 5.6.[2] SER-35. Notably, the report categorizes many middle housing types including duplexes, triplexes, and shared courtyard units as "single family residences" or "single family residential." SER-97 to 98, 100.

The City's significant engagement with the community during the periodic review process on the middle housing issue impacted the development of Policy 5.6. SER-34 to 37, 53. Community involvement, including testimony by neighborhood associations and housing organizations, motivated the City to consider greater emphasis on smaller scale infill development referred to as middle housing. *Id*. On October 8, 2015, Council held a work session and discussed the issue of increasing middle housing to ensure housing choice and supply. SER-14 (LCDC findings) and SER-91 (City agenda noting discussion of housing market trends, including housing supply and choice, with "'Middle

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[2] The report's conclusions that led to the development of Policy 5.6 are:

> "Producing a diverse supply of housing creates diverse communities with the opportunity for households to remain in their neighborhood as their lifestyles and housing needs change, especially in allowing older adults to age within their community.
>
> "Changing household needs and preferences will create demand for new and different housing types. Recently, Portland has seen the development of innovative housing types such as cohousing, microapartments and accessory dwelling units.
>
> "* * * adding more R2.5 or R2 zoning near neighborhood centers could increase the supply of small lot single family homes, duplexes, townhomes, and low density multifamily development types. This should be a consideration as refinement plans are developed for centers and corridors." SER-35 *quoting* SER-101.

Housing' and zoning" as a sub-topic). A February 2, 2016 Council work session presentation and a memo on middle housing was provided "in response to interest from several council offices, and recent hearing testimony." SER-78. By then, "middle housing" was defined as "multi-unit or clustered housing types that are compatible in scale with single-family homes." SER-87.

Policy 5.6 was introduced in March 2016. SER-34. The council took additional testimony on the policy through April. *Id*. The City completed its final work tasks through its June 15, 2016 adoption of Ordinance No. 187832 (Task 4) and the December 21, 2016 adoption of Ordinance No. 188177 (Task 5). SER-1. In adopting Task 4, the City added new Plan provisions including a housing element as required by the work program.[3] SER-51. The Plan's new *Chapter 5: Housing* states the element's purpose is "to provide policies that will help Portland meet its need for quality, affordable homes for a growing and socioeconomically-diverse population, and to help ensure equitable access to housing." SER-69. To achieve that purpose, Task 4 provided a number of housing policies: ten policies on housing access, nine on housing diversity, five on location, and over twenty on affordability. SER-70 – 71. Policy 5.6 addresses a "[d]iverse and expanding housing supply[.]" SER-73.

In findings on Policy 5.6, the City explained that this policy and four

[3]The housing element addresses goals and policies required by Subtask C of Task 4. SER-106 and SER-108 (Housing Element task requiring adoption of strategies for meeting identified housing needs).

others are intended to "emphasize housing choice in neighborhoods, affirmatively further fair housing, and encourage new forms of housing[.]" SER-65. The City noted the phrase "where appropriate" means that a variety of land suitability factors and other Plan policies will be weighed to determine where land should be rezoned to allow for middle housing to be developed, and that the policy does not rezone land by itself. SER-66.

The City's Task 5 submittal included zoning code and map amendments to implement major aspects of the Plan as required by the work program. SER-4, 108. Task 5 implemented Policy 5.6 in a limited manner by changing more land to R2.5 zoning, a zone that permits a broad range of middle housing types. SER-50, 78, 101. The City will apply Policy 5.6 to future land use decisions subject to review for compliance with the planning goals. *See* Portland City Code (PCC) 33.835.040 (App-1), discussed *infra*. Petitioner's representation that the City is "implementing the policy through the 'Residential Infill Project'" (Petition at 12) is incorrect, as that project has not and may never result in any final decision by the City, and therefore no implementation has occurred. That project is also not part of the record before LCDC.

II. RESPONSE TO PETITIONER'S FIRST ASSIGNMENT OF ERROR

LCDC did not err in its review and approval of Task 4 because Task 4 is consistent with and supported by earlier periodic review work tasks and because petitioner did not preserve the arguments it now raises.

A. Preservation of Error

Petitioner has not demonstrated that the general issue of whether Policy 5.6 conflicts with prior periodic review work has been preserved nor has petitioner identified how it preserved the specific arguments now raised. ORAP 5.45(1) requires preservation of error in a lower tribunal in order to consider the error on appeal; that preservation requirement applies to administrative proceedings. *1000 Friends of Oregon v. LCDC*, 244 Or App 239, 268-269, 259 P3d 1021 (2011); *Fraser v. LCDC*, 206 Or App 735, 738, 138 P3d 932 (2006).

ORAP 5.45(4)(a) requires petitioner to demonstrate that "the question or issue presented by the assignment of error timely and properly was raised and preserved[.]" The court's review is limited to issues presented to LCDC on appeal of the DLCD director's decision regarding the City's periodic review submittal. *1000 Friends v. LCDC*, 244 Or App at 268-269. Petitioner must identify objections filed with DLCD, and those objections frame the issues on appeal to LCDC. *Id*. at 268 *quoting Marion County v. Federation For Sound Planning,* 64 Or App 226, 237, 668 P2d 406 (1983). Parties before LCDC must preserve their appeal issue by making "an explicit and particular specification of error by the local government" and a "party's claim of error by LCDC in its periodic review order * * * is limited to the commission's resolution of objections raised in the periodic review proceedings." *Id*. at 268-269.

