

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a Jacksonville City Council order
4 denying their application for approval of the tentative plat
5 for a 63-lot subdivision.

6 **FACTS**

7 This is the second time a city decision concerning the
8 proposed Silvercrest Heights subdivision has been appealed
9 to this Board.¹ In Cecil v. City of Jacksonville, 19
10 Or LUBA 446, 449, aff'd 104 Or App 526 (1990), rev den 311
11 Or 166 (1991) (Cecil), we described the site of the proposed
12 subdivision as follows:

13 " * * * The subject property is vacant, includes
14 16.03 acres and is located within the city's
15 adopted urban growth boundary (UGB). The subject
16 property is designated Urban Single Family
17 Residential in the comprehensive plan and is zoned
18 R-1-8, Single Family Residential (8,000 square
19 foot minimum lot size)." (Footnote omitted.)

20 We also stated:

21 "The entire city of Jacksonville is a designated
22 National Historic Landmark. Although the subject
23 property does not appear to be identified as a
24 historic site in the [city comprehensive] plan and
25 the parties dispute the exact location of [a]
26 historic railroad right of way, it is clear that
27 there are numerous significant historic properties
28 close to the subject property. * * *" Cecil, 19
29 Or LUBA at 455.

30 In Cecil, decided on August 27, 1990, we remanded a

¹We note the local record submitted in the first appeal is not included in the local record submitted in this appeal.

1 city decision approving a tentative plat for the proposed
2 subdivision. We determined that because the Land
3 Conservation and Development Commission (LCDC) never issued
4 an order pursuant to ORS 197.251 acknowledging the city's
5 comprehensive plan and land use regulations, after a
6 previous LCDC acknowledgment order was reversed and remanded
7 by the Court of Appeals,² the city's comprehensive plan and
8 land use regulations were not acknowledged. Cecil, 19
9 Or LUBA at 451. We concluded that in view of the
10 unacknowledged status of the city's comprehensive plan and
11 land use regulations, the city erred in failing to apply
12 Statewide Planning Goal 5 (Open Spaces, Scenic and Historic
13 Areas, and Natural Resources) to the subject application for
14 tentative plat approval.

15 On September 18, 1990, after the issuance of our final
16 opinion and order in Cecil, the city adopted Ordinance
17 No. 358, establishing a moratorium on new construction in
18 all areas served by city water facilities.³ On March 5,
19 1991, the city council held a public hearing "for the
20 purpose of a Goal 5 review for Silvercrest [Heights]
21 Subdivision." Record 494. At that hearing, the city
22 council decided to continue the hearing to May 6, 1991, for
23 the purpose of reviewing the proposed subdivision for

²See Collins v. LCDC, 75 Or App 517, 707 P2d 599 (1985).

³The moratorium ordinance was upheld in Schatz v. City of Jacksonville,
___ Or LUBA ___ (LUBA No. 90-126, May 13, 1991) (Schatz I).

1 compliance with Statewide Planning Goals 1-14. Record 462.

2 On March 18, 1991, LCDC issued Compliance
3 Acknowledgment Order 91-ACK-738,⁴ acknowledging the city's
4 comprehensive plan and land use regulations except with
5 respect to Goal 5 historic resources, as provided in LCDC
6 Compliance Denial Order 91-DEN-740 issued the same date. On
7 March 20, 1991, LCDC issued Corrected Enforcement Order
8 91-EO-735, directing the city to apply certain standards in
9 making land use decisions prior to amending its plan and
10 regulations to comply with Goal 5 with regard to historic
11 resources.⁵ The nature and effect of the enforcement order
12 is disputed by the parties, and is discussed under the
13 second and fourth assignments of error, infra.

14 The city council conducted several additional hearings
15 and meetings concerning the subject tentative plat approval
16 application in May and June, 1991. On July 17, 1991, the
17 city council adopted the challenged order denying tentative
18 plat approval.

19 **PRELIMINARY ISSUE**

20 The city contends we must affirm the challenged

⁴LCDC Compliance Acknowledgment Order 91-ACK-738 is a limited acknowledgment order issued pursuant to ORS 197.251(9).

