

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

3
4 JEFF NELSON,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF HILLSBORO,
10 *Respondent,*

11
12 and

13
14 HENRY POINT DEVELOPMENT, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2022-035

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Hillsboro.

23
24 Kenneth P. Dobson filed a petition for review and reply brief and argued
25 on behalf of petitioner.

26
27 Chad A. Jacobs filed a joint response brief and argued on behalf of
28 respondent.

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30 Christen C. White filed a joint response brief and argued on behalf of
31 intervenor-respondent.

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33 RYAN, Board Member; RUDD, Board Member, participated in the
34 decision.

35
36 ZAMUDIO, Board Chair, did not participate in this decision.

37
38 AFFIRMED

08/19/2022

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

NATURE OF THE DECISION

Petitioner appeals a decision by the planning commission approving an application for redevelopment of a bank building with an adjacent drive-through canopy.

MOTIONS TO TAKE OFFICIAL NOTICE

In their joint response brief, the city and intervenor-respondent (intervenor) (together, respondents) include a motion to take official notice (Motion) of Ordinance 6294, which was enacted by the city council in 2019 (Ordinance). Respondents state that the Ordinance “added” Figure 12.61.300-A to the Hillsboro Community Development Code (CDC). Joint Response Brief 7 n 2.

After the response brief was filed, the city filed a Supplemental Motion to Take Official Notice (Supplemental Motion). The Supplemental Motion explains that the published, online version of CDC Figure 12.61.300-A is not the correct version of that Figure; that is, the published, online version is not the version that was adopted as an exhibit to the enacted Ordinance. The Supplemental Motion takes the position that the enacted version of Figure 12.61.300-A is shown in the exhibits to the Ordinance, and asks LUBA to take official notice of the Ordinance and Figure 12.61.300-A attached to it as an exhibit.¹

¹ The city originally attached a single page from the exhibits to the Ordinance that is a Figure labeled “Alley Improvements, Downtown.” Supplemental Motion

1 Petitioner filed a response to the Supplemental Motion. In their response,
2 petitioner does not object to LUBA taking official notice of the Ordinance, but
3 argues that the Supplemental Motion provides a reason for LUBA to remand the
4 decision.

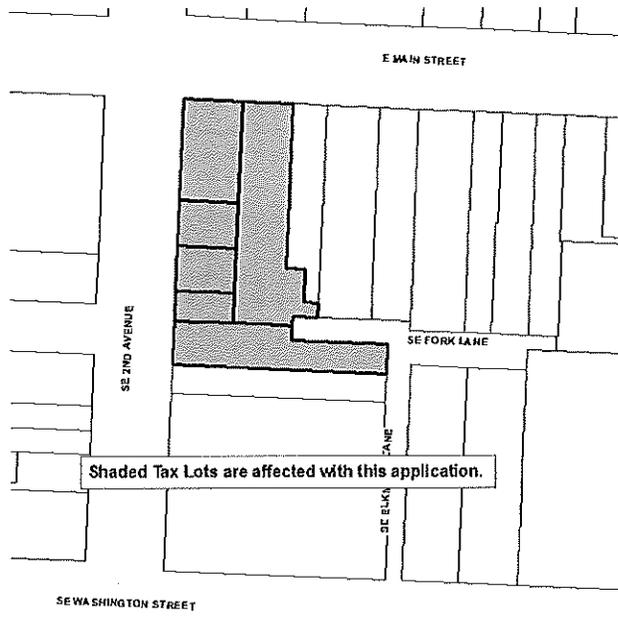
5 We agree with the city that the Ordinance is subject to official notice under
6 ORS 40.090(7) as “[a]n ordinance, comprehensive plan or enactment of any
7 county or incorporated city in this state [.]” The Motion and the Supplemental
8 Motion are allowed.

9 **FACTS**

10 Intervenor applied to renovate an existing bank building into a brewpub,
11 pizza parlor, bakery, and restaurant, including converting existing drive-through
12 lanes adjacent to the building into a covered and enclosed “multi-season patio.”
13 Record 355. The building is located on the corner of S.E. Main Street and S.E.
14 Second Avenue, between S.E. Second Avenue and S.E. Third Avenue. The south
15 end of the building is adjacent to existing drive-through lanes, which are covered
16 by a canopy affixed to the building.

17

Ex A. We issued an order directing the city to provide copies of the Ordinance, including all exhibits, to us and the parties, which the city subsequently did.



