

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

3  
4 RICHARD STEVENS and MELODY STEVENS,                                    )  
5    )  
6                                   Petitioners,                                )  
7    )  
8                                   vs.    )  
9    )  
10 CITY OF MEDFORD,    )  
11    )  
12                                   Respondent,                                )  
13    )  
14                                   and    )  
15    )  
16 ON-TRACK, INC.,    )  
17    )  
18                                   Intervenor-Respondent.                )

LUBA No. 95-004

FINAL OPINION  
AND ORDER

19  
20  
21                   Appeal from City of Medford.

22  
23                   John R. Hanson, Medford, filed the petition for review  
24 and argued on behalf of petitioner. With him on the brief  
25 was Werdell, Charter & Hanson.

26  
27                   Eugene F. Hart, Jr., Medford and Douglass H. Schmor,  
28 Medford, filed the response brief. With them on the brief  
29 was Brophy, Mills, Schmor, Gerking & Brophy. Douglass H.  
30 Schmor argued on behalf of intervenor-respondent.

31  
32                   GUSTAFSON, Referee; LIVINGSTON, Referee, participated  
33 in the decision.

34  
35                   AFFIRMED   07/17/95

36  
37                   You are entitled to judicial review of this Order.  
38 Judicial review is governed by the provisions of ORS  
39 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Richard and Melody Stevens (petitioners) appeal a  
4 decision of the Medford City Council (city) affirming a city  
5 Site Plan and Architectural Commission (SPAC) approval of a  
6 multi-plex dwelling in the Commercial-Service/Professional  
7 (C-S/P) zone.

8 **MOTION TO INTERVENE**

9 On-Track, Inc., (intervenor) moves to intervene on the  
10 side of respondent. There is no opposition to the motion  
11 and it is allowed.

12 **FACTS**

13 Intervenor applied to the SPAC for site plan approval  
14 of a six-unit, multi-plex dwelling on an established  
15 nonconforming parcel in the city's C-S/P zone. The dwelling  
16 is proposed to provide assisted housing for women leaving  
17 chemical dependency treatment.

18 The city's Land Development Ordinance (LDO) classifies  
19 uses according to the Standard Industrial Classification  
20 Manual (SIC). Until 1987, LDO 10.337 listed multi-plexes  
21 and apartments separately under the category "Major Group 88  
22 private households" as Industry Group 881. LDO 10.337  
23 prohibited both multi-plexes and apartments in the C-S/P  
24 zone.

25 In 1987, the city amended LDO 10.337. It deleted  
26 separate references to "multi-plex" and "apartment" and

1 replaced them with a single reference under Major Group 88  
2 private households to Industry Group 881 private households.  
3 All Industry Group 881 private households are now "Ps" in  
4 the C-S/P zone. LDO 10.337 defines "P" as permitted uses,  
5 and "s" as special uses, with a cross-reference to Section  
6 10.810, Special Use Regulations. Those special use  
7 regulations require that private households in commercial  
8 districts are subject to the development standards for  
9 housing in the MRF-30 district. The MRF-30 district is a  
10 multi-family district.

11 The SPAC approved intervenor's request. Petitioners,  
12 who reside near the subject parcel, appealed the approval to  
13 the city council. After a de novo review, the city council  
14 affirmed the SPAC decision. This appeal followed.

15 **FIRST ASSIGNMENT OF ERROR**

16 Petitioners argue a multi-plex dwelling is not a  
17 permitted use in the C-S/P zone. Petitioners contend that,  
18 prior to the 1987 amendments, apartments and multi-plexes  
19 were permitted in the C-S/P zone, but argue that when the  
20 city made private households permitted uses in the C-S/P  
21 zone, and deleted references to "apartment" and "multi-  
22 plex," it thereby prohibited apartments and multi-plexes in  
23 the C-S/P zone. Petitioners further argue that, pursuant to  
24 the SIC Manual definitions of private household, the C-S/P  
25 zone is limited to single family residences with domestic  
26 servants.

1           The city concludes LDO 10.337 permits the  
2 requested multi-plex, based, in part, on the following  
3 findings and analysis:

4           "Since the SIC is meant to classify economic  
5 activities, it contains no classification for  
6 residences as such. There are classifications for  
7 hotels, rooming houses, fraternity houses,  
8 residential care facilities and private  
9 household[s]. Although the term 'private  
10 households' sounds like it might describe any non-  
11 commercial residence, the SIC gives it a more  
12 restrictive meaning: 'This major group includes  
13 private households which employ workers who serve  
14 on or about the premises in occupations usually  
15 considered as domestic service.' If we do not  
16 look beyond that definition in the SIC Manual, it  
17 appears that only residences that employ domestic  
18 help are allowed. The Council concludes that this  
19 interpretation doesn't make much sense and even  
20 the [petitioners] don't take that position.  
21 [Petitioners] argue that private household means  
22 single-family residence, an argument that the  
23 Council also rejects.