⁵The city appealed LCDC Orders 91-ACK-738 and 91-EO-735 to the Court of Appeals. On October 31, 1991, the Court of Appeals issued orders dismissing the appeals. The city's petitions for review are pending before the Supreme Court. LCDC acknowledgment and enforcement orders are effective unless a stay is granted by LCDC or the Court of Appeals. ORS 183.482(3), 197.335(2), 197.650(1). No stay of LCDC Orders 91-ACK-738 and 91-EO-735 has been granted.

1 decision because the moratorium ordinance provides an
2 independent basis for the city's denial of tentative plat
3 approval, a basis which is not challenged by petitioners'
4 assignments of error. The city points out the moratorium
5 ordinance did not exist when it first reviewed the proposed
6 subdivision, and argues that it was required to apply the
7 moratorium ordinance after its first decision was remanded.
8 According to the city, the subject tentative plat
9 application is not protected from application of the
10 moratorium ordinance by ORS 227.178(3) because the city's
11 plan and land use regulations were not acknowledged when the
12 application was initially filed and, additionally, are not
13 acknowledged at present.⁶

14 There is no dispute that the subject site is within the
15 area served by the city water system affected by the
16 moratorium ordinance. The moratorium ordinance provides:

17 "The [moratorium] shall preclude the issuance of
18 any permit for connection to the water system or
19 the granting of permission for anyone to connect
20 to the water system as is traditionally done
21 through approval of a certificate of
22 appropriateness. Planning decisions should
23 reflect the following restrictions:

⁶ORS 227.178(3) provides:

"If the application was complete when first submitted * * * and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

1 "(A) No residential dwelling unit, commercial
2 building, industrial facility or public
3 service facility can be constructed and
4 connected to the water system.

5 "(B) The moratorium will require any structure
6 that is built to have an alternative water
7 system * * * and any planning action shall
8 consider the ability to provide an
9 alternative water system and its approval.

10 "* * * * *" Record 392.

11 The above quoted portions of the moratorium ordinance
12 indicate that under the moratorium, the city is prohibited
13 from approving (1) connections to its water system, and
14 (2) the construction of dwellings and other structures which
15 will require connections to its water system. However, we
16 agree with petitioners that there is nothing in the
17 moratorium ordinance itself which prohibits the city from
18 approving the subdivision of land. Consequently, we do not
19 determine whether the challenged decision relies on the
20 moratorium ordinance as a basis for denial, because the
21 moratorium ordinance cannot provide an independent basis for
22 denial of the subject application.

23 **SECOND AND FOURTH ASSIGNMENTS OF ERROR**

24 "Respondent violated applicable law in holding
25 that the application on remand was subject to
26 review for compliance with Goal 5 rather than
27 Attachments A and B to [LCDC Enforcement Order]
28 91-EO-735."

29 "Respondent misconstrued applicable law in holding
30 that the application on remand was subject to
31 review for compliance with Goal 5 rather than
32 Attachments A and B to [LCDC Enforcement Order]
33 91-EO-735."

1 Petitioners argue that LCDC Enforcement Order 91-EO-735
2 (hereafter "enforcement order") requires the city to apply
3 Attachments A and B of that order,⁷ rather than Goal 5, to
4 the subject application with regard to historic resources.
5 Petitioners contend the city erroneously failed to apply
6 Attachments A and B and improperly denied the subject
7 application for failure to comply with Goal 5. Petitioners
8 further argue that because Attachments A and B contain no
9 standards applicable to tentative subdivision plat approval,
10 this Board should find the subject application complies with
11 Attachments A and B as a matter of law. In the alternative,
12 petitioners request remand of the challenged decision, for
13 the city to apply Attachments A and B to the subject
14 application.

15 The city argues that this Board does not have authority
16 to review these assignments of error. The city contends
17 that under ORS 197.335(5), jurisdiction to determine whether
18 a LCDC enforcement order is violated lies in circuit court.⁸

⁷Attachment A is a 21-page document entitled "Jacksonville Historic Protection Ordinance." Attachment B is a 38-page document entitled "Jacksonville Historical/Architectural Guidelines." Both documents also bear the notation "[a]s modified for Modified Proposed Enforcement Order." Notwithstanding their titles, neither Attachment A nor Attachment B has been adopted by the City of Jacksonville.

