BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORTH EAST MEDFORD NEIGHBORHOOD
COALITION, TOM MICHAELS, GEORGE
EBERT, JAMES SHARP, and LOIS NOBLES,
Petitioners,

vs.

CITY OF MEDFORD,
Respondent,

and

CEDAR LANDING, LLC,
Intervenor-Respondent.

LUBA No. 2006-132

FINAL OPINION
AND ORDER

Appeal from City of Medford.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Johnson & Sherton, PC.

Lori J. Cooper and John R. Huttl, Medford, filed a response brief and argued on behalf of respondent.

Timothy E. Brophy, Medford, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Dominic M. Campanella, and Brophy, Mills, Schmor, Gerking, Brophy & Paradis, LLP.

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

REMANDED 02/01/2007

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

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision approving (1) a preliminary Planned Unit
4 Development (PUD) plan for a mixed-use development, (2) tentative plat approvals for four
5 subdivision areas within the development, and (3) a zone change to remove an Exclusive
6 Agriculture (EA) overlay from a portion of the subject property.

7 **FACTS**

8 The subject property is a 122-acre property located in the City of Medford, and is
9 zoned Single Family Residential – 4 Dwelling Units per Gross Acre (SFR-4).[1] A 7.3-acre
10 portion of the subject property is also subject to an EA zoning overlay district.[2] The
11 property was formerly the Cedar Links Golf Club, a public golf course. The property is
12 bisected by Cedar Links Drive running east/west, and is surrounded by single family
13 residences.

14 In January, 2005, Cedar Landing, LLC (applicant or intervenor) applied for approval
15 of a preliminary PUD plan for development of the property, and for tentative plat approval
16 for four subdivision areas on the property, known as High Cedars, Sky Lakes, Cascade
17 Terrace, and The Village. Record 1448. The PUD proposal contains 294 detached single-
18 family lots, 58 pad lots, 39 condominiums, and a 150-unit congregate care facility, totaling
19 541 dwelling units. Record 1453.[3] The final proposed tentative PUD plan designated 68 lots
20 in the Cascade Terrace subdivision, 34 lots in the High Cedars subdivision, and 3 lots in the

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[1] The SFR-4 zone permits outright detached single-family residences, duplexes and pad lot developments. Medford Land Development Code (MLDC) 10.314. Multi-family dwellings, congregate care facilities and commercial uses are prohibited in the SFR-4 zone except as allowed under the PUD approval process. MLDC 10.314.

[2] The Exclusive Agricultural overlay district restricts development to agricultural buildings. MLDC 10.361.

[3] According to MLDC 10.703, a "pad lot" is a lot "within a common area for non-residential use."

1 Sky Lakes subdivision as "Senior (55 plus) housing project." Record 674. The proposed
2 congregate care facility is located in The Village subdivision.

3 After the city had begun its review of the PUD proposal, the applicant learned for the
4 first time that a 7.3-acre portion of the property contained an EA overlay.[4] In January, 2006,
5 acting pursuant to the city's advice, the applicant submitted a zone change application to
6 remove the EA overlay from a portion of the subject property. Record 14, 567, 1070. The
7 city consolidated its review of the zone change application with its pending review of the
8 PUD and subdivision applications.

9 The planning commission held hearings on both the PUD and subdivision
10 applications, and the zone change application, and ultimately approved all applications.
11 Petitioners appealed the planning commission's decision to the city council, which held a
12 hearing on the appeal. The city council affirmed the planning commission's decisions. This
13 appeal followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioners argue that it was error for the city to approve the PUD and subdivision
16 applications because at the time those applications were submitted, part of the property was
17 subject to the EA overlay district that prevented development of the property as proposed.
18 According to petitioners, ORS 227.178(3)(a) required the city to apply the standards and
19 criteria of the EA overlay district to the PUD and subdivision applications.[5] Petitioners

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[4] Intervenor and the city (respondents) assert, and petitioners do not dispute, that the EA overlay did not appear on the version of the city's zoning maps of the property that were in use by the city when intervenor filed its applications.

