BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ONTRACK, INC.,
Petitioner,

vs.

CITY OF MEDFORD,
Respondent,

and

ROBERT P. PIERLE, JR. and GLEN ANDERSON,
Intervenors-Respondent.

LUBA No. 99-079

FINAL OPINION
AND ORDER

Appeal from City of Medford.

Diane Conradi, Grants Pass, filed the petition for review and argued on behalf of petitioner. With her on the brief was Oregon Legal Services.

Sydnee R. Berg, Senior Assistant City Attorney, Medford, filed a response brief and argued on behalf of respondent.

Robert P. Pierle, Jr. and Glen Anderson, Medford, filed a response brief and argued on their own behalf.

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

REMANDED 01/11/2000

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's denial of a request to change the zoning of a parcel from
4 single family residential to multi-family residential.

5 **MOTION TO INTERVENE**

6 Robert P. Pierle, Jr. and Glen Anderson (intervenors) move to intervene on the side of
7 the city. There is no opposition to their motions, and they are allowed.

8 **FACTS**

9 The subject property is a 2.08-acre portion of a 3.88-acre parcel zoned Single Family
10 Residential (SFR-4). The property is located on Delta Waters Road, a designated collector
11 street which runs from its eastern terminus at its intersection of Foothill Road to its western
12 terminus at its intersection with Highway 62.

13 Petitioner operates a residential treatment program on the subject property for up to
14 27 chemically-dependent single parents and their children. In 1996, the city amended the
15 city's comprehensive plan map designation for the property from "urban residential" to
16 "urban high density residential." As a condition of that amendment, the city required that
17 petitioner file a restrictive covenant that limits the use of the property to the residential
18 treatment program, and requires that the property revert to its original plan map designation
19 if the property is put to other uses.

20 In 1998, petitioner applied to the city to rezone the property from SFR-4 to Multi-
21 Family Residential (MFR-20) in order to upgrade its facilities and to provide service to an
22 additional 10 clients. The MFR-20 zone would allow petitioner to build an additional 41
23 dwelling units on the subject property. The city's Land Development Code (MLDC) 10.227
24 allows a quasi-judicial zone change if the city planning commission finds that "[t]he change
25 is consistent with the Comprehensive Plan's Goals, Policies and General Land Use Plan
26 Map," and that "Category A urban service and facilities are available to adequately serve the

1 property, or will be made available upon development."[1] Transportation facilities such as
2 streets are Category A urban services and facilities. Goal 3, Policy 1 of the city's
3 comprehensive plan specifies that streets must be sufficient to accommodate average
4 weekday traffic volumes at a minimum level of service [LOS] of "D."

5 Petitioner submitted a traffic impact study designed to demonstrate the adequacy of
6 transportation facilities serving the property. The scope of the traffic study spanned the
7 Foothill Road intersection east of the subject property, and the Crater Lake Avenue
8 intersection west of the subject property. For each of the intersections analyzed, the study
9 concluded that the additional trips created by the proposed rezone would not cause the level
10 of service to drop below LOS "D." However, the study did not consider the intersection of
11 Delta Waters Road and Highway 62, which is the next intersection to the west of the Crater
12 Lake Avenue intersection. The Highway 62 intersection is currently operating at an LOS of
13 "F."

14 The city planning commission conducted proceedings and, on February 11, 1999,
15 approved the requested zone change, based in part on a finding that Category A facilities are
16 adequate to support the zone change. Intervenors appealed the planning commission
17 approval to the city council. The city council conducted a hearing and, on April 15, 1999,
18 reversed the planning commission decision. The city council thus denied petitioner's

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[1] MLDC 10.227 provides:

> "The approving authority (Planning Commission) shall approve a quasi-judicial zone change if it finds that the zone change complies with all of the following criteria:
>
> "(1) The change is consistent with the Comprehensive Plan's Goals, Policies and General Land Use Plan Map.
>
> "(2) Category A urban service and facilities are available to adequately serve the property, or will be made available upon development.
>
> "Consideration of the above criteria shall be based on the eventual development potential for the area and the specific zoning district being considered."

application, on the grounds that there was not substantial evidence in the record before the planning commission to demonstrate the adequacy of Category A facilities.

