BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CONCERNED HOMEOWNERS AGAINST
THE FAIRWAYS and CARL SORENSEN,
Petitioners,

vs.

CITY OF CRESWELL,
Respondent,

and

PHIL VELIE,
Intervenor-Respondent.

LUBA Nos. 2006-053 and 2006-054

FINAL OPINION
AND ORDER

Appeal from City of Creswell.

William H. Sherlock, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock PC.

No appearance by City of Creswell

Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED 10/04/2006

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal two decisions that together approve a planned unit development (PUD) and a residential subdivision on property zoned General Commercial (GC) with a Resort Commercial (RC) "subzone" or overlay.

MOTION TO INTERVENE

Phil Velie (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO TAKE OFFICIAL NOTICE

Intervenor requests that the Board take official notice of certain city comprehensive plan refinement plans and Land Conservation and Development Commission (LCDC) orders and documents related to the acknowledgement of those refinement plans. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 4.56-acre parcel located in the Willamette River 100-year base floodplain, and for that reason is subject to the Flood Plain (FP) subzone. The parcel is completely surrounded by the Emerald Valley Golf Course. Intervenor filed PUD and subdivision applications with the city to develop 19 residential lots on the parcel. The proposed development would be accessed by a 300-foot raised road extended from existing residential development to the west that is also zoned RC.

The city planning commission conducted a single hearing on the PUD and subdivision applications, and approved the applications in separate decisions on November 17, 2005. Petitioners appealed the planning commission decisions to the city council, which held a hearing and issued separate decisions on March 13, 2006 upholding the planning commission decisions. These appeals followed.

FIRST, SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

These assignments of error generally argue that city misconstrued the applicable law and failed to adopt adequate findings supported by substantial evidence in finding that the proposed PUD and residential subdivision applications are allowed under the GC zone and the RC subzone.

The GC zone does not list single-family dwellings or similar residential uses in its list of permitted or conditional uses. The RC subzone does. Creswell Development Code (CDC) 13.1.0 is the purpose statement for the RC subzone. According to CDC 13.1.0, the RC subzone is applied to areas designated as "suitable for accommodating large-scale concentrations of recreationally-oriented uses" and the intent of the subzone is to allow uses that are "closely related" to recreational resources such as golf courses. CDC 13.1.0 states in relevant part that "[t]raditional residential and commercial uses shall not be permitted within this subzone except when shown as necessary to support the primary recreationally-oriented uses."[1] CDC 13.2.0 lists the uses permitted in the RC subzone, including "[s]ingle-family dwellings, townhouses, dwellings subject to ORS Ch. 94 and other residential uses primarily marketed under time-sharing provisions."[2]

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[1] CDC 13.1.0 states:

> "**Purpose.** The Resort Commercial Subzone is intended to designate those areas identified by the Creswell Comprehensive Plan as suitable for accommodating large-scale concentrations of recreationally-oriented uses. It is the intent of this subzone that such uses represent an internally consistent development pattern that is compatible and closely related to the recreational resources upon which they rely. Examples of such resources are lakes or other bodies of water, golf courses and related amenities, amusement centers and the like. Recreational uses allowed in this subzone must also be compatible with adjacent agricultural uses. *Traditional residential and commercial uses shall not be permitted within this subzone except when shown as necessary to support the primary recreationally-oriented uses. The burden of proof is on the applicant to show that all aspects of the development are clearly related to the recreational resource*." (Emphasis added).

[2] At the time of the challenged decisions, CDC 13.2.0 provided:

> "**Permitted Uses.** The following uses are permitted in the Resort Commercial Subzone, subject to the provisions of parts 13.3 and 13.4 of this Section and subject to any additional requirements of the underlying Commercial zone:

Petitioners argued to the planning commission that a "residential subdivision" is not allowed under either the GC zone or RC subzone. Record 278-82. The planning commission adopted findings in both its PUD and subdivision approvals addressing and rejecting those arguments. Petitioners filed a joint appeal of both planning commission decisions that substantially repeats the arguments made to the planning commission. Record 111-13. With respect to the PUD application, the city council cited the reference to "residential subdivision" and construed the relevant arguments in petitioners' notice of appeal to be directed only at the subdivision application.[3] With respect to the subdivision application, the city council adopted findings addressing and rejecting petitioners' arguments. The city council also incorporated the findings in each decision into the other decision, so that the PUD decision incorporates the subdivision decision findings, and vice versa.