[5] ORS 227.178(3)(a) provides:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was 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 assert that to the extent the city interpreted MLDC 10.101 and 10.102 to allow for
2 consolidation of the later filed zone change application with the previously filed PUD and
3 subdivision applications, that interpretation is inconsistent with ORS 227.175(2) and exceeds
4 the city's authority granted under that statute.[6] Respondent answers that the city properly
5 consolidated and processed the zone change application concurrently with the PUD and
6 subdivision applications under MLDC 10.101 and 10.102, and that those code sections are
7 consistent with ORS 227.175(2).

8 ORS 227.175(2) provides in relevant part:

9 "The governing body of the city shall establish *a consolidated procedure* by
10 which an applicant *may apply at one time for all permits or zone changes*
11 *needed for a development project*. The consolidated procedure shall be
12 subject to the time limitations set out in ORS 227.178. * * *" (Emphasis
13 added.)

14 Petitioners read ORS 227.175(2) to allow consolidated processing of all permits and
15 zone changes necessary for a development project only if the necessary applications are filed
16 *on the same date*. In other words, if a zone change will be needed to remove or alter an
17 approval standard that would preclude approval of a permit application, the zone change
18 must be submitted on the same date as the permit application. If a necessary zone change
19 application is not filed on the same date as other development permit applications, we

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[6] MLDC 10.101, which governs development permit applications, provides in relevant part:

> "* * * The applicant for a development permit may choose to request approval of all, any one, or a combination of required plan authorizations. A request for approval of a specific plan authorization may follow, *at any time*, the application for other required plan authorizations." (Emphasis added).

MLDC 10.102, which governs plan authorizations such as the PUD application and the zone change application, provides in relevant part:

> "* * * The development permit application will identify the required plan authorization necessary for issuance of a development permit. The applicant for a development permit, *at the time of application or any time thereafter*, may request approval of any one or combination of required plan authorizations as identified on the development permit application." (Emphasis added.)

1 understand petitioners to contend, the development applications must be judged by the
2 standards applicable in the originally applicable zone, which in most or all cases would
3 almost certainly mean that the proposed development must be denied. The practical effect of
4 petitioner's construction of ORS 227.175(2) is that a consolidated review process is not
5 available for development applications and necessary zone change applications that are not
6 filed on the same date. An applicant that belatedly discovers that pending development
7 permit applications are inconsistent with a zoning requirement that was in effect on the date
8 the development permits applications were filed would have to withdraw all development
9 permit applications and begin anew with review of those development permit applications.
10 We disagree with petitioners that ORS 227.175(2) must be read in that manner or that it
11 compels that outcome.

12 The clear intent of ORS 227.175(2) is to facilitate consolidated review of multiple
13 applications, including zone changes, that will be required to approve a development project.
14 ORS 227.175(2) and ORS 227.178(3)(a) work together to ensure that development
15 applications that require a zone change are judged by the standards and criteria that apply
16 under the new zoning designation, not the standards and criteria that would apply under the
17 zoning designations that existed when the development applications were filed. In that
18 sense, the consolidated review procedure authorized by ORS 227.175(2) functions to some
19 degree as an exception to or modification of the fixed goal post rule at ORS 227.178(3). The
20 intent of that statutory scheme is significantly thwarted by reading those two statutes to
21 effectively prohibit consolidated review except where the applicant files the development
22 applications and necessary zone change applications on the same date. In many cases it may
23 not be clear on the date that development applications are filed that the proposed
24 development requires a zone change. Certainly it was not clear in this case.

25 More importantly, ORS 227.175(2) does not explicitly require that all development
26 and necessary zone change applications must be filed "on the same date" in order to employ

a consolidated review and thus judge the development application by the standards of the zone applied for. Instead, ORS 227.175(2) requires the city to "establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project." The less specific phrase "at one time" does not suggest that the legislature intended the statute to authorize a consolidated procedure *only* if all the applications necessary for proposed development are filed on the same date. As explained, the purpose and intent of ORS 227.175(2) is to facilitate processing of development proposals that require multiple applications, including zone changes. Viewed in that light, the phrase "at one time" is better understood as a description of the consolidated process, rather than an implicit prohibition on consolidated review where all necessary applications are not filed at precisely the same time.