This appeal followed.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

In the third assignment of error, petitioner argues that the city council's findings are inadequate, because they fail to explain the nexus between the findings of fact and the ultimate conclusion. Petitioner argues that "[t]he findings state that the intersection of Highway 62/Delta Waters is operating at LOS 'F' but do not explain how the condition of the intersection is related to the project." Petition for Review 20. In the fourth assignment of error, petitioner argues that the city council's decision should be remanded because it fails to provide an adequate interpretation of the applicable code and comprehensive plan standards. We address these assignments of error together, because they approach, from different directions, the same alleged flaw in the city council's decision.

In the challenged decision, the city council made the following findings of fact:

> "1. The record did not contain information regarding the impacts of additional traffic on the Delta Waters Road and Highway 62 intersection.
>
> "2. The zone change criteria requires that all Category 'A' facilities be adequate in order to approve the request.
>
> "3. Transportation facilities (streets) are a Category 'A' facility.
>
> "4. The minimum acceptable level of service for streets in the City of Medford is 'D.'
>
> "5. The intersection of Delta Waters Road and Highway 62 is currently operating at level of service 'F.'
>
> "6. Under full build out, 41 additional dwelling units could be built on the 2.08 acres site.
>
> "7. The 41 dwelling units would generate an additional 181 average daily trips." Record 16.

Based on those findings, the city drew the following conclusion of law:

1 “There is not substantial evidence in the record to demonstrate that there are
2 adequate Category ‘A’ facilities (streets) available at the intersection of Delta
3 Waters Road and Highway 62 to accommodate the anticipated additional
4 traffic that would result from the requested zone change.” Record 17.

5 In our view, the central dispute in this case, and the primary disagreement between
6 the decision of the planning commission and that of the city council, is whether the Highway
7 62 intersection is a “facility” that “serves the property” within the meaning of MLDC 10.227.
8 That dispute is primarily a legal one. The planning commission evidently did not consider
9 the Highway 62 intersection to be a facility that “serves” the subject property within the
10 meaning of the code provision; the city council obviously disagreed. However, the city
11 council’s decision does not explain the council’s understanding of MLDC 10.227, or the
12 legal and factual basis for its conclusion that the planning commission erred in finding
13 compliance with that provision.

14 While findings of noncompliance with an applicable approval standard need not be as
15 exhaustive or detailed as those necessary to establish compliance, the city’s findings must
16 adequately explain its conclusion that the standard is not met. *Salem-Keizer School Dist. 24-*
17 *J v. City of Salem*, 27 Or LUBA 351, 371 (1994). At a minimum, such findings must inform
18 the applicant of the steps necessary to gain approval of the application, or of the reasons why
19 the application cannot gain approval under the relevant approval criteria, as the local
20 government understands them. *Boehm v. City of Shady Cove*, 31 Or LUBA 85, 89 (1996);
21 *Ellis v. City of Bend*, 28 Or LUBA 332, 334 (1994).

22 In the present case, the city council’s findings are defective in two respects. First, as
23 petitioner points out, a central factual premise to the council’s ultimate conclusion is that
24 rezoning the subject property will generate additional traffic, some of which will pass
25 through the Highway 62 intersection.[2] The city’s findings that the rezoning would generate

[2]We address in the first and second assignments of error, below, petitioner’s evidentiary challenges to that premise.

an additional 181 daily trips and that the Highway 62 intersection is already below the minimum acceptable level of service do not support the council's ultimate conclusion unless at least some of the daily trips generated by the proposal will pass through the Highway 62 intersection. However, the findings never state that premise. Second, and more importantly, that unspoken factual premise is not determinative of compliance with MLDC 10.227 unless the fact that one or more of the daily trips generated will pass through the Highway 62 intersection means that the intersection "serves" the subject property, and thus must be adequate to do so, within the meaning of the code. The city council's interpretation of MLDC 10.227 to that effect may be implicit in the challenged findings, read as a whole; however, even if so, we agree with petitioner that that interpretation is not adequate for review.