⁸ORS 197.335(5) provides:

"[LCDC] may institute actions or proceedings for legal or equitable remedies in the Circuit Court for Marion County or in the circuit court for the county to which [LCDC's] order is directed or within which all or a portion of the applicable city is located to enforce compliance with the provisions of

1 See Allen v. Columbia Cty. Commissioners, 8 Or LUBA 73,
2 74-75 (1983) (interpreting identical language of former ORS
3 197.320(6)). The city also argues that the enforcement
4 order exceeds the scope of LCDC's authority under
5 ORS 197.320 and, therefore, is invalid. However, as we
6 stated in Pilling v. Crook County, ___ Or LUBA ___ (LUBA
7 Nos. 91-098 and 91-099, October 17, 1991), slip op 12,
8 "whether [an] enforcement order exceeds LCDC's statutory
9 authority is a question we lack jurisdiction to consider."

10 In the alternative, the city contends it was not
11 required to apply the enforcement order in making the
12 challenged decision because the city council's hearing on
13 remand was opened on March 5, 1991, 15 days before the
14 enforcement order became effective. According to the city,
15 in Gordon v. Clackamas County, 13 Or LUBA 46 (1985), this
16 Board determined that for an LCDC enactment to be considered
17 in a local government proceeding after remand by this Board,
18 the local government hearing must be initiated after the
19 effective date of the enactment.

20 Because the city's comprehensive plan and land use
21 regulations were not acknowledged when the subject
22 application was initially filed, ORS 227.178(3) does not
23 restrict the applicable standards to those in effect when

any [enforcement] order issued under this section or to
restrain violations thereof. Such actions or proceedings may
be instituted without the necessity of prior agency notice,
hearing and order on an alleged violation."

1 the application was filed. Territorial Neighbors v. Lane
2 County, 16 Or LUBA 641, 646-47 (1988). In Gordon v.
3 Clackamas County, 13 Or LUBA at 51, we determined an LCDC
4 administrative rule adopted after we remanded a local
5 government decision was applicable "because it was in effect
6 after our remand and long before the county held an
7 evidentiary hearing on the remanded issues." However, in
8 Gordon, we were addressing an argument that respondent would
9 be prejudiced by requiring that it apply a rule adopted
10 after remand. We stated that cases supporting respondent's
11 position concerned circumstances "where the deciding body
12 has no opportunity for further evidentiary hearings or where
13 some injustice is suffered by a party by the application of
14 a new law." Id.

15 Here, the city held further evidentiary hearings after
16 issuance of the enforcement order, and made its final
17 decision approximately four months after the enforcement
18 order was issued. Additionally, being a party in the LCDC
19 enforcement proceedings, the city was well aware that an
20 enforcement order was pending. In these circumstances, we
21 conclude the city was required to consider and comply with
22 the enforcement order in adopting the challenged decision.

23 Furthermore, we disagree with the city's contention
24 that only the circuit courts have jurisdiction to determine
25 whether standards the enforcement order requires the city to
26 apply are violated. This Board has exclusive jurisdiction

1 to review local government land use decisions.
2 ORS 197.825(1). We are required to reverse or remand a land
3 use decision if we determine that the local government
4 "[i]mproperly construed the applicable law." ORS
5 197.835(7)(a)(D). Therefore, to the extent an enforcement
6 order establishes "applicable law," we are authorized to
7 determine whether the land use decision properly interprets
8 and applies that law. ORS 197.335(5) provides that LCDC may
9 institute proceedings in circuit courts to enforce its
10 enforcement orders, much the same as ORS 197.825(3) provides
11 that circuit courts retain jurisdiction to grant relief in
12 proceedings to enforce comprehensive plans and land use
13 regulations. Neither deprives this Board of the
14 jurisdiction to determine whether a land use decision
15 complies with applicable law. To the extent Allen v.
16 Columbia Cty. Commissioners, supra, holds otherwise, it is
17 overruled.