Whether an issue was preserved before LCDC, and therefore adequately preserved for this court's review, is a simple inquiry because LCDC's rules

contain strict specificity requirements for administrative appeals. To appeal a director's decision to LCDC, a person is required to "[c]learly 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[.]" OAR 660-025-0150(6)(d)(B). Accordingly, in this proceeding, petitioner was required to identify with particularity where in its appeal to LCDC it alleged deficiencies in the work tasks and violations of applicable law, goal or rule. Petitioner fails to meet this burden.

Petitioner neither identifies quotations from the record where the arguments in this assignment of error were raised nor cites where it clearly identified a specific conflict between Tasks 4 or 5 and earlier submittals. Petitioner relies on arguments presented below that do not match the arguments presented to this court; thus these arguments should not be considered. *Bibolet v. Employment Department*, 288 Or App 489, 495-6, 407 P3d 831 (2017) *citing Ayres v. Bd. of Parole*, 194 Or App 429, 435-6, 97 P3d 1 (2004) ("[T]he party must present the particular challenges it intends to raise on judicial review first to the administrative body whose review must be exhausted."). Petitioner fails to identify where the issue of conflicts between Policy 5.6 and Tasks 2 and 3 was raised below.

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Petitioner's citation to a general argument provided below asserting Task 4 was not *supported* by earlier work task studies and alternatives analysis does not preserve its claim that LCDC failed to make the City "resolve *conflicts* between [Policy 5.6] and the City's earlier periodic review work[.]" Petition at 15 (emphasis added); Petitioner's ER at 140; SER-38. Rather petitioner's argument before LCDC concerned adequacy of the City's findings on Policy 5.6 under Statewide Planning Goal 2. Before LCDC, petitioner did not refer to OAR 660-025-0150(8) or 660-025-0140(5), the rules that address internal conflicts between work tasks. Petitioner's citations to the record may establish a basis for preservation of a portion of its third assignment of error but not for this assignment.

Petitioner argued to LCDC that Policy 5.5 "Housing in Centers" did not comply with the periodic review work program, and argued that Policies 5.5. and 5.6 conflicted with each other. *See* SER-40 – 41. Those narrow arguments do not preserve petitioner's argument now presented regarding Task 4's alleged conflict with Tasks 2 and 3. Petitioners have not identified, and the City cannot find, any reference to conflicts with Plan policies 4.5, 5.14, or 9.63 in petitioner's appeal to LCDC and thus that issue is not preserved. Petition at 22.

Petitioner also fails to identify where it raised the issues of compliance with Statewide Planning Goals 11 and 12. Arguing that a policy is inconsistent with "other infrastructure planning" does not sufficiently preserve a Goal 11 or

12 compliance issue. SER-47. *See also* SER-19 (LCDC's adequate response to infrastructure arguments). Petitioner's general assertion does not adequately raise an issue of compliance with either goal. This court should refrain from addressing petitioner's arguments relating to Goals 11 and 12 because they were not preserved below. ORAP 5.45(4)(a).

Finally, petitioner did not identify where the issue of evading future application of the statewide planning goals and other Plan provisions during policy implementation was raised below. Petition at 4, lns 7-9. To the extent an argument is provided at Petition at 26 n 7 regarding the City's "overall compliance with the statewide planning goals, the City's work program and other relevant law[,]" that argument is neither sufficiently developed nor adequately preserved for review. Accordingly, the court should not reach this assignment of error.

B. Standard of Review

Pursuant to ORS 197.651(10), the court is to reverse or remand LCDC's order only if the court finds it to be "[u]nlawful in substance or procedure[,]" "[u]nconstitutional[,]" or "[n]ot supported by substantial evidence in the whole record as to facts found by the commission." ORS 197.651(9)(b) provides that the court "[m]ay not substitute its judgment for that of [LCDC] as to an issue of fact." As explained in *Barkers Five, LLC v. LCDC*, 261 Or App 259, 285 n 18, 323 P3d 368 (2014), the standard of review for LCDC orders in ORS

197.651(10) is "substantively akin to [the] standard of review of Land Use Board of Appeals orders."[4]

The "unlawful in substance" standard of review for LCDC orders under ORS 197.651(10) "is the functional equivalent of the 'erroneously interpreted a provision of law' standard in ORS 183.482(8)(a) that is applicable to [the court's] review of an order in a contested case issued by a state administrative agency." *Zimmerman v. LCDC,* 274 Or App 512, 519, 361 P3d 619 (2015) *quoting Dimone v. City of Hillsboro*, 182 Or App 1, 6 n 5, 47 P3d 529 (2002).

The court reviews LCDC's compliance with the applicable law under periodic review statutes, the goals and its rules. LCDC's consideration of appeal issues regarding "compliance" with applicable law is based on ORS 197.747, which requires that the local government's decision as a whole conform with the purpose of the law, and any failure to meet individual goal requirements is technical or minor in nature. ORS 197.633(3)(c).

C. Argument

LCDC properly approved Tasks 4 and 5 and denied petitioner's appeal, effectively approving Policy 5.6. The City's adoption of this policy responds to housing needs identified in record documents. Petitioner has not demonstrated the policy conflicts with earlier periodic review work. LCDC correctly

[4] In 2011, the legislature amended statutes governing judicial review of LCDC orders. *See 1000 Friends of Oregon v. LCDC*, 260 Or App 444, 452 n 3, 317 P3d 927 (2013).

acknowledged that the City identified a need for middle housing and adequately countered assertions that the policy would reduce housing affordability, concluding that Policy 5.6 "is an appropriate response to the periodic review work program." SER-18. Further, LCDC's decision does not enable the City to avoid review of Policy 5.6 against the Statewide Planning Goals during subsequent legislative decisions applying the policy.

