BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GREGG ADAMS,
*Petitioner,*

vs.

CITY OF MEDFORD,
*Respondent,*

and

MICHAEL T. MAHAR, MARY MAHAR,
ROBERT HUTCHINS, MARILYN
HUTCHINS and CRYSTAL SPRINGS
DEVELOPMENT GROUP,
*Intervenors-Respondent.*

LUBA No. 2000-165

FINAL OPINION
AND ORDER

Appeal from City of Medford.

Gregg Adams, Medford, filed the petition for review and a reply brief and argued on his own behalf.

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

John R. Hassen, Medford, and Alan D. B. Harper, Medford, filed a response brief. With them on the brief was Hornecker, Cowling, Hassen and Heysell. Alan D. B. Harper argued on behalf of intervenors-respondent.

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

AFFIRMED 02/21/2001

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision approving a zoning map amendment.

4 **MOTION TO INTERVENE**

5 Michael T. Mahar, Mary Mahar, Robert Hutchins, Marilyn Hutchins and Crystal
6 Springs Development Group, the applicants below, move to intervene on the side of
7 respondent. There is no opposition to the motion, and it is allowed.

8 **MOTION TO ALLOW REPLY BRIEF**

9 Petitioner filed a motion requesting permission to file a rely brief.[1] The reply brief is
10 limited to new issues raised in the intervenors' brief, and we grant the motion.

11 **FACTS**

12 The subject 66.8-acre property is located inside the city's urban growth boundary.
13 The property is located in an area of the city that is subject to a refinement or sub-area plan
14 called the Southeast Plan. The subject property is designated Urban Residential on the city's
15 General Land Use Plan Map and Standard Lot in the Southeast Plan. The corresponding
16 zoning for such plan map designations is Single Family Residential 4 (SFR-4) or Single
17 Family Residential 6 (SFR-6). The challenged decision rezones the subject property from
18 Exclusive Farm Use (EFU) to SFR-4.[2]

19 One of the primary concerns expressed during the local hearings on the proposed
20 zoning map amendment was whether existing and planned transportation facilities are
21 adequate to serve the development that the rezoning will allow. To address that concern, the
22 applicant prepared a Transportation Impact Study (TIS). Record 159-298. The TIS is based
23 on an assumption that the subject property would be developed at a density of four dwellings

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[1]As required by our rules, the proposed reply brief was attached to the motion.

[2]The subject property was recently annexed by the city. The subject property's EFU zoning was adopted by the county.

1 per acre, for a total of 267 dwelling units, as permitted under the requested SFR-4 zoning.
2 The TIS uses a number of assumptions to estimate the traffic impacts of the assumed 267
3 dwellings on nearby roads and intersections and concludes that none of those roads or
4 intersections will be significantly affected if the subject property is developed with 267
5 dwelling units. To address concerns that developers of the property might seek a 20 percent
6 density bonus that is available under the city's planned unit development ordinance, and
7 thereby generate more traffic than the TIS assumed, the planning commission imposed a
8 condition that limits development on the subject property to no more than the 267 dwelling
9 units that would be allowed outright under the SFR-4 zone.

10 The planning commission approved the requested rezoning on June 8, 2000.
11 Petitioner appealed that decision to the city council on June 29, 2000. On August 17, 2000,
12 the city council reviewed the planning commission's decision, based on the evidentiary
13 record compiled by the planning commission. On September 7, 2000, the city council
14 affirmed the planning commission's decision, and this appeal followed.

15 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

16 The application that led to the challenged zoning map amendment was submitted on
17 April 29, 1999. Medford Land Development Code (MLDC) 10.227 establishes the criteria
18 that must be met to approve a quasi-judicial zoning map amendment. MLDC 10.227
19 requires that "Category A urban services and facilities," which include transportation
20 facilities, must be adequate or improved so that they will be adequate at the time of
21 development. MLDC 10.227 was amended on June 3, 1999 (hereafter amended MLDC
22 10.227). Amended MLDC 10.227 imposes a requirement that the city adopt certain findings
23 when special development conditions are imposed to limit the allowed type or intensity of
24 uses.[3]

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[3]MLDC 10.227 is set forth below, with the deletion and additions that were adopted on June 3, 1999 shown by bracketed strikeout and bold type, respectively:

Petitioner argues the city committed error by imposing the condition that limits development of the subject property to 267 dwelling units without adopting the findings required by amended MLDC 10.227.