18 The enforcement order directs the city to do the
19 following:

20 "1. The City of Jacksonville shall amend its
21 comprehensive plan and land use regulations
22 to bring those portions relating to historic
23 resources into compliance with Goal 5.

24 "2. Until such time as the City of Jacksonville
25 has taken the action described in 1. above
26 and [LCDC] has acknowledged the City's plan
27 and land use regulations as in compliance
28 with Goal 5, the City shall apply the
29 ordinance and guidelines listed in
30 Attachments A and B to all land use decisions

1 made by the City after the effective date of
2 this Order, including decisions regarding
3 applications pending on such date whether for
4 initial decision or decision following remand
5 from appeal." Enforcement Order p. 11.

6 Fairly read, the enforcement order directs the city to
7 determine Goal 5 compliance with regard to historic
8 resources through application of Attachments A and B, rather
9 than application of Goal 5 itself. We therefore agree with
10 petitioners that the city erred in applying Goal 5 to the
11 subject application, and in denying the application on the
12 basis of noncompliance with Goal 5, with regard to historic
13 resources. However, it is not clear that the subject
14 application complies with Attachments A and B as a matter of
15 law. Therefore, the city must, in the first instance, apply
16 Attachments A and B to the subject application.

17 The second and fourth assignments of error are
18 sustained.⁹

19 **FIRST, THIRD AND FIFTH ASSIGNMENTS OF ERROR**

20 "Respondent violated applicable law in holding
21 that the application on remand was subject to
22 review for compliance with statewide planning
23 goals 1 through 14. The decision is prohibited as
24 a matter of law and should be reversed.

25 "Respondent misconstrued applicable law in holding
26 that the application on remand was subject to
27 review for compliance with statewide planning
28 goals 1 through 14, and the decision should be
29 remanded.

⁹Whether sustaining these assignments of error requires reversal or remand of the challenged decision is addressed in the Conclusion, infra.

1 [R]espondent erred in applying the statewide
2 goals to the application on remand rather than its
3 acknowledged comprehensive plan."

4 **A. Scope of Issues on Remand**

5 Petitioners contend the permissible scope of issues
6 which could be addressed by the city on remand was
7 determined by our decision in Cecil. Petitioners argue that
8 in Cecil, the only assignment of error sustained concerned
9 whether the city had demonstrated compliance with Goal 5
10 with regard to historic resources. According to
11 petitioners, under the "law of the case" doctrine, all other
12 issues which were raised or could have been raised in Cecil
13 are deemed adjudicated and cannot be considered after remand
14 or relied upon by the city as a basis for denial.
15 Therefore, the city's determination of whether the subject
16 application complies with other statewide planning goal
17 requirements is improper.

18 We have previously stated:

19 "The 'law of the case' or 'waiver' doctrine means
20 that after a local government decision is remanded
21 by this Board, and a subsequent local government
22 decision adopted in response to the remand is
23 appealed to this Board, only issues that could not
24 have been raised in the first appeal may be raised
25 in the later appeal. The "'law of the case'
26 doctrine does not limit a local government's
27 ability to adopt a different decision, or
28 different findings in support of its decision,
29 after its initial decision is remanded by this
30 Board, and we are aware of no such restriction.
31 * * * (Emphasis added; citations omitted.)
32 Eckis v. Linn County, ___ Or LUBA ___ (LUBA No.
33 90-132, September 11, 1991), slip op 16-17, aff'd
34 110 Or App 309 (1991).

1 This subassignment of error is denied.

2 **B. Applicability of Statewide Planning Goals**

3 Petitioners argue that LCDC Acknowledgment Order
4 91-ACK-738 (hereafter "limited acknowledgment order"), was
5 issued four months before the challenged decision was made
6 and granted limited compliance acknowledgment to the city's
7 comprehensive plan and land use regulations. Petitioners
8 argue that because the limited acknowledgment order
9 determines the city's plan and regulations comply with all
10 statewide planning goals other than Goal 5 (historic
11 resources), under ORS 197.175(2)(d) the city was required to
12 apply its plan and regulations, not Goals 1-4, 5 (resources
13 other than historic) and 6-14, to its subsequent decision on
14 remand.

