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**NATURE OF THE DECISION**

Petitioner appeals two City of Medford orders. One order approves a zoning map amendment; the other order approves a planned unit development (PUD) with residential and commercial components.

**MOTION TO INTERVENE**

OnTrack, Inc. (hereafter OnTrack), the applicant below, moves to intervene on the side of the respondent. No party opposes the motion, and it is allowed.

**DECISION**

OnTrack moves to dismiss this appeal, arguing that petitioner’s notice of intent to appeal was not timely filed. In resisting that motion, petitioner contends that his delay in filing the notice of intent to appeal is excused by ORS 197.830(3).<sup>1</sup> Petitioner’s notice of intent to appeal was filed months after the challenged decisions became final. Petitioner does not argue his notice of intent to appeal was timely filed if the 21-day deadline established ORS 197.830(9) applies.<sup>2</sup> Rather, petitioner argues the notice of intent to appeal

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<sup>1</sup> ORS 197.830(3) provides:

“If a local government makes a land use decision \* \* \* that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government’s final actions, a person adversely affected by the decision may appeal the decision to [LUBA] under this section:

- “(a) Within 21 days of actual notice where notice is required; or
- “(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.”

<sup>2</sup> ORS 197.830(9) provides in relevant part:

“A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615.”

1 was timely filed under ORS 197.830(3)(b), because the city’s notice of hearing was  
2 inadequate and his notice of intent to appeal was filed less than 21 days after petitioner  
3 “knew or should have known of the decision.” *See* n 1.

4 For the reasons explained below, we agree with OnTrack that ORS 197.830(3) does  
5 not apply, and this appeal must be dismissed because the notice of intent to appeal was not  
6 timely filed.<sup>3</sup> Resolving the parties’ arguments concerning whether the notice of intent to  
7 appeal was timely filed requires a fairly detailed explanation of the facts. We set out that  
8 explanation of the relevant facts before turning to the parties’ legal arguments below.<sup>4</sup>

9 **A. Facts**

10 **1. The Application**

11 The city received OnTrack’s application for a zoning map amendment and PUD  
12 approval on May 19, 2008. The application sought a zoning map amendment for six acres.  
13 For five of those acres the current zone SFR-00 (single-family residential) would be changed  
14 to MFR-15 (multifamily residential – 15 dwelling units per gross acre). The zoning of the  
15 other acre would change from the current SFR-00 to MFR-20 (multifamily residential – 20  
16 dwelling units per gross acre). The “Generations PUD” proposed in the application called  
17 for “82 attached residential dwelling units and 20,500 square feet of mixed use, community  
18 space, and retail and service lease space.” Record 398. The application included the  
19 following description of the anticipated residents:

20 “The residents of Generations PUD will include a generational mixture of 15  
21 to 30 reunited families and 52 to 64 senior mentors in a total of 82 dwelling

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<sup>3</sup> On October 1, 2009, LUBA received from OnTrack a “Motion to Substitute Counsel.” In that motion, OnTrack advises LUBA that it “intends to file a memorandum of supplemental points and authorities in support of the motion to dismiss within 10 days of the date of this motion.” There has already been a considerable delay in resolving OnTrack’s motion to dismiss. An additional delay for supplemental briefing is not warranted.

<sup>4</sup> Both petitioner and intervenor-respondent have asked that we consider extra-record evidence in resolving whether the notice of intent to appeal was timely filed. Because no party objects to either request, we have considered that extra-record evidence in ruling on the motion to dismiss.

1 units. OnTrack Inc., the owner developer of Generations PUD, has a national  
2 reputation for success in treatment of substance abuse. The residents of the  
3 proposed development will have completed treatment programs offsite and  
4 this development is provided with an environment to foster a healthy lifestyle.

5 “The senior mentor families of the development are committed to supporting  
6 the young families and the site has been designed to provide and encourage  
7 intergenerational contact in the numerous open spaces, common areas and  
8 buildings, as well as the attractive streetscapes.

9 “Prior to moving into the development, the senior residents agree to  
10 participate in volunteer programs within the development to support the other  
11 residents of the Generations PUD.” Record 400.

