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1 **INTERVENORS' FIRST ASSIGNMENT OF ERROR**

2 **Goal 10 and Goal 15 do not conflict.**

3 This appeal's bedrock principle is that the Legislature intended to give
4 meaning to both **Goal 10 Housing** and **Goal 15 Willamette River**
5 **Greenway**, not to place one goal above the other. ORS 174.010¹

6 Adopting clear-and-objective middle housing standards within
7 the Willamette River Greenway ("WRG") would meet both goals.

8 In OAR 660-0010(3)(f), DLCD correctly harmonized Goal 10, Goal
9 15, ORS 197.307(4), and ORS 197.758. To find otherwise would cause
10 sweeping disruption throughout the entire WRG .

11 Responses by the City and Intervenors-Respondent Johnson,
12 Kloos, and Mulkey flout the spirit of Senate Bill 100, as well as
13 ORS 174.010, and manufacture conflict where there is none – except for
14 conflicts arising from the City's indisputably failed process.²

15 **The Legislature intended to allow Middle Housing in the Greenway**
16 **under clear-and-objective standards.**

17 It would be absurd to believe the Legislature was intent on allowing
18 middle housing in the WRG and nonetheless would still allow

1 "where there are several provisions or particulars such construction
is, if possible, to be adopted as will give effect to all."

2 "the City failed to amend its code to come into compliance with the
Act [HB2001], * * *" Kloos 17

1 jurisdictions to apply onerous, discretionary standards as “barriers” to
2 middle housing in the Greenway.

3 **The City knew what it had to do and failed.**

4 Extensive evidence in the record leaves no doubt that the City *knew*
5 what was necessary to comply with Goal 15, but failed to act.

6 Petition 3-28. In a complete turnabout, the City now argues it’s not
7 required to do anything in this regard.

8 **Affirming Ordinance No. 20667 would ultimately nullify most WRG**
9 **standards for middle housing.**

10 Affirming the ordinance with respect to Goal 15 requirements would
11 essentially allow an approval process for *all* “middle housing”
12 development in Eugene’s WRG that would not require such
13 developments to meet a single standard to “protect, conserve, enhance
14 * * * the Willamette River Greenway.”

15 **Consequences of affirming the ordinance**

16 The City’s unmistakable position is that Ordinance No. 20667 would
17 allow *all* middle housing types within the WRG, subject *only* to
18 *discretionary* WRG permit standards.

19 That approach would conflict with ORS 197.307(4). An applicant
20 for a WRG permit for (e.g.) a fourplex could successfully appeal any
21 denial based on *discretionary* WRG permit standard(s). Thereafter, the
22 City could not apply *any* of the current WRG permit standards to
23 middle housing.

1 Intervenor Kloos essentially agrees the above scenario would
2 result from the City's position, but Kloos posits a "fail-safe framework":

3 "[T]he Model Code applies when the City fails to act, as the City
4 did here with respect to the Greenway.

5 * * *

6 "Thus, because the City failed to amend its code to come into
7 compliance with the Act, the Model Code applies directly * * *."

8 Kloos 15-16.

9 Obviously, affirming Ordinance No. 20667 would establish that *the City*
10 *did not fail to act*; and eliminate any basis for the Model Code to apply.

11 In contrast, the City argues that, although the current WRG permit
12 standards require "subjective analysis" (Resp. 21) ...

13 "[T]he requirements of Goal 15 supersede the requirements of
14 ORS 197.307(4). Response 25

15 * * *

16 "The plain Language of ORS 197.758(5) clearly indicates that the
17 Legislature intended the more particular requirements of
18 ORS 390.314 and Goal 15 to take precedence over the general
19 requirement for clear and objective standards for middle housing
20 located on lands within the Willamette River Greenway." *Ibid* 27

21 The City contends that middle housing anywhere within the entire
22 WRG – *not just Eugene* – can be approved *or denied* based on subjective
23 approval criteria. This is a sweeping conclusion that would impact
24 zoning up and down the Willamette River and is unsupported in
25 ORS 197.758(5), legislative history, or case law.

1 Among the “barriers” to housing which the Legislature
2 historically sought to remove were *discretionary* standards.³ Yet, the City
3 argues the 2019 Legislature adopted a statute that would allow Eugene
4 to apply onerous discretionary standards as barriers serving to exclude
5 middle (and other) housing from the WRG. That argument is pure
6 nonsense and a cynical misrepresentation of the intent of HB 2001.

7 **HB 2001 did not nullify applicable laws.**

8 The City and Intervenors-Respondent attempt to treat HB 2001 as
9 nullifying whatever goal, statute, or rule they don't like.

10 Intervenor Johnson's response is the most extreme example.

11 “[ORS 197.758] was specifically intended and worded to bypass
12 those [goal] requirements * * *.” *Ibid* 5.

