

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MULTNOMAH NEIGHBORHOOD
ASSOCIATION,

Petitioner,

v.

LAND CONSERVATION AND
DEVELOPMENT COMMISSION
and CITY OF PORTLAND,

Respondents.

Land Conservation and
Development Commission
18WKTSK001897

A168704

PETITIONER'S REPLY BRIEF

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

Michael J. Gelardi, OSB 083347
Gelardi Law P.C.
P.O. Box 8529
Coburg, OR 97408
(541) 412-9535
mike@gelardilaw.com

Attorney for Petitioner Multnomah
Neighborhood Association

Ellen F. Rosenblum, OSB 753239
Attorney General
Philip M. Thoennes, OSB 154355
Assistant Attorney General
State of Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301
(503) 378-4402
philip.thoennes@doj.state.or.us

Attorney for Respondent Land
Conservation and Development
Commission

Continued on Next Page

July 2019

Continued from Previous Page

Linly F. Rees, OSB 945098
Office of the City Attorney
City of Portland
1221 SW 4th Avenue, Ste. 430
Portland, OR 97204
(503) 823-4047
linly.rees@portlandoregon.gov

Attorney for Respondent
City of Portland

Steven Shipsey, OSB 944350
DOJ Gen Counsel Nat Resources
100 SW Market St
Portland, OR 97201
(503) 378-4409
steve.shipsey@doj.state.or.us

Attorney for Respondent Land
Conservation and Development
Commission

TABLE OF CONTENTS

I. SUMMARY OF THE REPLY	1
II. REPLY	2
III. CONCLUSION.....	14
COMBINED CERTIFICATE OF COMPLIANCE	15

TABLE OF AUTHORITIES

Cases

<i>1000 Friends of Oregon v. Land Conservation & Dev. Comm’n</i> , 244 Or App 239, 259 P3d 1021 (2011).....	2
<i>Boldt v. Clackamas County</i> , 107 Or App 619, 813 P2d 1078 (1991)	3, 4
<i>State v. Stevens</i> , 328 Or 166, 122, 970 P2d 215 (1998)	3
<i>VanSpeybroeck v. Tillamook County</i> , 221 Or App 677, 191 P3d 712 (2008)..	3, 6

Statutes

ORS 197.633.....	10, 12
------------------	--------

Rules

OAR 660-008-0005	11
OAR 660-008-0010	11
OAR 660-025-0150	10, 12
ORAP 5.45.....	2, 3

This page intentionally left blank.

I. SUMMARY OF THE REPLY

Petitioner adequately preserved the issues for review. Respondents are incorrect that Petitioner is limited to the exact same arguments on appeal that Petitioner made before the Land Conservation and Development Commission (“LCDC”). Petitioner’s arguments to LCDC gave the agency fair notice and the opportunity to respond to the issues that are now on appeal.

Respondents mischaracterize Petitioner’s arguments to the court and the evidence in the record. Petitioner has identified specific conflicts between middle housing policy and the City’s earlier periodic review work. The evidence identified by the City further demonstrates these conflicts.

Future City process to implement middle housing policy is not a substitute for LCDC’s compliance with the agency’s periodic review obligations. LCDC has failed to exercise oversight over the City’s development of middle housing policy as required by state law.

Finally, the City did not implement middle housing policy in Task 5 of periodic review. The R2.5 zoning changes cited by the City implement other comprehensive plan policies and are supported by fact-finding and policy analysis that does not apply to middle housing policy.

//

//

II. REPLY

A. Petitioner has preserved the issues Petitioner brings before this court

1. Respondents conflate the issues that Petitioner raised before LCDC with the specific arguments that Petitioner made before the agency

Respondents attempt to avoid issues raised in this appeal by arguing that the court's review is confined to the specific arguments that Petitioner made before LCDC. For example, the City faults Petitioner for making arguments to LCDC that "do not match the arguments presented to this court." (City Br. 11.) LCDC similarly accuses Petitioner of raising "new arguments on judicial review." (LCDC Br. 13.) Respondents misconstrue the applicable issue preservation standard.