A. Waiver or Exhaustion of Remedies

As an initial matter, intervenor argues that the first and third assignments of error, which challenge the PUD decision, should be rejected because in relevant part petitioners' notice of local appeal to the city council argued only that the "residential subdivision" was not permitted in the GC zone and RC subzone, and did not mention the PUD. Therefore, intervenor argues, petitioners "waived" those issues with respect to the PUD decision, or

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> "A. Single-family dwellings, townhouses, dwellings subject to ORS Ch. 94 and other residential uses primarily marketed under time-sharing provisions.
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> "B. Sports and playground facilities.
>
> "C. Facilities shown to be necessary to the support and service primary recreational uses and that are consistent with the intent of this subzone."

[3] The city council decision on the appeal of the planning commission's PUD decision states, in relevant part:

> "The errors alleged [above with respect to consistency with the GC zone and RC subzone] appear [to be] directed only at the subdivision application. Therefore, no findings are necessary." Record 17.

rather failed to exhaust the local appeal with respect to those issues, under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003), *rev den* 336 Or 615 (2004) (a party may not raise an issue before LUBA when that party could have specified it as a ground for local appeal to the governing body, but did not do so, even if the issue was raised during the proceedings before an earlier (lower level) decision maker).

We disagree. Although filed separately and approved under separate decisions, the applications were jointly processed and it is apparent that the PUD application and subdivision proposals are inextricably linked. *See* Record 129 (planning commission decision approving a "19-unit planned unit development") and Record 149 (planning commission decision approving a "19-unit subdivision"); *see also* CDC 13.4.0 (requiring that all development allowed in the RC subzone also requires PUD approval). The notice of local appeal as a whole is clearly directed at both planning commission decisions. While the reference to "residential subdivision" could be read to limit certain arguments to the subdivision application alone, it is reasonably clear from the arguments in which that phrase is embedded that petitioners' concern is with the residential *use* (single family dwellings) that is approved in both the PUD and subdivision decisions, and not with approval of the tentative subdivision plat as distinct from approval of the PUD. We cannot say that petitioners "waived" the issue of whether the proposed 19-unit PUD is consistent with the GC zone and RC subzone, under the reasoning in *Miles*.

B. GC Zone

Turning to the merits of these four assignments of error, petitioners repeat the arguments made below that the proposed development is not consistent with the GC zone and RC subzone. With respect to the GC zone, petitioners contend that nothing in that zone purports to authorize a residential development such as the one proposed here. The city's findings do not dispute that point, but respond in part by concluding that the RC subzone authorize uses in addition to those explicitly allowed in the underlying GC zone. Petitioners

challenge that finding, arguing that "nothing in the CDC or case law supports the city's unfounded interpretation that a subzone can insert additional uses not otherwise allowed by the underlying zone." Petition for Review 9. According to petitioners, the GC zone and RC subzone conflict.

Petitioners' conflict argument presumes that the GC zone *prohibits* residential development. That is not an accurate characterization. The GC zone may not *provide for* or authorize residential development, but it does not expressly prohibit such development. That a subzone or overlay zone operates in concert with the GC zoning district to authorize additional uses that are not provided for in the GC zone is not a "conflict" with the GC zone. It is true that the city's findings cite no authority for that view of the relationship between base zones on the one hand and overlay zones or subzones on the other; however, petitioners likewise cite no authority to the contrary. Petitioners have not established that the city council's interpretation to that effect is inconsistent with the language, purpose or policy of the GC zone or RC subzone, or any other CDC provision, and therefore we affirm that interpretation. ORS 197.829(1)(a)-(c).[4] Accordingly, we deny the first and third assignments of error.

C. RC Subzone

With respect to the RC subzone, petitioners contended below and now argue to us that CDC 13.1.0 expressly prohibits "[t]raditional residential" uses "except when shown as

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[4] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

necessary to support the primary recreationally-oriented uses." *See* n 1. According to petitioners, no evidence or findings in the record establish that the proposed single-family dwellings are "necessary to support the primary recreationally-oriented uses." Petitioners argue that the dwellings have nothing to do with supporting the existing golf course; indeed petitioners cite to evidence that the residential development will impede use and enjoyment of the golf course. To similar effect, petitioners argue, CDC 13.2.0 expressly limits "single-family dwellings" and other residential uses to those that are "primarily marketed under time-sharing provisions," and does not permit traditional, owner-occupied residential development such as that proposed here. *See* n 2.

