BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GLEN C. ANDERSON and ROBERT P. PIERLE, Jr.,
Petitioners,

vs.

CITY OF MEDFORD,
Respondent,

and

ONTRACK, INC.,
Intervenor-Respondent.

LUBA No. 2000-087

FINAL OPINION
AND ORDER

Appeal from City of Medford.

Glen C. Anderson, Medford and Robert P. Pierle, Jr., Medford, filed the petition for review and argued on their own behalf.

Ronald L. Doyle, City Attorney, Medford, filed a response brief and argued on behalf of respondent.

Diane Conradi, Kalispell, Montana, filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED 10/10/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the city's approval of a zone change for a 2.08-acre portion of a 3.88-acre parcel from single-family residential (SFR-4) to Multiple-Family Residential, 20 units per acre (MFR-20).

MOTION TO INTERVENE

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

FACTS

The city's decision is on remand from LUBA. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000). We repeat the relevant facts from our earlier decision:

> "The subject property is * * * located on Delta Waters Road, a designated collector street which runs from its eastern terminus at its intersection [with] Foothill Road to its western terminus at its intersection with Highway 62.
>
> "[Intervenor] operates a residential treatment program on the subject property for up to 27 chemically-dependent single parents and their children. In 1996, the city amended the city's comprehensive plan map designation for the property from 'urban residential' to 'urban high density residential.' As a condition of that amendment, the city required that [intervenor] file a restrictive covenant that limits the use of the property to the residential treatment program, and requires that the property revert to its original plan map designation if the property is put to other uses.
>
> "In 1998, [intervenor] applied to the city to rezone the property from SFR-4 to Multi-Family Residential (MFR-20) in order to upgrade its facilities and to provide service to an additional 10 clients. The MFR-20 zone would allow [intervenor] to build an additional 41 dwelling units on the subject property. The city's Land Development Code (MLDC) 10.227 allows a quasi-judicial zone change if the city planning commission finds that '[t]he change is consistent with the Comprehensive Plan's Goals, Policies and General Land Use Plan Map,' and that 'Category A urban service and facilities are available to adequately serve the property, or will be made available upon development.' Transportation facilities such as streets are Category A urban services and facilities. Goal 3, Policy 1 of the city's comprehensive plan specifies that streets must be sufficient to accommodate average weekday traffic volumes at a minimum level of service [LOS] of 'D.'

> "[Intervenor] submitted a traffic impact study designed to demonstrate the adequacy of transportation facilities serving the property. The scope of the traffic study spanned the Foothill Road intersection east of the subject property, and the Crater Lake Avenue intersection west of the subject property. For each of the intersections analyzed, the study concluded that the additional [181 average daily] trips created by the proposed rezone would not cause the level of service to drop below LOS 'D.' However, the study did not consider the intersection of Delta Waters Road and Highway 62, which is the next intersection to the west of the Crater Lake Avenue intersection. The Highway 62 intersection is currently operating at an LOS of 'F.'" 37 Or LUBA at 474-75 (footnote omitted).

The city planning commission approved the requested zone change, but on appeal to the city council, the council reversed the planning commission, denying intervenor's application on the grounds that there was not substantial evidence to demonstrate the adequacy of the Highway 62 intersection. The city's decision was then appealed to LUBA.

In *Ontrack, Inc.*, we stated:

> "In our view, the central dispute in this case, and the primary disagreement between the decision of the planning commission and that of the city council, is whether the Highway 62 intersection is a 'facility' that 'serves the property' within the meaning of MLDC 10.227. That dispute is primarily a legal one. The planning commission evidently did not consider the Highway 62 intersection to be a facility that 'serves' the subject property within the meaning of the code provision; the city council obviously disagreed. However, the city council's decision does not explain the council's understanding of MLDC 10.227, or the legal and factual basis for its conclusion that the planning commission erred in finding compliance with that provision.
>
> "* * * * *
>
> "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. * * * 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. The challenged decision leaves

> [intervenor], as well as all other applicants subject to MLDC 10.227, without any clear basis to determine which intersections 'serve' property, or which intersections must be studied, and thus how to demonstrate compliance with MLDC 10.227. As explained above, the city findings of noncompliance must suffice to explain to the applicant what steps can be taken to demonstrate compliance with approval criteria, or why the application cannot gain approval under those criteria. The council's findings are insufficient to do either." 37 Or LUBA at 476-78 (citations and footnote omitted).