12 **2. The Notices of Hearing**

13 **a. The Written Notice of Hearing Given to Nearby Property**  
14 **Owners**

15 The city planning commission conducted a quasi-judicial land use hearing to consider  
16 the proposal on August 14, 2008. Prior to that August 14, 2008 hearing, on July 24, 2008,  
17 the city sent written notice to owners of all properties within “200 feet of the project  
18 boundaries,” as required by Medford Land Development Code (MLDC) 10.158.<sup>5</sup> As  
19 relevant here, the city’s July 24, 2008 written notice to adjoining property owners stated:

20 “This notice is to inform you of an upcoming opportunity to participate in a  
21 public hearing regarding a request for Preliminary PUD Plan approval for a  
22 mixed-use development (including 82 dwelling units and common open  
23 space), plus a zone change from SFR-00 to five acres of MFR-15 \* \* \* and  
24 one acre of MFR-20 \* \* \* on one parcel totaling six acres located at the  
25 terminus of Harbrooke Road approximately 1,012-feet east of N. Phoenix  
26 Road, within an SFR-00 \* \* \* zoning district[. Please see the attached map.”  
27 Record 166.

28 The referenced “attached map” is a drawing of the proposal showing the location of  
29 buildings. According to the legend on that map Building A will include “Rental Mixed Use  
30 and Maintenance,” a “Senior Community Center” and “Residential Units.” Building B will

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<sup>5</sup> Because the subject property is within the city’s urban growth boundary, ORS 197.763(2)(a)(A) only required that the city provide written notice of this quasi-judicial hearing to owners of property located within 100 feet of the subject property. The city’s notice requirement is broader the statutory notice requirement.

1 include “Residential Units.” Building C will include a “Daycare and Preschool” and  
2 “Residential Units.” Building D will include “OnTrack offices and conference rm,” and  
3 “General community spaces: Library, game rm, computer rm, community laundry.”  
4 Building E will include a “Central Community gathering space \* \* \* Commercial Kitchen  
5 [and] exhibit space.” The legend also indicates there will be a number of “Town Houses.”  
6 Record 167.

7 **b. The Published Notice and Posted Notice**

8 Apparently a notice of hearing was posted on the subject property. If a copy of that  
9 notice has been included in the record, no party identifies where it appears in the record. A  
10 copy of the published notice is included in the record, and the substance of that notice is set  
11 out below:

12 “NOTICE IS HEARBY GIVEN that the City of Medford Planning  
13 Commission \* \* \* will hold public hearings on Thursday, August 14, 2008,  
14 beginning at 5:30 p.m. in the Council Chambers, to consider the following:

15 “\* \* \* \* \*

16 “PUD-08-068/ZC-08-069 Consideration of a request for Preliminary PUD  
17 Plan approval for a mixed-use development (including 82 dwelling units and  
18 common open space), plus a zone change from SFR-00 to five acres of MFR-  
19 15 \* \* \* and one acre of MFR-20 \* \* \*, on one parcel totaling six acres  
20 located at the terminus of Harbrooke Road approximately 1,012-feet east of  
21 N. Phoenix Road, within an SFR-00 \* \* \* zoning districts. On-Track, Inc.,  
22 Applicant (Scott Sinner Consulting, Inc., Agent).” Record 45.

23 Although the published notice did not include the map that was attached to the  
24 written notice of hearing, the substance of the written notice and published notice is  
25 otherwise almost identical. Both of those notices state that the proposal is for a mixed-use  
26 development that includes 82 dwelling units. The map attached to the written notice  
27 provides some details about the non-residential uses proposed, but the published notice does  
28 not. Neither the written notice nor the published notice states that the applicant plans to lease

1 the housing to families that include recovering addicts who have completed off-site recovery  
2 programs or sell housing to senior citizens who will serve as mentors.

3 **3. The August 28, 2008 Planning Commission Decision**

4 The August 28, 2008 planning commission decisions granting PUD and rezoning  
5 approval describe the approved proposal in terms that are nearly identical to the language in  
6 the notices quoted above. Record 12-13. The decisions adopt an August 21, 2008 planning  
7 staff report to support the decisions. *Id.* One of the exhibits attached to the planning staff  
8 report is a map that shows the proposal. Record 55. That map is the same map that was  
9 attached to the July 24, 2008 written notice of hearing.

