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

WENDY SIPOREN, IVEND HOLEN, and MEDFORD  
CITIZENS FOR RESPONSIBLE DEVELOPMENT,  
*Petitioners,*

vs.

CITY OF MEDFORD,  
*Respondent,*

and

WAL-MART STORES, INC.,  
*Intervenor-Respondent.*

LUBA No. 2008-185

FINAL OPINION  
AND ORDER

Appeal from City of Medford.

Kenneth D. Helm, Beaverton, filed the petition for review and argued on behalf of petitioners.

John R. Huttel, City Attorney, Medford, filed a response brief and argued on behalf of respondent.

Gregory S. Hathaway, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Jeff N. Evans and Davis Wright Tremaine LLP.

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

REMANDED 06/01/2009

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

**NATURE OF THE DECISION**

Petitioners appeal a city decision granting site plan approval for a Wal-Mart store.

**FACTS**

City decisions concerning earlier versions of the proposed Wal-Mart store were appealed to LUBA twice. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007); *Wal-Mart Stores, Inc. v. City of Medford*, 49 Or LUBA 52 (2005). As currently proposed and approved, the Wal-Mart store would occupy a 176,335 square foot building located on 18.5 acres. Although many substantive and procedural issues have been raised in these appeals, this appeal presents what is essentially a single legal issue—whether city land use regulations, which (1) require preparation of transportation impact analyses and (2) prohibit development if it would be served by transportation facilities that operate at worse than a level of service (LOS) D, must be applied to the proposed Wal-Mart store. The challenged decision determined that they do not; petitioners contend that they do.

**FIRST ASSIGNMENT OF ERROR**

**A. The Medford Land Development Code**

The Medford Land Development Code (MLDC) includes six Articles, Articles I through VI.<sup>1</sup> The most important of those Articles for purposes of this appeal are Articles I, II and IV.<sup>2</sup> Article I sets out definitions, including a very broad definition of the term “development.” That definition plays a central role in petitioners’ argument.

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<sup>1</sup> We set out the text of relevant sections of the MLDC later in this opinion. Our discussion here is limited to setting out the structure of the MLDC.

<sup>2</sup> The MLDC is Chapter 10 of the Medford Code. MLDC 10.007 provides the following summary description of the six Articles of Chapter 10:

**“Structure of this Chapter.**

“This chapter is in six parts. The provisions of Article I shall apply to the general provisions, administration and enforcement of the entire chapter. The provisions of Article II shall apply

1 Article II of the MLDC provides for thirteen different kinds of development reviews:  
2 (1) Major Comprehensive Plan Amendment, (2) Land Development Code Amendments, (3)  
3 Minor Comprehensive Plan Amendment, (4) Annexations, (5) Vacations, (6) Transportation  
4 Facility Development, (7) Zone Changes, (8) Planned Unit Development, (9) Conditional  
5 Use Permits, (10) Exceptions, (11) Land Divisions, (12) Site Plan and Architectural Review,  
6 and (13) Historic Review. The criteria for Site Plan and Architectural Review (number 12  
7 above) are the starting point for the interpretive argument set forth by both petitioners and  
8 the city council. The criteria for Zone Changes (number 7 above) play a key contextual role  
9 in the city’s interpretive argument.

10 Finally, Article IV (Public Improvement Standards and Criteria) sets out  
11 requirements concerning a variety of public improvements, including streets. MLDC 10.460  
12 describes the purpose of a traffic impact analysis (TIA). MLDC 10.461 describes when a  
13 TIA must be prepared and specifies the required content of a TIA. Finally, MLDC 10.462  
14 requires that development not be permitted if it will not maintain a level of service (LOS) D  
15 on the arterials and collectors that serve the development. The text of MLDC 10.461 and  
16 10.462 is at the heart of petitioners’ interpretive argument. The text of MLDC 10.461 and  
17 10.462 plays almost no role in the city’s interpretive position.

18 **B. Petitioners’ Argument**

19 **1. Site Plans Must Comply With Applicable Provisions of City**  
20 **Ordinances**

21 Petitioners’ interpretive argument is relatively straightforward. Petitioners start with  
22 the approval criteria for Site Plan and Architectural Review (site plan review). The site plan  
23 review criteria require, among other things, that the Site Plan and Architectural Review

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to the specific procedural and administrative requirements for a development permit. The provisions of Article III shall establish standards for the regulation of development by zoning districts. The provisions of Article IV shall apply to the establishment and application of development standards for public improvements. The provisions of Article V shall apply to the establishment and development standards for site improvements, and the provisions of Article VI shall apply to the establishment and provisions for the regulation of signs.”