We commented in a footnote that

> "* * * 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 parameters of what an applicant must demonstrate in order to show compliance with criteria such as MLDC 10.227." *Id*. at 478 n 3.

We then remanded the challenged decision to the city to provide a more adequate interpretation of MLDC 10.227 and to adopt more adequate findings.

On remand, the city council interpreted MLDC 10.227 to mean that streets "serve" property for purposes of that provision "only when a change of zone would result in an increase of 250 average daily automobile trips." Record 6. Because the proposed change of zone would produce only 181 additional average daily trips, the city council determined that the application satisfied MLDC 10.227 under the new interpretation. The city council then vacated its earlier decision and affirmed the planning commission's approval of the requested zone change. This appeal followed.

FIRST, SECOND AND FIFTH ASSIGNMENTS OF ERROR

In the first assignment of error, petitioners argue that the text and context of MLDC 10.227 compel an interpretation that requires the city to consider all transportation facilities that are impacted to any degree by the proposed rezone. In the second assignment of error, petitioners contend that the city's interpretation of MLDC 10.227 is inconsistent with the language, purpose and policies underlying that provision, and is "clearly wrong."

ORS 197.829(1);[1] *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992). In the fifth assignment of error, petitioners argue that MLDC 10.227 was adopted to implement Goal 12 (Transportation) and OAR chapter 660, division 12, and that the city's interpretation is contrary to the goal and the rule, because it allows amendments to land use designations that are inconsistent with the capacity and level of service of affected transportation facilities. ORS 197.829(1)(d). For the following reasons, we deny the first assignment of error and sustain the second and fifth.

A. Language of MLDC 10.227

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."

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[1]ORS 197.829(1) provides:

> "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; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

Petitioners contend that nothing in the text of MLDC 10.227 suggests that the term "serve" is capable of an arbitrary numerical definition.[2] According to petitioners, the city's interpretation has the absurd consequence that *no* streets, even Delta Waters Road

[2]Petitioners cite to a number of dictionary definitions of the term "serve," and argue that none of those definitions have a numerical or quantitative connotation.

immediately adjacent to the subject property, "serve" the property within the meaning of MLDC 10.227.

Further, petitioners argue that the city's interpretation is inconsistent with the context of MLDC 10.227. Petitioners point out that MLDC 10.227 requires that consideration of zone change criteria "shall be based on the eventual development potential for the area and the specific zoning district being considered." In other words, petitioners argue, MLDC 10.227 requires consideration of the cumulative impacts of (1) existing traffic in the area; (2) the new traffic potential for undeveloped or underdeveloped lands in the area under existing zoning designations; and (3) the potential of the subject property to generate new traffic under the proposed zoning. Once a zoning designation is in place, petitioners contend, the issue of street capacity is never reviewed under the city's code, even for conditional uses allowed under the zoning designation. Instead, petitioners argue, the city's code and plan require that street capacity issues must be addressed prior to allowing land use designations or development inconsistent with minimum levels of service.[3] Read together, petitioners

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[3]In support of this point, petitioners cite to several comprehensive plan and code provisions, including:

Medford Comprehensive Plan (MCP) Public Facilities Element 27:

> "It is understood that before an arterial reaches the intolerable level of service E, for any but exceptional peak period overloads, the City should take steps to manage land development to prevent further generation of traffic along the affected route until the necessary improvements are made. * * *"

MCP Public Facilities Goal 3, Policy 1:

> "In cases where the timely provision of essential urban facilities and services cannot be accomplished so as to achieve minimum adequate service levels, then that portion of the city subject to inadequate service shall be designated as a 'Limited Service Area and,' any or all development may be restricted until threshold levels of essential services can be achieved. * * * Timely provision of essential urban facilities and services shall mean that such services shall be provided in adequate condition and capacity prior, to or concurrent with, development of the subject area."

MCP Transportation Goal 2, Policy 3:

argue, the city's plan and code provisions compel the city to deny any zone change application that would impact to any degree an already deficient arterial, such as, in this case, Highway 62.

The only element of the city's code and plan that might support an arbitrary numerical definition of MLDC 10.227, petitioners argue, is MLDC 10.031, which provides an exemption from the obligation to obtain a "development permit" for "[b]uilding construction which does not cause an increase in trip generation of greater than ten (10) average daily trips." However, petitioners argue, MLDC 10.031 applies only to a later stage in the permitting process, and is not applicable to rezoning applications.