The city council rejected both of those arguments, finding:

> "1. Appellants assert that the purpose language of the [RC] Subzone in CDC 13.1.0 prohibits residential uses in this zone. Purpose language states purposes; it is not a substantive standard upon which decisions can be [made]. They are also not clear or objective.
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> "2. Appellants assert that in the [RC] Subzone 'single-family dwellings are only allowed if they are time-shares.' This statement is not sufficient to state an issue that can be considered on appeal, because it fails to identify a particular criterion upon which the decision was based and state reasons why the criterion was not satisfied.
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> "3. Furthermore, this misreads the list of permitted uses in CDC 13.2.0.A. The use listed is: 'Single-family dwellings, townhouses, dwellings subject to ORS Ch. 94 and other residential uses primarily marketed under time-share provisions.' The last phrase of this listing—time share uses—is a separate listing. It does not qualify every use that is listed before it. The uses allowed are not limited to time share arrangements." Record 28-29.

Petitioners challenge each of these findings.

1. CDC 13.1.0 Purpose Statement

Citing *Anderson v. Peden*, 284 Or 313, 320, 587 P2d 59 (1978), petitioners contend that, contrary to the city council's categorical conclusion, purpose statements can include approval standards applicable to individual development applications. Here, petitioners

argue, the CDC 13.1.0 purpose statement includes language that clearly prohibits "traditional residential" uses, absent circumstances not present here.

Intervenor responds that LUBA should defer to the city council's interpretation that the CDC 13.1.0 purpose statement does not include substantive approval criteria. Intervenor also argues, as discussed below, that the city council's interpretation is consistent with the city's acknowledged comprehensive plan, which intervenor argues includes lands zoned RC as part of the city's inventory of residential lands.

Whether language in the purpose statement of a land use regulation functions as an approval criterion depends on the text and context of that language. As we stated in *Freeland v. City of Bend*, 45 Or LUBA 125, 130 (2003),

> "Purpose statements in land use regulations are often generally worded expressions of the motivation for adopting the regulation, or the goals or objectives that the local government hopes to achieve by adopting the regulation. Where a purpose statement is worded in that manner, it does not play a direct role in reviewing applications for permits under the land use regulations. * * * In other cases, however, purpose statements can impose additional affirmative duties upon the local government that must be fulfilled."

Here, it is probably not accurate to characterize CDC 13.1.0's prohibition on "traditional residential" uses as an *approval criterion*, in the usual sense of a standard that an applicant must satisfy to obtain development approval. However, that language imposes such a clear and mandatory obligation on the city that it is hard to avoid the conclusion that it imposes at least "additional affirmative duties" that the city must fulfill before it approves residential development in the RC subzone. *Id*. Specifically, the city must ensure that "traditional residential" uses are not approved, unless it is shown that such uses are "necessary to support the primary recreationally-oriented uses."

Even if that CDC 13.1.0 language is not understood as imposing an affirmative obligation on the city prior to approving residential development, at a minimum that language functions as context for interpreting uses permitted in the RC subzone, pursuant to

RC 13.2.0. As discussed below, the prohibition on "traditional residential" uses has a considerable bearing on the meaning of RC 13.2.0.A, specifically under what circumstances "single-family dwellings" are permitted in the RC subzone.

2. CDC 13.2.0.A Other Residential Uses Primarily Marketed Under Time-Share Provisions

CDC 13.2.0.A is set out at n 2. The city interpreted the last phrase in CDC 13.2.0.A, "other residential uses primarily marketed under time-share provisions," to be a "separate listing" of "time share uses" subject to a restriction that does not apply to the other residential use listed in CDC 13.2.0.A. Record 29 (quoted above). Although not entirely clear, the city apparently understands the qualifier "primarily marketed under time-share provisions" to modify only the antecedent noun phrase, "other residential uses."

CDC 13.2.0.A is certainly ambiguous with respect to whether one, two or all residential uses listed in that provision are subject to the qualifier "primarily marketed under time-share provisions." LUBA must affirm the city council's interpretation of CDC 13.2.0.A if it is consistent with the express language, purpose or underlying policy. ORS 197.829(1)(a)—(c). In reviewing a local government's interpretation, we consider both the text and context of the ordinance at issue, under the framework provided in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-612, 859 P2d 1143 (1993). *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003).

