1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 RUDOLF H. THIELEMANN,
5 *Petitioner,*
6
7 vs.
8
9 CITY OF MEDFORD,
10 *Respondent.*
11
12 LUBA No. 2011-031
13
14 FINAL OPINION
15 AND ORDER
16
17 Appeal from City of Medford.
18
19 Christian E. Hearn, Ashland, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief was Davis Hearn and Bridges PC.
21
22 John R. Huttl, City Attorney, and Kevin R. McConnell, Assistant City Attorney,
23 Medford, filed the response brief. Kevin R. McConnell argued on behalf of respondent.
24
25 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,
26 participated in the decision.
27
28 REMANDED 08/03/2011
29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city council decision that affirms a planning director's earlier decision regarding a building permit for a 130-foot tower for a police and fire department communication antenna.

FACTS

The city of Medford Water Commission owns an approximately eight-acre property in the city of Medford next to developed residential areas. That property is zoned Single Family Residential (SFR-4) and is improved with a water supply reservoir. In 1993, a 60-foot tall pole and a 20-foot antenna were erected on the property and have been used by the city police and fire departments for communications. In November 2010, the city approved a building permit to allow the Medford Police Department to construct a new public safety communications tower. The tower and antenna have been constructed, and the facility is 130 feet tall. Once construction began on the tower, owners of residences in the area complained to the city council that the city should have provided a public review process and issued a quasi-judicial development permit to approve the disputed tower. Following its January 6, 2011 meeting, the city gave notice of a January 13, 2011 Planning Director decision that explains the process the city followed in approving the building permit and the city's legal theory for why no public process or development permit was required to approve construction of the disputed facility. Petitioner appealed that January 13, 2011 Planning Director decision to the city council. The city council gave prior notice of a February 17, 2011 appeal hearing regarding the tower and antenna, and on March 17, 2011 the city council adopted the January 13, 2011 Planning Director decision as its own, with additional findings. This appeal followed.

INTRODUCTION

Under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), the city council's interpretation of the Medford Land Development Code (MLDC) is entitled to a deferential standard of review under ORS 197.829(1).[1] LUBA may not substitute "its own interpretation of a local government's land use regulations for a *plausible* interpretation of those regulations offered by the local government." (Emphasis added.) 349 Or at 261. This appeal largely turns on whether the city council interpretations petitioner challenges are "'*plausible*, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE* [*v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993)].'" *Siporen v. City of Medford*, 231 Or App 585, 598, 220 P3d 427 (quoting *Foland v. Jackson County*, 215 Or App at 164, 168 P3d 1238, *rev den* 343 Or 690 (2007)) (emphasis added).

The deferential standard of review required by *Siporen*, ambiguities in the MLDC, ambiguities in the challenged decision and ambiguities in the parties' arguments in this case all combine to make this appeal a challenge to resolve. We attempt to describe the central question in this appeal and put aside one problematic aspect of the city's decision, before turning to petitioner's assignments of error. The central question is whether the 130-foot

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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:
>
> "(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."

1 tower that the city approved in this matter is a "Wireless Communication Facility," as
2 petitioner alleges, or a "utility" as the city determined.

3 The city concluded that the disputed facility is a "utility," as described in MLDC
4 10.830. Under MLDC 10.830, utilities are permitted in all zoning districts.[2] The critical
5 language in the lengthy first sentence of MLDC 10.830 that is entirely consistent with the
6 city's interpretation is as follows: "The erection, construction, alteration, or maintenance by
7 public utility or municipal or other governmental agencies of * * * [a] communication* * *
8 system, including * * * towers * * * and other similar equipment and accessories in
9 connection therewith, * * * shall be permitted in any district." The city also concluded that
10 the proposed facility is a "public utility service facility." Under MLDC 10.031(6), public
11 utility service facilities are exempt from any requirement to secure development permits
12 from the city.[3] Although the city did not exactly couch its decision in these terms, we
13 understand the city to have interpreted the MLDC to provide that if the disputed facility
14 qualifies as a "utility," and a "public utility service facility," the city may issue a building
15 permit to construct the facility without the necessity of a conditional use permit or any other
16 quasi-judicial development permit, and without the prior notice and public hearing process
17 that is required for conditional use permits and other development permits, even though the

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[2] MLDC 10.830 provides as follows:

> "The erection, construction, alteration, or maintenance by public utility or municipal or other governmental agencies of underground, overhead electrical, gas, steam, or water transmission or distribution systems, collection, communication, supply or disposal system, including poles, towers, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants, and other similar equipment and accessories in connection therewith, but not including buildings, shall be permitted in any district. Utility transmission and distribution lines, poles, and towers may exceed the height limits otherwise provided for in this code. *Wireless communication facilities as defined in [MLDC] 10.012 are not a utility for the purposes of this section*. (Emphasis added.)