An interpretation of a local provision is adequate for review where the local government's unambiguous understanding of that provision is expressed or, if implicit, is readily discernible in its findings. *Alliance for Responsible Land Use v. Deschutes County*, 149 Or App 259, 265, 942 P2d 836 (1997); *Weeks v. City of Tillamook*, 117 Or App 449, 453, 844 P2d 914 (1992). In the present case, one can infer from the decision that the city council believes the Highway 62 intersection "serves" the subject property within the meaning of MLDC 10.227. However, that inference is merely a conclusion that fails to illuminate the city council's understanding of the code provision. When compared with the numeric standards that city staff employed in this case to determine which transportation facilities serve the property and thus which intersections must be studied, the challenged findings give little indication under what circumstances the city council believes an intersection "serves" property within the meaning of MLDC 10.227.[3] The challenged

[3]As explained in our discussion of the fifth assignment of error, the practice of the city's planning staff is to require a traffic study only when that development would generate either 250 or 500 new daily trips, depending on whether the street involved was an arterial or collector, and to limit the scope of the study to those intersections through which at least 50 trips would pass. As a practical matter, that staff practice defined the

1 decision leaves petitioner, as well as all other applicants subject to MLDC 10.227, without
2 any clear basis to determine which intersections "serve" property, or which intersections
3 must be studied, and thus how to demonstrate compliance with MLDC 10.227. As explained
4 above, the city findings of noncompliance must suffice to explain to the applicant what steps
5 can be taken to demonstrate compliance with approval criteria, or why the application cannot
6 gain approval under those criteria. The council's findings are insufficient to do either.

7 ORS 197.829(2) provides that:

8 "If a local government fails to interpret a provision of its comprehensive plan
9 or land use regulations, or if such interpretation is inadequate for review, the
10 board may make its own determination of whether the local government
11 decision is correct."

12 Where ORS 197.829(2) applies, LUBA may interpret the local provision *ab initio*, or
13 remand the decision to the local government to provide an adequate interpretation. *Opp v.
14 City of Portland*, 153 Or App 10, 14, 955 P2d 768 (1998). Given the number of different
15 ways MLDC 10.227 could be plausibly interpreted, we deem it more appropriate to remand
16 the decision to the city to provide an adequate interpretation, as well as adopt more adequate
17 findings.

18 Petitioner makes one other argument under the third assignment of error, and two
19 other arguments under the fourth assignment of error, that bear discussion. In addition to a
20 broader findings challenge under the third assignment of error, petitioner specifically
21 challenges the city council's finding No. 1, that "[t]he record did not contain information
22 regarding the impacts of additional traffic on the Delta Waters Road and Highway 62
23 intersection." Petitioner argues that finding No. 1 is factually incorrect, because the record
24 contains a great deal of evidence regarding the impacts of the zone change on the Highway
25 62 intersection.

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parameters of what an applicant must demonstrate in order to show compliance with criteria such as MLDC 10.227.

1 We discuss some of the evidence relevant to the Highway 62 intersection in the first
2 and second assignments of error, below. From that discussion, it is evident that petitioner is
3 correct there is a considerable amount of evidence in the record regarding traffic impacts
4 from the challenged rezoning on the Highway 62 intersection. We agree with petitioner that
5 finding No. 1 is, at least when read literally, factually incorrect. The city responds that the
6 intended sense of finding No. 1 is that the traffic study did not include the Highway 62
7 intersection within its study area, not that there is no evidence at all in the record regarding
8 impacts on Highway 62. If that is the intended sense of finding No. 1, we agree with
9 petitioner that the finding is inadequate to express that meaning. Although it is not clear
10 what role that finding plays in the decision, or how essential it is, in the course of adopting
11 more adequate findings on remand as required above, the city may consider amending
12 finding No. 1 to clarify its intent.
13 In addition to the arguments in the fourth assignment of error addressed above,
14 petitioner also contends under that assignment that the city council's decision should be
15 remanded because "there is no way to tell whether the city intends the terms 'eventual
16 buildout' in the zone change ordinance (MLDC 10.227) to mean 'full buildout allowed by
17 the zone' or whether it means 'buildout intended by the applicant.'" Petition for Review 22.
18 We understand petitioner to argue that the city council failed to adopt an adequate
19 interpretation of MLDC 10.227 clarifying whether the focus under that provision is the
20 potential buildout under the new zone, or the actual development contemplated by the
21 applicant. However, MLDC 10.227 clearly requires that "[c]onsideration of the [zone
22 change] criteria shall be based on the eventual development potential for the area and the
23 specific zoning district being considered." *See* n 1. The challenged findings of fact state that
24 "[u]nder full [buildout], 41 additional dwelling units could be built" on the subject property,
25 and that "[t]he 41 dwelling units would generate an additional 181 average daily trips."
26 Record 16. Those findings clearly reflect the understanding that the relevant issue under

