

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of a comprehensive
4 plan amendment and zone change.

5 **MOTION TO DISMISS**

6 The city moves to dismiss this appeal on the grounds that
7 petitioner filed its notice of intent to appeal more than 21
8 days after the challenged decision became final. ORS
9 197.830(8).¹ The challenged decision became final on February
10 19, 1997, and notice of the decision was mailed March 3, 1997.
11 Petitioner filed its notice of intent to appeal on March 24,
12 1997, 32 days after the challenged decision became final, but
13 within 21 days of the date the city mailed notice of the
14 decision. The city argues that, under Wicks-Snodgrass v. City
15 of Reedsport, 148 Or App 217, 939 P2d 625 (1997), petitioner
16 cannot rely upon the date of mailing to satisfy ORS
17 197.830(8).

18 Petitioner responds that Wicks-Snodgrass is inapposite
19 because it involved a notice of intent to appeal a land use
20 decision filed under the first sentence of ORS 197.830(8).

¹ORS 197.830(8) provides in relevant part:

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

1 Petitioner argues that the present case involves an amendment
2 to a comprehensive plan and land use regulation, and therefore
3 the appellate deadline is governed by the second sentence of
4 ORS 197.830(8), which permits filing of a notice of intent to
5 appeal within 21 days "after the decision sought to be
6 reviewed is mailed to parties entitled to notice under ORS
7 197.615." Petitioner asserts that it is a party entitled to
8 notice under ORS 197.615.

9 At oral argument, the city replied that it did not
10 process the present application under ORS 197.610 to 197.625,
11 nor did petitioner receive notice pursuant to ORS 197.615.
12 The city thus argues that the appeal period in first sentence
13 of ORS 197.830(8) applies rather than the appeal period in the
14 second sentence. We disagree. The city does not dispute that
15 it was statutorily required to and should have processed the
16 application under ORS 197.610 to 197.625, and provided the
17 notice required by those statutes. The stated purpose of the
18 second sentence of ORS 197.830(8) is to give interested
19 parties 21 days after mailing the notice of decision to file a
20 notice of intent to appeal when a local government proposes to
21 amend its plan or land use regulations. The city's procedural
22 error in failing to follow the requirements of ORS 197.610 to
23 197.625 does not reduce the statutory appellate period.

24 The city's motion to dismiss is denied.

25 **FACTS**

26 The subject property is a 2.9-acre parcel at the

1 intersection of Highway 213 and the Clackamas River Drive
2 (intersection). The intersection is just south of the
3 intersection of Highway 213 with Interstate 205.

4 The applicant below, Stein Oil Co. (the applicant),
5 operates a 12-position card lock gas station on the subject
6 property. In July 1996, the applicant submitted an
7 application to redesignate the subject property from
8 Industrial to Commercial, and rezone the property from Heavy
9 Industrial to Tourist Commercial. The plan amendment and zone
10 change are sought in order to expand the operation to include
11 eight additional fueling positions, a 2400-sq. ft. convenience
12 store, and a 2400 sq. ft. corporate office for the applicant
13 (the new gas station). The convenience store is thematically
14 linked to the nearby Oregon Trail Interpretative Center. The
15 applicant also operates a 12-position gas station one-half
16 mile away (old gas station) that it intends to close when the
17 new gas station opens.

18 The applicant submitted a traffic engineering report that
19 counted traffic at the intersection and analyzed the effect of
20 the new gas station on the intersection's traffic capacity.
21 The city planning office reviewed the application and referred
22 it to the city commission for approval with several
23 conditions. One condition is that the applicant must apply
24 for and receive a conditional use permit to operate the new
25 gas station, which is otherwise permitted outright under the
26 proposed new designation and zoning. As part of the

1 conditional use permit review, the applicant must demonstrate
2 that the total traffic generated by the new gas station will
3 not reduce the intersection to an unacceptable level of
4 service.²

5 The city commission adopted the proposed zoning ordinance
6 and plan amendment with the conditions imposed by the planning
7 staff. This appeal followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioner argues that the city's finding that the
10 rezoning and plan amendment meets the requirements of the
11 Transportation Planning Rule (TPR) is not supported by
12 substantial evidence.

