

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

CAMRON SETTLEMIER,
Petitioner,

vs.

CITY OF ALBANY,
Respondent.

LUBA No. 2020-107

FINAL OPINION
AND ORDER

Appeal from City of Albany.

Camron Settlemier filed the petition for review and reply brief and argued on behalf of himself.

M. Sean Kidd filed the response brief and argued on behalf of respondent.

RYAN, Board Member; RUDD, Board Chair, participated in the decision.

ZAMUDIO, Board Member, did not participate in the decision.

AFFIRMED 05/27/2021

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals Ordinance 5949, which amends the Albany Development Code to implement new state legislation.

BACKGROUND

In 2017, the Oregon legislature enacted Senate Bill (SB) 1051 (2017), which amended ORS 197.312 to provide that

“[a] city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas that are zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design.” Or Laws 2017, ch 745, § 6.

That language is codified at ORS 197.312(5)(a). The legislative policy underlying SB 1051 is to increase available housing. *Warren v. Washington County*, 296 Or App 595, 600, 439 P3d 581, *rev den*, 365 Or 502 (2019). In 2019, the legislature enacted House Bill (HB) 2001 (2019), which further amended ORS 197.312 to provide that “[r]easonable local regulations relating to siting and design’ does not include owner-occupancy requirements of either the primary or accessory structure or requirements to construct additional off-street parking.” Or Laws 2019, ch 639, § 7. That language is codified at ORS 197.312(5)(b)(B).

HB 2001 also requires cities with a population of 25,000 or more to allow the development of

1 “(a) All middle housing types in areas zoned for residential use
2 that allow for the development of detached single-family
3 dwellings; and

4 “(b) A duplex on each lot or parcel zoned for residential use that
5 allows for the development of detached single-family
6 dwellings.” Or Laws 2019, ch 639, § 2.

7 That language is codified at ORS 197.758(2).¹

8 ORS 197.646(1) provides:

9 “A local government shall amend its acknowledged comprehensive
10 plan * * * and land use regulations implementing [the] plan by a
11 self-initiated post-acknowledgment process under ORS 197.610 to
12 197.625 to comply with a new requirement in land use statutes,
13 statewide land use planning goals or rules implementing the statutes
14 or the goals.”

15 In 2020, the city began proceedings to amend the Albany Development Code
16 (ADC) to implement HB 2001.

17 As relevant to this appeal, the amendments increase the maximum size of
18 an allowed accessory dwelling unit (ADU) from the lesser of 750 square feet or
19 50 percent of the square footage of the primary residence to the lesser of 900
20 square feet or 50 percent of the square footage of the primary residence.
21 Supplemental Record 20. On September 28, 2020, the planning commission held
22 a public hearing on the amendments and, at the conclusion, voted to recommend
23 to the city council that the amendments be adopted. On October 14, 2020, the city

¹ ORS 197.758(1)(b) defines “middle housing” to mean duplexes, triplexes, quadplexes, cottage clusters, and townhouses.

1 council held a public hearing on the amendments, at which petitioner presented
2 written and verbal testimony. At the conclusion of that hearing, the city council
3 voted to adopt the amendments. This appeal followed.

4 **FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR**

5 Petitioner's first, second, and third assignments of error contain
6 overlapping arguments, and we address them together.

7 **A. Standard of Review**

8 ORS 197.835(7)(a) requires LUBA to reverse or remand an amendment to
9 a land use regulation that is "not in compliance with the comprehensive plan."
10 The challenged decision is a legislative decision. Although there is no statutory
11 requirement to adopt findings in support of a legislative decision, *former* ADC
12 1.630(1) (July 11, 2018) provides that, "[i]n reaching a decision on a legislative
13 matter, the Council shall adopt findings applicable to the relevant policies and
14 criteria in support of the decision."²

15 **B. *Former* ADC 1.630(1) (July 11, 2018) Requirement for Findings**

16 As noted, petitioner presented written and verbal testimony on the
17 amendments at the October 14, 2020 city council hearing. In all three assignments
18 of error, petitioner argues that the city council erred in failing to adopt findings
19 that respond to their testimony from the October 14, 2020 city council hearing.