1 MLDC 10.227 is the "full buildout" allowed by the zoning, not the specific housing proposed
2 by petitioner. That view is consistent with the approach taken by petitioner's traffic study,
3 which examined impacts on nearby Category A traffic facilities based on the potential
4 buildout under the proposed rezoning. Petitioner does not challenge the city's implicit
5 interpretation as being inconsistent with the language, purpose or policy underlying MLDC
6 10.227. *See* ORS 197.829(1).[4] The city's understanding of MDLC 10.227 with respect to
7 the scope of the buildout analyzed under that provision is adequately expressed in its
8 findings, and we defer to that interpretation.
9 Finally, petitioner argues that "when [the] City does interpret its ordinance, it must do
10 so consistently. Under *Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701[, *rev*
11 *den* 328 Or 115] (1998), a city is not entitled to deference when it interprets the same
12 provision of its ordinance differently on different occasions." Petition for Review 22. It is
13 not clear what "different occasions" petitioner is referring to, or whether those prior
14 interpretations were staff interpretations or city council interpretations. In either case, we
15 disagree with petitioner that *Holland* constrains the city council's ability to adopt new or
16 different interpretations of MLDC 10.227 under the circumstances of this case. *See Greer v.*
17 *Josephine County*, ___ Or LUBA ___ (LUBA No. 99-059, November 29, 1999) slip op 13-
18 14 (*Holland* constrains a local government's ability to change interpretations regarding the

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

> "The Land Use Board of Appeals 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; * * *"

1 applicability of its approval criteria, but does not constrain reinterpretations of the meaning
2 of indisputably applicable standards). *See also Alexanderson v. Clackamas County*, 126 Or
3 App 549, 552, 869 P2d 873, *rev den* 319 Or 150 (1994) (in the absence of any indication that
4 different interpretations are the product of a design to act arbitrarily or inconsistently from
5 case to case, a county hearings officer is not bound to follow the previously applied
6 interpretations of planning staff).

7 The third assignment of error is sustained; the fourth assignment of error is sustained
8 in part.

9 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

10 The scope of the city council's review of the planning commission's decisions is set
11 out at MLDC 10.053, which provides in relevant part:

12 "Upon review, the City Council shall not re-examine issues of fact and shall
13 limit its review to determining whether there is substantial evidence to support
14 the findings of the tribunal which heard the matter, or to determining if errors
15 in law were committed by such tribunal. * * *"

16 Petitioner argues first that the city council exceeded its discretion, authority and
17 scope of review under MLDC 10.053, by improperly reexamining issues of fact *de novo* and
18 substituting its own evidentiary judgment for that of the planning commission.
19 ORS 197.835(10)(a).[5] According to petitioner, the city council's role in reviewing the
20 planning commission's decision under MLDC 10.053 is roughly the same as LUBA's role in
21 reviewing the evidentiary basis for a local government's land use decision. In either case,
22 petitioner contends, the reviewing body cannot substitute its own judgment for that of the

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[5]ORS 197.835(10)(a) provides in relevant part:

"The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:

"(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances; * * *"

1 lower body, but instead can consider the evidence only to determine whether the lower
2 body's decision is supported by "substantial evidence." As petitioner correctly points out,
3 the substantial evidence standard is commonly articulated as whether the evidence in the
4 record would permit a reasonable person to make the disputed finding. *Dodd v. Hood River*
5 *County*, 317 Or 172, 179, 855 P2d 608 (1993). In this context, petitioner argues, *LUBA's*
6 role in reviewing the *city council's* application of the substantial evidence standard is
7 analogous to the Court of Appeals' role in reviewing LUBA's decisions: a matter of
8 determining whether the lower body understood and applied the substantial evidence
9 standard correctly. *See Tigard Sand and Gravel, Inc. v. Clackamas County*, 149 Or App 417,
10 424, 943 P2d 1106, *amplified and adhered to*, 151 Or App 16, 949 P2d 1225 (1997) (Court
11 of Appeals' review of LUBA's substantial evidence determinations is generally limited to
12 deciding whether LUBA correctly understood and applied the legal test).[6]