As part of the textual analysis, Oregon courts have applied a grammatical rule or presumption that modifying words or phrases refer only to the "last antecedent," the last preceding word, phrase or clause, and not earlier words or phrases, where no contrary intent appears. *See State v. Webb*, 324 Or 380, 386, 927 P2d 79 (1996) (lead case applying the "last antecedent" rule). One indication that the last antecedent is the only intended reference is the absence of a comma between the modifying phrase and the last antecedent. *Id.* Conversely, "[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated

from the antecedents by a comma." *Id.* (quoting Norman J. Singer, 2A Sutherland Statutory Construction § 47.33, 270 (5th ed 1992)). Here, no comma separates the last antecedent phrase "other residential uses" (or perhaps "dwellings subject to ORS Ch. 94 and other residential uses") from the modifying phrase "primarily marketed under time-share provisions." Application of the "last antecedent" rule suggests that that modifying phrase qualifies only the immediately preceding phrase.

However, the text includes language that suggests a broader intent. First, CDC 13.2.0.A is structured as a list of specific types of residential dwellings, concluding in a general term "other residential uses." The use of the word "other" to describe the general term "residential uses" suggests a strong relationship with the preceding specific uses. That in turn suggests that qualifications applied to the general term apply equally to the specific instances. Otherwise, the word "other" seems to play no role in CDC 13.2.0.A.[5] The city's interpretation that "primarily marketed under time-share provisions" modifies only "residential uses" would have stronger textual support if the word "other" had been omitted and CDC 13.2.0.A provided for "[s]ingle-family dwellings, townhouses, dwellings subject to ORS Ch. 94 and residential uses primarily marketed under time-share provisions." Read as a whole, the text of CDC 13.2.0.A does not yield a clear answer but it is more consistent with petitioners' interpretation than the city council's interpretation.

As noted above, the RC subzone purpose statement at CDC 13.1.0 is at least context for CDC 13.2.0.A, as well as an explicit statement of its "purpose" and perhaps its "underlying policy," pursuant to ORS 197.829(1)(b) and (c). The purpose of the RC subzone is to accommodate "large-scale concentrations of recreationally-oriented uses." Most relevant here, as noted, CDC 13.1.0 *prohibits* "traditional residential" uses unless it is shown

[5] A similar example might be "Apples, pears, peaches and other fruit primarily picked by hand." Use of the word "other" and the general term "fruit" suggests that the modifying phrase "picked by hand" applies equally to the specific types of fruit listed earlier. Conversely, without "other" the more natural reading is that "picked by hand" modifies only "fruit," *e.g.*, "Apples, pears, peaches and fruit primarily picked by hand."

that such uses are "necessary to support the primary recreationally-oriented uses." We held, above, that that language clearly imposes certain obligations on the city when approving residential uses in the RC subzone. It is not clear from CDC 13.1.0 alone, however, what exactly the city must do, because the term "traditional residential" uses is not defined and hence it is not clear what the city must prohibit or allow only when necessary to support the primary recreationally-oriented uses.[6] Reading CDC 13.1.0 and 13.2.0.A together, however, offers an answer. Under the city's interpretation of CDC 13.2.0.A, typical single-family, owner-occupied dwellings are permitted uses, without any qualification. The city's interpretation gives no meaning to the CDC 13.1.0 prohibition on "traditional residential" uses. Petitioners' interpretation, on the other hand, gives effect to both provisions and makes it reasonably clear what kind of "traditional residential" development the city must prohibit, or allow only when necessary to support the primary recreationally-oriented uses. That is, the city generally may allow only residential development that is primarily marketed as time-shares. In short, while the city's interpretation of CDC 13.2.0.A is perhaps consistent with the text of that provision, it is inconsistent with its context. The only proffered interpretation of CDC 13.2.0.A that is consistent with both the text and context is petitioners' interpretation.

With respect to the "purpose" or "policy" underlying CDC 13.2.0.A, petitioners argue that reading CDC 13.2.0.A to allow only residential development marketed as time-shares is more consistent with the purpose of the RC subzone than allowing unrestricted residential development. We generally agree. The RC subzone is clearly intended to allow non-recreational uses that are related to or support identified recreational uses. *See* CDC 13.1.0 ("[t]he burden of proof is on the applicant to show that all aspects of the development are clearly related to the recreational resource"), quoted at n 1. Traditional residential and

[6] No party disputes petitioners' characterization of the proposed development as a "traditional residential" use.

commercial uses are prohibited unless shown to be "necessary to support the primary recreationally-oriented uses." *Id.* The city's interpretation would allow unrestricted residential development, including "traditional residential" uses, regardless of whether those residential uses in fact support or are related to the primary recreational use. Intervenor makes no effort to explain why that interpretation is consistent with the purpose and policy underlying the RC subzone.