B. Purpose and Policies

Petitioners also argue that the city's interpretation of MLDC 10.227 is inconsistent with the comprehensive plan goal and policies that that provision implements and is further inconsistent with the purpose of the code provision itself. Petitioners contend that MLDC 10.227 presumably implements MCP Public Facilities Goal 3, which is "[t]o assure that the General Land Use Plan Map designations and the development approval process remain consistent with the ability to provide adequate levels of essential public facilities and services." Policy 1 under that goal discusses streets, and provides that:

> "* * * A determination of minimum adequate service levels for essential urban facilities and services shall be based on the following:
>
> "* * * * *

> "Arterial streets shall be designed and improved so that the minimum overall performance during peak travel periods will be service level 'D.' Land use designations and development should not cause this minimum level of service to be exceeded during peak hours."

MLDC 10.462:

> "Whenever level of service is determined to be below level D for arterials and collectors, development is not permitted unless the developer makes the roadway or other improvements necessary to maintain level of service D * * *."

> "**Streets** – Sufficient to *serve* any proposed development consistent with the General Land Use Plan (GLUP) Map designation, and to accommodate average weekday traffic volumes at a minimum service level of 'D,' or as indicated by any applicable adopted plan." (Emphasis added).

Petitioners point out that the proposed zone change must be consistent with MCP Public Facilities Goal 3 and its policies, pursuant to MLDC 10.227(1). Petitioners argue that, like MLDC 10.227(2), Policy 1 requires that streets be sufficient to "serve" development. However, petitioners argue, the city did not interpret MCP Public Facilities Goal 3, Policy 1 or apply a numerical definition to the term "serve" as used in that provision. Thus, petitioners argue, the city has interpreted the term "serve" in MLDC 10.227(2) inconsistently with one of the plan goals and policies that provision implements.

Finally, petitioners explain that, as set forth in MLDC 10.005, the purpose of the MLDC is to:

> "(3) Manage the growth and physical development of the city consistent with its ability to provide adequate and cost-effective public services.
>
> "* * * * *
>
> "(6) Protect residents of the city from identifiable adverse impacts resulting from development, insofar as it is practical to do so.
>
> "(7) Establish street standards that will effectively serve all areas and residential neighborhoods of the City and that will minimize congestion, safety hazards and other traffic impacts."

Petitioners argue that the city's interpretation is inconsistent with these purposes. According to petitioners, the city's interpretation allows significant increases in traffic to access already deficient streets. Further, petitioners argue, the threshold allowed under that city's interpretation is easily avoided: a zone change that would allow development generating 700 average daily trips could be split into three separate applications, no single one of which would exceed the threshold. Thus, petitioners contend, the city's interpretation effectively allows any number of zone changes, generating virtually unlimited numbers of additional vehicle trips, without regard for cumulative impacts and without requiring a demonstration of

compliance with the requirements of MLDC 10.227(2).

C. Goal 12

Under the fifth assignment of error, petitioners argue that MLDC 10.227 was adopted in part to implement Goal 12 and OAR chapter 660, division 12, specifically OAR 660-012-0045(2)(g). According to petitioners, the city's interpretation is contrary to the goal and the rule, because it allows amendments to land use designations that are inconsistent with the capacity and level of service of affected transportation facilities.[4]

Goal 12 is "[t]o provide and encourage a safe, convenient and economic transportation system." Petitioners cite to OAR 660-012-0045(2), which implements Goal 12, and requires that local governments

> "* * * shall adopt land use or subdivision ordinance regulations, consistent with applicable federal and state requirements, to protect transportation facilities, corridors and sites for their identified functions. Such regulations shall include:
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> "* * * * *
>
> "(g) Regulations assuring that amendments to land use designations, densities, and design standards are consistent with the functions, capacities and levels of service of facilities identified in the TSP [Transportation System Plan]."