As explained below, the court should find no error because LCDC properly performed its review function in response to the issues raised in petitioner's administrative appeal. To the extent Policy 5.6's consistency with prior periodic review work is appropriately before this court, the record demonstrates that the policy is consistent with and supported by earlier periodic review work.

1. LCDC properly engaged in its review function when approving Task 4 including Policy 5.6.

Petitioner claims LCDC erred in approving Task 4 because it conflicts with prior work performed in earlier work task submittals. Petitioner asserts that under OAR 660-025-0140(5), LCDC erred by failing to require the City to reconcile the conflict, effectively ceding review authority and violating unidentified periodic review statutes. The rule 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 acknowledgment of all, or part, of the work task until completion of additional tasks." (Emphasis added.)

OAR 660-025-0140(5); *see also* identical rule OAR 660-025-0150(8).

By issuing its order approving Tasks 4 and 5, the Commission effectively found that there was no conflict with earlier Tasks. Because petitioner did not raise compliance with OAR 660-025-0140(5) or 660-025-0150(8), neither DLCD nor LCDC explicitly interpreted the rule.

Petitioner's assertion that LCDC was required to force the City to revisit Tasks 2 and 3 prior to adopting Policy 5.6 to perform a detailed analysis of the policy's possible implications is not supported by any periodic review statute, administrative rule or planning goal. Petitioner's interpretation would unnecessarily constrain a local government's ability to respond to needs identified during the periodic review process. Prohibiting the addition of a policy in later drafts of the revised Plan if the specific policy was not explicitly analyzed in earlier work tasks fails to acknowledge the iterative nature of periodic review and the requirement that the City respond to testimony, and supporting evidence developed during earlier work tasks. To the contrary, the earlier work tasks drove the need for Policy 5.6, as discussed below.

Petitioner has not demonstrated LCDC erred in its review, and its argument misconstrues the rule's purpose. OAR 660-025-0140(5) directs LCDC to require resolution when a subsequent work task *conflicts* with an earlier work task. The rule does not require that a particular policy adopted in a

subsequent work task must have been considered by a prior work task.

OAR 660-025-0130 provides the process for submission of a completed work task and does not include a prohibition on additional policies not analyzed in earlier work tasks. In fact, consistent with the work program, all of the Plan goals and policies were developed and adopted in Task 4. SER-106 – 108. Rather, the rule explains that a local government is generally required to "submit completed work tasks as provided in the approved work program" and that DLCD is required to "determine whether the submittal is complete." OAR 660-025-0130(1)-(2). A work task is considered complete when it "contain[s] all required elements identified for that task in the work program." OAR 660-025-0130(3). The City's work program set a floor for required submissions, rather than a ceiling, and petitioner does not challenge Task 4 as incomplete. SER-103 to 109. The addition of a new policy that is consistent with and supported by prior periodic review work is not prohibited.

2. Policy 5.6 is consistent with Work Tasks 2 and 3.

The court should affirm LCDC's order because the record demonstrates Policy 5.6 does not conflict with prior periodic review work. On the contrary, the policy is supported by and consistent with all prior periodic review work task submittals.

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i. The policy should be interpreted within the context of the City's Plan and zoning code.

Petitioner errs in its description of the operative effect of Policy 5.6. The policy does not, as petitioner contends, allow conversion of single-dwelling zones into *de facto* multi-dwelling zones without a zone change (Petition at 18). The policy is not self-executing. SER-16, 66. The City would have to amend its zoning code to allow additional middle housing in single-family residential zones. To do so, the City would be required to make policy decisions, based on all Plan policies and supporting documents about where middle housing is "appropriate," before it could amend the code to apply the policy. In fact, the discretionary nature of Policy 5.6 means the City could decide that middle housing is appropriate in no or very limited circumstances.[5]

The text of the policy demonstrates that it will be applied to future, post-acknowledgment, legislative land use decisions in a measured and appropriate manner.[6] Policy 5.6 directs the City to "[e]nable and encourage development of middle housing." The Plan defines "Enable" to mean "[t]o supply with the means, knowledge, or opportunity; make able." SER-75. The Plan defines "Encourage" to mean "[p]romote or foster using some combination of voluntary

[5] In any legislative change, Council is required to consider how the proposed decision "complies with" and is "consistent with" the Comprehensive Plan's policies. ORS 197.835(7); PCC 33.835.040, App-1. If Council cannot find compliance, Council must either not make a change or amend the Plan to allow the change. However, the reverse is not true; Council is not compelled to make a decision just because it would meet a Plan policy. *See* SER-67 ("How to Use the Plan" section of the Plan).

[6] Legislative land use amendments made outside of periodic review are post-acknowledgement plan amendments ("PAPAs") subject to ORS 197.610-197.625.

approaches, regulations, or incentives." *Id*. These definitions and the text of Policy 5.6 illustrate that the policy applies in all zones, not just single-family zones, as a directive to supply an opportunity and promote middle housing *where appropriate*. Petitioner's assertion at Petition at 16 that the policy will allow for "a large increase in housing units throughout most single-family residential neighborhoods in the City" is not supported by the text of the policy. It fails to acknowledge both that a future legislative action would be necessary if the City chose to further implement the policy and that "where appropriate" qualifies the policy.

The policy must be read in the context of the City's mandatory land use regulations and Plan provisions governing how the statewide goals and Plan apply to future land use decisions. Petitioner is incorrect that the City will not have to consider statewide goals and Plan policies when applying Policy 5.6 to future legislative zoning code amendments. PCC 33.835.040 requires that all amendments to the zoning code, goals or Plan policies be consistent with the Statewide Planning Goals and the Plan. App-1.