D. Existing Residential Uses and the Creswell Economic Opportunities Analysis

The city council also adopted findings noting that some of the petitioners reside in single-family dwellings that are located on lands subject to the RC subzone. Further, the city considered language in findings that were adopted in support of Ordinance 430. Ordinance 430 was adopted in 2005 and in relevant part adopts the Creswell Economic Opportunities Analysis as part of the comprehensive plan.[7] According to the city, that language demonstrates that the RC subzone is not "acknowledged as prohibiting residential uses."

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[7] The city council findings state, in relevant part:

> "4. The Council notes, too, that the Appellants live in residential dwellings on land that is zoned just like the subject property. If Appellants are correct in their interpretation of the code, then their own dwellings are not allowed on the land that they reside on.
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> "5. Finally, consistent with the finding above, the Council notes that the commercial zoning districts in Creswell are not acknowledged as prohibiting residential uses. This is apparent in the most recent amendments to the comprehensive plan, which were accomplished by Ordinance 430 (Sept. 12, 2005) and are acknowledged. Finding 13 in Exhibit A to the ordinance addresses goal compliance. Finding 13 states:
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> > "'The data show Creswell has 389 acres in 418 tax lots that are designated for non-residential use. Of the 389 acres designated for non-residential use, about 251 acres were classified as unavailable for development, and 138 were classified as available for development. About 48% of all non-residential land is designated for industrial use, about 35% for commercial uses, and 16% for commercial-resort uses. * * * All of the commercial/resort land is east of I-5. *The majority of this land appears to be developing [with] residential uses.* Commercial lands are clustered around the I-5 interchange.'

Although the cited language in Ordinance 430 and in the economic analysis presumably constitute context for CDC 13.1.0 and 13.2.0.A, we do not see that that language assists the city. Petitioners do not argue that the RC subzone prohibits "residential uses." It is undisputed that the RC subzone allows "residential uses." The relevant question is what restrictions if any apply to residential uses that are proposed in the RC subzone. The city interprets CDC 13.1.0 and 13.2.0.A to impose no relevant restrictions on the residential development proposed here. For the reasons set out above, that interpretation is inconsistent with the express language, purpose and policy underlying the code provisions. It is reasonably clear under CDC 13.1.0 and 13.2.0.A that residential uses must be "primarily marketed under time-share provisions" and that "traditional residential" uses are prohibited unless it is shown that they are necessary to support the primary recreational uses. Thus, traditional owner-occupied residential development may be authorized in one of two ways: (1) either as part of a residential development proposal that is "primarily" marketed as time-shares, or (2) where it is shown that traditional development is necessary to support the primary recreational use.

The finding supporting Ordinance 430 that the city cites simply states that the majority of land zoned RC east of I-5 is developing with "residential uses." The findings do

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> "Ordinance 430 adopted two refinement plans to the comprehensive plan. These were: (1) *Creswell Economic Opportunities Analysis (March 2005)*, and (2) *Creswell Preliminary Urbanization Study (June 2005)*. The earlier of these two plans recognizes and confirms that land zoned for commercial-resort use is available for residential development. The refinement plan states, at page 2-11:
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> > "'Finally, a lot of the land that is designated for commercial-resort use has been developed as housing. The Creswell *Economic Development Plan* assumed that only 17% of vacant land designated for commercial-resort use would be in commercial uses. The most likely location for commercial uses is across from the Emerald Valley Resort Clubhouse at the intersection of Dale Kuni Road and Emerald Parkway.'
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> "In summary, as reflected by the existing residential development that the Appellants enjoy, and the statements in the acknowledged refinement plans above, the subject zoning designations do not prohibit residential uses." Record 29-30.

not state what kind of residential use or how it was approved. The city apparently reads that statement to support its view that the RC subzone allows unrestricted traditional single-family owner-occupied residential development, but the finding does not say that. As explained above, the RC subzone does allow traditional single-family owner-occupied residential development, although not without restriction.

Similarly, the economic analysis the city cites to states that "a lot of the land that is designated for commercial-resort use has been developed as housing." Again, the type of housing and under what circumstances it was approved are not stated. The point of the quoted segment seems to be that only 17 percent of the RC subzone will develop with commercial uses, while the remainder will develop with unspecified residential uses. That statement does not provide any particular support for the city's interpretation that the RC subzone allows traditional single-family owner-occupied residential development without the restrictions set out in CDC 13.1.0 and 13.2.0.A.