² In January 2021, *former* ADC 1.630(1) (July 11, 2018) was renumbered as ADC 1.260(6)(a) but otherwise left unchanged.

1 The city responds, and we agree, that *former* ADC 1.630(1) (July 11, 2018)
2 does not require the city to adopt findings that respond to testimony, arguments,
3 or evidence presented to the city council. It merely requires the city to adopt
4 findings in support of the decision that address “relevant policies and criteria.”
5 The city council did so, and petitioner does not challenge any of the findings that
6 the city adopted.³ Petitioner points to no other basis for requiring the city to adopt
7 findings that respond to their testimony and evidence. Accordingly, petitioner’s
8 argument under all three assignments of error provides no basis for reversal or
9 remand of the decision.

10 **C. First Assignment of Error**

11 In their first assignment of error, petitioner argues that the amendments are
12 not in compliance with the following Albany Comprehensive Plan (ACP)
13 provisions: ACP Goal 5; ACP Goal 5, Policy 3(c); and ACP Goal 5,
14 Implementation Method 8.⁴ According to petitioner, by allowing larger ADUs in

³ In their second assignment of error, petitioner quotes a finding from a staff report at Record 319 that the city council incorporated into the decision, but petitioner does not explain why that finding demonstrates that the city council did not comply with *former* ADC 1.630(1) (July 11, 2018). Petition for Review 14.

⁴ ACP Goal 5 is to “[p]rotect Albany’s historic resources and utilize and enhance those resources for Albany residents and visitors.” ACP Goal 5, Policy 3(c), provides that the city will maintain historic review ordinances for historic structures and districts to “[e]nsure that the design of new construction within historic districts does not detract from the architectural qualities of the district.” ACP Goal 5, Implementation Method 8, is to “[d]evelop review criteria which

1 some circumstances, the amendments effectively change the existing single-
2 family residential zoning in the Hackleman and Monteith Historic Districts by
3 allowing multi-family residential uses at a higher density. Petitioner also argues
4 that the increased maximum ADU size changes the character of neighborhoods
5 in a manner that is inconsistent with ADC 1.020(9), ADC 3.010, and ADC
6 3.020(7).⁵

would discourage those zone changes resulting in increased pressure to replace historic structures with more intense land uses.”

The petition for review references ACP Goal 5, Implementation Method 7(c), and ACP Goal 10, Policies 10 and 11, but petitioner does not develop any argument that the amendments do not comply with those provisions. Petition for Review 6. ACP Goal 10, Policy 10, is to “[p]reserve and enhance Albany’s historic housing as a unique and valuable resource.” ACP Goal 10, Policy 11, is to “[p]romote the conservation of existing housing by supporting programs that rehabilitate and upgrade substandard and deteriorating units.”

⁵ ADC 1.020(9) provides that one of the purposes of the ADC is to “[p]rotect and enhance the city’s beauty and character.”

ADC 3.010 provides:

“The residential zones are intended to preserve land for housing. This Code preserves the character of neighborhoods by providing seven zones with different density standards. The site development standards allow for flexibility of development while maintaining compatibility within the City’s various neighborhoods. These regulations provide certainty to property owners, developers and neighbors by stating the allowed uses and development standards for the base zones. Sites within overlay districts are also subject to the regulations in Articles 6 and 7.”

ADC 3.020(7) provides, “The [Hackleman-Monteith] district is intended primarily to preserve the existing single-family residential character of the

1 The city responds that petitioner has not established that the increased
2 maximum ADU size fails to comply with any of the provisions cited in the
3 petition for review and that the city’s allowance of multi-family residential
4 structures in single-family zones is consistent with the requirement in ORS
5 197.758(2) that the city allow middle housing. The city also responds that, to the
6 extent that petitioner argues that the amendments amend the criteria for new
7 construction in historic districts, petitioner is wrong.