10 **4. Community Reaction to the Decision**

11 Intervenor-respondent provided LUBA with a number of newspaper articles that  
12 discuss the proposal and asks that LUBA consider those articles for the purpose of  
13 determining whether petitioner knew or should have known of the challenged decision long  
14 before he filed his notice of intent to appeal on April 10, 2009. A December 1, 2008 article  
15 discusses OnTrack's plan to lease housing to recovering addicts and their families and sell  
16 housing to senior citizens who would serve as mentors. December 9, 2008 and December  
17 14, 2008 articles discuss concerns that were expressed by neighbors of the approved  
18 Generations PUD about the potential for increased crime and lowering of property values.  
19 According to the articles some residents felt blindsided by the proposal and criticized  
20 OnTrack for not meeting with the neighborhood concerning the proposal earlier in the  
21 process. Two December 16, 2008 letters to the editor criticize opponents of the proposal. A  
22 December 21, 2008 article called for OnTrack to hold a community meeting in the  
23 neighborhood to more fully describe the proposal. A January 31, 2009 article reports on a  
24 meeting that OnTrack held in the neighborhood on January 28, 2009 to explain the proposal.  
25 According to the January 31, 2009 article, "[h]undreds of people showed up for the  
26 community meeting," and many neighborhood residents remained opposed to the proposal

1 and expressed objections that the nature of the proposal was not better understood at the time  
2 the zoning amendment and PUD approvals were granted.

3 **5. Petitioner’s April 10, 2009 Notice of Intent to Appeal**

4 Petitioner filed his notice of intent to appeal on April 10, 2009. As noted earlier,  
5 petitioner contends the deadline that applies to his notice of intent to appeal is set out at ORS  
6 197.830(3)(b), because the notice of hearing did not “reasonably describe the [city’s] final  
7 actions.” Intervenor-respondent challenges petitioner’s attempt to rely on ORS  
8 197.830(3)(b) on a number of different grounds.

9 **B. The Notice Reasonably Described the Final Action**

10 Petitioner offers the following explanation for why he believes the city’s notice of  
11 hearing was inadequate to reasonably describe the city’s final decision:

12 “The notice was misleading, because the Decision differs substantially from  
13 the notice of hearing. The notice only advertised a proposed ‘mixed-use’  
14 PUD and zone change from single-family residential to multi-family  
15 residential. Respondent approved Intervenor’s proposed uses, which include  
16 retail commercial, senior housing, post-treatment substance abuser housing,  
17 ‘community services’ (including laundromat and daycare), senior community  
18 center, central community gathering center, commercial kitchen, and offices  
19 for Intervenor. The term ‘mixed-use’ might indicate a blend of commercial  
20 and residential uses to an attorney or land use consultant. However, a  
21 reasonable citizen might interpret ‘mixed-use’ to mean a mix of single-family  
22 and multi-family housing. Such an interpretation would be reasonable in the  
23 context of the notice, which indicated a mix of single-family and multi-family  
24 housing. The notice conspicuously states that the proposal includes 82  
25 dwelling units. However, the notice does not mention the inclusion of  
26 retail/commercial space, or how many retail/commercial units are proposed.

27 “Intervenor argues that the notice was not misleading, because a preliminary  
28 PUD plan attached to the notice at page 167 of the record expounded on the  
29 proposal. Petitioner submits that the preliminary PUD plan is insufficient to  
30 comply with the requirements of ORS 197.763(3)(a). First, the preliminary  
31 PUD plan makes no mention of senior housing or housing for recovering  
32 substance abusers. Secondly, the preliminary PUD plan lists the proposed  
33 uses in excessively fine print. If such fine print were used on the face of a  
34 notice, the notice would likely be defective.” Petitioner’s Response to  
35 Intervenor-Respondent’s Motion to Dismiss 2-3.

