

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WAL-MART STORES, INC.,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF MEDFORD,
10 *Respondent,*

11
12 and

13
14 WILLIAM A. MANSFIELD
15 and WENDY SIPOREN,
16 *Intervenors-Respondent.*

17
18 LUBA No. 2004-095

19
20 SOUTH GATEWAY PARTNERS,
21 *Petitioner,*

22
23 vs.

24
25 CITY OF MEDFORD
26 *Respondent,*

27
28 and

29
30 WAL-MART STORES, INC.,
31 *Intervenor-Respondent.*

32
33 LUBA No. 2004-096

34
35 FINAL OPINION
36 AND ORDER

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38 Appeal from City of Medford.

39
40 E. Michael Connors, Portland, filed a petition for review and argued on behalf of petitioner
41 Wal-Mart Stores, Inc. With him on the brief were Gregory S. Hathaway and Davis Wright
42 Tremaine, LLP.
43

1 Dana L. Krawczuk, Portland, filed a petition for review and argued on behalf of petitioner
2 South Gateway Partners. With her on the brief was Ball Janik, LLP.
3

4 Ronald L. Doyle, City Attorney, Medford, filed a response brief and argued on behalf of
5 respondent. With him on the brief was Lori J. Cooper.
6

7 William A. Mansfield, Medford, and Wendy Siporen, Talent, represented themselves.
8

9 E. Michael Connors, Portland, filed a response brief and argued on behalf of intervenor-
10 respondent Wal-Mart Stores, Inc. With him on the brief were Gregory S. Hathaway and Davis
11 Wright Tremaine, LLP.
12

13 DAVIES, Board Member; HOLSTUN, Board Chair; participated in the decision.
14

15 REMANDED

03/11/2005

16
17 You are entitled to judicial review of this Order. Judicial review is governed by the
18 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city decision denying petitioner Wal-Mart Stores, Inc.’s (Wal-Mart’s) application for site plan and architectural review approval for a retail/grocery store.

MOTION TO INTERVENE

William A. Mansfield and Wendy Siporen move to intervene on the side of the city in LUBA No. 2004-095. Wal-Mart moves to intervene on the side of the city in LUBA No. 2004-096. There is no opposition to these motions, and they are granted.

SGP’S MOTION TO TAKE OFFICIAL NOTICE AND WAL-MART’S MOTION TO STRIKE

Wal-Mart moves to strike documents included in South Gateway Partners’ (SGP) petition for review.¹ SGP initially sought to include these documents as part of the record through an objection to the record. That objection sought to supplement the record with a 1991 ordinance adopting a zone change and minutes and a resolution or ordinance “memorializing a December 21, 1995 city council hearing in which the city council accepted SGP’s traffic study and ‘allowed development of 600,000 square feet.’” ___ Or LUBA ___ (LUBA Nos. 2004-095 and 2004-096, Order on Record Objections, September 21, 2004) slip op 5. In addressing SGP’s request, in its record objection, that we take official notice of those documents, we noted that even if we were to take official notice of them, they would not thereby become part of the local record. Accordingly, we denied SGP’s request to include those documents in the record. SGP now requests that we take official notice of documents related to those previous zone changes.²

¹ Those documents are a 1991 staff report for a zone change request, a final decision on a zone change dated February 7, 1997, and minutes of a December 21, 1995 city council meeting. SGP Petition for Review App B6, B7 and B8.

² Although SGP does not specifically request that we take official notice of the city council minutes, we assume that SGP makes that request for all three documents.

1 Appendices B6, B7 and B8 do not constitute judicially cognizable law under OEC 202.³
2 Although the 1991 staff report, which the Medford Planning Commission apparently adopted as its
3 final decision, includes a cover letter that references Resolution #91-5, that resolution is not
4 attached. Furthermore, it appears that SGP requests that we take official notice of those prior
5 decisions so that we can consider adjudicative facts. We noted in our September 21, 2004 order
6 that we may not take official notice of adjudicative facts. *Id.* at slip op 6 n 5 (citing *Ramsey v. City*
7 *of Portland*, 23 Or LUBA 291, 294 (1992)).