13 Petitioner cites to comments by city council members during the council's
14 deliberations that, petitioner argues, demonstrate that the council members improperly drew
15 their own inferences and thus the council made its own decision based on reweighing the
16 evidence, rather than reviewing the planning commission's decision under the appropriate
17 limited scope of review.

18 Petitioner does not contend that anything in the council's final written decision
19 demonstrates that the council exceeded the scope of its discretion under MLDC 10.053. We
20 have often stated that the decision subject to our review is the final written decision, not oral
21 statements made by the decision makers during the course of the proceedings below. *McCoy*
22 *v. Linn County*, 16 Or LUBA 295, 306 (1987), *aff'd* 90 Or App 271, 752 P2d 323 (1988);
23 *Sanders v. Clackamas County*, 10 Or LUBA 231, 238 (1984). Even if it is appropriate to
24 examine the council members' *oral* statements to determine whether the council exceeded

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[6]For purposes of this opinion we assume, without deciding, that petitioner's understanding of the city council's role and our role under the present circumstances is correct.

1 the scope of its discretion in its *written* decision, we do not agree with petitioner that those
2 statements demonstrate that the council members misunderstood the scope of review under
3 MLDC 10.053. For example, petitioner quotes one council member as stating that "I don't
4 believe that the Planning Commission, or anyone else, could reasonably conclude that the
5 trips [generated by the proposed rezoning] are going to stop at Crater Lake [Road] and not go
6 to Highway 62 and Delta Waters." Petition for Review Appendix 17. The council member's
7 above-quoted comment appears to reflect a correct understanding of the substantial evidence
8 standard, and a correct application of that standard to the planning commission's decision.
9 Petitioner does not explain why that comment, or the others quoted in the petition for review,
10 demonstrates that the city council improperly reviewed the planning commission's decision
11 *de novo* or otherwise exceeded its discretion under MLDC 10.053.

12 Petitioner argues next that, even if the city council did not exceed its discretion under
13 MLDC 10.053, its conclusion that the planning commission's decision is not supported by
14 substantial evidence is itself not supported by substantial evidence, for purposes of LUBA's
15 review. ORS 197.835(9)(a)(C).[7] Petitioner argues that in fact the record *does* contain
16 substantial evidence demonstrating that the Delta Waters Road/Highway 62 intersection is
17 adequate to accommodate the additional traffic generated by the proposed zone change.
18 Petitioner cites to a letter from the Oregon Department of Transportation (ODOT) that the
19 proposed use, given its location and the deed restriction, will not have a "substantial impact
20 to the Highway 62 corridor." Record 119. Because there is substantial evidence in the

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[7]ORS 197.835(9)(a)(C) provides:

"[LUBA] shall reverse or remand the land use decision under review if [LUBA] finds:

"(a) The local government or special district:

"* * * * *

"(C) Made a decision not supported by substantial evidence in the whole record;"

1 record indicating that the proposed use will not substantially impact the Delta Waters
2 Road/Highway 62 intersection, petitioner argues, the city's finding to the contrary is
3 erroneous.

4 The city and intervenors (respondents) respond that the record clearly establishes that
5 the Delta Waters Road/Highway 62 intersection serves the subject property, and that the
6 intersection is currently inadequate to serve the uses allowed under the proposed zone
7 change. According to respondents, the traffic report estimates that the proposed rezoning
8 will generate an additional 13 daily peak-hour westbound vehicle trips from the property,
9 seven of which will pass westbound through the Delta Waters Road/Crater Lake Avenue
10 intersection toward the next intersection with Highway 62. Record 207. In other words,
11 respondents argue, over half of the westbound trips generated by the proposed rezoning will
12 use the Highway 62 intersection. The pattern for eastbound traffic to the subject property is
13 similar. The traffic study estimates that the proposed rezoning will generate an additional 16
14 daily peak hour vehicle trips to the property, with six of those trips passing eastbound
15 through the Delta Waters Road/Crater Lake Avenue intersection from the Highway 62
16 intersection. Respondents note that, based on the traffic study, the Highway 62 intersection
17 provides more service to the subject property, in terms of vehicle counts, than Foothill Road,
18 the arterial immediately to the east of the subject property.