The use of the phrase "consolidated procedure" connotes a *process* by which all necessary development applications for a single development project are considered in the same proceeding. We understand the phrase "may apply at one time," when read in conjunction with the phrase "consolidated procedure," to mean that all development applications may be submitted and processed in the same proceeding. Further, while we agree with petitioners that ORS 227.178(3)(a) provides protection for an applicant for a development permit, as well as project opponents, from the laws changing in the middle of the application process, that statute must be read together with and harmonized with ORS 227.175(2), if possible. *Fairbanks v. Bureau of Labor and Industries*, 323 Or 88, 94, 913 P2d 703 (1996). ORS 227.175(2) expressly envisions consolidating permit reviews that will apply existing laws with zone changes that will alter existing laws. We read ORS 227.175(2) as allowing an applicant to request review of multiple applications in a "consolidated procedure" and continue to enjoy the protections of the fixed goal post statute as to each application, even if the application for a necessary zone change is not filed on the same date as the development applications. This reading harmonizes the clear intent of ORS

227.175(2) to allow applicants to consolidate all necessary applications in a single proceeding with the fixed goal post protection for each application afforded under ORS 228.178(3)(a). It was not error for the city to consolidate and process the zone change application with the PUD and subdivision applications under MLDC 10.101 and 10.102 and ORS 227.175(2).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners assign error to the city's failure to give notice to the Department of Land Conservation and Development (DLCD) of the zoning map amendment to remove the EA overlay from a portion of the property, as required by ORS 197.610(1).[7] Specifically, petitioners argue: (1) the MLDC is an acknowledged land use regulation, (2) the EA overlay district and the city's zoning map applying the EA zoning district to the subject property are part of that acknowledged land use regulation, and (3) the adoption of a resolution approving a change to the zoning map therefore constitutes a post-acknowledgment amendment to a land use regulation. Unless some exception or exemption applies, we agree with petitioners that the proposal to amend the city's zoning map to remove the EA overlay district is "[a] proposal to amend a local government acknowledged * * * land use regulation" and that notice to DLCD was required under ORS 197.610(1). *See* n 7.

Respondents answer that the removal of the EA overlay from the property was not an amendment to a land use regulation requiring notice to DLCD under ORS 197.610(1), because the zoning map amendment is a "small tract zoning map amendment" which is

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[7] ORS 197.610(1) provides:

> "A proposal to amend a local government acknowledged comprehensive plan *or land use regulation* or to adopt a new land use regulation shall be forwarded to the Director of the Department of Land Conservation and Development at least 45 days before the first evidentiary hearing on adoption.* * * The notice shall include the date set for the first evidentiary hearing. * * *" (Emphasis added).

1 expressly excluded from the definition of "land use regulation" under OAR 660-018-
2 0010(11).[8] We are not persuaded by respondent's argument that the zoning map
3 amendment is exempt under OAR 660-018-0010(11). The rule does not define "small tract
4 zoning map amendment," and the city makes no attempt to explain why the amendment to
5 the city's zoning map qualifies as a "small tract zoning map amendment."

6 Moreover, upon closer review of the rule's exemption for small tract zoning map
7 amendments from the ORS 197.610(1) DLCD notice requirement, we are unable to locate
8 any specific statutory authority for such an exemption. The phrase is not defined in any
9 currently effective statute or rule. The original version of ORS 197.015(11), which was
10 adopted during the 1981 legislative session by Oregon Laws, Chapter 748, Section 1, defined
11 "land use regulation" to exclude "small tract zoning map amendments." The original version
12 of OAR 660-018-0010(11) mirrored the statute's language, and became effective on
13 December 15, 1981. *See* n 8. ORS 197.605, which was also adopted by the legislature in
14 1981, in Oregon Laws Chapter 748, Section 3, was the first statute to refer to "small tract
15 zoning map amendments." ORS 197.605(4) provided in relevant part:

16 "(a) A small tract zoning map amendment is subject to review for
17 compliance with the goals in the manner provided in sections 4 to 6,
18 chapter 772, Oregon Laws 1979, as amended by sections 35 to 36a,
19 chapter 748, Oregon Laws 1981 if;

20 "(A) The amendment applies to land outside an acknowledged urban
21 growth boundary;

22 "(B) The Local government has a comprehensive plan that was
23 acknowledged before July 1, 1981; and

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[8] OAR 660-018-0010(11) provides:

"'Land Use Regulation' means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan. 'Land use regulation' does not include *small tract zoning map amendments*, conditional use permits, individual subdivisions, partitioning or planned unit development approvals or denials, annexations, variances, building permits, and similar administrative-type decisions." (Emphasis added)

1 "(C) The acknowledged comprehensive plan has not been reviewed
2 under ORS 197.640.