D. The city's and intervenor's responses

The city responds that the city council's interpretation of MCLD 10.227(2) is within the scope of discretion afforded by ORS 197.829(1) and *Gage v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994), because the city council acted in its policy making role as the politically accountable body most familiar with the intended meaning of MLDC 10.227(2) to

[4]Petitioners also argue under this assignment of error that the city's interpretation impermissibly amends its zoning ordinance in the guise of interpretation. *See Goose Hollow Foothills League*, 117 Or App at 218 (to amend legislation *de facto* or to subvert its meaning in the guise of interpreting it is not a permissible exercise). However, petitioners do not elaborate on that argument or explain how it differs from the interpretational challenges brought in the first and second assignments of error. Absent that explanation, we assume that that argument does not state an independent basis for reversal or remand, and do not consider it further.

construe that code provision in a manner that avoids an absurd and destructive result. The city argues that its interpretation of MLDC 10.227(2) is intended to avoid the absurd consequence, inherent in petitioners' view of that provision, that a zone change that would generate even one peak hour trip through a failed intersection must be denied, no matter how distant that intersection is from the subject property, or how tangential the service it provides to that property.[5] In a city the size of Medford, the city argues, the practical effect of petitioners' proposed interpretation is to effectively prohibit new zone changes that would generate additional traffic once any single intersection in the city fell below the appropriate service level. According to the city, MLDC 10.227(2) must be interpreted and applied in a manner that allows zone changes with *de minimis* impacts on facilities that have fallen below acceptable standards. Intervenor makes similar responses to the first and second assignments of error.[6]

With respect to petitioners' arguments under Goal 12 and OAR 660-012-0045, neither the city nor intervenor appears to dispute petitioners' contention that MLDC 10.227 implements the goal and the rule.[7]

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[5]The city quotes a statement from a city council member regretting that the council had interpreted MLDC 10.227(2) in a manner that effectively adopts a "one-trip" threshold:

> "* * * I think that was one of the worst votes that I ever made when we hung our hat on a one trip rule and that can shut down any development anywhere in the city if we're going to hang our hat on a one trip rule and I haven't been comfortable with that since we made that vote. * * *" Respondent's Brief, App 2.

[6]Intervenor's response differs in one respect from the city's. We understand intervenor to take the position that, under the city's interpretation, even where a project falls below the 250-trip threshold the city will still determine the adequacy of nearby streets by examining existing road capacity data, although it may not require a formal traffic study. Intervenor-Respondent's Brief 5. The city's position, as amplified at oral argument, is that where a project falls below the 250-trip threshold the city will conduct no further inquiry into the adequacy of nearby streets, even those that provide direct ingress and egress to the subject property. This opinion proceeds on the assumption that the city's characterization of the city council's interpretation is accurate.

[7]Intervenor does argue that Goal 12 is not directly applicable to the city's decision, and that to the extent petitioners challenge the adequacy of the city's existing acknowledged provisions to comply with Goal 12, such arguments are not cognizable in the present appeal. *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, 911 P2d 350 (1996). Intervenor also argues that to the extent petitioners assign error to the city's failure to adopt a transportation plan and implement that plan as required by OAR 660-012-0045, that argument was

D. Analysis

The plain meaning of the term "serve" does not contain any connotation, one way or another, regarding numerical or quantitative thresholds.[8] Therefore, as far as the language of MLDC 10.227(2) goes, the numerical threshold the city chose is not necessarily inconsistent with that language. ORS 197.829(1)(a). However, we agree with petitioners that the city's interpretation is inconsistent with the purpose and policies underlying that provision. ORS 197.829(1)(b) and (c). The city does not dispute petitioners' contention that the purpose of MLDC 10.227(2), and the policies underlying it, is in part to require consideration of the traffic impacts on transportation facilities caused by rezoning property, in order to ensure that any impacts are consistent with the minimum level of service for such facilities. Under the city's interpretation, *no* consideration of such impacts on *any* streets is required for rezoning decisions that generate fewer than 250 average daily automobile trips, even if the 250 additional daily trips will cause transportation facilities to fall below or further below the acceptable level of service.[9] The test under the statute and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), is whether a person could reasonably interpret the provision in the manner the city has. *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996). Given the undisputed purpose of MLDC 10.227(2), and the policies underlying it, no reasonable person could conclude that a street accommodating up to 250 average daily trips from adjacent property does not "serve" that

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not raised in the first appeal and is barred by law of the case. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). However, neither of intervenor's points are responsive to petitioners' argument, which is that Goal 12 and the Goal 12 rule constrain the city's ability to interpret MLDC 10.227 in the way it has. ORS 197.829(1)(d).

[8]The most pertinent dictionary meaning of "serve" in the present context is probably the following:

> "[T]o be of use to or answer the needs of **:** provide for **:** AVAIL <private reservoirs and canals [serve] each separate estate * * *" *Webster's Third New International Dictionary*, 2075 (unabridged ed. 1981).