8 For the foregoing reasons, we deny SGP's request that we take official notice of those
9 documents, and we grant Wal-Mart's motion to strike.⁴

10 **FACTS**

11 On July 28, 2003, Wal-Mart filed an application for site plan and architectural review
12 approval for a 206,533 square foot retail store on 20.51 acres. The portion of the subject property
13 on which the store is proposed is zoned Regional Commercial (C-R). The proposed use is
14 permitted outright in the C-R zone, subject to site plan and architectural review.

15 The subject property, commonly referred to as Miles Field, is located between Highway 99
16 on the west and Center Drive on the east. *See* diagram on following page. Center Drive, Stewart
17 Avenue, Barnett Road, and Garfield Road/Belknap Road are classified as major arterials.⁵
18 Interstate 5 runs generally north/south some distance to the east of the subject property, and

³ OEC 202 provides:

"Law judicially noticed is defined as:

*** **

"(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, 'comprehensive plan' has the meaning given that term by ORS 197.015."

⁴ As discussed later in this opinion, those adjudicative facts were summarized in the local notice of appeal filed by SGP's attorney, Record 87-94, so our resolution of these motions is likely inconsequential.

⁵ The arterial identified as Garfield Road on the diagram is also referred to as Belknap Road.



1 intersects with Barnett Road northeast of the property. Over the next several years, an approved
2 project will extend Garfield Road to the east and replace the interchange at Barnett Road with an
3 interchange at the intersection of I-5 and Garfield/Belknap, which will be closer to the subject
4 property than the existing Barnett Road/I-5 interchange.

5 At hearings before the Site Plan and Architectural Commission (commission), Wal-Mart
6 presented a traffic impact analysis (TIA) that addressed the proposed store's impact on some but
7 not all of the nearby intersections.⁶ Despite SGP's arguments that Wal-Mart's TIA must analyze
8 other intersections that would be impacted, the commission conditionally approved Wal-Mart's
9 application. SGP, among others, appealed the commission's decision to the city council. The city
10 council found that the TIA was adequate, but denied the application, concluding the proposal was
11 incompatible with uses and development on adjacent land.

⁶ Specifically, the TIA analyzed the following intersections: Stewart Avenue/ Highway 99 (Riverside Avenue); Garfield Road/ Highway 99; Stewart Avenue/Center Drive. The TIA also analyzed the impacts on existing and proposed access points. Record 1115. The TIA did not take into account the impacts on the existing I-5 interchange or the possible effects of the proposed relocation of the I-5 interchange.

1 These appeals followed.

2

3 **WAL-MART’S FIRST ASSIGNMENT OF ERROR**

4 Wal-Mart argues that the city council exceeded its scope of review on appeal of the
5 commission’s decision. Medford Code (MC) 10.053, which limits the city council’s scope of
6 review on appeal of a decision of the commission, provides in relevant part:

7 “Upon review, the City Council shall not re-examine issues of fact and shall limit its
8 review to determining whether there is substantial evidence to support the findings of
9 the tribunal which heard the matter, or to determining if errors of law were
10 committed by such tribunal.”

11 Wal-Mart argues that the city council did not limit its review to determining whether the findings of
12 the commission were supported by substantial evidence or whether the commission committed legal
13 error, as required by MC 10.053. Rather, it re-examined the issues of fact, made findings of fact
14 that are inconsistent with those of the commission, and on the basis of those findings, denied Wal-
15 Mart’s application. Wal-Mart compares the city council’s scope of review in this case to LUBA’s
16 scope of review under ORS 197.835(9)(a).⁷ The city claims that the commission’s order contained
17 few factual findings addressing the applicable criteria of MC 10.290, and that the city council denied
18 the application because those findings were not supported by substantial evidence.⁸

⁷ ORS 197.835(9) provides, in relevant part:

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

- “(a) The local government or special district:
 - “(A) Exceeded its jurisdiction;
 - “(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
 - “(C) Made a decision not supported by substantial evidence in the whole record;
 - “(D) Improperly construed the applicable law; or
 - “(E) Made an unconstitutional decision[.]”