When amending the zoning code in the future to implement Policy 5.6, the City must weigh and balance all applicable Plan policies to determine whether a particular decision would "on the whole" comply with the Plan. SER-67, ORS 197.835(7), PCC 33.835.040(A), App-1. A single policy in the Plan does not "allow a use" or control a particular zoning decision on housing

density; rather the Plan requires a holistic evaluation based on many Plan policies and zoning code regulations when making legislative land use decisions. Petitioner's position that Policy 5.6 "likely trumps more general policies" is inconsistent with the text of the Plan and the zoning code.

Petitioner's assertion that Policy 5.6 "could dramatically change residential neighborhoods" ignores the single-dwelling zones' purpose of "provid[ing] housing opportunities for individual *households*" and the variety of uses already allowed within single-dwelling residential zones. PCC 33.110.010 (emphasis added); *See* PCC Table 110-1 (listing a number of uses allowed including group homes, schools, and community services) and Table 110-2, App-2 – 5 (allowing ADUs; attached houses; duplexes on corner, transitional lots, and in the single-family R 2.5 zone). Furthermore, Policy 5.6 applies to legislative decisions made for all zones throughout the City, not just in single-dwelling residential zones.

ii. Evaluation of Policy 5.6 should consider the City's housing obligations under state law.

The City's planning obligations come not only from periodic review, but also needed housing statutes, Statewide Planning Goal 10, and the Metropolitan Housing Rule and implementing Metro Code. Evaluation of Policy 5.6 should occur within the context of these obligations. For example, pursuant to Metro Code 3.07.730, the Plan is to include "strategies to ensure a diverse range of housing types[,]" "actions and implementation measures designed to * * *

increase the opportunities for new dispersed affordable housing[,]" and "policies, actions, and implementation measures aimed at increasing opportunities for households of all income levels to live within their individual jurisdictions in affordable housing." App-6. Under Goal 10 and the Metropolitan Housing Rule, OAR 660-007-0030(1), at least half of residential capacity must be available for multi-family units or attached single-family units. SER-58.

Goal 10 requires governments to adopt plans that "encourage the availability of adequate numbers of needed housing units[7] at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density." App-7. Under Goal 10, the Plan must address overall supply and the provision of housing for different income levels and preferences in Portland. In Task 4, the City explained Goal 10 requires the City to "[i]dentify future housing needs by amount, type, tenure, and affordability" and adopt necessary policies to accommodate needed housing, addressing housing capacity and other needs including the provision of type, tenure and affordability. SER-56 to 57.

[7] "Needed Housing Units" are "housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels" and include "attached and detached single-family housing, multiple-family housing, and manufactured homes, whether occupied by owners or renters." Statewide Planning Goal 10. App-7.

In addition, the City must follow the Needed Housing statutes. *See* ORS 197.303-197.307 (identifying housing for low and middle income levels as a matter of statewide concern; providing that zoning must allow needed housing including attached single-family and multifamily dwellings). Recent changes to state law mandate that the City allow an accessory dwelling unit in addition to a primary residence in areas zoned for detached single-family dwellings. ORS 197.312(5)(a).

Petitioner ignores these concerns and obligations, and presents a one-dimensional understanding of the City's planning obligations. Petitioner appears to argue that if overall housing demand is met, housing needs are addressed, and any additional provision of housing is unnecessary. Petition at 6, 23. Such an oversimplification is contrary to the City's statutory obligations. The City considers many dimensions when making housing policy, and consistency between prior periodic review tasks and Policy 5.6 should be reviewed in light of how Policy 5.6 supports achieving *all* planning obligations related to the provision of housing supply, choice, and affordability.

iii. Policy 5.6 correctly addresses housing needs identified during Tasks 2 and 3.

Petitioner imagines a conflict when it asserts that Policy 5.6 conflicts with a Task 2 conclusion that found the City's existing zoning to be adequate to ensure sufficient overall housing supply. Petition at 23 *citing* SER-110. Policy 5.6 is not intended to address an overall supply deficiency, but rather to

encourage the appropriate consideration of additional dwelling units in areas near existing transit services, centers, and the Central City to ensure housing choice and affordability. SER-65 – 66. Such a policy aligns with and is supported by Tasks 2 and 3 analyses. SER-43 (describing Task 2 supporting documents regarding need for and role of infill in meeting housing supply needs); SER-95. (Task 3 Growth Scenarios report states "A critical component * * * is to accommodate growth by taking advantage of existing infrastructure efficiencies in well-served inner neighborhoods.")

Petitioner also makes a distinction between middle housing and single-family housing. However, the Growth Scenarios report included middle housing as a single-family residential housing type for certain analyses. Where the report referred to homes on separate lots, it used the term "single-dwelling residential development." *Compare* SER-93 *and* SER-97 and 98 (single-family residential includes such middle housing types as duplexes and triplexes). The report's statement that single-family residential neighborhoods will remain single-family thus includes middle housing types.

Petitioner's dependence on SER-93 to establish a conflict between the Growth Scenarios report and Policy 5.6 fails to account for the report's full explanation of the intentional provision of excess housing allowances. *See* Figure 5 of Growth Scenarios report at SER-93 (showing planned excess capacity of 144,271 units). Petitioner's attempt to characterize Task 3 as not

envisioning excess housing units is contrary to the Growth Scenarios report.

Task 2 included the adoption of a Housing Needs Analysis ("HNA") that estimated the City's overall need for housing by size and income in 2035 and concluded the City could accommodate over 123,000 new housing units by 2035. SER-57. But Task 2 reports also provided evidence supporting a determination of an ongoing need to motivate diversity in housing type, tenure, and affordability. *Id*. The City noted that within Task 2, the report "Housing and Transportation Cost Study" explained that single-family rental opportunities will become harder to find over time, and location-efficient housing can lessen the cost burden for households. SER-43. Also within Task 2, the reports titled "Housing, Supply" and "Housing: Updates on Key Supply and Affordability Trends" note a trend toward replacing garages with new housing units such as accessory dwelling units, reinforcing the role of small-scale multifamily infill in the housing supply. *Id*.