1 PUD's commonly include both residential uses and commercial uses. The written  
2 and published notices specifically state that 82 dwelling units were proposed and that the  
3 proposal calls for a "mixed-use development." The notices were sufficient to provide notice  
4 that the applicant proposed both residential and non-residential uses. The copy of the map  
5 that is attached to the copy of the written notice in the record is not easy to read. But the  
6 copy of that map that appears at Record 55 is much easier to read and there is no reason to  
7 assume the written notices did not include more readable copies of the map than the copy of  
8 the map that appears at Record 167. In any event, either copy of the map provides additional  
9 detail about the non-residential uses that are proposed.

10 The only feature of the proposed development that is not mentioned in the notices  
11 seems to be the feature that has generated the opposition to the proposal. That feature is  
12 OnTrack's proposal to lease housing to the families of recovering addicts and sell housing to  
13 senior citizens who are interested in mentoring those families. The problem with relying on  
14 the city's failure to specifically mention that feature of the proposal in its notices is at least  
15 three-fold. First, petitioner identifies no legal requirement that the notice must give notice of  
16 the applicant's intent to sell units to senior citizens and lease property to recovering addicts  
17 and their families. Any state or city legal requirement that the city give notice that the  
18 intended occupants of the dwellings will be recovering addicts and senior citizens would  
19 potentially run afoul of one or more federal laws that prohibit discrimination based on age or  
20 disability. Second, while OnTrack apparently plans to lease to recovering addicts and their  
21 families and sell units to senior citizens, the challenged decision imposes no condition of  
22 approval that OnTrack do so. As far as we can tell, OnTrack could sell or lease the proposed  
23 housing to anyone. Finally, it does not appear that the intended occupants of the housing  
24 played any role in the approval criteria that were applied to approve the proposal. At least  
25 petitioner does not claim that OnTrack's plan to allow recovering addicts and their families  
26 and senior citizens to occupy the housing has any bearing on any approval criterion.

1           Petitioner’s attempt to rely on *Caine v. Tillamook County*, 22 Or LUBA 687 (1992) in  
2 arguing that the notice of hearing was inadequate is misplaced. ORS 197.763(3)(a) requires  
3 that a notice of quasi-judicial land use hearing must “[e]xplain the nature of the application  
4 and the proposed use or uses which could be authorized[.]” In *Caine*, although the applicant  
5 sought statewide planning goal exceptions to construct “retirement housing for the elderly,”  
6 the written notice of hearing did not identify the proposed use at all. LUBA held in *Caine*  
7 that where a reasons exception is sought for a particular use, a local government “must list  
8 the proposed use of the property in the notice of hearing.” 22 Or LUBA at 692. While it  
9 may well be that greater precision in describing the proposed use will be necessary where a  
10 statewide planning goal exception is proposed, the error in *Caine* was the county’s *complete*  
11 failure to identify the proposed use, not a failure to “reasonably describe” the use.<sup>6</sup> As we  
12 have already concluded, the written notice’s description of the proposed “mixed-use  
13 development” and the attached map were sufficient to “reasonably describe the [city’s] final  
14 actions” in this matter. Therefore, ORS 197.830(3) does not apply.

15           **C.       Petitioner Was Not Misled by the City’s Notice**

16           Where it applies, ORS 197.830(3) delays the ORS 197.830(9) deadline for filing a  
17 notice of intent to appeal where a petitioner is “misled” by differences between the proposal  
18 described in the notice of hearing and the proposal that is approved, so that the petitioner’s  
19 failures to (1) appear during the local proceedings and thereby become entitled to notice of  
20 the decision, and (2) file a notice of intent to appeal within 21 days after the decision became  
21 final under ORS 197.830(9) should be excused. *Bigley v. City of Portland*, 168 Or App 508,  
22 514, 4 P3d 741 (2000); *Pacific Cascade Resources v. Columbia County*, 55 Or LUBA 216,  
23 220 (2007); *Jacobsen v. City of Winston*, 54 Or LUBA 730, 732, *aff’d* 216 Or App 555, 173  
24 P3d 841 (2007); *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227, 232-33 (1994). In this

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<sup>6</sup> Under ORS 197.732, a statewide planning goal exception may be approved to allow a use that would otherwise be prohibited by the statewide planning goals, if certain criteria are satisfied.