1

2 Record 333.

3 The west end of an alley known as S.E. Fork Lane is located to the east of
 4 the drive-through lanes at the property boundary. S.E. Fork Lane is connected at
 5 a 90-degree angle to S.E. Elkmont, a different alley running from S.E.
 6 Washington Street north to its intersection with S.E. Fork Lane. S.E. Fork Lane
 7 and S.E. Elkmont were created in 1950 by the recording of a plat:

8

1 provide secondary access to block interiors, thereby encouraging
2 preservation of traditional downtown streetscapes.

3 “1. The Review Authority shall condition approval of
4 developments in the Downtown Plan District adjacent to any
5 *existing or vacated alleys shown on Figure 12.61.300-A* to
6 provide for future alley dedications or easements as shown in
7 Table 12.61.300-1.” (Underlining in original, emphases
8 added).

9 Petitioner argues, as they argued below, that CDC 12.61.300(B)(1) requires an
10 alley dedication on intervenor’s property because S.E. Fork Lane exists on the
11 ground. According to petitioner, S.E. Fork Lane satisfies the requirements to
12 condition approval on future dedication of an extension of S.E. Fork Lane over
13 intervenor’s property to S.E. Second Avenue because (1) it is an “existing alley”
14 that exists on the ground; and (2) is “shown on Figure 12.61.300-A.” Petition for
15 Review 20.

16 As explained above, the published, online version of Figure 12.61.300-A
17 (the Figure) is not the version of the figure that was adopted as an exhibit to the
18 Ordinance that enacted CDC 12.61.300(B)(1) and the Figure. There is no dispute
19 that Figure 12.61.300-A that is shown in the published, online version of the CDC
20 shows S.E. Fork Lane as a “potential alley.” Record 108. The published, online
21 version of Figure 12.61.300-A was presented to the planning commission, and
22 the planning commission approved the applications.² Record 108.

² During the proceedings before the planning commission, planning staff presented a staff report that took the position that S.E. Fork Lane is not shown on Figure 12.61.300-A as an “existing or vacated alley,” and consequently that no future alley dedication or easement was required by CDC 12.61.300(B)(1).

1 Respondents respond that the introductory section of CDC 12.61.300(B)
2 provides context for interpreting CDC 12.61.300(B)(1) as requiring a showing of
3 more than that an alley is “shown in Figure 12.61.300-A.” Rather, the alley must
4 be shown as an “existing or vacated alley” “shown in” the figure. Joint Response
5 Brief 5. We agree. The introductory section of (B) recites that “[t]he system of
6 *existing and previously vacated alleys* in the Downtown Plan District *is shown in*
7 *Figure 12.61.300-A.*” CDC 12.61.300(B). The published, online version of
8 Figure 12.61.300-A in turn includes a legend that explains that “existing alley[s]”
9 are labeled in black, and “potential alley[s]” are labeled in pink. S.E. Fork Lane
10 is labeled in pink on Figure 12.61.300-A. Record 108.

11 Similarly, while it appears that CDC Figure 12.61.300-A that is an exhibit
12 to the Ordinance is the enacted version of the figure, that enacted version does
13 not show S.E. Fork Lane as either an existing or vacated alley. The Figure that is
14 an exhibit to the Ordinance does not show S.E. Fork Lane at all.³

15 Petitioner also argues that CDC Figure 12.61.300-A contains an “obvious”
16 and “blatant” scrivener’s error, because there is no factual dispute that S.E. Fork

Record 143-44. The planning commission’s decision does not include any findings. However, petitioner does not assign error to the adequacy of the findings.

³ After oral argument, petitioner filed a motion to keep the appeal “in abeyance” until their appeal of the Ordinance that was filed on July 8, 2022 and assigned LUBA No. 2022-061, is resolved. We see no purpose in delaying resolution of this appeal, because under either the published, online, incorrect version of the Figure or the enacted version of the Figure, S.E. Fork Lane is not shown as “an existing or vacated alley.” The motion is denied.

1 Lane “exists” as an alley on the ground. Petition for Review 19. Respondents
2 respond, and we agree, that petitioner has not satisfied the burden to demonstrate
3 that CDC Figure 12.61.300-A is wrong. Moreover, even if petitioner had
4 demonstrated that the enacted version contains an error, it is not within the
5 planning commission’s or LUBA’s authority to correct it by “insert[ing] what has
6 been omitted[.]” ORS 174.010; *see also Halperin v. Pitts*, 352 Or 482, 495, 287
7 P3d 1069 (2012) (“[l]egislative history may be used to identify or resolve
8 ambiguity in legislation, not to rewrite it.” (citing *US West Communications v.*
9 *City of Eugene*, 336 Or 181, 188, 81 P3d 702 (2003)); *Dilger v. School District*
10 *24 CJ*, 222 Or 108, 112, 352 P.2d 564 (1960). If the enacted version of CDC
11 Figure 12.61.300-A is wrong, the recourse is for the city council to correct it
12 through an amendment to the CDC.