Intervenors and the city (together respondents) offer a variety of arguments why they believe amended MLDC 10.227 either does not apply to the challenged decision or does not apply in the way petitioner argues it does. However, the most straightforward answer to petitioner's second and third assignments of error is that the city council did adopt the findings that petitioner argues the city failed to adopt. After taking the position that amended MLDC 10.227 does not apply to the disputed application, the city council adopted the following alternative findings in the event that amended MLDC 10.227 does apply:

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> "The approving authority * * * 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 services and facilities are available to adequately serve the property, or will be made available [~~upon~~] **at the time of** development.
>
> **"When a Category A facility must be improved in order to be adequate at the time of development, the specific facility improvement to create adequacy must be identified, and it must be demonstrated that the improvement will make the facility adequate. In determining the adequacy of Category A facilities, the approving authority * * * may evaluate potential impacts based upon approval of special development conditions which apply to all or part of the proposed area of the zone change request. Special development conditions may include, but are not limited to the following:**
>
> "**(1) Restriction of uses by type or intensity; however, in cases where such a restriction is proposed, the approving authority * * * must find that the resulting development pattern does not materially preclude future development, or intensification of development, on the subject parcel or parcels, or on adjacent parcels. In no case shall residential densities be approved which do not meet minimum density standards[.]**
>
> **"* * * * ***
>
> "Consideration of the above criteria shall be based on the eventual development potential for the area and the specific zoning district being considered." Intervenors-Respondent's Brief Exhibit C.

> "The [City] Council interprets [amended MLDC 10.227] and finds that its purpose is to prevent residential lands from being developed to densities substantially lower than that envisioned by the comprehensive plan and zoning. The MLDC establishes minimum and maximum housing densities for its residential zones. The condition states only that the resulting density will be not greater than the maximum density of the SFR-4 zone. Based on maps in Exhibits 3, 4, 5 and 6, there is no evidence that the development pattern which will ultimately result from this zone change will materially preclude future development or the intensification of development on the subject parcels or on adjacent parcels and the Council concludes that it will not.
>
> "The minimum density standard of the SFR-4 * * * zone will be met because the condition simply states that the allowable housing yield will not exceed the maximum density standard of the zone. In other words, the condition simply prevents this property from obtaining the density bonus otherwise available under the City's [planned unit development (PUD)] ordinance." Record 18-19.

The findings explain that *minimum* density requirements are met and that barring the applicants from seeking bonus density under the city's planned unit development provisions so that the *maximum* density that is otherwise allowable under the SFR-4 zone could be increased will not "materially preclude future development or the intensification of development." These findings appear to be the findings that amended MLDC 10.227 requires when types or intensities of uses are restricted by special development conditions. Petitioner neither acknowledges nor makes any attempt to challenge these findings.[4]

The second and third assignments of error are denied.[5]

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[4]Curiously, neither do respondents specifically cite these findings in their briefs. Intervenors do argue in their brief that the city council adopted findings to address amended MLDC 10.227, but in support of that argument they cite to Record 104-07. The cited pages of the record are not findings, they are maps. Nevertheless the findings quoted in the text are clearly stated in the decision, and we therefore consider them.

[5]Under his third assignment of error, petitioner includes an argument that the city erred by not providing petitioner an opportunity to review the findings required by amended MLDC 10.227 before they were adopted. Petitioner cites no legal requirement that petitioner be given an opportunity to review the city's findings before they are adopted, and we are aware of none. *See Adler v. City of Portland*, 25 Or LUBA 546, 551 (1993) (there is no general requirement that parties be provided an opportunity to rebut proposed findings).

## FIRST ASSIGNMENT OF ERROR

Under the first assignment of error, petitioner argues the TIS does not constitute substantial evidence in support of the city's decision that transportation facilities "are available to adequately serve the property or will be made available at the time of development," as required by amended MLDC 10.227(2). Petitioner identifies six reasons that he argues "show why the [TIS] is so flawed that it cannot be used in its present form to substantiate the * * * findings of fact." Petition for Review 12.

### A. The Assumption of 267 Dwelling Units

Petitioner's first evidentiary challenge concerns the 267 dwelling unit assumption. Residential development in the Southeast Plan Area must be approved under the city's planned unit development ordinance. As we have already discussed, the planned unit development ordinance authorizes a density bonus of up to 20 percent over the maximum allowable density that would otherwise be allowable under SFR-4 zoning.[6] With that allowable bonus, petitioner argues the subject property can be developed with 320 dwelling units and it was therefore error for the TIS to assume the property would only be developed with 267 dwelling units. According to petitioner, if the TIS erroneously assumes the subject property can only be developed with 267 dwelling units, the TIS underestimates the development's traffic impacts and is not substantial evidence in support of the city's findings that transportation facilities are adequate to serve the proposed development.

This evidentiary challenge depends entirely on petitioner's argument that the city failed to justify its condition limiting development to 267 dwelling units, making that condition ineffective. Because we have rejected the argument that this subassignment of error depends on, we reject this evidentiary challenge as well.

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[6]MLDC 10.230(D)(8) provides:

> "Housing Density: The housing density for residential portions of the PUD may be increased by up to 20% over the maximum permitted density in the underlying residential zone[.]"