1 Committee (SPAC) find that the “proposed development complies with applicable provisions  
2 of all city ordinances \* \* \*.” MLDC 10.290.<sup>3</sup> There is no dispute that MLDC 10.460  
3 through 10.462 are provisions of the MLDC, which is a city ordinance. The only dispute is  
4 whether they are *applicable* provisions. To answer that question, petitioners go directly to the  
5 text of MLDC 10.460 through 10.462.<sup>4</sup>

6 **2. TIAs Are Required for Proposed Development**

7 MLDC 10.460 explains that the purpose of a TIA is to “identify the traffic impacts”  
8 of “proposed development,” so that appropriate measures can be implemented to “maintain  
9 adequate LOS at [the TIA] study area intersections” and allow safe “ingress to and egress  
10 from the transportation system.”<sup>5</sup>

11 MLDC 10.461 subsections (1) through (3) generally describe the scope of TIAs, the  
12 required study area and when TIAs are required. MLDC 10.461(1) explains that the detail  
13 and scope of a TIA is determined by the Public Works Department in a scoping letter.

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<sup>3</sup> MLDC 10.290 provides:

“The Site Plan and Architectural Commission shall approve a site plan and architectural review application if it can find that the proposed development conforms, or can be made to conform through the imposition of conditions, with the following criteria:

- “(1) The proposed development is compatible with uses and development that exist on adjacent land, and
- “(2) *The proposed development complies with the applicable provisions of all city ordinances, or the Site Plan and Architectural Commission has approved (an) exception(s) as provided in MLDC Section 10.253.*” (Emphasis added.)

<sup>4</sup> As we explain in more detail below, rather than proceed directly to the text of MLDC 10.460 through 10.462, the city proceeds to a contextual analysis of other sections of the MLDC, under which it concludes that MLDC 10.460 through 10.462 are not “applicable provisions.”

<sup>5</sup> MLDC 10.460 provides:

“A Traffic Impact Analysis specifically identifies the generation, distribution, and assignment of traffic to and from a *proposed development*. The purpose is to identify the traffic impacts that a *proposed development* will have on the existing and future street network. It determines all improvements or mitigation measures necessary to maintain adequate LOS at study area intersections and *ensure safe pedestrian and vehicular ingress to and egress* from the transportation system.” (Emphases added.)

1 MLDC 10.461(2) describes the extent of the required study area for a TIA and requires that a  
2 TIA must include any intersection where the “proposed development can be expected to  
3 contribute 25 or more trips during the analysis peak period.” Finally, MLDC 10.461(3)  
4 provides that “[i]f a proposed application has the potential of generating more than 250 net  
5 average daily trips,” a TIA is generally required.<sup>6</sup> MLDC 10.461(4) through (6) set out in  
6 some detail how a TIA must be prepared.

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<sup>6</sup> The complete text of MLDC 10.461(1) through (3) is set out below:

“(1) The level of detail and scope of a traffic impact analysis (TIA) will vary with the size, complexity, and location of the proposed application. Prior to any TIA, the applicant shall submit sufficient information to the City for the Public Works Department to issue a scoping letter. If stipulations to reduce traffic are requested by an applicant, it must first be shown by means of an analysis that an unconditional approval is not possible without some form of mitigation to maintain an adequate LOS. This will determine whether a stipulation is necessary.

“(2) Extent of Study Area:

“The study area shall be defined by the Public Works Department in the scoping letter and shall address at least the following areas:

“(a) All proposed site access points;

“(b) Any intersection where the proposed development can be expected to contribute 25 or more trips during the analysis peak period. Impacts of less than 25 peak period trips are not substantial and will not be included in the study area. his volume may be adjusted, at the discretion of the Public Works Department, for safety or unusual situations; and

“(c) Any intersections directly adjacent to the subject property. The Public Works Department may, at its discretion, waive the study of certain intersections when it is concluded that the impacts are not substantial.

“(3) When required:

“If a proposed application has the potential of generating more than 250 net average daily trips (ADT) or the Public Works Department has concerns due to operations or accident history, a TIA will be required to evaluate development impacts to the transportation system. The Public Works Department may waive a TIA if it is concluded that the impacts are not substantial.”