E. 1982 Acknowledgment

In 1982, LCDC acknowledged the city's comprehensive plan to comply with the statewide planning goals, including Goal 10 (Housing). Although the city made no findings on this point, intervenor cites to language in a staff report by the Department of Land Conservation and Development (DLCD) that recommended approval of the city's comprehensive plan during the city's initial acknowledgement proceedings before LCDC. Specifically, intervenor notes that the DLCD staff report discussion of Goal 10 states the following:

> "Creswell has designated 266 vacant buildable acres to meet residential land use needs. Of 289 vacant acres designated 'Residential,' 256 acres are located outside the floodway and so are suitable for development. *Ten additional acres of the land designated for Resort Commercial use east of I-5 are intended to accommodate 70 owner-occupied housing units*."

According to intervenor, this language confirms that RC subzoned land was acknowledged as allowing single-family, owner-occupied residential dwellings as a

permissible use. It certainly indicates that, in 1982, both DLCD and the city expected that 10 acres of RC-zoned land would develop with 70 owner-occupied housing units. However, that expectation does little to support the city's interpretation that owner-occupied housing is allowed throughout the RC subzone without regard for the restrictions imposed by CDC 13.1.0 and 13.2.0.A. As noted, it is possible for much of the RC subzone to develop with traditional residential development, if the appropriate findings are made that such development complies with CDC 13.1.0 and 13.2.0.A.

F. Needed Housing

Finally, intervenor notes that the city council adopted the following finding:

> "This is an application for single family housing. As such, it meets the definition of 'needed housing' as defined in state statutes. ORS 197.303(1)(a). The City may only apply standards [to needed housing] that are 'clear and objective.' ORS 197.307(6). The limitation that only clear and objective standards may be used in evaluating a project applies in the context of individual applications such as this. See *Home Builders Assoc. of Lane County v. City of Eugene*, 41 Or LUBA 370, 424 (2002). This rule applies to some of the Appellants' theories." Record 27.

In addition, the city findings note elsewhere that the purpose statement at CDC 13.1.0 includes language that is not "clear and objective." Record 28; *see* n 1. Intervenor argues that the foregoing findings essentially conclude that, even if petitioners' interpretation that CDC 13.1.0 includes an approval standard or limitation is correct, the city cannot apply that code provision under that interpretation to the proposed single-family residential development, because CDC 13.1.0 includes language that is not "clear and objective," and ORS 197.307(6) prohibits local governments from applying standards that are not clear and objective to needed housing.[8]

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[8] ORS 197.303(1) defines "needed housing" as follows:

> "As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at

Intervenor also argues that petitioners fail to challenge this alternative basis for rejecting petitioners' interpretation that CDC 13.1.0 includes an approval standard, and these assignments of error should be denied for that reason alone. Intervenor is correct that petitioners' challenge to the city's conclusions regarding needed housing are not well

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particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' also means:

"(a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;

"(b) Government assisted housing;

"(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490; and

"(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions."

ORS 197.307 provides, in relevant part:

"(1) The availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers, is a matter of statewide concern.

"(2) Many persons of lower, middle and fixed income depend on government assisted housing as a source of affordable decent, safe and sanitary housing.

"(3)(a) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing, including housing for farmworkers, shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

"(b) A local government shall attach only clear and objective approval standards or special conditions regulating, in whole or in part, appearance or aesthetics to an application for development of needed housing or to a permit, as defined in ORS 215.402 or 227.160, for residential development. The standards or conditions may not be attached in a manner that will deny the application or reduce the proposed housing density provided the proposed density is otherwise allowed in the zone.

"* * * * *

"(6) Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

focused. Petitioners quote the city's finding that language in CDC 13.1.0 is not clear and objective and complain in a footnote:

> "This 'clear and objective' assertion appeared for the first time in the City Council's Revised Findings and Decision for both the subdivision and the PUD application. The applicant/intervenor never claimed in the proceedings below that this proposed residential development qualifies as 'needed housing' nor did any of the Notices of Hearing mention the needed housing statutes as applicable criteria. Indeed, in the initial drafts of the City Council decisions the city staff asked parenthetically if 'we are in any way shooting ourselves in the foot for future decisions by relying upon the needed housing statutes in this decision.' Supp Rec. 1642. Because petitioners never had a chance to respond to the assertions in the findings regarding the applicability of the needed housing statutes the finding should be rejected to the limited degree it is even relevant." Petition for Review 13, n 3.