The standard is whether an issue has been preserved, not whether a party is making the same arguments. ORAP 5.45(4)(a) requires a petitioner to demonstrate that the "issue or question" brought before the Court of Appeals was preserved in the lower tribunal. This standard applies to appeals of LCDC's periodic review decisions as in other cases. The court confirmed this in *1000 Friends of Oregon v. Land Conservation & Dev. Comm'n*, 244 Or App 239, 259 P3d 1021 (2011) ("the focus of our review is on the *issues* presented on appeal that have been preserved before LCDC") (emphasis added).

In *1000 Friends*, the court relied on *VanSpeybroeck v. Tillamook County*,

221 Or App 677, 690, 191 P3d 712 (2008), to explain the preservation standard. *VanSpeybroeck* was an appeal from the Land Use Board of Appeals (“LUBA”), where the court held that ORAP 5.45(1)¹ applies to appeals of state administrative proceedings. *VanSpeybroeck*, 221 Or App at 690. *VanSpeybroeck* explained that specific arguments about an issue need not be articulated below in order to preserve the underlying issues for review. *See id.* at 691. Rather, an issue “must be preserved in sufficient detail to allow a thorough examination of the issue by the decision-maker so as to obviate the need for further review or at least make that review more efficient and timely.” *Id.* at 691 n.5. Petitioner therefore is not limited to making the same arguments here as it did before LCDC.

1000 Friends indicates that the rules for preservation in LCDC appeals are analogous to the rules used in appeals from LUBA. In *Boldt v. Clackamas County*, 107 Or App 619, 622, 813 P2d 1078 (1991), the court held that the purpose of issue preservation in a land use appeal “is to prevent unfair surprise.”² The court explained that government bodies are expected to know that their decisions must comply with applicable land use criteria. Therefore, land use decision-makers cannot reasonably claim surprise from a challenge to their compliance with applicable criteria when the “subject matter” of the criteria was

¹ ORAP 5.45(1) states that “[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court * * *.”

² Fair notice is also the purpose of issue preservation requirements in other contexts. *See State v. Stevens*, 328 Or 166, 122, 970 P2d 215 (1998).

raised below. *See id.* at 624. In reaching this conclusion, the court reasoned that land use proceedings are not “susceptible to the same kind of specificity that is required to preserve issues in the courts” because land use proceedings are meant to facilitate citizen input and citizens are not expected to be represented by legal counsel in land use proceedings. *See id.*

Although the periodic review process at issue in this case differs somewhat from the more conventional land use process at issue in *Boldt*, the same basic principles and dynamics apply. The City and LCDC are arguably the two most sophisticated land use authorities in the state, and they have been in dialogue with one another over the City’s periodic review process for the past decade. (Rec. 34130-0084.) Petitioner, by contrast is a local neighborhood association that sought assistance from the Department of Land Conservation and Development (“DLCD”) and LCDC after the City’s unexpected addition of middle housing policy to the City’s 2035 Comprehensive Plan late in the periodic review process. (Rec. 369.) Petitioner was not represented by legal counsel before LCDC or the City. It is therefore unreasonable for Respondents to attempt to impose a heightened preservation standard on the issues presented in this case.

2. Respondents had fair notice and the opportunity to respond to the issues presented in this case

The crux of Petitioner’s argument to LCDC was that middle housing policy is inconsistent with the City’s periodic review fact-finding and policy analysis.

Petitioner questioned the City's post-hoc justification for the policy, noting that the periodic review process requires the City's comprehensive plan policies to be "based on a record of research, studies and public input developed in Tasks 1, 2 and 3, and not upon [the comprehensive plan] itself." (ER-140.) Petitioner specifically identified the City's relevant periodic review work product and argued that middle housing policy is inconsistent with this earlier work:

"The data and evidence that exists does not support the Middle Housing Policy. As we stated in our appeal, the fundamental documents upon which comprehensive planning is supposed to be based, fail to support this policy. These include the Housing Needs Analysis, the Growth Scenarios Report, and the Periodic Review Work Program."