1                   **3. Development Cannot be Permitted if it Would Result in a LOS**  
2                   **Below D**

3                   MLDC 10.462 provides that the city may not permit “development” if it would be  
4 served by arterials or collectors that are operating at an LOS below LOS D, unless steps are  
5 taken to achieve and maintain LOS D.<sup>7</sup> According to petitioners, MLDC 10.460 through  
6 10.462 operate in concert to require that development not be permitted unless it would  
7 maintain the LOS D standard. Petitioners contend that the text of MLDC 10.460 through  
8 10.462 makes it clear that the requirement for a TIA is triggered by “development” and the  
9 MLDC 10.462 LOS D standard is directed at “developers.”<sup>8</sup>

10                   **4. Wal-Mart is Development**

11                   MLDC 10.012 provides the following definition of “development:”

12                   “Development. The improvement of a parcel of land; including partitioning  
13 or subdividing of any improved or unimproved real property, for any purpose,  
14 and by any person, association, or other entity.”

15                   There does not appear to be any question that the proposed Wal-Mart is “development,” as  
16 MLDC 10.012 defines that term. Similarly, there does not appear to be any serious question  
17 that Wal-Mart is a “developer,” as MLDC 10.012 defines that term. *See* n 8. It follows,  
18 petitioners argue, that the city erred by not requiring that Wal-Mart (1) prepare the kind of

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<sup>7</sup> MLDC 10.462 provides:

“Whenever level of service is determined to be below level D for arterials or collectors, development is not permitted unless the developer makes the roadway or other improvements necessary to maintain level of service D respectively. See Table IV-3 for description of service levels.”

<sup>8</sup> MLDC 10.012 provides the following definition of “developer:”

“Developer. A person, firm, corporation, partnership, syndicate, local agency, city, county, state or federal government or any district of or division thereof, *who or which causes the development of real property* and is the owner of record or owner under contract to purchase or lease for purposes of development, the real property to be developed or improved.” (Emphasis added.)

1 TIA that is required under MLDC 10.461 and (2) demonstrate that its proposal complies with  
2 the MLDC 10.462 LOS D standard.<sup>9</sup>

3 **5. The Medford Comprehensive Plan**

4 The Medford Comprehensive Plan includes a section entitled “Goals Policies and  
5 Implementation.” One of the elements within that section is the “Public Facilities Element.”  
6 One of the sub-elements within that element is “Transportation.” Transportation Goal 2,  
7 Policy 3 provides:

8 “Arterial Streets shall be designed and improved so that the minimum overall  
9 performance during peak travel periods should be service level ‘D.’ Land use  
10 *designations and development* should not cause this minimum level of service  
11 to be exceeded during peak hours.” (Emphasis added).

12 The above plan policy seems to be concerned with LOS D both at the time land use  
13 designations are changed and at the time of development. We understand petitioners to  
14 contend that their interpretation of the MLDC to require that “development” such as the  
15 proposed Wal-Mart prepare a TIA and comply with the MLDC 10.462 LOS D standard is  
16 consistent with Transportation Goal 2, Policy 3.

17 **C. The City’s Interpretation**

18 The city and Wal-Mart complain that most of petitioners’ arguments are directed at  
19 defending petitioners’ interpretation of the MLDC. The city and Wal-Mart argue the  
20 question LUBA must answer in this appeal is whether the *city’s interpretation* of the MLDC  
21 must be sustained under ORS 197.829(1), not whether petitioners’ contrary interpretation is  
22 plausible.<sup>10</sup> We agree with the city and Wal-Mart that the critical question in this appeal is

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<sup>9</sup> Wal-Mart prepared what the parties refer to as a limited TIA, which was done to allow SPAC to consider the impact of ingress and egress to the proposed Wal-Mart store on bordering traffic flow. That TIA was not of the scope required by MLDC 10.461.

<sup>10</sup> 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:

1 whether the city’s interpretation of the MLDC is sustainable under ORS 197.829(1), not  
2 whether petitioners’ interpretation is better or sustainable.<sup>11</sup> *Taylor v. City of Canyonville*,  
3 55 Or LUBA 658, 663-64 (2008); *Blossom Properties, LLC v. Marion County*, 50 Or LUBA  
4 269, 273 (2005); *Staus v. City of Corvallis*, 48 Or LUBA 254, 273 (2004), *aff’d* 199 Or App  
5 217, 111 P3d 759 (2005). We return to that question after we describe the city’s  
6 interpretation and the MLDC text that the city relied on in adopting that interpretation.