During Task 3, the City identified in its Growth Scenarios report that housing choice was a complex issue, shaped by a number of factors, including income level. SER-96.[8] The complexity of the issue is illustrated by the

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[8] The Growth Scenarios report provides:

"Housing choice is a complex issue that is shaped by household preference based on factors such as age, family size and income level. * * * Such complexities make it difficult to assess the housing choice impact of different scenarios. The housing choice analysis encompasses the mix of housing types (buildings) and how those types are expected to meet forecasted demand for households (people)." SER-96.

numerous adopted housing policies, including Policy 5.6, that address Goal 10 obligations and ensure a range of housing choices that relate to locational diversity, unit affordability and diversity, and housing mix. When addressing affordability and cost burden, the report explained expected housing production will not fully address low-income household needs. SER-99. The report acknowledged a gap in predicted low-income housing availability that puts pressure on existing affordable units and increases the number of cost-burdened households. *Id*. The report concluded that ensuring that excess capacity in housing types "could help protect against upward price pressure." *Id*.

In addressing the draft Plan, the report stated that the Plan "does not yet ensure a supply of affordable units to the lowest income groups." SER-100. The report identified a targeted increase of zoning density "near neighborhood centers" as a strategy to "increase[] the supply of small lot single family homes, duplexes, townhomes, and low density multifamily development types." SER-101. Policy 5.6 reflects this approach. In addition, the "Housing Choice" section of the report provided several conclusions that support Policy 5.6, with a focus on production of a diverse housing supply and demand for new and different housing types including middle housing. SER-96 – 101.

Respondent acknowledges City staff presented a map to Council that demonstrated what property might be evaluated for future density increases in line with Policy 5.6, as it depicts land a quarter mile from centers, stations and

frequent transit. SER-76 – 77. That map is of limited value. It does not determine what property will be rezoned to higher density, as those future zoning decisions have not yet occurred. Nonetheless, the map is consistent with prior periodic review work. *See e.g.,* Figure 24 of the Growth Scenarios Background Report (SER-94), particularly the left-most graphic, showing new household growth distribution proposed under the Plan.

Policy 5.6 is consistent with the above-described report's projections, strategies and conclusions. The City repeated these major conclusions in its Task 4 findings, noting the Plan accounts for market dynamics in order to ensure both an adequate overall supply and diverse housing options. SER-61 to 62. The City found Policy 5.6 addresses the growing demand for housing supply and choice in terms of price, size, location, tenure options and accessibility. SER-65. The City provided detailed analysis of how more middle housing will help meet homeownership demands, allow for access to complete neighborhoods, and ensure affordability and choice in housing. SER-66. LCDC agreed with these findings. SER-16.

Petitioner fails to appreciate the scope of housing needs the City studied in Tasks 2 and 3, and the obligations the City faces when ensuring the provision of needed housing for households of all income levels. Petitioner fails to identify any inconsistency between Tasks 2 and 3 and Policy 5.6. Similarly, petitioner does not identify any work program directive that Policy 5.6 impedes.

There is no conflict with prior periodic review work. The court should deny the first assignment of error.

iv. Analysis of compliance with Goals 11 and 12 is premature.

Even if the court agrees petitioner preserved the alleged error of compliance with Goals 11 and 12, this argument should be rejected. Petitioner overstates the effect of the adoption of Policy 5.6 as part of Task 4. The policy itself does not create any additional residential density. It is premature to address these goals because any changes to zoning allowances require a separate, subsequent post-acknowledgment amendment. As noted, City code requires compliance with statewide goals and Plan policies for zoning code amendments. *See* Rec 14986 to 15038 (City Plan Goals 8 and 9 and policies). The City will address Goals 11 and 12 through zoning code amendments when there is certainty about whether or where additional middle housing is proposed to be permitted.

In addition to local requirements, Goal 12 and its implementing administrative rules apply directly to any legislative amendments to provide additional middle housing consistent with Policy 5.6. Goal 12 rules require the City to consider whether an amendment to its land use regulations or zoning map would significantly affect a transportation facility. OAR 660-012-0060(1). Similarly, Policy 8.21 requires that public facilities and services are maintained at levels to support land use patterns and anticipated growth. Accordingly, if

and when the Council determines additional middle housing is appropriate, the Council will consider whether the transportation and public facilities support the allowance.

If Policy 5.6 were, in fact, self-executing and directly created additional middle housing, the City would be obligated to consider infrastructure impacts. However, given the actual effect of Policy 5.6, which is to "enable and encourage" a future legislative action to consider appropriate middle housing, it is neither possible nor required to anticipate how the policy may be implemented. LCDC's conclusion regarding the City's consideration of infrastructure issues is lawful in substance.

III. RESPONSE TO PETITIONER'S SECOND ASSIGNMENT OF ERROR

LCDC correctly determined that the City completed Task 5.

A. Preservation of Error

While petitioner fails to identify where it raised the issue of whether implementation of Policy 5.6 was required to occur in Task 5 (*see* ORAP 5.45(4)(a)), the City does not dispute petitioner preserved this argument. SER-45. However, petitioner asserted that failure to implement Policy 5.6 violates Goal 1 and did not challenge consistency with the work program.