[3] MLDC 10.031 sets out "developments [that] do not require a development permit." Among the exempted developments is "[t]he establishment, construction or termination of a *public utility service facility* that is being developed to provide service to development authorized by this chapter." MLDC 10.031(6).

1 disputed facility may also have all the components, features and impacts of a Wireless
2 Communication Facility.

3 Petitioner argued below that the city erred and should have required that the proposed
4 facility be approved as a Wireless Communication Facility. The MLDC sets out definitions
5 for "Wireless Communication Facility," "Wireless Communication Provider," "Wireless
6 Communication Support Structure," and "Wireless Communication Systems Antenna."[4]

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[4] Those definitions from MLDC 10.012 are set out below:

> "Wireless Communication Facility. An unstaffed facility that transmits and/or receives signals or waves radiated or captured by a Wireless Communication Systems Antenna. The site may include, but is not limited to: Wireless Communication Systems Antennas or other transmission and reception devices; a support structure; equipment building, cabinet or other enclosed structure containing electronic equipment; cables, wires, conduits, ducts, pedestals, vaults, parking area, and/or other accessory development. This definition includes roof-mounted appurtenances.
>
> "* * * * *
>
> "Wireless Communication Provider. A person or company in the business of designing, installing, marketing and maintaining wireless communication systems and services including cellular telephones, personal communications services (PCS), enhanced/specialized mobile telephones, and commercial paging services, and any other technology which provides similar services.
>
> "Wireless Communication Support Structure. A structure, tower, pole, or mast erected for the purpose of supporting Wireless Communication Systems Antennas and connecting appurtenances operated by a wireless communication provider. For the purpose of these regulations, such a support structure includes, but is not limited to:
>
> "1. Guyed tower: A tower, which is supported by the use of cables (guy wires), which are permanently anchored.
>
> "2. Lattice tower: A tower characterized by an open framework of lateral cross members that stabilize the tower.
>
> "3. Monopole: A single upright pole, engineered to be self-supporting and not requiring guy wires or lateral cross-supports.
>
> "4. Other alternative support structures as may be used for Wireless Communication Systems Antennas.
>
> "* * * * *
>
> "Wireless Communication Systems Antenna. The device used to capture an incoming, or transmit an outgoing radio-frequency signal from wireless communication systems. Wireless Communication Systems Antennas include, but are not limited to, the following types:

1 Because the city approved a tower and antenna, we understand petitioner to argue that the
2 city approved a Wireless Communication Support Structure and a Wireless Communication
3 Facility.

4 If we focus exclusively on the definitions set out at footnote 4, they are sufficiently
5 ambiguous to allow the city to conclude that the disputed facility may be approved as a
6 utility, and need not be approved as a Wireless Communication Facility. The gist of the
7 city's interpretation is that because "Wireless Communication Providers" must be engaged
8 "in the business of designing, installing, marketing and maintaining wireless communication
9 systems * * *" and the city police and fire departments are not so engaged, the city is not a
10 "Wireless Communication Provider." Similarly, while the proposed tower may literally fall
11 within most of the MLDC 10.012 definition of "Wireless Communication Support
12 Structure," the definition of Wireless Communication Support Structure provides that such a
13 structure is "operated by a [W]ireless [C]ommunication [P]rovider." The city found the
14 disputed structure will be operated by the police and fire departments, which are not Wireless
15 Communication Providers.

16 In arguing that LUBA should find that the city council misinterpreted the MLDC,
17 petitioner relies primarily on the subsection of ORS 197.829(1) that requires LUBA to
18 reverse or remand the city council's interpretation of the MLDC if it is inconsistent with the
19 MLDC's underlying policies. ORS 197.829(1)(c); *see* n 1. We reject petitioner's argument
20 under ORS 197.829(1)(c) later in this opinion. Had petitioner argued that the city's
21 interpretation violates ORS 197.829(1)(a), because it is inconsistent with the "express

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"1. Directional or Parabolic Antenna (panel or disk) - receives and transmits signals in a directional pattern.

"2. Omni-direction (whip) antenna - receives and transmits signals in a 360-degree pattern.

"3. Microwave antennas - receives and transmits to link two telecommunication facilities together by line of sight."

language" of the last sentence of MLDC 10.830, when read in context with the balance of MLDC 10.830 and the text of the MLDC 10.012 definition of Wireless Communication Facilities, the question would be much closer.