On the other hand, the findings intervenor cites are also not well-focused, and do not clearly state that they set out an alternative basis for rejecting petitioners' arguments. The above-quoted findings conclude that the subject development is "needed housing," observes that the city can apply only clear and objective standards to needed housing, states that the needed housing rule applies to some of the appellants' theories, and then, a page later, observes that language in CDC 13.1.0 is not clear and objective. It is difficult to fault petitioners for failing to recognize in the city's findings an alternative theory that is explicitly set out only in intervenor's response brief. In these circumstances, we are not inclined to accept intervenor's invitation to deny these assignments of error notwithstanding the city's misinterpretation of CDC 13.1.0 and 13.2.0.A, based on petitioners' failure to directly challenge the above-quoted findings.[9]

Petitioners do argue, briefly, that "the finding [regarding the applicability of the needed housing statutes] should be rejected to the limited degree it is even relevant." Petition for Review 13, n 3. Petitioners also note, elsewhere, that the proposed housing

[9] In addition, the city's "needed housing" findings appear to apply only to CDC 13.1.0, not to CDC 13.2.0.A. Thus, even if we agreed with intervenor that petitioners' failure to directly challenge the city's needed housing findings is a basis to reject petitioners' argument that CDC 13.1.0 applies as an approval standard, that failure would not affect petitioners' arguments under CDC 13.2.0.A.

constitutes "high-end homes" in a gated community. Petition for Review 2. We understand petitioners to question the city's conclusion that the proposed development is "needed housing" for purposes of ORS 197.303 through 197.307, although petitioners do not explain why the city erred in reaching that conclusion.

On the other hand, the city's findings do not explain why the proposed development constitutes "needed housing" under the statute. In *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 145, *aff'd* 158 Or App 1, 970 P2d 685 (1999), we held that the particular housing types are "needed housing" for purposes of ORS 197.303 through 197.307 if the local government's comprehensive plan or land use regulations identify a need "for housing within an urban growth boundary at particular price ranges and rent levels." *See also Rogue Valley Assoc.*, 158 Or App at 6, n 4 (needed housing as defined by ORS 197.303(1) "consists of specific kinds of residential uses for which there is a legislatively recognized special need"). Neither the city nor intervenor cites to any language in the city's comprehensive plan or elsewhere that identifies a special need for dwellings at the "particular price ranges and rent levels" apparently served by the proposed development.

Given the incomplete state of the findings and argument on this point, the better course is to remand the city's decision to address the requirements of CDC 13.1.0 and 13.2.0.A, as discussed above. If the city believes that the needed housing statutes provide a basis to ignore or waive those requirements, under the theory outlined in intervenor's brief, the city may adopt more adequate findings to that effect. Accordingly, we sustain the second and fourth assignments of error.

For the foregoing reasons, the first and third assignments of error are denied, and the second and fourth assignments of error are sustained.

FIFTH ASSIGNMENT OF ERROR

CDC chapter 14 sets outs out development standards for various types of development that apply in addition to any standards that apply under the specific zoning

districts. CDC 14.6 is a code section dealing with "lots and block specifications," such as lot width and depth, etc. CDC 14.6.14 is titled "Unsuitable Area," and states in relevant part that "[n]o land subject to slippage or inundation shall be developed."[10]

As noted, the subject property is within the 100-year base floodplain, and subject to the FP subzone. CDC Chapter 11 sets out the standards and requirements for development in the FP subzone. Pursuant to that chapter, the city approved placement of 22,000 cubic yards of engineered fill on the subject property to raise the grade above the flood elevation.

Petitioners argued below, and now to us, that CDC 14.6.14 precludes placement of the proposed fill on the subject property, noting that the code definition of "development" includes "filling." CDC 23.1.0.59. Citing to CDC 2.3.0 and 2.5.0, petitioners argued that because CDC 14.6.14 is "more restrictive" than CDC Chapter 11 with respect to placement of fill in the flood zone, CDC 14.6.14 supersedes or trumps any conflicting provision in CDC Chapter 11.

CDC 2.3.0 is entitled "Interpretation," and states that "[w]here the conditions imposed by a provision of this Ordinance are less restrictive than comparable conditions imposed by any other provisions of this Ordinance or any other ordinance, the provisions that are more restrictive shall govern." CDC 2.5.0 is entitled "Conflict," and states that "[i]f any portion of this Ordinance is found to be in conflict with any other provision of any zoning, building, fire safety, or health ordinance of the City, the provision that establishes the higher standard shall prevail."