15 Citing, Allen v. Columbia Cty. Commissioners, supra,
16 the city contends this Board does not have authority to
17 determine whether the challenged decision violates the
18 limited acknowledgment order.¹⁰

19 Petitioners do not ask us to find a violation of the
20 limited acknowledgment order. Rather, petitioners ask that
21 we construe the limited acknowledgment order, together with
22 relevant statutory provisions, to determine whether the

¹⁰The city also argues, as it did with regard to the enforcement order, that the limited acknowledgment order exceeds LCDC's authority and that the limited acknowledgment order is not applicable because the city council opened its hearing on remand before the order was issued by LCDC. We reject these arguments for the reasons stated under the second and fourth assignments of error, supra.

1 statewide planning goals are applicable to approval of the
2 subject tentative subdivision plat.

3 The limited acknowledgment order was issued pursuant to
4 ORS 197.251(9), which provides in relevant part:

5 "[LCDC] may issue a limited acknowledgment order
6 when a previously issued acknowledgment order is
7 reversed or remanded by the Court of Appeals or
8 the Oregon Supreme Court. Such a limited
9 acknowledgment order may deny or continue
10 acknowledgment of the part of the comprehensive
11 plan or land use regulations that the court found
12 not in compliance with the goals and grant
13 acknowledgment of all other parts of the
14 comprehensive plan and land use regulations."
15 (Emphasis added.)

16 The limited acknowledgment order states:

17 "[LCDC] acknowledges that the comprehensive plan
18 and land use regulations of the City of
19 Jacksonville are in compliance with the statewide
20 planning goals except with regard to Goal 5
21 historic resources * * *." Limited Acknowledgment
22 Order p. 3.

23 Based on the above quoted provisions of the statute and
24 order, we conclude the limited acknowledgment order grants
25 acknowledgment to the city's comprehensive plan and land use
26 regulations with regard to all Statewide Planning Goals
27 except Goal 5 (historic resources). It is well established
28 that after acknowledgment, the local comprehensive plan and
29 land use regulations, not the Statewide Planning Goals,
30 govern a local government's decisions on land development
31 permit applications. ORS 197.175(2)(d); Byrd v. Stringer,
32 295 Or 311, 666 P2d 1332 (1983); Kola Tepee, Inc. v. Marion
33 County, 17 Or LUBA 910, 920, aff'd 99 Or App 481 (1989).

1 Accordingly, the city erred in applying Goals 1-4, 5
2 (resources other than historic) and 6-14 in making its
3 decision on the subject application.

4 This subassignment of error is sustained.

5 The first, third and fifth assignments of error are
6 sustained, in part.

7 **CONCLUSION**

8 The challenged decision denies the subject application
9 due to noncompliance with Goals 5 (open space; fish and
10 wildlife habitat; historic resources), 6, 8, 9, 11, 12 and
11 14.¹¹ Under the preceding assignments of error, we
12 determine the city erred in denying the subject application
13 on these bases.

14 We agree with petitioners that the approval standards
15 applicable to the subject application are established by the
16 city's comprehensive plan and land use regulations and
17 Attachment A and B of the enforcement order. However, the
18 challenged decision does not identify and address the
19 applicable standards in the city plan and regulations and
20 the enforcement order.¹²

¹¹The challenged decision may also deny the subject application for failure to comply with the moratorium ordinance. However, as we explain, supra, the moratorium ordinance does not provide an independent basis for denial of the application.

¹²While the first city decision on the subject application, appealed in Cecil, did include findings of compliance with applicable city plan and regulation standards, that decision was remanded, and those findings were not adopted as part of the challenged decision.

1 Petitioners do not argue that we can determine
2 compliance with the applicable plan and regulation standards
3 as a matter of law, based on the local record in this
4 appeal. Also, we reject, supra, petitioner's contention
5 that compliance of the subject application with Attachment A
6 and B of the enforcement order can be determined as a matter
7 of law. Therefore, we remand the challenged decision so the
8 city may identify and apply applicable plan, land use
9 regulation and enforcement order approval standards.

10 The city's decision is remanded.