MLDC 10.830 identifies utilities that are permitted in all zoning districts, and as previously noted expressly allows governmental communication facilities, including towers. *See* n 2. However, even if the disputed facility qualifies as a governmental communication facility, the last sentence of MLDC 10.830 provides that "Wireless [C]ommunication [F]acilities as defined in Section 10.012 are not a utility for the purposes of this section." *Id.* Although petitioner does not make the argument in his petition for review, the MLDC definition of Wireless Communication Facilities is not expressly limited to Wireless Communication Facilities that are operated by Wireless Communication Providers, and therefore arguably includes Wireless Communication Facilities, even if they are constructed and operated by public entities, such as the city police and fire departments. If the definition of Wireless Communication Facilities is viewed in context with the other definitions set out at footnote 4, the failure to draft the definition of Wireless Communication Facilities expressly to include only Wireless Communication Facilities that are operated by Wireless Communication Providers could have been intended or inadvertent. We set out the purpose and intent of the MLDC 10.824 regulations concerning Wireless Communication Facilities at the beginning of our discussion of the first assignment of error below. One of those purposes is to allow "citizens to access and adequately utilize" Wireless Communication Facilities. Since citizens would not be allowed to access and utilize police and fire Wireless Communication Facilities, that purpose suggests the Wireless Communication Facility regulations are aimed at facilities operated by Wireless Communication Providers, and suggests that the failure to draft the definition of Wireless Communication Facilities expressly to include only Wireless Communication Facilities that are operated by Wireless Communication Providers may have been inadvertent.

1 There is a second potential problem with the city's interpretation. The "utilities"
2 described in MLDC 10.830 all must be erected, constructed, altered, or maintained by a
3 "public utility or municipal or other governmental agenc[y]." A Wireless Communication
4 Provider in the business of providing wireless communication services is clearly not a
5 "municipal or other governmental agenc[y]" and probably would not qualify as a "public
6 utility" either. The MLDC does not define "public utility." As defined by ORS 757.005, for
7 purposes of state utility regulation under ORS Chapter 757, a public utility is a business or
8 individual that provides "heat, light, water or power" to the public. Wireless Communication
9 Providers are regulated separately as a "telecommunications utility" under ORS Chapter
10 759.[5] If a Wireless Communication Provider is neither a "public utility" nor a "municipal or
11 other governmental agenc[y]," it could not be a utility for that reason alone. Although
12 petitioner does not raise the issue in his petition for review, the last sentence in MLDC
13 10.830 arguably has no independent legal effect *unless* it was included to preclude Wireless
14 Communication Facilities that are constructed and operated by governmental agencies from
15 qualifying as utilities. But the city might not have appreciated that a Wireless
16 Communication Facility that is operated by a Wireless Communication Provider could not
17 qualify as a MLDC 10.830 utility because a Wireless Communication Provider is a business
18 entity and is not a "municipal or other governmental agenc[y]." Or the city might have been
19 concerned a Wireless Communication Provider might argue that it is a "public utility," since
20 the MLDC does not define that term. In either event, the city may have been concerned that
21 a Wireless Communication Provider might attempt to take advantage of an easier path for
22 approval of a Wireless Communication Facility as a utility, and the city might have included
23 the last sentence of MLDC 10.830 to preclude such an attempt.

[5] As defined by ORS 759.005(9)(a), a telecommunications utility is a business or individual that provides "telecommunications service" to the public.

LUBA raised the interpretive issues set out in the preceding two paragraphs at oral argument. However, petitioner did not raise those issues to either the city in the proceedings below or to LUBA in his petition for review. The challenged decision does not expressly recognize either of the problems we identify above and therefore does not address them. To avoid the potential unfairness of deciding this appeal based on interpretive problems that were neither raised before the city nor briefed by any party, and to avoid the potential that there may be adequate explanations for those interpretive problems, we do not consider those interpretive problems further. We limit our review in this decision to the arguments petitioner advances in the petition for review.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner argues the city erred in granting a building permit for the disputed facility and in failing to review the application as an application for a Wireless Communication Facility. The argument in support of petitioner's first assignment of error is a series of seven points. Some of those points overlap and appear to repeat or rely on earlier points. Petitioner apparently intends those points to build on each other and support his assignment of error. The precise scope and nature of petitioner's seven point argument is not entirely clear. For lack of a better alternative, we briefly discuss each of the seven points below.

Petitioner first quotes MLDC 10.824(A), the "Purpose and Intent" section of MLDC 10.824, and claims it is "pivotal," without explaining why. As we have already explained, MLDC 10.824 establishes standards for approval of Wireless Communication Facilities. The MLDC 10.824(A) purpose and intent section is set out below:

> "Purpose and Intent - The purpose of this section is to establish standards that regulate the placement, appearance, and impact of wireless communication facilities while allowing citizens to access and adequately utilize the services provided by such facilities.
>
> "Because of the physical characteristics of wireless communication facilities, the impact imposed by these facilities affects not only neighboring residents,

1 but also the community as a whole. The standards are intended to mitigate
2 such impacts to the greatest extent possible and to preserve the character of
3 the City's zoning districts and historic districts by protecting them from the
4 visual and aesthetic impacts associated with wireless communication
5 facilities."