3 "(b) If [LUBA] determines that an amendment described in paragraph (a)
4 of this subsection is consistent with specific related land use policies
5 contained in the acknowledged comprehensive plan or land use
6 regulations, the amendment shall be considered to be in compliance
7 with the goals. * * *"

8 ORS 197.605 established joint jurisdiction between LUBA and the Land
9 Conservation and Development Commission (LCDC) on issues arising from amendments of
10 acknowledged comprehensive plans and land use regulations. LCDC's review authority over
11 such amendments generally encompassed review of amendments for statewide planning goal
12 compliance, while LUBA's review authority encompassed issues other than goal compliance,
13 *e.g.*, compliance with a statute, or an acknowledged comprehensive plan or ordinance.
14 However, pursuant to ORS 197.605(4) and Oregon Laws 1979, Chapter 772, Sections (4)
15 through (6), as amended by Oregon Laws 1981, Chapter 748, Sections 35 through 36(a),
16 LUBA was authorized to review certain decisions known as "small tract zoning map
17 amendments" for statewide planning goal compliance. *See former* ORS 197.605(4); see also
18 *Babb v. City of Veneta*, 8 Or LUBA 197, 200 (1983) (discussing LCDC and LUBA's
19 jurisdiction over amendments to acknowledged comprehensive plans and land use
20 regulations); *Worcester v. City of Cannon Beach*, 9 Or LUBA 307, 320-21 (discussing
21 LUBA's review authority over certain small tract zoning map amendments.)

22 ORS 197.605 was repealed in 1983. At the same time that ORS 197.605 was
23 repealed, LUBA was given jurisdiction to review all PAPAs.[9] However, the language in the
24 1981 version of ORS 197.015(11) exempting small tract zoning map amendments from the
25 definition of land use regulation, and thus from the requirement to provide notice of the
26 proposed small tract zoning map amendment to DLCD under ORS 197.610(1), remained in

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[9] *See Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572, 582-84, *aff'd* 207 Or App 8, 139 P3d 990 (2006) for a general discussion of the 1983 legislation.

1 the statute until 1989, when the legislature amended ORS 197.015(11) to remove the
2 language.[10] Arguably, small tract zoning map amendments were not subject to the ORS
3 197.610(1) requirement that notice of post acknowledgment land use regulation amendments
4 be provided to DLCD, until the exception for "small tract zoning map amendments" was
5 removed from the ORS 197.015(11) definition of land use regulation in 1989.

6 The legislature's amendment of the statutory definition of "land use regulation" to
7 delete the former exemption for "small tract zoning map amendments," together with the
8 unqualified requirement in ORS 197.610(1) that notice of post-acknowledgment land use
9 regulation amendments be sent to DLCD, leaves all post-acknowledgment land use
10 regulation amendments, including small tract zoning map amendments, subject to the ORS
11 197.610(1) notice requirement. However, the language exempting small tract zoning map
12 amendments found in the original version of OAR 660-018-0010(11) remains in the current
13 version of the rule. *See* n 8. The language in the rule that exempts "small tract zoning map
14 amendments" almost certainly represents an oversight on LCDC's part to conform its rule to
15 the changed statutory definition of land use regulation. The rule now refers to a statutory
16 distinction that no longer exists, and is arguably inconsistent with ORS 197.015(12) and
17 ORS 197.610(1).