19 Respondents also argue that the ODOT letter petitioner relies upon does nothing to
20 undermine the city's implicit conclusion that the Highway 62 intersection serves the subject
21 property and is inadequate to serve that property. Respondents note that the ODOT letter
22 merely states that the proposed use would not have a "substantial impact" on the Highway 62
23 corridor. Respondents argue that that statement is not directed at the applicable standard:
24 whether the Highway 62 intersection is adequate to serve the property. Further, respondents
25 argue, ODOT later clarified that its letter was based upon its understanding that
26 improvements on the site would be limited to 10 additional beds, combined with measures to

1 limit vehicle trips to and from petitioner's facility that would result in no additional peak
2 hour trips. Record 99. However, respondents note, the planning commission's rezoning
3 approval did not limit uses on the property to an additional 10 beds, or impose any conditions
4 limiting vehicle trips. Respondents submit that the ODOT letter does nothing to demonstrate
5 that the Highway 62 intersection is adequate to serve the subject property.

6 Other than the ODOT letter, and staff comments that merely go to whether the
7 Highway 62 intersection should have been included in the study area, petitioner does not
8 identify any evidence in the record contradicting the data in the traffic study showing that a
9 portion of the peak hour trips generated under the proposed rezoning will pass through the
10 Highway 62 intersection. We agree with respondents that, given the foregoing evidence that
11 the Highway 62 intersection will be impacted by the proposed rezoning, the undisputed fact
12 that the Highway 62 intersection is already at LOS "F," and the absence of any evidence
13 demonstrating the adequacy of the Highway 62 intersection to serve the property, the city
14 council correctly concluded that there is not substantial evidence supporting the planning
15 commission's conclusion that Category A facilities are available to adequately serve the
16 subject property.[8]

17 The first and second assignments of error are denied.

18 **FIFTH ASSIGNMENT OF ERROR**

19 Petitioner argues that the city's decision is a result of standardless, ad hoc decision-

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[8]In a footnote, petitioner advances the argument that the city cannot conclude that the Highway 62 intersection is inadequate simply because the intersection is already below the acceptable standard and the proposed rezoning will generate additional traffic passing through the intersection, citing *Dept. of Transportation v. Coos County*, 158 Or App 568, 976 P2d 68 (1999). In that case, the Court of Appeals rejected ODOT's argument that a proposed plan amendment "significantly affects" an intersection within the meaning of the state Transportation Planning Rule at OAR 660-012-0060 merely because the intersection is already below the acceptable standard and development allowed by the amendment will generate additional traffic affecting the intersection. However, OAR 660-012-0060 is not at issue here. In any case, the Court of Appeals' reasoning turned on the definition of when an amendment "significantly affects" a transportation facility, which in that case depended on whether the amendment would *reduce* the intersection below the minimum acceptable level of service. OAR 660-012-0060(2)(d). The applicable standard in this case merely requires that transportation facilities be "adequate," and does not impose the causative analysis inherent in the rule at issue in *Dept. of Transportation.*

making that violates petitioner's rights to equal protection embodied in the privileges and immunities clause of Article I, section 20, of the Oregon Constitution.[9]

MLDC 10.461 provides that a traffic impact report may be required "by the approving agency as necessary to determine a development impact on the adjacent street system." The purpose of the study is to "identify the traffic impacts and problems which are likely to be generated by a proposed use * * *." MLDC 10.460. Petitioner explains that the city staff's practice under MLDC 10.461 has been to require a traffic study only when either 250 or 500 new trips would be generated (depending on whether the street is an arterial or a collector) and, even then, the scope of the traffic study includes only those intersections through which at least 50 trips would pass. Petitioner's traffic study demonstrated that at the maximum allowable buildout the zone change would generate only 181 new daily trips, and the scope of that study included five intersections up to 1.5 miles away from the subject property, including those through which less than 50 trips would pass. Petitioner argues that the city violated the privileges and immunities clause by holding petitioner to a different and higher standard than other applicants, requiring petitioner to submit a traffic study when other applicants would not and, further, a traffic study that exceeded the usual geographic scope.