13 ORS 197.758 renders otherwise applicable goals, rules, and local
14 land use regulations inapplicable.” *Ibid*.

15 Johnson's brief provides nothing to support “bypassing” or “rendering
16 inapplicable” all goal requirements.⁴

17 The HB 2001 text contradicts Johnson's claim:

18 “SECTION 10. (1) It is the policy of the State of Oregon to reduce
19 *to the extent practicable* administrative and permitting costs and
20 barriers to the construction of middle housing, as defined in
21 section 2 of this 2019 Act, *while maintaining safety, public health*

³ EC 9.8815(1) criterion “to the greatest possible degree” could be applied to “discourage” middle housing development.

⁴ Johnson's response doesn't address any specifics in Intervenors-Petitioner's assignments of error.

1 *and the general welfare* with respect to construction and
2 occupancy." (Emphasis added)

3 None of the City's and Intervenors-Respondent's arguments that
4 depend on presumed conflict(s) among the goals, statutes, and OAR
5 have merit.

6 **OAR 660-0010(3)(f) doesn't conflict with ORS 197.758.**

7 ORS 197.758 provisions are clear:

- 8 • Section (3) requires the City to "allow the development of a duplex
9 on each lot or parcel zoned for residential use that allows for the
10 development of detached single-family dwellings."
- 11 • Section (5) allows the City to "regulate middle housing to comply
12 with protective measures adopted pursuant to statewide land use
13 planning goals."
- 14 • Oregon Laws 639(3)(2) requires DLCD to create a "model middle
15 housing ordinance."
- 16 • ORS 197.040(1)(b) and HB 2001 Subsection 14(2) authorize DLCD
17 to adopt middle housing OAR.

18 There's no dispute that DLCD had authority to adopt OAR 660-046-0000
19 *et seq.* The City contests only subsection OAR 660-0010(3)(f). However, if
20 the Board were to affirm the ordinance, the same arguments could
21 potentially void many other protective measures adopted pursuant to
22 statewide goals.

1 The City erroneously asserts “ORS 197.758’s use of the term
2 ‘regulate’ means something less than ‘prohibit.’” Resp 24. That’s simply
3 wrong – regulations commonly include prohibitions.

4 That semantic error leads to the City’s erroneous argument:

5 “Because ORS 197.758 requires cities to *allow the development of*
6 *middle housing, but also allows cities to regulate that*
7 *development to comply with Goal 15, the Board should*
8 *recognize that the Legislature did not intend to prohibit middle*
9 *housing within the areas subject to Goal 15, where subjective*
10 *criteria must be applied.” Resp. 24*

11 In fact, the two distinct parts of ORS 197.758(5) demonstrate the
12 opposite. Whereas the *general* provision for regulation is strictly
13 constrained to “siting and design,” the more *specific* regulation for
14 protective measures pursuant to goals has no such constraint.

15 As demonstrated under the first and second subassignments of
16 error, the ordinance conflicts with OAR 660-0010(3)(f) by allowing
17 development of middle housing in the WRG when the applicable
18 approval criteria that implement Goal 15 are not clear and objective.⁵

19 The City argues “that the Legislature did not intend to prohibit
20 middle housing within areas subject to Goal 15.” Resp. 24 Intervenors-
21 Petitioner agree, but that’s beside the point.

⁵ The Model Code carves out duplexes, based on ORS 197.758(3), which reinforces DLCDC’s interpretation that ORS 197.758(5) *does* allow prohibition of other middle housing types within “Goal Protected Lands.”

1 Nothing supports the claim that the Legislature abandoned its
2 intent that housing standards comply with ORS 197.307(4) in the WRG.
3 The City clearly understood that both Goal 15 and ORS 197.307(4)
4 requirements applied to middle housing code amendments, but the City
5 seeks to dodge accountability for their failure to meet these
6 requirements.

7 ORS 197.758(5) doesn't "create an exception from the clear and
8 objective requirement" (Resp. 26), and the Board cannot let the City's
9 failures justify a sweeping new effect of HB 2001 – especially one that's
10 not necessary. (ORS 174.010 "not to insert what has been omitted.")

11 The City falsely claims that, if the Model Code were imposed, it
12 would prohibit middle housing, including duplexes, in the WRG.
13 Resp. 30-31. Although irrelevant to this appeal, the Model Code *would*
14 allow duplexes; but duplexes would not be subject to any criteria related
15 to the WRG, as explained above.

16 **Subassignment 1**

17 The City acknowledges that Goal 15 requires a review process for
18 individual applications. However, the City's current process is
19 noncompliant with ORS 197.307(4) and consequently ineffective to
20 "insure [sic] their [applications'] compatibility with the Willamette River
21 Greenway." OAR 660-015-0005(F)(3).