24           "In order to determine what is permitted under  
25 'private households' all relevant provisions of  
26 the code must be considered. Private households  
27 are listed as a permitted use subject to special  
28 use regulations in the C-S/P zone. Among the  
29 special use regulations we find MLDC 10.847 which  
30 provides that, '[h]ousing subject to the dwelling  
31 type standards established for housing within the  
32 MFR-30 district.' The MFR-30 district is  
33 described in Section 10.312 which states that,  
34 '[t]his district is typified by three-story  
35 apartments and is primarily planned for locations  
36 within or adjacent to the CBD district and near  
37 regional commercial centers with easy access to  
38 the freeway'. The specific uses permitted in the  
39 MFR-30 district are duplex, multiplex and  
40 apartment. These types of households do not  
41 normally employ domestic help. The SIC definition  
42 is at odds with the clear meaning of these other  
43 code provisions.

1 "The drafters of the MLDC used the term 'private  
2 households' because it 'sounds right' (if you  
3 don't read the SIC Manual definition) and there  
4 isn't anything else in the SIC Manual that exactly  
5 describes the contemplated uses. The intent of  
6 the MLDC is to allow multi-plexes and apartments  
7 in the C-S/P zone whether or not domestic help is  
8 employed. The legislative history supports this  
9 interpretation." Record 11.

10 Notwithstanding the city's findings, on appeal  
11 petitioners allege the C-S/P zone is restricted to single-  
12 family residences which employ domestic servants.

13 Petitioners' argument is premised, in part, on an  
14 assertion that apartments and multiplexes were permitted  
15 uses in the C-S/P zone before 1987, and that the 1987  
16 amendments changed them from a permitted to a prohibited  
17 use. Petitioners have misread the city's prior ordinance.  
18 Under the prior ordinance, apartments and multi-plexes were  
19 expressly prohibited. Petitioners' premise that apartments  
20 and multiplexes were permitted uses before 1987 is  
21 incorrect.

22 When the city amended its zoning ordinance, it deleted  
23 separate references to "apartment" and "multi-plex," and  
24 made all Industry Group 881 private households permitted  
25 uses in the C-S/P zone, subject to special use regulations.  
26 Those regulations require that Industry Group 881 private  
27 households in the C-S/P zone satisfy the dwelling type  
28 standards of the MFR-30 district, a multi-family zone. As  
29 explained in the findings quoted above, the city concluded  
30 that private households includes apartments and multi-

1 plexes. The city further concluded that the C-S/P zone is  
2 not limited to households which employ domestic servants.

3 This Board is required to defer to a local governing  
4 body's interpretation of its own enactment, unless that  
5 interpretation is contrary to the express words, purpose or  
6 policy of the local enactment or to a state statute,  
7 statewide planning goal or administrative rule which the  
8 local enactment implements. ORS 197.829; Gage v. City of  
9 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v.  
10 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).<sup>1</sup>  
11 This means we must defer to a local government's  
12 interpretation of its own enactments, unless that  
13 interpretation is "clearly wrong." Reeves v. Yamhill  
14 County, 132 Or App 263, 269, \_\_\_ P2d \_\_\_ (1995); Goose  
15 Hollow Foothills League v. City of Portland, 117 Or App 211,  
16 217, 843 P2d 992 (1992); West v. Clackamas County, 116  
17 Or App 89, 93, 840 P2d 1354 (1992).

18 We defer to the city's interpretation that the proposed  
19 multi-plex is a private household, and is allowed as a "Ps"  
20 use under LDC 10.337. That interpretation is consistent  
21 with the express code language.<sup>2</sup> Petitioners' ordinance

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<sup>1</sup>ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the court of appeals has stated that it will interpret ORS 197.829 to mean what the Supreme Court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309, rev den 320 Or 407 (1994).

<sup>2</sup>We disagree with the city that the SIC definition of "private households" is at odds with the city's interpretation. The language of the

1 construction would limit residences allowed in the C-S/P  
2 zone to single family households with domestic servants in  
3 dwellings satisfying the multi-family development standards.  
4 This construction is not only inconsistent with the code  
5 language, it leads to an absurd result.

6 The first assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioners contend that (1) no private households are  
9 permitted uses in the C-S/P zone because private households  
10 are subject to special use restrictions; and (2) because  
11 private households are not permitted uses, the subject  
12 parcel is required to conform to the development standards  
13 in the MRF-30 zone as required for Ps uses in the C-S/P  
14 zone.

15 In the city's commercial zones, uses are designated  
16 "permitted" ("P"), "prohibited" ("X") or "permitted subject  
17 to special use regulations" ("Ps"). In the C-S/P zone,  
18 private households are designated "Ps." The "s" indicates  
19 the use is subject to the special use restrictions of LDO  
20 10.837. Petitioners argue private households do not satisfy  
21 the special use requirements of LDO 10.837, which states:

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SIC definition that the category of private households "includes" households with domestic servants does not restrict the private household definition. Rather, it includes within the category of private household even those households with domestic servants, i.e. a household remains "private" even if it includes domestic servants. Moreover, our conclusion is limited to the issue in this case whether the proposed multi-plex is a "private household" for purposes of LDO 10.337. We express no opinion on whether single family dwellings are allowed as Ps uses in the C-S/P zone.