LCDC did not consider petitioner's appeal to be one asserting substantial prejudice (SER-12), and that finding is not appealed. To the extent the court considers this assignment of error to be procedural, it should not reach it

because petitioner waived its right to contest a procedural claim, as it did not plead substantial prejudice. ORS 197.633(3)(b) and 197.651(10)(a).

B. Standard of Review

The court is to reverse or remand LCDC's order if the court finds it to be unlawful in substance or procedure but error in procedure is not cause for reversal or remand unless the court determines that substantial rights of the petitioner were prejudiced. ORS 197.651(10). *See* Section II.B.

C. Argument

LCDC correctly concluded that all future code amendments that depend on new Plan provisions need not be adopted as part of periodic review. SER-33. The City's Task 5 submittal explained that its scope was "not to make every possible implementation of the recently adopted Plan, but to take steps that are sufficient to complete Task 5 of Portland's periodic review work program." SER-49.

LCDC made no error in law when it rejected petitioner's argument that the City failed to conduct comprehensive planning when it approved Policy 5.6. SER-18. First, the City implemented Policy 5.6 in Task 5 in a limited manner by rezoning some property to R2.5. As discussed in Task 5 findings citing Policy 5.6, additional R2.5 zoning is a measure to "increase housing options in opportunity-rich locations close to the Central City." SER-50; *see also* SER-78 (discussing additional R2.5 zoning as a middle housing strategy). Second,

nothing in state law requires concurrent implementation of every policy alongside Plan adoption. The City acknowledged testimony requesting acceleration of zoning code amendments in tandem with policy adoption, but the City chose a traditional planning process and developed the policy first. SER-54. The City explained the council's clear intent that the policy would result in a future planning process with appropriate community involvement. SER-54 to 55. The findings stress the importance of implementation occurring in the context of the entire Plan. *Id*.

Petitioner provides no support for its underlying premise that periodic review constrains a local government's ability to adopt new Plan policies during periodic review that may be implemented later. The strictures of periodic review must align with the City's independent authority to adopt ordinances pursuant to the Oregon Constitution Article XI § 2. Through this constitutional protection, home rule municipalities possess authority to enact substantive policies, even in areas regulated by state law, so long as the local enactment is not "incompatible" with state law. *Gunderson, LLC v. City of Portland*, 352 Or 648, 659, 290 P3d 803 (2012). Accordingly, this court should not interpret periodic review to constrain a municipality's ability to adopt substantive policies that are not incompatible with state law.

LCDC explained that no statewide goal violation occurs if implementation is performed outside of a periodic review work task,

acknowledging a possible difference in venue, but that any party can seek review of future code or map amendments. SER-33. Petitioner has not identified any law that requires implementation of Policy 5.6 within periodic review, nor has it demonstrated any prejudice if future zoning code amendments apply Policy 5.6 outside of periodic review. The City's code requires full compliance with the Statewide Planning Goals for all future land use decisions, and petitioner can participate in those proceedings. PCC 33.835.040, App-1.

Petitioner's argument that LCDC ceded authority to review the City's future ordinances that implement the policy (Petition at 30-31) elevates form over substance, as LCDC is the commission that governs DLCD. Petitioner acknowledges DLCD can challenge any future changes to zoning regulations to ensure compliance with state law under ORS 197.610-197.615.

To the extent petitioner argues Policy 5.6 is currently implemented through the "Residential Infill Project," (Petition at 12), the City stresses that the project has not been presented to Council, much less resulted in a final decision. The project may result in a separate PAPA outside of periodic review, but such a potential PAPA does not invalidate Task 5.

For these reasons, the court should deny petitioner's second assignment of error.

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IV. RESPONSE TO PETITIONER'S THIRD ASSIGNMENT OF ERROR

The court should deny this assignment of error because LCDC correctly performed its substantial evidence review function. To the extent the court reevaluates the substantiality of the evidence under Statewide Planning Goal 2, it should find Policy 5.6 is supported by an adequate factual base because the record includes substantial evidence, including testimony and studies in Tasks 2 and 3, that demonstrates a need and rationale for the policy.

A. Preservation of Error

Parties before LCDC must preserve appeal issues by making "an explicit and particular specification of error by the local government" and a "party's claim of error by LCDC in its periodic review order * * * is limited to the commission's resolution of objections raised in the periodic review proceedings." *1000 Friends v. LCDC*, 244 Or App at 268-269. *See also* OAR 660-025-0150(6)(d)(B). The City does not contest that petitioner raised the general issue of whether findings on Policy 5.6 were supported by substantial evidence. But petitioner's arguments below addressed claims of inadequate findings for particular statements in support of the policy, not the factual basis relating to any established legal obligation. *See, e.g.,* SER-46 (petitioner's non-specific argument that "inventories and other forms of data" were lacking); SER-39 (arguing findings are based on speculation). Petitioner's assertions of a lack of an adequate factual base for non-essential findings did not provide LCDC with fair notice of arguments now presented regarding an evidentiary

demonstration of support for "compliance with legal criteria applicable to the policy." Petition at 33. Petitioner does not demonstrate preservation of substantial evidence claims relating to Goals 11 and 12 below. Petition at 37. Neither did petitioner raise the issue of whether a Goal 2 needs analysis was required for Policy 5.6. Petition at 36-37. Therefore, the court should not consider those arguments.