⁸ MC 10.290 provides:

1 We agree with Wal-Mart that the city council exceeded its scope of review. Although the
2 city council concluded that “there is not substantial evidence in the record to support the
3 [commission’s] decision and that errors of law occurred” in the commission’s decision approving
4 the subject application, the city’s attorney at oral argument conceded that this is boilerplate
5 language. In any event, the remainder of the challenged decision supports Wal-Mart’s argument
6 that the city council exceeded its scope of review. The challenged decision states that the city
7 council’s determination is “based upon the findings of fact and conclusions of law which are
8 attached as Exhibit A * * *.” Record 17. Exhibit A contains the findings of fact of the city council.⁹

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

- “(1) The proposed development complies with the applicable provisions of all city ordinances.
- “(2) The proposed development is compatible with uses and development that exist on adjacent land.”

⁹ The challenged decision contains ten findings of fact. The findings relevant to Wal-Mart’s first assignment of error provide:

- “3. In accordance with Medford Land Development Code Section 10.227, the City determines the adequacy of public facilities for a property at the time of a zone change for that particular property, not at the time of site plan application.
- “4. At the time of Site Plan and Architectural Commission review of a proposed project, the Public Works Department may request a Traffic Impact Analysis (TIA) to determine access requirements of a development.
- “5. A TIA was conducted by the applicant and the City finds that the traffic study is adequate to determine access requirements of the proposed development.
- “6. The building proposed is a single-story structure. The building is rectangular in shape, measuring approximately 530 by 350 feet. The building lacks architectural features to lessen the building’s bulk. Other adjacent buildings have a higher degree of architectural features.
- “7. The building’s entrance faces Center Drive. The back of the building faces South Pacific Highway. South Pacific Highway is one of the major vehicular gateways to the City of Medford.
- “8. There is proposed a 920-foot long screen wall along the South Pacific Highway frontage. The purpose of the wall was to screen the building and the outdoor storage

1 Those findings make no reference to the commission’s findings, however, nor do they explain why
2 the city council concluded the commission’s findings are unsupported by substantial evidence. It
3 appears that the city council reviewed the evidence and record of the commission and found its own
4 facts on which it based its denial.

5 Finally, the challenged decision concludes:

6 “Based upon the preceding Findings of Fact, the city concludes that the applicant
7 has failed to establish by substantial evidence that the proposed development is
8 compatible with uses and development that exist on adjacent land.” Record 19.

9 The foregoing makes clear that the city council made its own findings of fact and determined that the
10 applicant failed to establish compliance with the applicable criteria. However, the city code requires
11 the commission, not the city council, to determine whether the applicant satisfied its burden of
12 demonstrating compliance with the applicable criteria. The city council’s scope of review, pursuant
13 to MC 10.053, is limited to (1) determining whether the commission’s findings regarding the
14 applicant’s success or failure in carrying its burden are supported by substantial evidence and (2)
15 whether the commission committed any errors of law. The city council did not merely review the
16 commission’s findings to determine whether they were supported by substantial evidence, but
17 rather, based on its own adopted findings, concluded that the applicant had not carried its burden of

containers from the public right-of-way. The effect of the wall and rear orientation forecloses any aesthetically pleasing highway frontage. No other buildings in the adjacent area have a wall, which screens the building and associated facilities.

“9. The largest single-story building adjacent to the proposed building is the Fred Meyer store consisting of 158,500 square feet, which is 31 percent smaller than the proposed building.