8 We agree. Petitioner disagrees with the amendments, but they have not
9 developed any cognizable argument that the increased maximum ADU size fails
10 to comply with any provisions of the ACP or ADC.⁶

11 **D. Second Assignment of Error**

12 In their second assignment of error, petitioner argues that the amendments
13 fail to comply with ACP Goal 10, Policy 16, which is to “[e]ncourage the
14 development of a range of affordable housing in a range of types and appropriate
15 sizes to meet Albany’s housing needs. Examples include accessory apartments,
16 manufactured housing, and attached single-family houses.” Petitioner argues that
17 allowing larger ADUs effectively allows two houses on one lot and that the

Hackleman and Monteith National Register Historic Districts. Conversion of single-family residential structures to other uses, including multi-family residential, is not allowed.”

⁶ Petitioner does not argue that the city erred in failing to contemporaneously amend the ACP to implement the provisions of HB 2001.

1 amendments will result in the demolition of existing single-family houses and the
2 construction of two expensive houses on the same lot, with one being an ADU.

3 The city responds, and we agree, that petitioner's argument amounts to a
4 disagreement with the increased maximum ADU size and does not come close to
5 demonstrating that the amendments fail to comply with ACP Goal 10, Policy 16.

6 The second assignment of error is denied.

7 **E. Third Assignment of Error**

8 In their third assignment of error, petitioner argues that the amendments
9 fail to comply with ACP Goal 12, Policy 5, and ADC 1.020(7) (July 11, 2018),
10 which both relate to transportation, and ADC 1.020(8) (July 11, 2018), which
11 relates to design safety.

12 ACP Goal 12, Policy 5, is to "[e]ncourage development design that
13 emphasizes safety and does not create unnecessary conflicts." ADC 1.020(7)
14 (July 11, 2018) provides that one of the purposes of the ADC is to "provide for
15 review and approval of the relationship between land uses and traffic circulation
16 in order to minimize congestion, with particular emphasis on not exceeding the
17 planned capacity of residential streets." According to petitioner, allowing larger
18 ADUs is inconsistent with those provisions because, as petitioner testified before
19 the city council, "[a]llowing ADUs up to 900 square feet allows double the
20 population density in developed neighborhoods. Neighborhoods that were never
21 designed for double the traffic and congestion. * * * These streets and the traffic
22 patterns were never designed to support two houses per lot." Record 303.

1 The city council did not address ACP Goal 12, Policy 5, or ADC 1.020(7)
2 (July 11, 2018) in the findings, and the city responds in its brief that the city
3 council was not required to do so because those provisions are not “relevant
4 policies and criteria” within the meaning of *former* ADC 1.630(1) (July 11,
5 2018). In addition, the city points out that HB 2001 provides that a local
6 government is not required to consider whether amendments to its development
7 code to allow middle housing “significantly affect an existing or planned
8 transportation facility.” Or Laws 2019, ch 639, § 3. In HB 2001, the legislature
9 has determined that the effect of middle housing on traffic is not a barrier to
10 implementing that legislation’s requirements.

11 We agree with the city. Petitioner has failed to develop any argument that
12 anything in the amendments fails to comply with ACP Goal 12, Policy 5, or ADC
13 1.020(7) (July 11, 2018).

14 Petitioner also argues that allowing larger ADUs fails to comply with ADC
15 1.020(8) (July 11, 2018), which requires that “development designs provide
16 reasonable protection from fire.” Petitioner argues that “existing residential
17 neighborhoods were never originally designed to accommodate the size of a 900
18 square foot ADU addition,” that the existing neighborhoods were originally built
19 with spacing to prevent the spread of fire, and that allowing ADUs will make it
20 easier for fires to spread quickly. Petition for Review 18.

21 The city council did not adopt any findings addressing ADC 1.020(8) (July
22 11, 2018), and the city responds that it was not required to do so because ADC

1 1.020(8) (July 11, 2018) is not a relevant policy or criterion. We agree. Petitioner
2 has not established that the amendments fail to comply with ADC 1.020(8) (July
3 11, 2018).

4 Fundamentally, petitioner's disagreement is with the statutory mandate
5 that the city allow ADUs and middle housing in all areas zoned for residential
6 use. Petitioner disagrees with that statutory mandate, but ORS 197.646(1)
7 requires the city to implement the statute, and petitioner has not established that
8 the city has done so in a way that fails to comply with the ACP and the ADC.

9 The third assignment of error is denied.

10 The city's decision is affirmed.