The city planning commission adopted the following finding to address petitioners' arguments:

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[10] CDC 14.6.14 states:

> "**Unsuitable Area**. No areas dangerous to the health and safety of the public shall be developed. No land subject to slippage or inundation shall be developed."

> "There is a seeming conflict in the code, based on the opponents' arguments. The conflict needs to be resolved. It should be resolved by giving meaning to all the provisions of the code, if possible. CDC Section 11 is the [FP subzone]. This section addresses particularly how development is to be done in flood hazard areas. This section explicitly anticipates that filling will be done in flood hazard areas. This section of the code needs to be given meaning. To give it meaning, the development standards in CDC [14.6.14] must be read as allowing filling in areas subject to inundation if such filling is otherwise allowed by the code. That is, if it is allowed under the regulations of the [FP] Subzone. That is the situation here." Record 134-35, 154.

The city council agreed with that interpretation:

> "* * * [T]he Planning Commission reads the general prohibition against development in areas subject to inundation as being subject to an exception for development that is explicitly authorized by more particular parts of the code. This interpretation is correct. The interpretation is correct because it gives meaning to all parts of the code. The Appellants' interpretation would create a conflict in the code language and would negate an entire chapter of the code, CDC 11, the Flood Plain Subzone. The Flood Plain Subzone is premised upon placing fill in the Flood Plain. It establishes a regulatory scheme for doing this safely. The interpretation adopted here avoids conflicts between code provisions." Record 23.

Intervenor argues that the city reasonably harmonized CDC 14.6.14 and CDC chapter 11, giving effect to both provisions as much as possible, and that LUBA should defer to the city's interpretation.

The city council interpreted the provisions of CDC 14.6.14 and CDC Chapter 11 to eliminate the potential conflict that petitioners identified below. If the city council's interpretation is affirmable under ORS 197.829(1), then that would appear to dispose of petitioners' arguments under CDC 2.3.0 and 2.5.0.

As we understand the city council's interpretation, the provisions of CDC 14.6.14 and CDC Chapter 11 do not conflict because the CDC 14.6.14 prohibition on "development" in areas subject to "inundation" does not apply when fill is placed as permitted under CDC Chapter 11 to elevate the site so that it is no longer subject to inundation. That interpretation is not entirely consistent with the broad code definition of "development," which includes "filling." The city council apparently views the CDC 14.6.14 prohibition on "development"

to be narrower than the code definition of that term, and not to include placement of fill under CDC Chapter 11 that is necessary to render lands not subject to inundation. The city council's interpretation is certainly consistent with the structure of the code as a whole. Under petitioners' interpretation, CDC Chapter 11 is effectively nullified, because its only apparent purpose is to allow placement of fill in areas subject to flooding or inundation, so that such lands can then be developed. It is difficult to believe that the city intended to adopt an entire code chapter to allow fill in areas subject to inundation and at the same time adopt a code provision that makes it impossible to place fill in areas subject to inundation. The city's interpretation does far less violence to the CDC than petitioners' preferred interpretation. For that reason, we believe the city's interpretation is consistent with the text, purpose and underlying policy of the relevant code provisions. ORS 197.829(1).

Further, although the city's findings do not directly address CDC 2.3.0 and 2.5.0, we question whether those provisions apply to the present circumstances. It is not clear that CDC 2.5.0 applies at all. That provision deals only with conflicts between the CDC and "any other zoning, building, fire safety, or health ordinance[.]" CDC 2.5.0 does not appear to apply where there is an apparent conflict between two CDC provisions, as here. CDC 2.3.0, in contrast, applies when "conditions imposed by this Ordinance [the CDC] are less restrictive than comparable conditions imposed by any other provisions of this Ordinance[.]" However, CDC 2.3.0 appears to govern circumstances where the code imposes "comparable conditions," that is, where one applicable code provision imposes certain conditions on development, for example, a 10-foot setback, while another applicable code provision imposes a more restrictive five-foot setback. It is not at all clear that the CDC 14.6.14 prohibition on development in areas subject to inundation and the CDC Chapter 11 provisions allowing for fill in the floodplain impose "comparable conditions" within the meaning of CDC 2.3.0. CDC 14.6.14 is simply not intended to govern the kind of structural interpretative issue petitioners raise here.

The fifth assignment of error is denied.

The city's decision is remanded.