13 The TPR, OAR 660-12-060(1), provides in relevant part
14 that:

15 "Amendments to functional plans, acknowledged
16 comprehensive plans, and land use regulations which
17 significantly affect a transportation facility shall
18 assure that allowed land uses are consistent with
19 the identified function, capacity, and level of
20 service of the facility. This shall be accomplished
21 by either:

22 "(a) Limiting allowed land uses to be consistent
23 with the planned function, capacity and level
24 of service of the transportation facility;

25 "* * * * *." (Emphasis added.)

²The application involved only a plan amendment and zone change, not the applicant's particular development proposal for the new gas station. However, the city chose to analyze and condition the application in light of that development proposal, in order to more accurately assess the traffic impacts on the intersection. Record 11. This approach also allowed the city to obviate the usual procedure of assessing the most intensive use permitted by the new designation and zone (tourist commercial). Id.

1 A plan or land use regulation amendment "significantly affects
2 a transportation facility" if it

3 "[w]ould reduce the level of service of the facility
4 below the minimum acceptable level identified in the
5 TSP." OAR 660-12-060(2)(d) (emphasis added).³

6 The decision finds that the plan amendment and new
7 development will not have a "significant impact" on Highway
8 213 at the intersection, and thus that OAR 660-12-060(1) does
9 not apply, or is satisfied. Record 14. That finding is based
10 solely on the applicant's traffic report, which states that
11 the intersection currently operates at a "D level of service,"
12 and that the proposed changes and development will not affect
13 the intersection's function or level of service.

14 We do not understand petitioner to dispute the traffic
15 counts and other data provided in intervenor's traffic study.
16 However, petitioner argues that the traffic study's analysis
17 is fundamentally flawed in several respects, its conclusion is
18 thus flawed, and hence the finding that the plan amendment
19 will not significantly impact the intersection is not
20 supported by substantial evidence.

21 The traffic study determines that the new gas station
22 will generate 130 morning peak hour trips and 172 evening peak
23 hour trips, more than double that generated by the old gas
24 station (57 morning, 53 evening) at its location one half mile

³"Level of Service" is a term describing traffic flow, from A (very low delay) to F (extreme delay). As petitioner explains, urban streets and signalized intersections are typically designed for level of service D. Level E is considered to be the limit of acceptable delay, while level F is considered unacceptable.

1 away. Record 314, 334. The study estimates that 20 percent
2 of the trips into the new gas station will be "new" trips,
3 while the remainder will be existing "pass-by" or "diverted-
4 link" trips.⁴ Thus, the study concludes that the new gas
5 station will generate 34 new trips in the morning peak hour
6 and 44 new trips in the evening peak hour. Record 334. If
7 the subject property were developed under the current zoning
8 (industrial), it would generate six additional trips during
9 morning and evening peak hours. Record 315.

10 The signals at the intersection have a cycle length of
11 130 seconds during the morning peak hour and 135 seconds
12 during the evening peak hour. However, at the time of the
13 study, the evening peak hour cycle had been temporarily
14 increased to 150 seconds to compensate for nearby
15 construction. After construction was completed, the
16 intersection returned to the original cycles. Record 309.
17 The apparent effect of the temporarily longer cycle is to
18 reduce delay and "cycle failures" (vehicles forced to wait
19 more than one cycle) for the busiest directions of travel.
20 Record 200.

21 The traffic study calculates delays and level of service

⁴"Pass-by" trips are trips that directly pass the site on an adjacent street, while "diverted-link" trips are trips that require a small diversion from another roadway to the site and return in the original direction of travel. Record 315. The traffic study does not indicate how many of the existing trips are "pass-by" trips and how many are "diverted-link" trips, nor how many of the "diverted-link" trips the proposed use would cause to be diverted through the intersection, and thus constitute a "new" trip through that intersection.