(ER-145.) Petitioner therefore provided LCDC with fair notice that approval of the City's middle housing policy would violate LCDC's obligation to ensure that the policy is consistent with the City's work program and supported by the analysis required by state law.

Moreover, LCDC's decision shows that LCDC understood and responded to this issue. LCDC's response specifically acknowledges and rejects Petitioner's position that middle housing policy is inconsistent with the City's work program and Task 3 Growth Scenarios Report. (ER-164 to 165.) This response demonstrates that LCDC had the opportunity to examine the issue that underlies Petitioner's first and third assignments of error. *See VanSpeybroeck*, 221 Or App

at 691. Petitioner has therefore preserved these assignments of error.³

B. Respondents mischaracterize Petitioner’s arguments and the evidence in the record regarding middle housing policy

Respondents’ briefs contain several straw man arguments designed to obscure the issues presented in this case. For example, LCDC claims that Petitioner asserts that “a local government *must* revisit prior periodic review work tasks anytime it adopts a policy in a subsequent work task that was not explicitly analyzed in the prior work” (emphasis in original). (LCDC Br. 17.) LCDC also characterizes Petitioner’s Second Assignment of Error as arguing that the City’s work program “requires the City to implement all Task 4 policy decisions in Task 5 * * *.” (LCDC Br. 20.) The City portrays Petitioner as arguing that middle housing policy is self-executing. (City Br. 18.) These statements mischaracterize Petitioner’s arguments.

Petitioner does not argue that every policy in the City’s comprehensive plan must be specifically analyzed and implemented in periodic review. Not all comprehensive plan policies are created equal; many do not impose binding obligations on the City, and many do not relate to the issues that were the focus of the City’s periodic review.

³ The City and LCDC both contest Petitioner’s preservation of its First Assignment of Error, but only the City contests preservation of Petitioner’s Third Assignment of Error. Neither LCDC nor the City challenge preservation of Petitioner’s Second Assignment of Error.

Middle housing policy, however, is directly related to the housing issues that LCDC required the City to study in Task 2, and to the policy alternatives that the City was required to analyze in Task 3. Petitioner contends that state law requires LCDC to ensure that the City studies and implements middle housing policy through the periodic review process because of the specific conflicts between this policy and the City's assessment of housing needs and policy alternatives.

Although middle housing policy is not self-executing, the policy obligates the City to consider zoning code changes that increase housing density in all neighborhoods within a quarter mile of designated centers and corridors. The policy requires these changes "where appropriate" and does not provide any standard to assess whether the policy is appropriate for a given area. (ER-126.) Petitioner's concern is that LCDC has allowed the City to grant itself broad discretion to change residential zoning rules across most of the City without an evaluation of whether these changes will help meet the City's stated housing needs and development goals. The periodic review statutes and the City's work program require LCDC to ensure that this evaluation takes place in the context of periodic review. (*See* Pet'r Br. 19-22.)

As described in Petitioner's opening brief, middle housing policy enables a broad pattern of residential development that is different than the development patterns analyzed by the City in Task 3. The City's claims about the relationship

between the policy and the Task 3 Growth Scenarios Report are inaccurate. The City asserts that the policy is supported by the conclusions in the Task 3 report regarding housing choice. (City Br. 25.) Although the City’s Task 3 Growth Scenarios Report does contain an analysis of “housing choice,” this analysis is limited to the alternative development scenarios the city considered in Task 3:

“The [Task 3] scenarios allow for a wide range of housing types that are expected to meet a wide range of housing needs. The differences [among the scenarios] are in the minor shifts in the unit mix of housing types that can affect affordability and gentrification risk.”

(ER-58.)⁴ The Growth Scenarios Report is based on the City’s July 2014 comprehensive plan draft—the City did not introduce middle housing policy until 2016. (ER-23; Rec. 14847; 23358; 23379 to 23380.) The policy applies outside of the centers and corridors studied in the Growth Scenarios Report. The City’s housing choice analysis therefore does not contemplate the potential impact of middle housing policy on housing choice and affordability.