[9]As petitioners point out, the city's interpretation would not require any consideration of impacts on Delta Waters Road, which provides direct ingress and egress to the subject property, even if those impacts would cause the road to fall below or further below the minimum level of service.

property within the meaning of MLDC 10.227(2).

With respect to petitioners' arguments under Goal 12 and the Goal 12 rule, it is not clear to us that MLDC 10.227 specifically implements OAR 660-012-0045(2)(g). Nonetheless, the city and intervenor have given us no basis to question petitioners' assertion that it does. Assuming it does, we agree with petitioners that the city's interpretation of MLDC 10.227 cannot be contrary to OAR 660-012-0045(2)(g).[10] For the reasons discussed above, the city's interpretation of MLDC 10.227 is contrary to OAR 660-012-0045(2)(g), because it allows amendments to land use designations without any inquiry into whether the new designations are consistent with the capacities and levels of service of transportation facilities.

However, we also agree with the city that MLDC 10.227(2) can be interpreted in a manner that allows zone changes notwithstanding *de minimis* impacts on street facilities that only tangentially "serve" the subject property. That is because, as the city points out, absent some such threshold, every intersection throughout the city can be said to "serve" every property in the city. In other words, the "one-trip" or "any impact" threshold that petitioners advocate in the first assignment of error and that the city rejected is no less arbitrary a number or threshold than the 250-trip figure the city selected.[11] The method by which the city calculates trip generation and impacts focuses on *average* daily automobile trips, from which are derived peak hour trips. There is always *some* probability, no matter how small,

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[10]We recognize that, to the extent MLDC 10.227 implements Goal 12 or the Goal 12 rule, no deference is owed to the city's interpretation of it. ORS 197.829(1)(d); *Leathers v. Marion County*, 144 Or App 123, 130, 925 P2d 148 (1996). If so, the standard and focus of our review is considerably different. However, given our uncertainty whether MLDC 10.227 is intended to implement Goal 12 or OAR 660-012-0045(2)(g), our analysis will rely principally on the arguments under ORS 197.829(1)(a)–(c) and *Clark*.

[11]We note that, if the city's interpretation was intended to reject the "one-trip" threshold for all classes of rezones, it is not clear it does so. Under the city's interpretation, the "one-trip" threshold adopted in the city's earlier decision would still appear to apply to rezones that generate *more* than 250 average daily trips. Consequently, the applicant for a rezone of that size would apparently have to demonstrate that any impacted intersection in the city, no matter how geographically distant or tangentially impacted by the proposal, was adequate to accommodate the proposal.

that traffic from particular property will pass through a particular intersection within the city, even intersections at great distance and only intermittently or slightly affected by traffic from the property. A person could reasonably conclude that intersections only intermittently or slightly affected by traffic from a rezoned property do not "serve" the subject property within the meaning of MLDC 10.227(2). We reject petitioners' argument that the *only* sustainable

interpretation of MLDC 10.227(2) is that all streets impacted to any degree by the subject property must be deemed to "serve" that property.

Consequently, remand is necessary for the city to adopt a sustainable interpretation of MLDC 10.227(2). We are mindful that our earlier decision can be read to suggest that the city should rely upon the informal staff policy for determining when traffic studies are required, as guidance for determining when facilities "serve" property within the meaning of MLDC 10.227(2). Our point was that the staff policy has the virtue of providing certainty to the inquiry it is directed at, as compared to the city's uncertain view in its prior decision of when streets "serve" property under MLDC 10.227(2). However, we did not mean to suggest that the staff policy could be applied without further justification. There is no necessary relationship between applying a threshold for formal traffic studies and applying a threshold for determining when streets "serve" property. It is true that determining which streets serve property requires some reliable foundation or methodology; however, it is not clear whether such a determination requires an empirical traffic analysis in all cases.[12] Be that as it may, the principal problem with the city's interpretation is that it allows approval of a potentially significant number of rezoning applications, with potentially significant collective traffic impacts, without considering the adequacy of any transportation facilities, including those that are most proximate to the affected properties.