1 for both morning and evening peak hours with (1) existing
2 traffic, (2) existing traffic plus site-generated traffic, and
3 (3) projected traffic in the year 2016 using site-generated
4 traffic and traffic attributable to general development in the
5 area. Record 355-61. The evening peak hour calculations for
6 all three sets of data use the temporary 150-second signal
7 cycle. The study concludes that the intersection is currently
8 in level of service D, will remain in level of service D with
9 the addition of site-generated traffic, but will reach level
10 of service F by the year 2016. Record 330, 334. The study
11 goes on to conclude that

12 "[t]he proposed land use is expected to generate
13 slightly more new trips on the nearby roadway system
14 than other land uses which could be developed on the
15 site under the existing zoning. Although the
16 intersection * * * is expected to operate at level
17 of service F with estimated 2016 volumes, the
18 project does not contribute a significant increase
19 in traffic." Record 336 (emphasis added).

20 Petitioner disputes two essential premises of these
21 conclusions. First, petitioner submitted testimony that, when
22 the evening peak hour delays are calculated with the 130/135-
23 second signal cycle, rather than the temporary 150-second
24 cycle, the intersection is currently operating at or near a
25 level of service F. Record 200, 277.⁵ Petitioner argues that

⁵Martin Jensvold, ODOT Senior Transportation Analyst, reviewed the traffic study and stated in a memorandum dated November 28, 1996:

"* * * the cycle length assumed in the traffic impact report is longer than that currently being used, resulting in an overly favorable assessment of traffic operations at the intersection. Based on the existing traffic volumes and a cycle length of 130 seconds, the intersection is already operating at Level of

1 the study's failure to calculate delays and level of service
2 using the proper signal cycle fatally undermines any reliance
3 on its conclusions.

4 Second, petitioner disputes the calculation by which the
5 traffic study offsets trips generated by the new gas station
6 with trips no longer generated by the old gas station, a
7 calculation essential to the study's conclusion that the new
8 gas station will not cause a significant increase in traffic,
9 despite doubling the number of trips generated.⁶

10 Petitioner attacks that calculation on several grounds,
11 but the principal one is that the traffic study and hence the
12 decision assume that once the old gas station closes, no other

Service 'F.' With traffic volumes expected to grow and no mitigating transportation improvements identified or funded, it's inappropriate to implement zone changes which would increase traffic at the intersection, as this zone change would do." Record 200.

In addition, Joseph Marek, the Clackamas County Traffic Engineer, submitted a memorandum to the city that stated:

"The traffic study prepared by Lancaster Engineering assumed a 150 second cycle length for the intersection of Highway 213/Clackamas Drive. Under this scenario, traffic operations were estimated to be LOS 'D.' However, ODOT operates the traffic signal at a cycle length of 130 to 135 seconds. The traffic signal was operated at a cycle length of 150 seconds for a short period of time during construction on Highway 99E. Using the 130 to 135 second cycle length, the intersection LOS is most likely an 'E' or 'F' under existing conditions. ODOT currently has not identified this intersection for improvements at this time. Trip generation under the proposed zoning will result in significantly more trips than under the existing zoning." Record 142.

⁶The parties dispute whether the study actually uses trips no longer generated by the old gas station to offset trips generated by the new gas station. One part of the study appears to disclaim the use of offsets, while a supplement seems to rely on them. The decision does not address this issue. From what we can discern from the record and arguments made to us, it appears that the study relies on closure of the old gas station to support its conclusion that the new gas station will not contribute a "significant increase in traffic." Record 336.

1 use will replace it and thus no traffic from that
2 redevelopment need be calculated. However, as petitioner
3 notes, the decision places no restriction on any use
4 redeveloping at the old gas station site, other than that any
5 uses be limited to those permitted in the existing light
6 industrial zone. Petitioner argues that the study and the
7 decision fail to account for any traffic generated by
8 redevelopment of the old gas station site.