22 Further, the ordinance amended the comprehensive plan to
23 eliminate density maximums for middle housing, including within the

1 WRG. Record 143. That PAPA required DLCD approval for consistency
2 with Goal 15. Neither the City nor DLCD analyzed (i.e., reviewed) the
3 impacts of the plan and code amendments or acted to ensure the current
4 WRG application review process would conform to Goal 15
5 requirements.

6 Kloos's claim that HB 2001 mandates middle housing (Kloos 9) is
7 inarguable but has nothing to do with Intervenors' challenge to the
8 ordinance's failure to conform to Goal 15.

9 Kloos creates a "straw man" by falsely claiming that Intervenors-
10 Petitioner believe a review is required for all duplexes in the WRG.
11 *Ibid* 17. That's neither stated nor implied in the petition. Where duplexes
12 have already been allowed, the City may find that the review of
13 duplexes' impact on the WRG has already been done.

14 Kloos's several arguments that depend on his "fail-safe
15 framework" have been addressed *supra*. *Ibid* 15(a), 18(c). The Model
16 Code will *not* go into effect if the Board affirms the ordinance.

17

18 **Subassignment 2.**

19 Mulkey repeats several City arguments, particularly that ORS 197.758
20 cancels the requirements of ORS 197.307 within the WRG and that OAR
21 660-046-010(f) is invalid, which are addressed *supra*.

22 Mulkey also argues that – even if ORS 197.307(4) applies within
23 the WRG, the City's failure to address Goal 15 can be challenged only by

1 “require[ing] the City to change that portion of the Greenway code.”
2 Mulkey 10. Mulkey doesn’t explain how Intervenors-Petitioner (or
3 anyone) could *require* such a change from the City other than by this
4 appeal.

5 The ordinance amended Eugene Land Use Code under sections
6 9.2700 to 9.2777 Residential Zones and 9.5550 Middle Housing
7 Development Standards to allow middle housing in all residential
8 zones. Previously, various forms of middle housing were permitted only
9 in certain zones (or under Planned Unit Developments). For example,
10 townhouses were previously not permitted in Eugene’s R-1 Zone, which
11 covers much of the WRG.

12 The ordinance now permits middle housing, including
13 townhouses, in R-1 areas of the WRG, which the City asserts will require
14 meeting a set of *discretionary* standards.

15 Consequently, an applicant cannot get approval for a proposed
16 townhouse on an R-1 lot in the WRG without the City’s approval that
17 the proposal meets standards that are *not* clear and objective. Thus, the
18 ordinance does not comply with ORS 197.307(4), ORS 215.416(8)(b),
19 ORS 197.831, and/or OAR 660-046-010(f).

20 Kloos’s argument that the Greenway standards can’t be
21 challenged is moot because Intervenors-Petitioner don’t challenge the
22 Greenway standards. Kloos 18(d) (*See* Intervenors’ Petition at 36.)

23

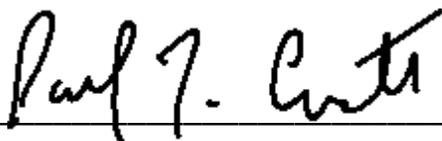
1 **Subassignment 3.**

2 The City's and Kloos's argument that findings are not required is
3 inapposite because the City has *chosen* to adopt a finding for Goal 15.
4 That finding expresses the results of elected officials' "consideration" of
5 Goal 15 conformance.

6 The finding states only that Goal 15 is inapplicable because the
7 ordinance didn't amend the WRG permit code in any substantive way.

8 That finding is inadequate to support the City's argument that
9 Goal 15 trumps ORS 197.307(4).

10 Respectfully submitted on December 23, 2022,

11 

12 Paul T. Conte, Intervenor-Petitioner

13 
14 _____
Gary Nance, Intervenor-Petitioner

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation of 2,000 words allowed by the Board's order, and (2) the word count of this brief as described in OAR 661-010-0030(2)(b) is 1,999 words according to the MS Word document statistics.

Type Size

I certify that the size of the "Palatino Linotype" proportional type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by OAR 661-010-0030(2)(e).

Dated: December 23, 2022.

A handwritten signature in black ink, appearing to read "Paul T. Conte", written over a horizontal line.

Paul T. Conte
Intervenor-Petitioner

CERTIFICATE OF FILING & SERVICE

I hereby certify that on December 23, 2022, I filed by certified, first-class mail, postage prepaid, an original and one copy of the foregoing REPLY on the Oregon Land Use Board of Appeals at DSL Building, 775 Summer Street NE, Suite 330, Salem OR 97301-1283.

I also certify that on December 23, 2022, I served a true and correct copy of the REPLY by First Class Mail to the following persons:

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