The City’s semantic argument about the discussion of single-family neighborhoods in the Growth Scenarios Report is also inaccurate. The report states that “Portland’s predominantly single-family residential neighborhoods (the areas outside of the centers and corridors) will see limited new housing

⁴ The City’s Supplemental Excerpt of Record also contains portions of the Growth Scenarios Report. The City cites this page of the Growth Scenarios report as SER-96.

development and will remain single family residential neighborhoods.” (ER-30.) The City asserts that this reference to “single-family” neighborhoods encompasses neighborhoods that will be redeveloped with middle housing. (City Br. 23.) That interpretation is inconsistent with the report’s conclusion that neighborhoods outside of centers and corridors will see “limited new housing development.” Moreover, the very next sentence in the report clarifies that the capacity for development in these neighborhoods is limited to “detached or attached homes on their own lot.”⁵ (*Id.*) Middle housing types include multiple dwelling units on an individual lot, such as triplexes and four-plexes. (SER-78.) The growth encouraged by middle housing policy therefore contradicts the City’s Task 3 conclusion that limited new development will occur in neighborhoods outside of centers and corridors.

C. Future City process is not a substitute for LCDC compliance with periodic review requirements

The City argues that the City’s local requirements for zoning code amendments ensure that middle housing policy will comply with state law as implemented. (City Br. 18-19.) State law however requires LCDC to determine whether the City’s periodic review work product complies with the statewide

⁵ This discussion in the Growth Scenarios Report describes the capacity for new development under the July 2014 draft comprehensive plan. As noted above and in Petitioner’s Opening Brief, this draft predates the City’s introduction of middle housing policy.

planning goals and the City's work program within the periodic review process. *See* ORS 197.633(3)(c); OAR 660-025-0150(8). The City's local policy implementation process outside of periodic review therefore does not excuse LCDC from compliance with periodic review requirements.

Moreover, LCDC has limited authority over the City's zoning code amendments and LCDC has not shown an inclination to oversee the City's work. Petitioner's opening brief describes how DLCD and LCDC must choose to actively participate in the City's zoning code amendment process in order to exercise oversight of the City's implementation of middle housing policy. (Pet'r Br. 30-31.) The periodic review process, by contrast, requires LCDC to conduct an independent evaluation of the City's policy decisions and to approve or reject these decisions.

The record indicates that DLCD and LCDC have not exercised the required oversight in this case. DLCD's and LCDC's decisions simply repeat the City's Task 4 findings regarding middle housing policy and do not consider whether the policy is consistent with the City's prior periodic review work approved by DLCD. (*Compare* ER-118 to 119 *with* ER-165 and Rec. 649 to 50.) Neither set of state findings cite evidence in the record that supports the City's findings. LCDC simply asserts that the City's findings are based on "additional materials

in the record.”⁶ (ER-165.)

Moreover, LCDC shifted the burden of proof to Petitioner to demonstrate that middle housing policy will not achieve the City’s stated goals for the policy. Specifically, LCDC asserted that Petitioner’s argument that the policy could result in demolition of less expensive housing “is not supported by the evidence in this record” (ER-165) but did not identify evidence in the record that supports the policy. It is the City’s burden to demonstrate that the policy is supported by the City’s factual and policy analysis, not Petitioner’s burden to show the opposite. (ER-3, 6 to 8.)

The City’s briefing regarding Statewide Planning Goal 10 further highlights LCDC’s failure in this case. The City implies that middle housing policy is needed for the City to comply with the Goal 10 requirement to provide for needed housing. (City Br. 20-22.) Goal 10, however, requires the City to define needed housing through a specific analysis called a housing needs projection. *See* OAR 660-008-0005(4) and 660-008-0010. The City completed this analysis in Task 2. (ER-6.) As described in Petitioner’s Opening Brief, the City’s Task 2 work product did not identify a need for zoning code changes to support middle housing. On the contrary, the City touted the increase that is occurring in this type of housing and other forms of multi-family housing under

⁶ DLCD’s findings cite to four pages in the record, but those pages do not discuss middle housing. (*See* Rec. 651 n.1 and Rec. 23354-57.)

existing City rules. (Pet'r Br. 6-7.)