The city responds, first, that it did not require petitioner to submit a traffic study at all. According to the city, petitioner undertook to provide a traffic study on its own, and the only staff input was to consult with petitioner, at petitioner's request, as to which intersections to study. It is true, the city concedes, that staff did not suggest that the study include the Highway 62 intersection, based on staff's understanding that the size of the project did not warrant a geographic scope that included that intersection. However, the city

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[9]Article I, section 20, of the Oregon Constitution provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

1 argues that when the traffic study and other testimony demonstrated impacts on the Highway
2 62 intersection, and the inadequacy of that intersection to serve the subject property when
3 rezoned, the city council properly chose to require that the Highway 62 intersection be
4 considered in determining whether the proposed rezoning complied with MLDC 10.227.
5 The city submits that requiring review of the Highway 62 intersection and a demonstration
6 that the intersection is adequate in this case is consistent with applicable criteria and is not
7 standardless or arbitrary.

8 Intervenors respond along similar lines, arguing that erroneous staff practices do not
9 set a standard upon which an applicant is entitled to rely, or one that the city council is
10 prohibited from correcting, citing to *Alexanderson*, 126 Or App at 552. Intervenors argue
11 that "[t]o the extent that [the staff's] application of such thresholds denied evidence of non-
12 compliance with criteria to the appropriate approval authority (Planning Commission), the
13 approval authority with policy-making powers [the City Council] * * * has now disapproved
14 the practice." Intervenors' Response Brief 42-43.

15 Petitioner is correct that vague, discretionary standards can lead to ad hoc policy-
16 making implicating Article I, section 20, of the Oregon Constitution, because such ad hoc
17 decisions may grant to some citizen or class of citizens privileges or immunities that do not
18 belong to all citizens on the same terms. *Anderson v. Peden*, 284 Or 313, 326, 587 P2d 59
19 (1978); *Towry v. City of Lincoln City*, 26 Or LUBA 554, 557 (1994). We understand
20 petitioner to argue that because MLDC 10.460 and 10.461 do not provide sufficient
21 standards as to when the city will require a traffic study, and the geographic extent of any
22 study required, those standards allow the city to impose the traffic study requirement in ad
23 hoc and inconsistent ways that deprive petitioner and others who may propose controversial
24 land uses the privileges and immunities enjoyed by other citizens.

25 The Oregon Supreme Court explained in *Anderson* that the risk of ad hoc policy
26 making, in contravention of Article 1, section 20, of the Oregon Constitution, is always

1 present where discretionary decision making involves application of subjective standards.
2 However, the court went on to explain that "an attack based on this premise must show that
3 in fact a policy unlawfully discriminating in favor of some persons against others either has
4 been adopted or has been followed in practice." *Anderson*, 284 Or at 326. In the present
5 case, petitioner has not shown that the city council has in fact applied MLDC 10.460 and
6 10.461 in a manner that discriminates in favor of some persons and against others. Petitioner
7 has not demonstrated that the city council has ever approved or even acquiesced in the staff's
8 understanding of how the traffic study requirement should be imposed, or that the city
9 council intends that the traffic study requirement should be imposed differently only in this
10 case. We agree with intervenors that the city council has the authority, even under its limited
11 scope of review, to correct legal errors in the planning commission's decision, and that the
12 city council's decision has the effect of disapproving or modifying the staff's practices in
13 applying the traffic study requirement. Doing so does not violate the privileges and
14 immunities clause, absent a further showing that the city council is engaged in a design to act
15 arbitrarily or inconsistently from case to case.[10]

16 The fifth assignment of error is denied.

17 The city's decision is remanded.

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[10]In resolving the third and fourth assignments of error, we determined that the challenged decision lacks required interpretative findings regarding MLDC 10.227. The city's explanation of what that provision requires may also require the city to clarify under what circumstances an applicant must provide a traffic study under MLDC 10.460 and 10.461, and the geographic scope of that study.