B. Standard of Review

Under the "unlawful in substance" standard at ORS 197.651(10)(a), the court is limited to determining whether LCDC applied the correct legal test in deciding whether the City's decision is supported by substantial evidence. *Zimmerman*, 274 Or App at 522 *citing 1000 Friends of Oregon v. LCDC*, 244 Or App at 267-268. The court is to reverse or remand only if it finds that LCDC's order is not supported by substantial evidence in the whole record as to facts found by LCDC. ORS 197.651(10)(c). The court is not to reweigh factual determinations made by LCDC. *Zimmerman*, 274 Or App at 519. The court reviews LCDC's application of the substantial evidence rule for legal correctness and does not review the evidence independently for substantiality. *C.f.*, *Reinert v. Clackamas County*, 286 Or App 431, 446, 398 P3d 989 (2017) (review of substantial evidence rule application by LUBA). The court must affirm LCDC's decision where LCDC properly articulates the standard unless the evidence is "so at odds" with LCDC's evaluation that the court can infer

LCDC misunderstood the proper standard. *Barkers Five, LLC*, 261 Or App at 348 *citing Younger v. City of Portland*, 305 Or 346, 359, 752 P2d 262 (1988).

C. Argument

1. LCDC correctly understood and applied its evidentiary review function.

Petitioner argues that LCDC's order violates Goal 2 because it is not supported by substantial evidence. Petitioner asserts that because LCDC and the City's findings are based on aspiration rather than facts developed through Tasks 2 and 3, and the work underlying those tasks did not provide substantial evidence to demonstrate compliance with Goals 11 and 12, LCDC erred in its administrative review function.

When considering an appeal of a work task, LCDC is to review "whether there is substantial evidence in the record as a whole to support the local government's decision." ORS 197.633(3)(a). *See also* OAR 660-025-0160(2)(a). LCDC explained its role is not to determine whether the City's decision is "correct," but whether the City's decision is supported by an adequate factual base. SER-17 *citing 1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

LCDC correctly reviewed evidentiary issues raised by petitioner based on substantial evidence in the record, and therefore, the order is not unlawful in substance. Petitioner has not demonstrated that LCDC erred in its substantial evidence review based on the whole record as to facts found by the

commission. ORS 197.651(10)(a) and (c). LCDC understood its review obligations, and correctly applied the law when approving the City's work task submittals. SER-7, 8, 16, 17. LCDC acknowledged the limitations at OAR 660-025-0150(6)(d)(B) and correctly interpreted its review as limited "to considering a deficiency in a local government's work task submittal, clearly identified by an appellant, that constitutes a violation of a statute, goal or administrative rule." SER-6. LCDC correctly rejected petitioner's adequate factual base argument as presented below.

When analyzing petitioner's evidentiary appeal, LCDC characterized petitioner's premise as incorrectly stating the effect of Policy 5.6, and rejected the assertion of "a wholesale citywide rezoning[.]" SER-16. LCDC explained the policy was not self-executing, and that future public processes would implement the policy. *Id*. LCDC acknowledged the City's right to make its own policy choice, and that the choice was based on "(1) the need for more housing with higher densities than single-family houses and lower densities than larger multi-family or mixed use buildings, and (2) the positive impacts on housing expense, home ownership, access to complete communities and housing choice provided by the policy." SER-16 to 17. LCDC referenced Task 4 findings in support of this conclusion. SER-16 *citing* Task 4 Record at 45-46 (SER-65 – 66). LCDC correctly evaluated whether the policy was supported, and determined it was adequately based on demonstrated housing needs and

projected positive outcomes.

LCDC responded to petitioner's argument that the policy could motivate demolition resulting in loss of affordability by noting petitioner based its argument on extra-record evidence and the City adequately addressed the concern by explaining that, even assuming some new units developed under the policy could be more expensive, an increase in supply results in older more affordable homes opening up to lower income households as higher income households occupy new units. SER-16 *citing* Task 5 Record at 45 (SER-48). LCDC correctly concluded, based on its findings summarizing relevant evidence, and additional materials the findings were based upon, that Policy 5.6 was adopted with an adequate factual base. SER-16.

LCDC did not err in its review, and petitioner's mischaracterization of the effect of Policy 5.6 cannot be used to establish otherwise. Petitioner has not demonstrated that the record evidence is so at odds with LCDC's order to permit an inference that LCDC misapplied the substantial evidence standard. Accordingly, the court should deny petitioner's assignment of error.

2. Policy 5.6 is supported by substantial evidence within the record that forms an adequate factual base.

If the court addresses whether Policy 5.6 has an adequate factual base, it should affirm LCDC's order because the record contains sufficient supporting evidence. Petitioner's underlying premise is that because Policy 5.6 was submitted and approved through a work task within periodic review, the City,

and DLCD's review and LCDC's appellate review were all prohibited from considering evidence not specifically developed during Tasks 2 and 3, and facts derived from Tasks 2 and 3 constituted the only factual evidence under consideration. Petitioner cites no direct authority for this proposition, and it should be rejected. Petitioner's approach is inconsistent with the standards governing this court's review, as it asks the court to reweigh evidence and impermissibly attempts to constrain the Goal 2 inquiry to evidence developed in certain periodic review phases notwithstanding ORS 197.651(10)(c) and its broad review of "evidence in the whole record[.]" Petitioner cannot use Goal 2 to allege its unpreserved argument that Policy 5.6 is inconsistent with Tasks 2 and 3.

Nonetheless, LCDC's findings addressed substantial evidence supporting Policy 5.6. LCDC explained that the City provided adequate findings and conclusions based on substantial evidence regarding its reasoning for adopting Policy 5.6. LCDC noted the City's explanation of the rationale for the policy:

> "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."

SER-16 *citing* Task 4 Record at 45-46 (SER-65 – 66). In addition, LCDC pointed to the City's discussion about the need to open up more affordable

housing by increasing the supply of units as a sufficient response to petitioner's claim that the policy would lead to a loss of affordability. SER-16, 48. Petitioner has not established that earlier periodic review reports constrain policy development in the manner advocated by petitioner.