9 The city responds first with a general argument that
10 because opponents ODOT and Clackamas County did not submit
11 detailed traffic studies of their own, assigning their letters
12 and memorandum in opposition any credibility would grant ODOT
13 "special expert status" without the necessity of filing an
14 independent traffic study. We disagree. We know of no
15 requirement that parties seeking to discredit a traffic study
16 must supply their own. Nor do we agree with the city's
17 suggestion that the traffic engineers at ODOT and Clackamas
18 County who supplied testimony and commentary are less credible
19 than the applicant's traffic engineer, simply because they
20 analyzed the applicant's data rather than supplied their own.
21 See Angel v. City of Portland, 22 Or LUBA 649, 657-58, aff'd
22 113 Or App 169 (1992) (affirming the city's denial based on
23 testimony by opponents' traffic engineer, who analyzed the
24 data gathered by applicant's traffic engineer and reached a
25 different conclusion).

26 The city next argues that the dispute amounts to a

1 difference in expert opinion, and that where experts reach
2 different conclusions, the local government decision maker is
3 entitled to choose between conflicting believable evidence.
4 Angel, 22 Or LUBA at 659. In this context, the issue is
5 whether the expert testimony on which the local government
6 relies is so undermined by opposing expert testimony and other
7 evidence in the record, considered as a whole, that it is not
8 evidence on which a reasonable person would rely. Id. In our
9 view, petitioner's testimony regarding signal cycle length and
10 failure to calculate traffic caused by redevelopment of the
11 old gas station does just that.

12 The only evidence in the record on whether the level of
13 service at the intersection is acceptable under the actual
14 signal cycle length is from petitioner and Clackamas County.
15 Neither the traffic study nor the decision address whether
16 level of service in the intersection is acceptable under the
17 actual signal cycle length. Instead, the study rests its
18 conclusion upon a temporary signal length that does not
19 represent the actual site conditions.⁷ We conclude that the
20 evidence cited by petitioner so undermines the study's
21 conclusion that a reasonable person would not rely on that
22 study in reaching a decision.

23 We also agree with petitioner that the study is flawed in

⁷The applicant's traffic study acknowledges that the 150-second signal cycle is temporary and ODOT would return the intersection to the 130/135-second cycle, but makes no effort to calculate traffic impacts under the actual signal cycle length. Record 309.

1 failing to consider the impact of redevelopment at the old gas
2 station. From what we can determine, the study relies on
3 reductions in traffic from closure of the old gas station. In
4 our view, any analysis relying on such reductions is flawed to
5 the extent it fails to consider the traffic impacts of
6 redevelopment at the site, as allowed by the decision.

7 For these reasons, we conclude that the city's findings
8 that the proposed use will not significantly affect the
9 intersection are not supported by substantial evidence.

10 Notwithstanding, the city argues that any defects in the
11 traffic study and hence the decision are harmless, because the
12 decision requires the applicant to obtain a conditional use
13 permit (CUP), and that a condition of the CUP is that

14 "the applicant must demonstrate with credible
15 evidence that the total traffic generated by the
16 applied for use(s) will not reduce the
17 [intersection] to an unacceptable level of service."
18 Record 16.

19 We understand the city to argue that this condition requires a
20 future traffic study based on the actual signal cycle length,
21 and thus the city will have a chance to determine before final
22 approval whether the proposed use renders the level of service
23 unacceptable.

24 However, we see nothing in the condition quoted that
25 requires the applicant to perform another traffic study, much
26 less one using the actual signal cycle length. As petitioner
27 points out, the applicant's 1996 traffic study essentially
28 performs all the analysis (albeit a flawed analysis) required

1 of a study supporting a CUP application. Nothing in the
2 decision appears to prevent the applicant from resubmitting
3 the 1996 traffic study in support of its CUP application.
4 More importantly, even if the decision required a new study,
5 and one that uses the actual signal cycle length, we agree
6 with petitioner that the TPR requires assurance that the
7 proposed rezoning complies with the TPR before approving that
8 rezoning. A decision that defers the issue of compliance with
9 the TPR does not provide that required assurance.