“10. Other buildings adjacent to the proposed building are:

“Rogue Federal Credit Union building—two stories at 30,770 square feet.

“The Armory building—single story with mezzanine at approximately 40,000 square feet.

“Harry and David building has a two-story component.

“The Comfort Inn is a four-story building.” Record 18-19.

1 demonstrating compliance with the applicable criteria. Accordingly, it exceeded its limited scope of
2 review under MC 10.053.

3 Wal-Mart's first assignment of error is sustained.¹⁰

4

5 **SGP'S FIRST ASSIGNMENT OF ERROR**

6 Although the city council denied the application based on other considerations, as discussed
7 earlier in this opinion, it adopted findings concluding that the TIA submitted by Wal-Mart was
8 adequate to determine access requirements. *See* n 9, Findings 3-5. SGP challenges those findings
9 and asserts that if we remand the decision based on Wal-Mart's assignments of error, we should
10 also review the city's traffic findings and remand the city council's decision for the additional reason
11 that the city erred in failing to require a more comprehensive TIA.

12 The city required Wal-Mart to complete a limited TIA that addressed access to the site and
13 some of the adjacent intersections. However, it did not require a comprehensive traffic analysis
14 studying the impacts of the proposed development on all of the intersections that could be impacted,
15 as SGP contends it must. Specifically, SGP argues that MC 10.290, which provides the applicable
16 review criteria for the subject application, requires that the application comply with "the applicable
17 provisions of all city ordinances." *See* n 8. SGP argues that both MC 10.462 and MC 10.291 are
18 applicable provisions that the city was required to consider in determining compliance with the
19 applicable criteria.

20 MC 10.462 prohibits development unless the developer makes roadway and other
21 improvements necessary to maintain a level of service (LOS) of D or better for arterials and
22 collectors.¹¹ SGP argues that MC 10.461(2) spells out the level of detail required of a TIA and

¹⁰ Because we sustain Wal-Mart's first assignment of error, and the city council will be required to adopt a new decision on remand applying the correct scope of review, we do not address its remaining assignments of error.

¹¹ MC 10.462 provides:

1 provides guidance regarding which arterials and collectors must be included in determining
2 compliance with MC 10.462.¹² MC 10.461(2) requires that the study area for a TIA include at
3 least the following: all proposed access points, intersections directly adjacent to the property and
4 any intersections that will be substantially impacted by the development; *i.e.*, intersections where
5 proposed development can be expected to contribute 25 or more trips during the analysis peak
6 period. The TIA prepared by Wal-Mart's experts is limited to an analysis of accessibility, LOS and
7 volume to capacity (v/c) ratios for the proposed development's access points and only three other
8 intersections. SGP alleges that Wal-Mart cannot demonstrate compliance with MC 10.462 with
9 the limited scope of its TIA.

10 The city found that the adequacy of public facilities is determined at the time of zone change,
11 not at the time of a site plan application. *See* n 9, Finding 3. SGP asserts that this finding is an
12 implicit interpretation that MC 10.462 does not apply to the decision challenged in this appeal, and
13 that that implicit interpretation is inconsistent with the express language and context of the regulation
14 and the purpose and policy of the regulation, which is to insure that land use designations and

“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 D service respectively.”

¹² MC 10.461(2) provides:

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

“(a) All proposed site access points;

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

“(c) Any intersections directly adjacent to the subject property.

“The Public Works Department may, at its discretion, waive the study of certain intersections when it is concluded that the impacts are not substantial.”

1 development do not cause the minimum LOS to be exceeded. Medford Comprehensive Plan,
2 Transportation Goal 2, Policy 3.