7 In its decision the city specifically relied on the text of “MLDC 10.285, MLDC  
8 10.287, MLDC 10.290, MLDC 10.291, MLDC 10.461, MLDC 10.462 and MLDC 10.285,”  
9 as well as language in the Medford Transportation System Plan, to support the interpretation  
10 that is at issue in this appeal. Record 7. That interpretation is that the MLDC 10.461  
11 requirement for a TIA and the MLDC 10.462 requirement that development not violate the  
12 LOS D standard are not “applicable provisions,” within the meaning of MLDC 10.291(2).  
13 Therefore, Wal-Mart was not required to prepare a TIA and was not required to demonstrate  
14 that the proposed Wal-Mart store will not generate additional traffic that will violate the  
15 MLDC 10.462 LOS D standard in seeking approval of its site plan. As interpreted by the  
16 city council, MLDC 10.461 and MLDC 10.462 apply to rezoning applications and to certain  
17 planned unit development applications, but they do not apply to site plan review applications.

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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[.]”

<sup>11</sup> We do not agree with the city and Wal-Mart that petitioners do not challenge the city’s interpretation. While most of petitioners’ arguments are directed at their preferred interpretation, petitioners challenge the city’s reliance on certain text in 10.227, 10.285, 10.287 and 10.290 to conclude that MLDC 10.460 through 10.462 are not applicable provisions of the MLDC, within the meaning of MLDC 10.290(2).

1                   **1.       MLDC 10.290(2) is Ambiguous**

2                   Petitioners first contend that MLDC 10.290(2) is not ambiguous and that the city’s  
3 interpretation “is not an interpretation, it is a story and that story is not entitled to  
4 deference.”<sup>12</sup> Petition for Review 15. As we have already explained, under MLDC  
5 10.290(2), the “proposed development [must comply] with the applicable provisions of all  
6 city ordinances.” Land use regulations that are worded like MLDC 10.290(2) are almost  
7 always going result in ambiguities, because they require an unguided review of city  
8 ordinances to determine whether they are “applicable.” While it is certainly possible that the  
9 applicability or non-applicability of those ordinances will be unambiguous, that will  
10 frequently not be the case.<sup>13</sup> We agree with the city that such is not the case with the MLDC.

11                   If the interpretive analysis is limited to the MLDC sections cited by petitioner  
12 (MLDC 10.290(2) and 10.460 through 10.462), there is not much of an ambiguity to resolve,  
13 if any. On that much we agree with petitioners. If that is the only MLDC text that is  
14 relevant, the city’s decision is inconsistent with the text of those sections. But other parts of  
15 the MLDC may also provide context for determining whether MLDC 10.461 and 10.462 are  
16 “applicable” to the development proposed in this site plan review under MLDC 10.290(2).  
17 *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) (the first  
18 level of analysis in determining the meaning of a statute is to examine its text and context).  
19 Contextual MLDC sections may qualify or limit what would otherwise appear to be the  
20 unqualified requirement in MLDC 10.461 and 10.462 that those sections of the MLDC be  
21 applied to all proposed “development,” as that term is defined at MLDC 10.012. For

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<sup>12</sup> Petitioners’ contention that the city’s interpretation is really a story appears to be based on the city’s heavy reliance on its past practice of not applying MLDC 10.461 and 10.462 to site plan review. We agree with petitioners that past practice is not a permissible substitute for textual support for the city’s interpretation.

<sup>13</sup> To put it more bluntly, wording land use regulations in this manner is almost always a bad idea, because it invites disputes in individual land use proceedings over what ordinance requirements are “applicable.” A far better practice is to specify the ordinance provisions that apply or at the very least to provide some guidance regarding which provisions apply.

1 example, the MLDC provisions for zoning map amendments and planned unit developments  
2 and the city’s comprehensive plan may establish that the requirements of MLDC 10.461 and  
3 10.462 *only* apply to zone changes and certain planned unit development decisions. As  
4 explained below, the city and Wal-Mart argue that such is the case here.