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 Petitioner’s second assignment of error is initially phrased as an argument
16 that the planning commission’s decision is not supported by substantial evidence
17 in the record. ORS 197.828(2)(a). However, the only argument that petitioner
18 develops in support of the assignment of error alleges that Figure 12.61.300-A
19 includes a “drafting error” that is inconsistent with the city’s comprehensive plan.

20 Respondents respond, and we agree, that petitioner’s second assignment
21 of error challenges a decision that is not the appealed decision. The appealed
22 decision is a decision approving intervenor’s development application. The
23 second assignment of error challenges the Ordinance, which was adopted in

1 2019. For that reason, the second assignment of error is not within our scope of
2 review. *See Turner v. Jackson County*, 62 Or LUBA 199, 201 (2010), *aff'd* 240
3 Or App 816, 249 P3d 564 (2011) (an acknowledged ordinance cannot be
4 collaterally attacked in an appeal to LUBA of a quasi-judicial decision that
5 involves the ordinance); *Butte Conservancy v. City of Gresham*, 47 Or LUBA
6 282, 296, *aff'd*, 195 Or App 763, 100 P3d 218 (2004) (assignments of error that
7 collaterally attack a decision other than the decision on appeal do not provide a
8 basis for reversal or remand).

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioner's third assignment of error implicates CDC 12.61.400(J), which
12 provides:

13 "Streetscape Design Standards and Guidelines. The following
14 standards apply to *new* multi-family residential, commercial,
15 Mixed-Use and institutional *buildings*.

16 "1. The ground floor of all *new buildings* facing the street shall
17 be distinguished through façade design into a 'base,'
18 'middle,' and 'top.' The 'base' extends from the finished
19 sidewalk to the bottom of the window sill, and shall be
20 defined by a masonry or concrete plinth and projecting
21 window sills. The 'middle' shall be defined by storefront
22 windows, transom windows, canopies, and/or pilasters. The
23 'top' shall be defined by a projecting cornice.

24 "2. The front façade of all *new buildings* 2 stories or more in
25 height shall have tripartite façades, with distinct ground
26 bases, middles, and tops. The ground floor base shall be
27 defined by plinths, projected windowsills, large display
28 windows, and/or the use of masonry or concrete. The middle

1 shall be defined by vertically-oriented windows, changes in
2 materials, and/or horizontal bands (such as string courses or
3 soldier courses). The top shall be defined by detailed cornices
4 and/or projecting parapets.

5 “3. The Review Authority may approve architectural features or
6 materials in addition to those cited in paragraphs 1 and 2
7 above where such features or materials also divide the façade
8 into design into a base, middle, and top.” (Underscoring
9 omitted; emphases added.)

10 The planning commission did not apply CDC 12.61.400(J). Petitioner argues that
11 the decision that CDC 12.61.400(J) does not apply is not supported by substantial
12 evidence because, according to petitioner, the evidence in the record is that the
13 applications propose to create a “new building” by enclosing the existing canopy
14 over the drive-through lanes with walls connected to the canopy. In support of
15 their argument, petitioner cites the dictionary definitions of “new.” Petition for
16 Review 27. Petitioner argues that the enclosed canopy is “different from” the
17 existing canopy because it proposes walls, flooring, and air conditioning.⁴
18 Petition for Review 28.

19 Respondents respond that CDC 12.61.400(J) does not apply because the
20 applications do not propose a “new building” within the meaning of CDC
21 12.61.400(J) but rather propose an “alteration” of an existing building within the
22 meaning of CDC 12.01.500, which defines “alteration” to mean “[a]ny change,
23 addition or modification of an existing *structure*.” (Emphasis in original.)

⁴ CDC 12.01.500 defines “building” to mean “[a] *structure* having a roof supported by columns or walls, which is built for the support, shelter or enclosure of *persons*, animals, or property of any kind.” (Emphases in original.)

1 Respondents argue that whether new amenities are part of the project is not the
2 relevant question, and that the relevant question is whether the applications
3 propose a “new building” as that phrase is used in CDC 12.61.400(J). We agree
4 with respondents. Petitioner has not established that enclosing the existing
5 canopy, which is affixed to the existing building, or installing flooring and air
6 conditioning, results in the creation of a “new building” within the meaning of
7 CDC 12.61.400(J).

8 The third assignment of error is denied.

9 The city’s decision is affirmed.