18 LCDC has broad rule-making authority under ORS 197.040(1) and has authority to
19 broaden or enhance statutory requirements. *Lane County v. LCDC*, 325 Or 569, 583, 942
20 P2d 278 (1997). But LCDC does not have rulemaking authority to waive or make
21 unnecessary the statutory notice of proposed post-acknowledgment land use regulation
22 amendments that is required by ORS 197.610(1). While in certain circumstances, DLCD

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[10] The statutory definition of "land use regulation" now appears at ORS 197.015(12) and provides:

> "'Land use regulation' means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

may promulgate rules that are broader than or that vary in some way from the authorizing language found in a statute, such rules cannot be inconsistent with state statutes. *See City of West Linn v, LCDC*, 200 Or App 269, 284, 113 P3d 935, *rev den* 339 Or 609 (2005) (LCDC rule that did not require application of locational factors set out in Goal 14 violated the goal and was invalid); *see also Altamirano v. Woodburn Nursery, Inc.*, 133 Or App 16, 23, 889 P2d 1305 (1995) (an agency may not, by its rules, limit the terms of a statutory definition to include only part of its ordinary meaning).

The failure to provide notice to DLCD of the proposed amendment to the zoning map to remove the EA overlay requires remand.[11] *See Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993) (failure to comply with ORS 197.610(1), if compliance is required, is a substantive matter requiring remand); *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759, 776, *dismissed* 208 Or App 189, ___ P3d ___ (2006) (same). On remand, the city must give notice to DLCD of the zoning map amendment and include such information as the statute requires, and allow DLCD the time provided in ORS 197.610(1) to provide notice to persons who have requested notice that the zone map amendment is pending.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city erred in finding that the standards set forth in MLDC 10.235(C)(7) governing traffic impacts were satisfied because the applicant's traffic impact analysis (TIA) for the project was generated using a faulty assumption that certain sections of the project would include "senior housing." Petitioners argue that that assumption was

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[11] In *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001), we found without discussion or analysis that no notice to DLCD was required because the zoning map amendment at issue in that case was a small tract zoning map amendment, which was exempted from the definition of "land use regulation" under OAR 660-018-0010(11). Our decision in *Neighbors for Sensible Dev.* is inconsistent with our conclusion in this case that ORS 197.610(1) requires notice of all post acknowledgment land use regulation amendments to DLCD and that part of our decision in *Neighbors for Sensible Dev.* is overruled.

1 flawed because the final decisions did not impose any conditions of approval requiring
2 certain dwelling units to be age-limited in a manner consistent with the requirements of the
3 Fair Housing Act, 42 U.S.C. §§ 3606 et seq.

4 The TIA based its traffic generation projections on an assumption that the PUD
5 would contain 105 units of senior housing. Based on that assumption, the TIA projected
6 lower traffic than a standard single family dwelling would generate (3.71 average daily trips
7 (ADT) for a senior housing unit versus 9.57 ADT for a standard single family residence).
8 Record 1104. The lower ADT figures resulted in a conclusion by the city that the
9 requirements of MLDC 10.235(C)(7)(d) were met.

10 We disagree with petitioners that the applicant's TIA was based on flawed
11 assumptions. The approved tentative plan specifically proposes 105 senior housing units in
12 its High Cedars and Cascade Terrace subdivisions. The TIA reasonably assumed that the
13 project would include the 105 units of senior housing proposed by the tentative plan. The
14 city approved the tentative plan, including the proposal for 105 units of senior housing. It is
15 reasonable to assume that the final PUD plan will be consistent with the approved tentative
16 plan, since MLDC 10.240(G) provides that a final PUD plan may only be approved if it is
17 "substantially consistent" with the preliminary plan. Therefore, the final PUD plan
18 presumably will also propose 105 units of senior housing. We do not believe the city was
19 required to impose a separate condition of approval requiring the senior housing in order to
20 ensure that the final PUD plan proposes the senior housing that was proposed on the
21 approved tentative plan.

22 In addition, we reject petitioners' argument that the applicant should have been
23 required to prove that the project can meet the requirements for the Fair Housing Act prior to
24 preliminary PUD approval. Nothing cited to us in the Act requires a developer to fulfill the
25 requirements of the Act at any particular stage of the development approval process, and
26 petitioners do not allege that the project cannot qualify for such exemption at a later time. In

1 addition, if in the future the project is unable to qualify for the Fair Housing Act exemption,
2 the applicant presumably would be required to seek approval of a revision of the final PUD
3 plan according to the provisions of MLDC 10.245(A) in order to vary from the approved
4 senior housing component of the final PUD plan.

5 The third assignment of error is denied.

6 The city's decision is remanded.