Because we are not traffic engineers and would be required to step outside our proper review function to do it, we will not attempt to articulate precisely how the city might go about describing the scope of the analysis that is required under MLDC 10.227(2) in

[12]Petitioners argue, in the sixth assignment of error, that for smaller projects compliance with MLDC 10.227 can be established by relying on existing street capacity data rather than a traffic study. Similarly, intervenor's brief cites to evidence suggesting that, even without a traffic study, it is possible to determine based on certain assumptions and known street capacity data which streets are impacted by a particular rezone and whether those streets are adequate to serve the property. Petition for Review Addendum 13 (testimony of the city traffic engineer, to the effect that, regardless of the scope of the analysis adopted in the traffic study, the amount of traffic generated by the proposed rezone would require a "circle" of analysis extending "past one intersection" from the subject property).

particular circumstances. However, the following points are likely to assume importance on remand and may not be obvious. We discuss them briefly to provide some guidance to the city on remand.

First, as we have already suggested, we agree in principle with the city that a zone change might generate so few additional auto trips that it is appropriate for the city to assume that, although city streets and intersections in a literal sense "serve" the property, whether they be adjacent, nearby or distant, the impact of those additional auto trips will be so small that it can be ignored under MLDC 10.227(2).[13] *See* MLDC 10.031 (exempting building construction that does not cause more than 10 additional average daily trips from the obligation to obtain a development permit). Our primary difficulty with the city's interpretation of MLDC 10.227(2) is that it is not apparent to us that a rezoning decision that generates as many as 250 additional daily auto trips is properly viewed as falling within such a *de minimis* exception. The city does not explain why as many as 250 additional daily auto trips can be ignored in individual rezoning decisions without violating the goal, rule, plan and MLDC policies that MLDC 10.227(2) implements.

A second, related point seems potentially important in this case but is not really addressed by the city's decision. Even where a proposed rezoning decision will generate sufficient traffic that its impacts on at least some parts of the city's transportation system will exceed whatever *de minimis* threshold the city may establish under MLDC 10.227(2), the geographic scope of those impacts remains a question. This is because at some *distance* from the subject property, it may again be appropriate to assume that the impact of the proposal will be *de minimis*. Again, we have no basis for attempting to identify precisely what that distance might be in any given set of circumstances, but it would seem logical that

[13]We recognize, as petitioners argue, that ignoring a large number of very small rezoning decisions could potentially add up to a significant impact over time. However, we do not believe the precision that the cited goal, rule, comprehensive plan and land use regulations require for transportation planning by the City of Medford is so great that a reasonable *de minimis* exception is prohibited.

it could vary based on the type of transportation facilities involved and the gross and peak hour amounts of traffic that the proposal is expected to generate.[14]

The first assignment of error is denied; the second and fifth assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city council, on remand, essentially reversed its earlier decision and determined that the applicant had demonstrated compliance with MLDC 10.227(2), as the city council interpreted that provision. In doing so, petitioners argue, it was incumbent on the city council to adopt findings addressing other issues that petitioners raised in their initial appeal to the city council. In that initial appeal, the city council ultimately agreed with petitioners that the requested rezone violated MLDC 10.227(2), and denied the request. Petitioners argue that, in their initial appeal, they also argued that the city can approve the requested rezone only if it finds compliance with MLDC 10.462, as well as MCP Transportation Goal 2, Policy 3 and MCP Public Facilities Goal 3, Policy 1, pursuant to MLDC 10.227(1). *See* n 3. Petitioners argue that the city's decision on remand fails to address that MLDC provision and the MCP goals and policies.

The city responds that the city council adopted the planning commission's decision approving the rezone as part of the city council's decision. In turn, the planning commission's decision adopts a staff report dated January 7, 1999, and adopts the applicant's

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[14]We also note that, although the city enjoys considerable interpretive discretion under ORS 197.829(1) and *Clark*, the identification and justification of a *de minimis* exception under MLDC 10.227(2), as it is currently written, is a mixed question of law and fact. Accordingly, approaching that question as an interpretive exercise in individual cases will continue to involve some uncertainty and a fair amount of effort on the part of the applicant and the city to ensure the interpretation rests on an adequate factual base. As an alternative for future cases, the city could address the question legislatively, and amend MLDC 10.227(2) to specify more precisely the amount of traffic that must be generated before traffic impacts must be considered under MLDC 10.227(2) and the required geographic scope of such consideration. Even such a legislative amendment of MLDC 10.227(2) would have to be supported by an adequate factual base. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377-78, *aff'd* 130 Or App 406, 882 P2d 1130 (1994). However, if such an amendment were adopted and deemed acknowledged under ORS 197.610 to 197.625, individual applications for zone changes could proceed with more certainty concerning whether transportation impacts must be considered and the required scope of such consideration.

proposed findings as its own findings. Record 130. We understand the city to argue that the planning commission's findings address MLDC 10.462, MCP Transportation Goal 2, Policy 3 and MCP Public Facilities Goal 3, Policy 1, finds either that those provisions are satisfied or that they are not applicable criteria.