5 **2. MLDC 10.285, 10.287 and 10.291**

6 The city council first looked at the text of MLDC 10.285, which according to the city  
7 council “defines SPAC’s duties and responsibilities in the review of an application.” Record  
8 6. The city council concluded that under MLDC 10.285 SPAC can only consider “points of  
9 ingress and egress as related to bordering traffic flow patterns,” when considering the level  
10 of service of arterials and collectors.<sup>14</sup> The text of MLDC 10.285 is set out in the margin and  
11 the text in MLDC that the city council relies on is italicized. The italicized language lends  
12 slender support for the city’s interpretation and that slender support appears to be negated by  
13 the underlined language that the city council does not acknowledge.

14 The city council also relied explicitly on MLDC 10.287, which sets out the  
15 information that must accompany a site plan review application. As the city correctly notes,  
16 MLDC 10.287 does not expressly require a TIA. The city contends that this lends support to

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<sup>14</sup> MLDC 10.285 provides:

“Site Plan and Architectural Review is required of all projects which are not exempted from the Development Permit process as stated in Section 10.031, Exemptions to the Development Permit Requirement. Site Plan and Architectural Review applications shall be submitted to the Planning Department prior to the application for a building permit. The Site Plan and Architectural Review process is established in order to provide for review of the functional and aesthetic adequacy of development and to assure compliance with the standards and criteria set forth in this chapter for the development of property as applied to the improvement of individual lots or parcels of land as required by this code.

“Site Plan and Architectural Review considers consistency in the aesthetic design, site planning and general placement of related facilities such as street improvements, off-street parking, loading and unloading areas, *points of ingress and egress as related to bordering traffic flow patterns*, the design, placement and arrangement of buildings as well as any other subjects included in the code which are essential to the best utilization of land in order to preserve the public safety and general welfare, and which will encourage development and use of lands in harmony with the character of the neighborhood within which the development is proposed.” (Italics and underlining added.)

1 its view that the requirement to prepare a TIA and to apply the MLDC 10.462 LOS D  
2 standard applies to zone change applications, not development applications such as site plan  
3 review. However, the MLDC 10.226 requirements for a zone change application also do not  
4 expressly require a TIA.

5 Next, the city rejected arguments that MLDC 10.291, which authorizes the city  
6 council to impose conditions of approval to “protect the health, safety and general welfare of  
7 the surrounding area and community as a whole,” could be relied on to require a TIA and  
8 compliance with the MLDC 10.462 LOS D standard.<sup>15</sup> The city concluded that this  
9 potentially broad grant of authority should not be interpreted to enlarge the limited grant of  
10 authority SPAC has under MLDC 10.285. We note, however, that MLDC 10.291(2) also  
11 authorizes SPAC to impose conditions of approval to require “the installation of appropriate  
12 public facilities and services and dedication of land to accommodate public facilities when  
13 needed[.]” The city does not acknowledge or discuss this language in MLDC 10.291(2).

14 As additional contextual support for its position that MLDC 10.285, 10.287 and  
15 10.291 limit SPAC’s authority to consider off-site transportation impacts, the city council  
16 considered other MLDC provisions involving development review where off-site  
17 transportation impacts expressly must be considered and language in the city’s transportation  
18 system plan. We now turn to those contextual provisions.

19 **3. MLDC 10.227 Specifically Requires that Street Adequacy be**  
20 **Considered When Changing Zoning**

21 One of the 13 development reviews authorized by MLDC Article II is a zoning map  
22 amendment or zone change. Under the “Zone Change Criteria” set out at MLDC 10.227, the  
23 zone change must be shown to be consistent with the Transportation System Plan. MLDC  
24 10.227(1). In addition MLDC 10.227(2) specifically requires that the streets that serve the  
25 rezoned property have adequate capacity and meet minimum standards “contained in the

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<sup>15</sup> MLDC 10.291 is lengthy and we do not set out the complete text of that section.

1 [MLDC].”<sup>16</sup> The specific requirement in MLDC 10.227 that impacts on nearby  
2 transportation facilities be considered when amending the zoning, and the lack of any such  
3 specific requirement in the provisions governing site plan review appears to be the center  
4 piece of the city’s contextual argument.