1 **B. TIS Traffic Direction and Route Assumptions**

2 The TIS assumes that the traffic that will be generated by the proposed development
3 will behave more like the existing locally generated traffic in the study area than the existing,
4 externally generated through traffic. Petitioner disputes this assumption, and argues that the
5 traffic generated by the proposal will behave more like the existing externally generated
6 traffic in the study area, with the result that more traffic generated by the proposed
7 development will use two nearby freeway interchanges during peak hour.

8 Although respondents do not specifically respond to this argument, there are two
9 problems with it. First, petitioner simply disagrees with the TIS assumptions. Petitioner's
10 disagreement with the TIS assumptions does not establish that they are "not valid." Petition
11 for Review 13. Second, the same evidentiary argument that petitioner makes here was made
12 to the city council and the city council specifically addressed the argument in the challenged
13 decision.[7] Petitioner makes no attempt to challenge those findings. Absent such a challenge,
14 we reject this evidentiary argument.

15 **C. Petitioner's Remaining Challenges**

16 Petitioner argues the TIS cannot constitute substantial evidence concerning traffic
17 impacts because other large-scale projects that have already been approved or are in the
18 process of being approved were not considered, and the TIS findings and conclusions differ
19 from a traffic study that was done for a different development proposal. Petitioner also

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[7]The city's findings are as follows:

> "As testified to by applicant's traffic engineer during the Planning Commission public hearing, distributing project traffic based upon current traffic patterns, is a standard and well accepted practice. In the absence of better available data such as more recent 2 hour traffic counts, this method is *required* by the City of Medford Public Works Department when distributing traffic to and from a site. [Petitioner] also states his belief that project traffic has no reason to turn off onto side roads. As covered by [the applicant's traffic engineer] during the Planning Commission hearing, there are many reasons for residents of one subdivision to travel to another subdivision. [Petitioner] offered no credible evidence to support his position." Record 19 (emphasis in original).

1 argues that certain key intersections were only studied for one-half hour rather than the full
2 peak hour. Finally, petitioner disputes the TIS assumption that traffic will increase at a 2.5
3 percent annual rate and challenges the applicants' traffic engineer's professional
4 qualifications.[8]

5 All of petitioner's remaining challenges noted above suffer from a common defect.
6 The arguments were specifically acknowledged in the city council's decision, and the city
7 council adopted findings that respond to those arguments.[9] Petitioner repeats the same
8 arguments he made to the city council, but makes no attempt to challenge the findings the
9 city adopted to address those challenges.

10 As we have explained on many occasions, in making quasi-judicial land use decisions
11 local governments are required to adopt findings that respond to specific issues that are
12 raised in the local proceedings concerning compliance with relevant approval criteria.
13 *McKenzie v. Multnomah County*, 27 Or LUBA 523, 544-45 (1994); *Heiller v. Josephine*
14 *County*, 23 Or LUBA 551, 556 (1992); *Grover's Beaver Electric Plumbing v. Klamath Falls*,
15 12 Or LUBA 61, 66 (1984). However, where a local government meets that obligation and
16 adopts such findings, as the city did here, the party raising those issues may not simply
17 restate those same issues in an appeal to LUBA without making an attempt to challenge the
18 findings that were adopted below to respond to those issues. Petitioner's remaining
19 evidentiary objections are denied.

20 The first assignment of error is denied.

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[8]Petitioner's challenge concerning the traffic engineer's qualifications is based on a draft MLDC provision that the city contends has not been adopted.

[9]The challenged decision identifies and addresses each objection: Objection 6 (video study of key intersections for less than a full hour), Objection 8 (failure to consider traffic from other developments), Objection 9 (differences between the TIS and the study done for Rouge Valley Manor PUD), Objection 10 (assumed annual traffic growth rate), Objection 11 (traffic engineer qualifications). Record 19-20.

1 **FOURTH ASSIGNMENT OF ERROR**

2 The challenged decision adopts the following response to petitioner's argument
3 below that the city must apply OAR 660-012-0060(1) and (2) and demonstrate that the
4 proposal complies with the rule.[10]

5 "The findings of fact and conclusions of law proposed by the applicants, urge
6 *alternative* conclusions regarding the applicability of and compliance with
7 OAR 660-012-0060. The first *alternative* finding is that the rule does not
8 apply. That there has been an attorney general's opinion on the applicability
9 of OAR 660-012-0060 to zone changes is not dispositive. It is not uncommon

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[10]OAR 660-012-0060(1) and (2) provide:

"(1) Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:

"(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;

"(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;

"(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or

"(d) Amending the TSP to modify the planned function, capacity and performance standards, as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided.

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

"(a) Changes the functional classification of an existing or planned transportation facility;

"(b) Changes standards implementing a functional classification system;

"(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or

"(d) Would reduce the performance standards of the facility below the minimum acceptable level identified in the TSP."