The applicant's findings at Record 184-85 appear to address and find compliance with MCP Public Facilities Goal 3, Policy 1. Petitioners do not challenge those findings. However, we can locate no findings addressing either MLDC 10.462 or MCP Transportation Goal 2, Policy 3. Although it is not clear that either of those provisions constitute criteria applicable to the proposed zone change, petitioners are correct that the city's findings do not address whether those provisions are applicable criteria and, if so, whether the proposed rezone complies with them. We agree with petitioners that, because the city reversed its initial decision and affirmed the planning commission's decision, it was incumbent on the city to address all issues regarding applicable criteria properly raised before it during the initial appeal opposing the planning commission's approval. Accordingly, remand is necessary for the city to address petitioners' contentions regarding MLDC 10.462 and MCP Transportation Goal 2, Policy 3.

The third assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that three of the city council's findings mistakenly discuss the requested rezone as a request for Multiple-Family Residential, 30 units per acre (MFR-30) zoning, rather than MFR-20 zoning. Petitioners contend that those findings are not supported by substantial evidence, because they refer to the higher-density MFR-30 zone rather than the MFR-20 zone. Petitioners point out that, if the requested zone had been MFR-30, the development potential and traffic impacts would be correspondingly greater than those the city found to exist.

The city responds, and we agree, that the reference in the disputed findings to the MFR-30 zone is a typographic error that does not provide a separate basis for reversal or remand. There appears to be no dispute that the requested rezone was for MFR-20, and all of the evidence and argument presented below addressed the MFR-20 zone and not the MFR-30 zone. The city's decision and the planning commission's decision correctly state that the requested and approved zone is MFR-20. Record 3; 130. While the city's findings in support of that decision incorrectly refer to the MFR-30 zone, petitioners have not demonstrated that that misreference renders the city's decision unsupported by substantial evidence.

The fourth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

In addition to interpreting MLDC 10.227, the challenged decision states the following:

> "Existing policy administered by city staff provides traffic studies are required only where there is evidence that a zone change would result in an increase of 250 average daily automobile trips. In accordance with this policy, applicant was instructed that it need not include the intersection of Highway 62 and Delta Waters Road in a traffic study for the rezoning application." Record 6.

Petitioners argue that the city's approval of the 250 average daily trip threshold for purposes of identifying when a traffic study is required is inconsistent with our earlier decision in *Ontrack, Inc.*, exceeds the permissible scope of the city's authority on remand, and further is inconsistent with the purposes of the traffic study requirement as set forth in MLDC 10.460 and 10.461.[15]

[15]MLDC 10.460 provides:

> "The traffic impact report is designed to identify the traffic impacts and problems which are likely to be generated by a proposed use and to identify all improvements required to insure safe pedestrian and vehicular ingress to and egress from a proposed development and maintenance of adequate street capacity, and the elimination of hazardous conditions."

A. Scope of Remand

Petitioners argue that in *Ontrack, Inc.* we determined that the city council's initial decision had effectively rejected the city staff practice in applying the traffic study requirement. Petitioners contend that the city's attempt to revisit that issue and reach an opposite conclusion approving the staff practice is precluded by the law of the case doctrine. *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32, 35 (1994) (resolved issues which may not be considered in the proceedings on remand include (1) issues presented in the first appeal and rejected by LUBA and (2) issues which could have been, but were not, raised in the first appeal).