5 **4. MLDC 10.235 Planned Unit Developments That Allow Uses that**  
6 **are not Allowed by the Underlying Zone**

7 Other than the MLDC 10.227 Zone Change Criteria, only one other type of permit  
8 review of the thirteen development permit reviews expressly requires that traffic impacts be  
9 considered. MLDC 10.235 governs approval of preliminary PUD plans. MLDC  
10 10.235(C)(5) provides that if a PUD proposes to include a use that is not allowed by the  
11 underlying zone, the applicant must establish that Category A public facilities, which include

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<sup>16</sup> MLDC 10.227(2) provides, in part:

“It shall be demonstrated that Category A urban services and facilities are available or can and will be provided, as described below, to adequately serve the subject property with the permitted uses allowed under the proposed zoning, except as provided in subsection (c) below. The minimum standards for Category A services and facilities are contained in the Land Development Code and Goal 3, Policy 1 of the Comprehensive Plan ‘Public Facilities Element’ and Transportation System Plan.

“(a) Storm drainage, sanitary sewer, and water facilities must already be adequate in condition, capacity, and location to serve the property or be extended or otherwise improved to adequately serve the property at the time of issuance of a building permit for vertical construction.

“(b) Adequate streets and street capacity must be provided in one (1) of the following ways:

“(i) Streets which serve the subject property, as defined in Section 10.461(2), presently exist and have adequate capacity; or

“(ii) Existing and new streets that will serve the subject property will be improved and/or constructed, sufficient to meet the required condition and capacity, at the time building permits for vertical construction are issued; or

“(iii) If it is determined that a street must be constructed or improved in order to provide adequate capacity for more than one (1) proposed or anticipated development, the Planning Commission may find the street to be adequate when the improvements needed to make the street adequate are fully funded. \* \* \*”

1 streets, will be adequate.<sup>17</sup> We understand the city and Wal-Mart to argue this requirement  
2 would be redundant if all development must assess the impact on the transportation system  
3 generally and specifically establish that nearby streets meet the LOS D standard.

4 **5. Medford Transportation System Plan**

5 The Medford Transportation System Plan (TSP) includes a discussion of LOS and the  
6 “City of Medford LOS Standard.” Medford TSP 3-10. That discussion is set out below:

7 “The City of Medford’s *Comprehensive Plan* has established LOS standards  
8 that are intended to guide roadway design and improvement priorities by  
9 establishing a threshold for determining the level of delay that is unacceptable  
10 to the community, thus triggering a roadway or intersection improvement.  
11 Currently the acceptable LOS threshold is LOS D or better. *Under its current*  
12 *application, this standard requires that zone change decisions not allow*  
13 *increases in traffic that would exceed Level of Service D.”* Medford  
14 Transportation System Plan 3-10 (emphasis added).

15 Because the above-quoted TSP language specifically mentions zone change decisions  
16 and does not mention site plan review decisions, the city and Wal-Mart argue that it is  
17 consistent with the city’s interpretation that MLDC 10.460 through 10.462 are not  
18 “applicable provisions” of the MLDC, within the meaning of MLDC 10.290(2).

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<sup>17</sup> MLDC 10.235(C)(5) provides in part:

“If the Preliminary PUD Plan includes uses not allowed in the underlying zone pursuant to Subsection 10.230(D)(7)(c), the applicant shall alternatively demonstrate that either: 1) demands for the Category ‘A’ public facilities listed below are equivalent to or less than for one or more permitted uses listed for the underlying zone, or 2) the property can be supplied by the time of development with the following Category ‘A’ public facilities which can be supplied in sufficient condition and capacity to support development of the proposed use:

- “a. Public sanitary sewerage collection and treatment facilities.
- “b. Public domestic water distribution and treatment facilities.
- “c. Storm drainage facilities.
- “d. Public streets.

“Determinations of compliance with this criterion shall be based upon standards of public facility adequacy as set forth in this Code and in goals and policies of the comprehensive plan which by their language and context function as approval criteria for comprehensive plan amendments, zone changes or new development. \* \* \*”

1           **D.     Decision**

2           The city council’s decision reads far too much into selected text of MLDC 10.285,  
3 10.287 and 10.291 while ignoring other text in those sections that does not support its narrow  
4 view of the scope of the inquiry in site plan review. The applications for site plan review  
5 that are subject to SPAC review under those MLDC sections are applications for  
6 “development,” as that term is defined by MLDC 10.012. As we have already pointed out  
7 MLDC 10.461 applies to “development,” and MLDC 10.462 applies to “developers.” The  
8 city council’s reliance on MLDC 10.285, 10.287 and 10.291 to conclude that the reference to  
9 “other applicable provisions” of the MLDC in MLDC 10.290(2) does not encompass MLDC  
10 10.461 and MLDC 10.462 is not consistent with the text of MLDC 10.285, 10.287 and  
11 10.291, if the text of those sections is viewed as a whole.