The City appears to contend that it subsequently determined in Task 4 that code changes are needed to encourage middle housing pursuant to Goal 10. (City Br. 20-22.) If that is the case, then it is LCDC's responsibility to require the City to justify through housing needs analysis that middle housing policy will actually produce the type of housing that the City needs. LCDC did not do so and therefore violated its obligations under ORS 197.633(3)(c) and OAR 660-025-0150(8).

D. The City did not implement middle housing policy in Task 5

The City argues that it implemented middle housing policy "in a limited manner by rezoning some property to R2.5" in Task 5 of periodic review (City Br. 29.) The City's findings for its Task 5 ordinance explain that this rezoning "directly addresses *Comprehensive Plan* policies 5.21 through 5.23," not middle housing policy 5.6 (emphasis in original). (Rec. 1328.) Although this portion of the ordinance findings does include the text of policy 5.6, the findings do not state that the R2.5 zoning map change implements middle housing policy, nor do the findings otherwise explain the reference to policy 5.6. (Rec. 1328-1329.)

Unlike middle housing policy, the Task 5 zoning map changes are grounded in the City's prior periodic review work. The Task 5 ordinance findings state that the zoning map changes "increase housing options in opportunity-rich locations close to the Central City." (Rec. 1328.) This reflects the City's Task 3 analysis and recommendation of a central city-focused growth pattern. Indeed,

comprehensive plan policies 5.21 through 5.23 appear in the July 2014 comprehensive plan draft that predates the Growth Scenarios Report. (Rec. 32618-19.) The policies are also supported by “housing opportunity” analysis and mapping that indicates higher opportunity around the central city area. (Rec. 32618 and 32624; 14940 and 14945.) Finally, the change in R2.5 zoning geography is limited to specific corridors in inner southeast Portland that are adjacent to the central city. (Rec. 1326.)

The City admits that middle housing policy “applies in all zones,” (City Br. 19), which means that the policy is much broader than the R2.5 zoning map changes the City adopted in Task 5. As a practical matter, middle housing policy most impacts single family neighborhoods with less dense residential zoning designations such as R5 because other zones generally allow middle housing types and other larger multi-family buildings. (SER-89; ER-23; App 8.)

The record indicates that the City is implementing middle housing policy outside of periodic review through the City’s Residential Infill Project. (Rec. 197; 22375.)⁷ The City therefore did not implement middle housing policy through Task 5 mapping changes to the R2.5 zone.

⁷ See also SER-78, noting that the City “is considering expanded range of housing types in all or some R5, with Residential Infill Project.” This page in the City’s Supplemental Excerpt of Record is taken from a February 2, 2016 City Council work session package. (Rec. 23533.)

III. CONCLUSION

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

Respectfully submitted,

GELARDI LAW P.C.

By /s/*Michael J. Gelardi*

Michael J. Gelardi, OSB 083347

mike@gelardilaw.com

Attorney for Petitioner

**COMBINED CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS,
AND CERTIFICATES OF FILING AND SERVICE**

I certify that this PETITIONER'S REPLY BRIEF complies with the word-count limitation in ORAP 5.05. The word count of this brief is 3,094 words.

I certify that the size and type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

I certify that on this date, I filed this brief with the State Court Administrator by the Oregon Judicial Department's Appellate eFiling system.

I certify that service of a copy of this brief on the following participants in this case, who are registered users of the Oregon Judicial Department's Appellate eFiling system at the participants' email addresses as recorded on this date in the appellate eFiling system:

Philip M. Thoennes, OSB 154355
Linly F. Rees, OSB 945098

I further certify that I have this date served each participant in this case who is not being served by the appellate courts' eFiling system by mailing two copies, with postage prepaid, in an envelope at the following address:

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

DATED: July 24, 2019

GELARDI LAW P.C.

By /s/Michael J. Gelardi

Michael J. Gelardi, OSB 083347
mike@gelardilaw.com
Attorney for Petitioner