3 The city and Wal-Mart argue that a comprehensive TIA is not required for site plan and
4 architectural review.¹³ According to the city, MC 10.462 is not made applicable to the challenged
5 decision through MC 10.290(1), which requires that development comply with “*applicable*
6 provisions of all city ordinances.” (Emphasis added). MC 10.462, the city argues, does not *apply*
7 here; it applies only at the time of a zone change. This interpretation, it asserts, is supported by MC
8 10.227, which requires that zone changes demonstrate that adequate transportation facilities are
9 adequate to “serve permitted uses allowed under the proposed zoning.”¹⁴ Further, MC 10.285,
10 which applies specifically to site plan and architectural review, requires only a limited traffic
11 analysis.¹⁵

¹³ Wal-Mart filed a response brief defending the city’s decision regarding the assignments of error raised by SBG. The city’s response brief to SGP’s petition for review incorporates Wal-Mart’s response as its own.

¹⁴ MC 10.227, entitled “Zone Change Criteria” provides, in relevant part:

“The approving authority (Planning Commission) shall approve a quasi-judicial zone change if it finds that the zone change complies with subsections (1) and (2) below:

“(1) The proposed zone is consistent with the Oregon Transportation Planning Rule (OAR 660) and the General Land Use Plan Map designation. * * *

“* * * * *

“(2) It shall be demonstrated that Category A urban services and facilities are available or can and will be provided, as described below, to adequately serve the subject property with the permitted uses allowed under the proposed zoning * * *”

¹⁵ MC 10.285 provides, in relevant part:

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

1 The city’s and Wal-Mart’s explanation in their briefs and at oral argument for why MC
2 10.290(1) should not be interpreted to make MC 10.462 apply to the disputed application may be
3 supported by the MC provisions they cite. However, that interpretation is not found in the
4 challenged decision. Although the findings state that the adequacy of public facilities is determined
5 only at the time of a zone change, the findings fail to explain why MC 10.462 applies only when the
6 zoning is changed and not also at the time an application for site plan and architectural review
7 approval is submitted. Accordingly, SGP’s challenge to the adequacy of the city’s findings is
8 sustained. On remand, the city must address MC 10.462 and either apply that provision to the
9 disputed application or explain why it does not apply.¹⁶

10 SGP’s first assignment of error is sustained.

11 **SGP’S SECOND ASSIGNMENT OF ERROR**

12 In its second assignment of error, SGP argues that MC 10.291, which authorizes the
13 commission to impose conditions to “protect the health, safety and general welfare,” requires a more
14 comprehensive TIA.¹⁷ In order to ensure the protection of health, safety and welfare, it argues, a
15 more comprehensive TIA than the one that was provided by Wal-Mart is required. Wal-Mart
16 argues that this argument is completely dependent on the previous argument; *i.e.*, the city did not

¹⁶ Given the city council’s scope of review on remand, that interpretation will be made in the city council’s analysis of whether the commission’s transportation findings are supported by substantial evidence or whether the commission made legal errors in concluding as it did regarding those transportation issues.

¹⁷ MC 10.291 provides in relevant part:

“In approving a site plan and architectural review application, the Site Plan and Architectural Commission may impose, in addition to those standards expressly specified in this code, conditions determined to be reasonably necessary to ensure compliance with the standards of the code and the criteria in Section 10.290, and to otherwise protect the health, safety and general welfare of the surrounding area and community as a whole. These conditions may include, but are not limited to the following:

“* * * * *

“(2) Requiring the installation of appropriate public facilities and services and dedication of land to accommodate public facilities when needed[.]”

1 have the evidence it needed to impose conditions to protect the health, safety and general welfare
2 because the TIA did not adequately address the traffic impacts of Wal-Mart's proposed
3 development. If a more comprehensive TIA is not required under MC 10.462, then SGP's second
4 assignment of error, which turns on the adequacy of the TIA, must also fail.