12           The MLDC 10.227 provisions for rezoning, on which the city relies heavily, do not  
13 support the city’s interpretation either. The city’s apparent practice over the past 20 years to  
14 apply MLDC 10.461 and 10.462 only to rezoning decisions has almost no support in the text  
15 of MLDC 10.227, 10.461 and 10.462. Again, MLDC 10.461 and 10.462 apply to  
16 “development.” MLDC 10.461 and 10.462 make no reference to rezoning or zone changes  
17 and do not include a single reference to MLDC 10.227. While a request for development  
18 approval might accompany a request for rezoning, it does not appear to us that rezoning falls  
19 within the MLDC 10.012 definition of “development.” There is only one reference in  
20 MLDC 10.227 to MLDC 10.461. MLDC 10.227(2)(b)(i).<sup>18</sup> Although a TIA or something  
21 like a TIA would likely be necessary to satisfy the MLDC 10.227(2)(b)(i) requirement that  
22 an applicant for rezoning show that streets are adequate and have the requisite capacity,  
23 nowhere does MLDC 10.227 expressly require a TIA. There is not a single reference in

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<sup>18</sup> MLDC 10.227(2)(b)(i) requires a rezoning applicant to demonstrate that “[s]treets which serve the subject property, as defined in Section 10.461(2), presently exist and have adequate capacity[.]” See n 16. This oblique reference to MLDC 10.461 is the only reference to MLDC 10.461 in MLDC 10.227.

1 MLDC 10.227 to MLDC 10.462, oblique or otherwise. If application of the MLDC 10.461  
2 requirement for a TIA and the MLDC 10.462 LOS D standard is limited to zone changes  
3 under MLDC 10.227 and certain PUD decisions under MLDC 10.235(C)(5), something in  
4 the text of those sections or elsewhere in the MLDC would limit the application of MLDC  
5 10.461 and 10.462 in that way. There simply is no direct textual support for that  
6 interpretation and almost no indirect textual support for that interpretation.

7 The language at page 3-10 of the Medford TSP does state that the LOS standard  
8 applies at the time of rezoning. But that TSP language does not say the LOS standard applies  
9 *exclusively* to zone changes. The Medford Comprehensive Plan language cited by petitioners  
10 says the LOS D standard applies both to “[l]and use designations and development.” That  
11 comprehensive plan language is consistent with petitioners’ interpretation and inconsistent  
12 with the city council’s interpretation. If there is additional textual support in the  
13 comprehensive plan for the city council’s interpretation, no one calls it to our attention.

14 Finally, the MLDC 10.235(C)(5) requirement that an applicant for PUD approval  
15 must demonstrate that streets will be adequate if uses are proposed that are not otherwise  
16 allowed by the underlying zone does lend some support to the city’s decision. That  
17 requirement might be based on a theory that unless the uses allowed under the existing  
18 zoning are being changed in some way, it may be assumed that the existing and planned  
19 transportation facilities are adequate. However, even MLDC 10.235(C)(5) includes no  
20 express reference to MLDC 10.461 or 10.462. Given the absence of textual support for the  
21 city’s interpretation elsewhere in the MLDC, we conclude that MLDC 10.235(C)(5) is  
22 simply inadequate to provide sufficient contextual support for the city’s interpretation that  
23 the “applicable provisions” referenced in MLDC 10.290(2) do not include 10.461 and  
24 10.462.

25 Under ORS 197.829(1), *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992)  
26 and *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), the city council’s

1 interpretation and our review of that interpretation are guided by the principles articulated in  
2 *PGE v. Bureau of Labor and Industries*. Our review in this case begins and ends with the  
3 text of MLDC 10.290(2) and the contextual sections of the MLDC that the city council relied  
4 on. We are mindful that under *Clark* and *Church* LUBA is to give the city council “some  
5 deference.” *Wal-Mart Stores, Inc. v. City of Oregon City*, 204 Or App 359, 364-65, 129 P3d  
6 702 (2006). But the city’s interpretation finds almost no support in that text. Given the  
7 paucity of textual support for the city’s interpretation of MLDC 10.290(2), we cannot defer  
8 to that interpretation. The city will need to amend MLDC 10.290(2) if it wishes to approve  
9 development site plans without applying MLDC 10.461 and 10.462.

10           Petitioners’ first assignment of error is sustained.

11           The city’s decision is remanded.