1 case petitioner concedes he was not entitled to receive the written notice of the August 14,  
2 2008 planning commission hearing. As we note below, in arguing that he was unaware of  
3 the neighborhood opposition to the decision that was reported in the Medford Mail Tribune  
4 during December of 2008 and January of 2009, petitioner argues he lives in California and  
5 does not subscribe to the Medford paper. Therefore, even if the written and published  
6 notices were inadequate in some way, it is hard to see how petitioner could have been misled  
7 by a notice he was not entitled to receive or a notice in a newspaper he claims not to read. At  
8 no point in resisting the motion to dismiss does petitioner claim that he saw the written  
9 notice, the published notice or the notice that was posted on the property before the August  
10 14, 2008 hearing. Petitioner could not have been misled by notices he never saw. In a case  
11 with similar facts, we held that ORS 197.830(3)(b) does not apply to delay the ORS  
12 197.830(9) 21-day deadline for filing a notice of intent to appeal. *Ebar v. Harney County*,  
13 \_\_\_ Or LUBA \_\_\_ (LUBA No. 2009-035, July 7, 2009), slip op at 5-6.

14 **D. When Petitioner Knew or Should Have Known of the Decision**

15 While petitioner and other neighborhood residents may have been unaware of the  
16 proposal or the city’s August 28, 2008 decisions until after they were rendered, the decision  
17 and proposal were well known in the neighborhood by January 2009. As noted earlier,  
18 OnTrack met with neighbors in a well-attended neighborhood meeting on January 28, 2009.  
19 In resisting OnTrack’s argument that petitioner knew or should have known of the proposal  
20 by January 28, 2009, petitioner responds that he lives in Etna, California, which is 80 miles  
21 from Medford. Petitioner also argues:

22 “The Medford newspaper is unavailable in Etna. \* \* \* Local cable in Medford  
23 is not ‘local’ in Etna. The geographical divide delayed Petitioner’s discovery  
24 of the Decision.” Petitioner’s Response to Intervenor-Respondent’s Motion to  
25 Dismiss 5.

26 We have already concluded that the notices the city provided were adequate to  
27 “reasonably describe the [city’s] final actions” in this matter. Even if the notices were

1 inadequate under ORS 197.830(3), petitioner does not explain how he could have been  
2 misled by notices he never received. Because there are two reasons why ORS 197.830(3)  
3 does not apply here, we need not determine whether petitioner knew or should have known  
4 of the challenged decision before March 14, 2009, when petitioner claims he first learned of  
5 the decision. However, we question whether a property owner may absent himself from the  
6 city while a well-publicized controversy over a land use decision plays out over a period of  
7 several months, and then return months later and rely on his choice to be absent from the city  
8 and uninformed about events in the city that affect his property to take advantage of ORS  
9 197.830(3).

10 **E. Conclusion**

11 The notice provided by the city in this matter identified the proposal as a mixed-use  
12 residential and non-residential development. The notice with attached drawing adequately  
13 described the non-residential uses proposed. The city was under no obligation to specify that  
14 the applicant plans to lease residential units to recovering addicts and sell residential units to  
15 senior citizens and the city's failure to so specify in the notice of hearing does not mean the  
16 city "did not reasonably describe the [city's] final actions," within the meaning of ORS  
17 197.830(3). Even if the notice of hearing the city provided did fail to reasonably describe the  
18 city's final action, petitioner does not claim that he ever saw the written or published notices  
19 before the August 14, 2008 hearing and therefore could not have been misled by those  
20 notices. Therefore, ORS 197.830(3) does not delay the deadline for filing the petition for  
21 review. Petitioner does not argue his notice of intent to appeal was timely filed, if ORS  
22 197.830(9) applies. Because the notice of intent to appeal was not filed within the deadline  
23 specified by ORS 197.830(9), this appeal must be dismissed. OAR 661-010-0015(1)(a).<sup>7</sup>

24 This appeal is dismissed.

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<sup>7</sup> OAR 661-010-0015(1)(a) provides that a notice of intent to appeal that is filed after the deadline specified in ORS 197.830 "shall not be deemed timely filed, and the appeal shall be dismissed."