10 The first assignment of error is sustained.

11 **SECOND ASSIGNMENT OF ERROR**

12 Petitioner argues that the city's decision is
13 inconsistent with Chapter L of the city's comprehensive plan
14 (Transportation Goal),⁸ and Oregon City Zoning Code (OCZC)
15 17.68.020(B) and (C).⁹

16 The city council explicitly interprets the Transportation

⁸The city's Transportation Goal is to:

"Improve the systems for movement of people and products in accordance with land use planning, energy conservation, neighborhood groups, and appropriate public and private agencies."

⁹OCZC 17.68.020(B) and (C) require the following findings:

"(B) That public facilities and services (water, sewer, storm drainage, transportation, schools, police and fire protection) are presently capable of supporting the uses allowed by the zone, or can be made available prior to issuing a certificate of occupancy. Service shall be sufficient to support the range of uses and development allowed by the zone.

"(C) The land uses authorized by the proposal are consistent with the existing or planned function, capacity and level of service of the transportation system serving the proposed zoning district." (Emphasis added.)

1 Goal to "require a basic functioning level of service for all
2 transportation facilities affected by this proposed use."

3 Record 12. The decision finds compliance with the
4 Transportation Goal based on the traffic study's conclusion,
5 examined above, that the intersection currently has adequate
6 capacity and that the proposed use will not degrade the level
7 of service or adversely impact operation of the intersection.

8 Record 13. The decision finds compliance with OCZO
9 17.68.020(B) and (C) based on the same evidence. Record 15.

10 Petitioner challenges these findings on the grounds that,
11 because the evidence shows a current level of service at or
12 near level of service F with the new development, and an
13 indisputably failing level of service in 20 years, the city's
14 findings with respect to the Transportation Goal and OCZO
15 17.68.020(B) and (C) are inadequate and not supported by
16 substantial evidence.

17 The city's response is confusing. It ignores all of the
18 above, and instead reads the second assignment of error to
19 assert that the TPR, OAR 660-12-060(1), requires that the
20 applicant demonstrate and the city find adequate capacity for
21 a 20 year planning horizon. In a footnote, the city notes
22 that "to the extent" petitioner ascribes such a requirement to
23 local ordinances, that argument must fail, because petitioner
24 raised that argument below only with respect to the TPR, none
25 of the city's local standards require a 20-year capacity, and,
26 in any case, the city's view of its ordinances is entitled to

1 deference. Respondent's Brief 18, n5. In the text, the city
2 then proceeds to argue that the TPR does not require a finding
3 that the proposed use be consistent with 20 years of capacity.

4 The parties' arguments bear only a tangential relation to
5 each other. It does not appear to us, as it so evidently
6 appears to the city, that petitioner is arguing that either
7 the TPR or local standards require a finding of 20-year
8 capacity. We cannot find that argument anywhere in
9 petitioner's brief. Petitioner's two citations to the
10 intersection's level of service in 20 years seem intended to
11 bolster the argument it unquestionably does make: that the
12 intersection is already above capacity, and currently at or
13 near an unacceptable level of service when the proposed
14 development is considered, and therefore the city's findings
15 to the contrary are inadequate and not supported by
16 substantial evidence.

17 The city has interpreted the Transportation Goal to
18 supply essentially the same approval criterion as the TPR: a
19 finding that the intersection will operate at an adequate
20 level of service considering the traffic generated by the
21 proposed use. Record 12-13. The city did not expressly
22 interpret OCZO 17.68.020(B) and (C), but the plain terms and
23 the decision's treatment of those provisions are consistent
24 with the TPR in requiring a showing that the proposed use be
25 "consistent with the existing or planned function, capacity
26 and level of service of the transportation system serving the

1 proposed zoning district." OCZO 17.68.020(C). In other words,
2 the city interprets and applies the Transportation Goal and
3 OCZO 17.68.020(B) and (C) to supply analogous, if not
4 identical, standards as the TPR. That being the case, it
5 follows that our conclusion above, that the city's finding
6 regarding the TPR is inadequate and not supported by
7 substantial evidence, applies with equal effect to its
8 findings under the Transportation Goal and OCZO 17.68.020(B)
9 and (C).

10 The second assignment of error is sustained.

11 The city's decision is remanded.