1           "Housing shall be allowed in those commercial  
2           districts where permitted subject to the dwelling  
3           type standards established for housing within the  
4           MFR-30 district."

5           Petitioners argue that because the use is a "Ps"  
6           instead of a "P", it is not permitted under LDO 10.837.

7           Petitioners also argue that the parcel does not meet  
8           the development standards of the MFR-30 zone, and that,  
9           therefore, the city could not approve the multi-plex. The  
10          parcel is 71 feet wide. The MFR-30 zone requires an 80-foot  
11          parcel width. Petitioners acknowledge the parcel is legally  
12          nonconforming under LDO 10.033 but argue that, since the  
13          multi-plex is not a permitted use, intervenor cannot rely on  
14          the parcel's nonconforming status to obviate the development  
15          standards. Petitioners base this argument on LDO 10.033,  
16          which states, in part, that nonconforming parcels "may be  
17          developed and occupied by a permitted use subject to  
18          compliance with the minimum standards of this code."

19          The city finds that uses designated "Ps" are permitted  
20          subject to special use restrictions. The special use  
21          restrictions consist of development standards. The  
22          imposition of development standards does not convert a  
23          permitted use into a prohibited one. Because the parcel is  
24          legally nonconforming, development on it is not required to  
25          meet the dimensional standards otherwise required in the  
26          MFR-30 zone.

27          We defer to the city's interpretation of its

1 ordinance.<sup>3</sup> Gage v. City of Portland, 319 Or at 316-17;  
2 Clark v. Jackson County, 313 Or at 514-15.

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioners contend the city's notice was defective for  
6 failure to recite all applicable comprehensive plan  
7 provisions. The city listed LDO 10.290, the site plan and  
8 architectural review criteria, as applicable to the site  
9 plan application. LDO 10.290(1) requires that the  
10 application "compl[y] with the applicable provisions of all  
11 city ordinances." Petitioners specifically claim  
12 comprehensive plan Housing Element Goal 1, Policy 3 applies  
13 to this application.<sup>4</sup>

14 The city found LDC 10.290 does not require independent  
15 evaluation of a site plan application for compliance with  
16 the comprehensive plan, and that, specifically, Housing  
17 Element Goal 1, Policy 3 does not apply to this application.  
18 The city further found that, even if this policy did apply,

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<sup>3</sup>Under petitioner's reasoning, no households could ever be allowed in the C-S/P zone since the subject development standards apply only to permitted uses, but because private households must comply with those development standards in order to be permitted, they are not permitted. Petitioners' interpretation renders meaningless the 'Ps' designation for private households in the C-S/P zone.

<sup>4</sup>Petitioners also allege LDO 10.290 itself fails to meet statutory requirements for review of SPAC applications. That ordinance is not under review in this appeal. If petitioners wished to challenge that ordinance, they should have done so at the time it was adopted. See Mission Bottom Assoc. v. Marion County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 94-196, June 9, 1995), slip op 13.

1 the record includes substantial evidence that the proposed  
2 site plan is consistent with it.

3 The city's interpretation that LDO 10.290 does not  
4 require independent evaluation of compliance with  
5 comprehensive plan provisions is not clearly wrong, and we  
6 defer to it.<sup>5</sup> Gage v. City of Portland, 319 Or at 316-17;  
7 Clark v. Jackson County, 313 Or at 514-15; Reeves v. Yamhill  
8 County, 132 Or App at 269.

9 The third assignment of error is denied.

10 The city's decision is affirmed.

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<sup>5</sup>Even if the city had committed procedural error in omitting comprehensive plan provisions from its notice, petitioners would be entitled to relief only if they suffered prejudice to their substantial rights as a result of that error. ORS 197.835(7)(a)(B). Petitioners have shown no prejudice since the city made alternative findings that the proposed development satisfies the provisions petitioners allege to be applicable. Those findings were based on evidence in the record that assisted-living facilities are dispersed throughout the city and are not concentrated in the area of the subject property. The only contrary evidence petitioners cite to is an alleged concentration of rehabilitation facilities in the area. Housing Element Goal 1, Policy 3 prohibits concentration of assisted housing; it does not address rehabilitation facilities or equate assisted housing with rehabilitation facilities. The city's alternative findings are supported by substantial evidence in the record. See Younger v. City of Portland, 305 Or 356, 360, 752 P2d 262 (1988); Angel v. City of Portland, 22 Or LUBA 649, 659, aff'd 113 Or App 169 (1992); Wissusik v. Yamhill County, 20 Or LUBA 246, 260 (1990); Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990).