Petitioners cite no authority for the proposition that the law of the case doctrine constrains the city council's authority to reach a different conclusion on remand than it reached in the initial decision. However, even assuming that proposition to be true, petitioners' premise that our decision "resolved" an issue regarding the staff traffic study threshold in a manner that constrains the scope of remand is not. In the portion of our decision to which petitioners cite, we rejected an argument that the city council's failure to follow the staff practice violates the privileges and immunities clause of the Oregon Constitution. We agreed with an argument that the city council had the authority, under its limited scope of review, to disapprove or modify the staff practice, and that doing so does not violate the privileges and immunities clause. *Ontrack, Inc.*, 37 Or LUBA at 488. We specifically invited the city on remand to clarify the circumstances under which an applicant must provide a traffic study under MLDC 10.460 and 10.461, and the geographic scope of that study. *Id.* at 488 n 10. We see nothing in our disposition of those arguments that

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MLDC 10.461 provides:

> "A traffic impact report may be required by the approving agency as necessary to determine a development impact on the adjacent street system. When required the traffic impact report shall be prepared by a registered engineer prior to action on a plan authorization for which the traffic impact report was required."

constrains the city's ability on remand to reach a conclusion regarding the traffic study requirement that differs from its original conclusion.

Petitioners also argue that the city improperly relied upon testimony on remand concerning a different application to rezone property on Delta Waters Road submitted subsequent to the present one, in which the city council approved the rezone without applying the "one-trip" policy it had adopted with respect to intervenor's application, notwithstanding that the proposed use there, like the present one, would apparently impact the Highway 62/Delta Waters Road interchange. Petitioners contend that this testimony persuaded the city council in the present case to retreat from the previously adopted "one-trip" policy, and that doing so violated ORS 227.178(3), which requires that the city apply the standards and criteria in effect at the time the application is complete.

The challenged decision does not refer to this other application for rezone, or otherwise indicate that the city council was persuaded by the testimony discussing that application. Even if it did, petitioners' argument that the city council is compelled to adhere to the "one-trip" policy is the mirror image of an argument we rejected in our earlier decision. *Ontrack, Inc.*, 37 Or LUBA at 481 (rejecting an argument that the city is compelled to adhere to the staff 250-trip policy, because that policy had been applied in other cases). MLDC 10.460 and 10.461 were applicable at the time intervenor's application was complete. The city applied these standards in its earlier decision and in the present one. As we noted in *Ontrack, Inc.*, the city is not constrained by ORS 227.178(3) from reinterpreting the meaning of indisputably applicable standards. *Id.* Petitioners' arguments under this subassignment of error provide no basis for reversal or remand.

B. Purpose of the Traffic Study Requirement

Finally, petitioners argue that the city council's approval of the 250-trip traffic study threshold is inconsistent with the purpose of the traffic study requirement, set forth at MLDC 10.460 and 10.461. Petitioners concede that not all zone changes or proposed

development will require a traffic study, and that many smaller projects can demonstrate compliance with MLDC 10.227 by using existing data regarding street capacity. However, petitioners argue that the 250-trip threshold is so high that it fails to implement the purpose of the traffic study requirement: to identify traffic impacts generated by a proposed use and improvements required for, among other things, maintenance of adequate street capacity. In any case, petitioners argue, a traffic study was performed in the present case that shows that a street, the Highway 62/Delta Waters Road intersection, serving the subject property has insufficient capacity to do so. Petitioners argue that, regardless of the traffic study threshold, the city cannot ignore the existing traffic study or the conclusions that can be drawn from it.

As we noted earlier, there is no necessary relationship between the threshold for requiring a traffic study and the threshold for determining which streets "serve" property for purposes of MLDC 10.227. As petitioners point out, it may be possible for smaller projects to establish compliance with MLDC 10.227 even without conducting a formal traffic study. Even if petitioners are correct that the staff policy is inconsistent with the purpose of the traffic study requirement at MLDC 10.460 and 10.461, the city's endorsement of that policy in this case, to the extent it did so, does not provide a basis for reversal or remand. Neither MLDC 10.460 nor 10.461, much less the staff policy, is an approval criterion for rezoning decisions. Even if it were an approval criterion, the staff policy was not applied in this case: a traffic study was submitted. As we explained in addressing the first, second and fifth assignments of error, whether the Highway 62/Delta Waters Road intersection "serves" the subject property within the meaning of MLDC 10.227(2) depends on how the city council interprets that provision. The conclusions that can be drawn from the existing traffic study regarding the Highway 62/Delta Waters Road intersection may or may not be relevant, depending on whether the city council interprets MLDC 10.227 in a manner that requires the applicant to demonstrate that that intersection is adequate to serve the property. Until that

legal issue is resolved, petitioners' arguments regarding the staff policy and the traffic report are, at best, premature.

The sixth assignment of error is denied.

The city's decision is remanded.