5 We are not sure that we agree with Wal-Mart that SGP's argument based on MC 10.291
6 under the second assignment necessarily is entirely dependent on the arguments presented under the
7 first assignment of error. However, it is difficult to see how a provision that grants the commission
8 the *option* to impose conditions that it believes are "reasonably necessary" to comply with other
9 requirements could itself impose a requirement that the city demand a detailed TIA. Whatever the
10 case, given our disposition of SGP's first assignment of error, the city will be required on remand to
11 consider whether it is obligated under MC 10.290(1) to consider traffic impacts under 10.462 and
12 require the TIA described in MC 10.461. If the city interprets the MC not to impose that
13 requirement, it can then consider whether MC 10.291 independently imposes such a requirement.
14 Accordingly, we do not reach SGP's second assignment of error.

15 **SGP'S THIRD ASSIGNMENT OF ERROR**

16 SGP's third assignment of error alleges that the city's findings are inadequate and
17 unsupported by substantial evidence because they fail to identify the access requirements of the
18 proposed development and fail to explain how those access requirements have been satisfied. The
19 challenged decision provides simply that "[a] TIA was conducted * * * and * * * the traffic study
20 is adequate to determine access requirements of the proposed development." See n 9, Finding 5.
21 Wal-Mart notes that, in essence, this assignment of error incorporates the same arguments
22 presented in SGP's first and second assignments of error.

23 We read SGP's third assignment of error to allege different deficiencies in the findings than
24 those alleged in its first two assignments of error. While we concede that the requirements for
25 findings may be somewhat different where the scope of review is limited in the manner the city
26 council's review is limited in this case, the city council must still, at a minimum, set out the applicable

1 criteria and explain why the commission’s determination is legally correct or supported by
2 substantial evidence. The city council adopts a conclusory finding that the traffic study is adequate
3 to determine access requirements. That finding is inadequate to explain what those access
4 requirements are and how the commission’s decision on this issue is supported by substantial
5 evidence.

6 SGP’s third assignment of error is sustained.

7 **SGP’S FOURTH ASSIGNMENT OF ERROR**

8 SGP argues that the challenged findings are inadequate because they fail to address issues
9 raised below that Wal-Mart was required to complete a more comprehensive TIA in order to
10 comply with unfulfilled conditions of approval from a previous zone change. A brief summary of the
11 previous land use history is necessary to a complete understanding of this assignment of error.¹⁸

12 In 1991, the city planning commission approved a zone change to C-C (Community
13 Commercial) for the subject property. In 1997, the city council approved a zone change from C-C
14 to C-R (Regional Commercial). A condition of the 1991 zone change required:

15 “1. A comprehensive traffic study of the site and the surrounding area shall be
16 completed by a professional traffic engineer and reviewed and approved by
17 ODOT and the City of Medford prior to the first application for Site Plan
18 and Architectural Commission review.

19 “All street improvements, identified by the City of Medford as necessary to
20 support development of each phase of the site, shall be completed or
21 guaranteed prior to issuance of any building permits for the respective
22 phase.” Record 88.

23 SGP conducted a traffic study that analyzed the traffic impacts generated from its own commercial
24 development. In 1995, SGP prepared a supplemental traffic study, which the city council
25 approved. Record 88. The property that is now the subject of this appeal was not included in that

¹⁸ Although earlier in this opinion we denied SGP’s attempts to include certain documents in its brief, the history of those previous land use actions is adequately preserved in the record through written submittals by SGP’s attorney. Record 87-94.

1 supplemental traffic study prepared by SGP. SGP argued below that the 1991 conditions of
2 approval continue to apply because the 1997 zone change relied upon the 1991 zone change to
3 address the Transportation Planning Rule and Goal 12 and that the traffic impacts for Wal-Mart's
4 proposed development have yet to be studied. SGP now asserts that the challenged findings do not
5 address the continuing applicability of the 1991 conditions of approval or the applicability of the
6 TPR. The challenged findings are silent on this subject, and we agree with SGP that the findings
7 must address this issue, which SGP raised at the local level.

8 SGP's fourth assignment of error is sustained.

9 The city's decision is remanded.