Policy 5.6 will help the City comply with Goal 10 and other housing obligations by ensuring affordability and a surplus supply of a variety of housing options by encouraging middle housing where appropriate near transit services, centers and the Central City. During the LCDC appeal, the City identified evidence that supports Tasks 4 and 5. Rec 262 to 363. The City explained that Policy 5.6 was the logical culmination of housing supply findings initially identified in Tasks 2 and 3. SER-42.

Petitioner does not adequately establish what evidence the City was obligated to include as support for Policy 5.6. Petitioner fails to identify with specificity what "applicable approval criteria" create a need to identify certain factual support for Policy 5.6, but rather repackages its argument on work program consistency, which is waived. The demonstrated need for housing choice, along with public testimony repeatedly requesting additional housing provides a sufficient factual base for Policy 5.6 that applies along with numerous other policies to future land use decisions. *See e.g.*, SER-53 (City explaining that public testimony motivated emphasis on middle housing infill). LCDC acknowledged the City identified persuasive testimony during Task 3

that called for more diverse housing options including duplexes, triplexes, fourplexes, rowhouses, and courtyard apartments in single-family zones. SER-43-44. In the acknowledged Task 3 submittal, the Council stressed that it selected a land use approach that allowed significant potential for growth of middle housing. SER-44. As periodic review progressed, individuals continued to request stronger policies that allowed for infill housing options within single-dwelling zones. *Id*.

The City also identified substantial evidence in the Task 3 Growth Scenarios report within its Task 4 findings on Goal 10. SER-58 to 62. Notably, the report categorizes the housing type of "Single Family Residences" to include detached single-family dwellings on one lot, attached individual units with a common wall on separate lots such as townhomes and rowhouses, and higher density options such as duplexes, triplexes and units with shared courtyards. SER-97. This broad category of single-family housing types that includes middle housing provides context to evaluate the factual base necessary to support this policy, as Task 3 considers single-family houses and some middle housing to fall within the same housing type category. *Id*.

In addressing opposition to Policy 5.6, the City acknowledged the Plan provides enough general zoned capacity to meet the expected amount of housing needed over the planning period. SER-65. However, the Task 2 and 3 analyses identified a need for an expanded range of housing options. The City

explained the Plan "highlights and addresses the need for more housing in the range between the single-family houses and units in larger multi-family or mixed-use buildings." *Id*. The City concluded Policy 5.6 does not by itself rezone property, and that the qualified nature of the policy means "that a variety of land suitability factors and other Plan policies will be weighed to determine where land should be rezoned to allow for middle housing to be developed." *Id*.

Petitioner appears to argue that once the City determined it had capacity for needed housing, it was prohibited from adopting policies that support increases in certain housing types pursuant to Policy 5.6. However, the requirements in Statewide Planning Goal 10, the Metropolitan Housing Rule, and the Metro Code to provide adequate capacity for needed housing set a floor, not a ceiling. OAR 660-015-0000(10); OAR 660-007-0000; Metro Code 3.07.730. Nowhere do Goal 10 or Metro Code limit the City's authority to accommodate more housing capacity than is needed.[9] Ultimately, the City's ability to allow additional housing may be limited by other statewide planning goals (*e.g.*, ensuring enough employment land, adequate capacity in transportation systems or public facilities, or protecting natural resources). However, it is premature to evaluate how possible future application of Policy 5.6 creates tension with these other planning obligations.

[9] Were a city to expand its Urban Growth Boundary, Goal 14 and its rules explicitly require jurisdictions to base expansions on "demonstrated need." *See 1000 Friends v. LCDC*, 237 Or App 213, 278-279 239 P3d 272 (2010) (city could not amend UGB to accommodate more industrial land than needed in order "to provide market choice.") No similar limitation applies here.

The Task 3 Growth Scenarios report provides evidence on housing supply and demand and conclusions regarding the risk of gentrification that directly relate to the need for Policy 5.6. Conclusions presented under the report's "Options for Improving Performance" provide: (1) the production of a diverse supply of housing creates diverse communities with opportunities for households to remain in their neighborhood as housing needs change, including allowing older adults to age in place; (2) changing household needs and preferences will create demand for new and different housing types, noting innovative development such as accessory dwelling units; and (3) the addition of denser zoning near neighborhood centers could increase the supply of small lot homes, duplexes, townhomes, and low density multifamily development types. SER-43. *See also* SER-101. The report acknowledged the City needed to do a better job of aligning growth management with affordable housing strategies. *Id*.

The report's "Housing Choice" analysis summarizes affordability and cost burden, broken down by income. The report predicts that diversity of expected housing type production will not create enough housing units to meet demand for low-income households. SER-99. Although the lowest income-earning households are expected to grow by 25,000, the expected provision of additional housing for that group will only be between 8,000 and 10,000 units. *Id*. Such a result is predicted to create more cost-burdened households. *Id*. The

report notes low-income households will face competition from higher income groups for affordable housing units, and that "[e]nsuring that excess capacity exists in those housing types could help protect against upward price pressure." *Id*. Based on evidence in the Growth Scenarios report, a need for a housing policy that motivates affordable infill development is demonstrated. Task 2 studies also include substantial evidence supporting the policy and its supportive findings. *See* Section II.C.2.iii.

The record evidence discussed above and in Section II.C.2.iii allowed LCDC to determine Policy 5.6 is supported by an adequate factual base. Accordingly, LCDC did not err and the court should deny the third assignment of error.

V. CONCLUSION

Based on the foregoing, the City requests that the court deny petitioner's appeal and affirm the LCDC order.

Respectfully submitted July 3, 2019.

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