

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

MULTNOMAH NEIGHBORHOOD
ASSOCIATION,

Petitioner;

v.

LAND CONSERVATION AND
DEVELOPMENT COMMISSION OF
THE STATE OF OREGON

and

CITY OF PORTLAND,

Respondents.

LCDC Order 18-WKTSK—001897

CA No. A168704

PETITIONER’S PETITION FOR RECONSIDERATION

The court has issued a decision in this case that is inconsistent with Court of Appeals precedent without providing an opinion to explain the discrepancy. The court’s decision is contrary to law because it approves actions by Respondent Oregon Land Conservation and Development Commission (“LCDC”) that are inconsistent with the periodic review statutes and that undermine the purpose of these statutes. Petitioner therefore requests that the court reconsider the court’s decision pursuant to ORAP 6.25(1)(e).

State law requires LCDC to periodically review the comprehensive plans and zoning regulations of Oregon cities and counties. This is a complex process with long term consequences for local planning and development across the state. *See, e.g., Hummel v. LCDC*, 152 Or App 404, 954 P2d 824 (1998).

The only case that that squarely concerns the process of periodic review is *Hummel*. The *Hummel* court derived two key rules from the periodic review statutes. First, the *Hummel* court explained that the statutes require LCDC to ensure that a local government’s periodic review work product is internally consistent and complies with the Statewide Planning Goals:

“When a later work task conflicts with a work task that has been deemed acknowledged, or when a later work task violates a goal related to a previous work task, DLCD and LCDC will not approve the submission until all conflicts and goal compliance issues are resolved. OAR 660-25-140(5).”

Id. at 410.

Second, *Hummel* establishes that a local government’s “revised comprehensive plan and land use regulations must comply with all of the goals at the conclusion of the [periodic review] process, when they become effective.” *Id.*

The *Hummel* court upheld LCDC’s approval of the expansion of the City of Brookings’ urban growth boundary (“UGB”) by applying these two rules. Specifically, the court reasoned that the city had analyzed whether the city could implement its UGB expansion consistent with the Statewide Planning Goals and

the city had found that it could feasibly comply with the goals. Second, the court noted that the city planned to implement the UGB expansion with oversight from LCDC in a later periodic review work task. The court therefore upheld LCDC's decision in *Hummel* because the city and LCDC had applied the Statewide Planning Goals to the UGB decision and would take further action to ensure compliance with these goals before concluding the periodic review process. *Id.* at 413-14.

In this case, by contrast, the Respondent City of Portland ("City") and LCDC did not evaluate whether middle housing policy would comply with the Statewide Planning Goals. This is because the City did not develop the policy until late in the periodic review process, after the City's relevant goal analysis. (*See* Pet'r Br. 25-28; Reply 7-9.) Moreover, the City did not implement the policy as part of its periodic review work. (*See* Pet'r Br. 28-33; Reply 12-13.) *Hummel* therefore dictates that LCDC's decision in the instant case must be remanded to the City to: (1) ensure that middle housing policy is consistent with the City's periodic review policy analysis; and (2) require the City to implement the policy consistent with the Statewide Planning Goals before concluding the periodic review process.

Despite the *Hummel* precedent, the court affirmed LCDC's decision in the instant case without opinion. This decision denies local governments and the public guidance to resolve the discrepancy between *Hummel* and the court's

decision in this case.¹ The court should therefore reconsider its decision in order to reconcile this case with *Hummel*.

If the court does not reconsider its decision, this case will reallocate authority between LCDC and local governments contrary to the legislative intent of the periodic review statutes. The legislature has given responsibility to LCDC to oversee the periodic review of local comprehensive plans and zoning regulations and to require changes to these regulations as needed meet the Statewide Planning Goals. (*See* Pet'r Br. 19-20.) In this case, the City skirted LCDC oversight of middle housing policy by excluding the policy from the City's analysis of policy alternatives and by diverting implementation of the policy to a local process outside of periodic review. (*See* Pet'r Br. 23-33.) The Department of Land Conservation and Development and LCDC allowed this to occur because they failed to evaluate whether middle housing policy was consistent with the City's periodic review policy analysis and with the Statewide Planning Goals.² The court's decision excuses LCDC's failure to meet its obligations under the periodic

¹ Unlike most land use cases, periodic review appeals are not heard by the Land Use Board of Appeals. There is therefore no lower court opinion to explain the outcome of this case.

² The record does not contain any report or other analysis by the Department of Land Conservation and Development of the City's compliance with the City's work program or the Statewide Planning Goals. (*See* Pet'r Br. 26 n.7.) LCDC's decision in this case simply summarizes the City's findings in support of middle housing policy and neither the City nor LCDC cite any evidence to support these findings. (*See* Pet'r Br. 37-38; Reply 10-11.)

review statutes. The court's decision also validates the City's adoption of a policy without an adequate factual basis and the City's actions to avoid oversight of this decision.

The precedent allows other local governments to exclude controversial land use decisions from their periodic review work in order to avoid state review. This result undermines the oversight purpose of the periodic review statutes, turning periodic review into a meaningless bureaucratic exercise that does not inform or improve policymaking.

For these reasons, Petitioner respectfully requests that the court reconsider its decision to affirm LCDC's decision without opinion.

DATED: February 10, 2020.

GELARDI LAW P.C.

By /s/ *Michael J. Gelardi*

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CERTIFICATE OF FILING AND SERVICE

Pursuant to ORAP 16.25, I certify that on February 10, 2020, I caused the foregoing PETITION FOR RECONSIDERATION to be filed with the Court of Appeals through the Oregon Judicial Department's eFiling System.

I further certify that, pursuant to ORAP 16.45, the foregoing PETITION FOR RECONSIDERATION was electronically served on February 10, 2020, on the following through the Oregon Judicial Department's eFiling System:

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