> for attorney general opinions to be overturned by the courts. Second, if OAR 660-012-0060 does apply, the applicants' traffic impact study has demonstrated compliance with the Oregon Transportation Planning Rule as it has been interpreted by [the Oregon Department of Transportation] ODOT—pursuant to the 'current 25-trip threshold'." Record 16 (emphasis in original).

Petitioner's fourth assignment of error challenges both of the city's alternative conclusions.

### A. A Zoning Map Amendment is a Land Use Regulation Amendment

As relevant here, OAR 660-012-0060 applies to "[a]mendments to * * * land use regulations which significantly affect a transportation facility * * *." In considering whether OAR 660-012-0060 applies, the first question therefore is whether the decision is a land use regulation amendment. If it is, OAR 660-012-0060 applies if the challenged decision will significantly affect a transportation facility, within the meaning of OAR 660-012-0060(2).

The challenged decision is clearly a land use regulation amendment, and we agree with petitioner that the city's conclusion to the contrary is clearly wrong. As defined by ORS 197.015(11):

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

The MLDC was adopted, in part, to "[i]mplement and supplement the [City of Medford] Comprehensive Plan." MLDC 10.005(1). The MLDC includes the city's zoning ordinance and zoning map. The zoning map is expressly "made a part of [the MLDC]." MLDC 10.301. No serious argument can be made that a decision that amends the city zoning map is not a decision that amends a land use regulation. The city erred in concluding that the challenged decision does not amend a land use regulation.

### B. Significantly Affect a Transportation Facility

Once it has been determined that a decision amends a land use regulation, or is one of the other types of decisions that may be subject to OAR 660-012-0060, the second question that must be asked and answered is whether the challenged decision will significantly affect a transportation facility, within the meaning of OAR 660-012-0060(2). Although the

challenged decision is not entirely clear, we understand the city to have relied on the TIS to conclude that the challenged decision complies with OAR 660-012-0060 because it will not significantly affect a transportation facility.[11]

Petitioner's entire argument in challenging this aspect of the city's decision is as follows:

> "[I]t has not been demonstrated that this project meets the requirements for approval or is in compliance with conditions which would allow the City to approve this land use action. In a letter dated May 6, 1998 of the Access Management Development Review, District 8, Mike Arneson, P.E., reiterates that a zone change requires the applicant to be consistent with the planned function, capacity, and level of service of the transportation facility. For the Rogue Valley Manor, they required a 20-year analysis and a Level of Service of D with a v/c maximum of .89. Exhibit B. This application has not fully addressed these concerns, not only for their own trip generation but for already approved and committed developments currently being developed." Petition for Review 17-18.

For a number of reasons, petitioner's argument provides no basis for reversal or remand. Petitioner provides no record citation for the May 6, 1998 letter that appears to form the basis for his argument. Assuming petitioner is referring to the letter that appears at Record 57, that letter is directed at a different project (the Rogue Valley Manor PUD) and we are uncertain what bearing, if any, that letter has on the subject property or the transportation facilities that serve it. Petitioner appears to claim that OAR 660-012-0060 was applied

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[11]The TIS includes nine pages of single-spaced text explaining the results of the study, with a 139-page appendix providing documentation for the study. Record 159-310. The TIS includes the following summary of its conclusions:

> "In summary, the rezone will not have a significant impact on any of the roadways in the study area as discussed above. It is our opinion that the project traffic will not have a significant impact on the interchanges. As stated above, the project traffic will be above the 25 vehicle threshold at the Northbound On/Off Ramps at Barnett/Alba and east of the Northbound On Ramp but not by a substantial change according to ODOT Development Review Guidelines - March 1999. The Phoenix interchange is not impacted by 25 vehicles or more and is not significantly impacted by the project traffic. The intersection of Hillcrest/Foothill is currently failing, but this intersection will be modified in the near future to realign Foothill and North Phoenix Road and install a signal. When this is done, the LOS [Level of Service] will improve to a C. From a traffic engineering point of view, it is our opinion that this rezone should be allowed to proceed." Record 170.

1 differently in the Rogue Valley Manor PUD case, but petitioner does not explain why he
2 believes the rule was applied correctly there and incorrectly here. Finally, as noted above,
3 the challenged decision is supported by a lengthy TIS. Although we are not sure we fully
4 understand the conclusions and reasoning in that study, it is not our role to develop an
5 argument for petitioner challenging the TIS. *See Neighbors for Livability v. City of*
6 *Beaverton*, 168 Or App 501, 507, 4 P3d 765 (2000) (LUBA does not review land use
7 decisions *per se*; it reviews "the arguments that the parties make about land use decisions").
8 The fourth assignment of error is denied.
9 The city's decision is affirmed.