6 Petitioner's second point is that MLDC 10.824(F) lists certain uses and activities that
7 are exempt from the MLDC 10.824 Wireless Communication Facility standards, and MLDC
8 10.824(F) does not list city-owned communication towers.[6]

9 In his third point, petitioner cites ORS 197.829(1)(c), which states that LUBA is not
10 to affirm a local government interpretation that is "inconsistent with the underlying policy
11 that provides the basis for the * * * land use regulation." *See* n 1.

12 In his fourth point, petitioner argues that the "purpose and intent" of the MLDC
13 10.824 Wireless Communication Facility regulations, which we understand petitioner to
14 equate with the "underlying policy" of those regulations, is to "mitigate" the impacts of
15 Wireless Communication Facilities on "neighboring residents" to the "greatest extent
16 possible" "by protecting them from the visual and aesthetic impacts associated with wireless
17 communication facilities."

18 In his fifth and sixth points, petitioner contends the city's interpretation that the
19 disputed facility is a utility and not subject to the MLDC 10.824 standards governing
20 Wireless Communication Facilities is inconsistent with the underlying policy of those

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[6] MLDC 10.824(F) provides:

"Exemptions: The following uses and activities shall be exempt from these standards except as otherwise provided herein:

"(1) Existing Wireless Communication Support Structures and Wireless Communication Systems Antennas and any repair, reconstruction or maintenance, which does not increase the height of the tower.

"(2) Amateur radio station towers, citizen band transmitters and antennas.

"(3) Microwave and satellite dishes accessory to a permitted use and/or unrelated to a wireless telecommunication service system."

1 standards, because the disputed facility will have the same visual and aesthetic impacts on
2 the adjoining residential neighbors that it would have if it were operated by a private entity.

3 In his seventh point, petitioner quotes a portion of the Oregon Supreme Court's
4 decision in *Siporen* that states that under ORS 197.829(1)(a) LUBA is not required to affirm
5 a decision that is inconsistent with the "express language" of the applicable land use
6 regulations. However, in making his seventh point, petitioner makes no attempt to identify
7 any land use regulation language that petitioner believes the city's interpretation is
8 inconsistent with.

9 As already noted, under ORS 197.829(1)(a), LUBA is not required to affirm a local
10 government interpretation of a land use regulation that is inconsistent with the "express
11 language of the * * * land use regulation." *See* n 1. The closest petitioner comes to making
12 a cognizable argument under ORS 197.829(1)(a) is his second point that city owned and
13 operated communication towers are not among the exempt uses and activities set out in
14 MLDC 10.824(F). But that argument ignores the city's legal theory that the disputed facility
15 is a utility rather than a Wireless Communication Facility. If the city's legal theory is
16 correct, there would be no need for a MLDC 10.824(F) exemption and there would be no
17 inconsistency with the text of MLDC 10.824(F). In this opinion we ultimately reject all of
18 petitioner's challenges to the city's legal theory that the disputed facility is properly viewed
19 as a utility.

20 Petitioner's other points, collectively, seem to rely on his position that the disputed
21 facility looks like a Wireless Communication Facility and has most if not all of the material
22 attributes and visual impacts of a Wireless Communication Facility. That being the case,
23 petitioner contends the city's interpretation of MLDC 10.824 and 10.830 to allow essentially
24 identical facilities as "utilities," which are not subject to the regulations imposed on Wireless
25 Communication Facilities, simply because utilities are publically owned and operated, is
26 inconsistent with the underlying policy of the city to regulate Wireless Communication

1 Facilities to minimize visual impacts on neighbors. However, petitioner neither
2 acknowledges nor challenges the city's council's findings on this question:

> 3 "As for the policies expressed in [MLDC] 10.824 regarding 'Wireless
> 4 Communications Facilities,' the text of 10.830 rendered those policies
> 5 inapplicable to utilities as we interpret them. [MLDC] 10.031(6) exempts
> 6 from the City's development permit requirement '[t]he establishment,
> 7 construction or termination of a public utility service facility that is being
> 8 develop[ed] to provide service to development authorized by this chapter.'
> 9 Life, health and safety policies support treating public emergency and private
> 10 commercial systems differently." Record 11.

11 We understand the city to have interpreted the MLDC to include different policies,
12 one with regard to Wireless Communication Facilities (to minimize visual impacts of
13 Wireless Communication Facilities provided by Wireless Communication Providers through
14 an extensive regulatory scheme and a public review process) and one with regard to utilities
15 (which emphasizes the health, safety and emergency functions of such facilities and supports
16 allowing such facilities outright in all zones with fewer regulations and no public review
17 process). While petitioner may have a public policy argument that the city should not draw
18 such a distinction between Wireless Communication Facilities and public communication
19 systems that resemble Wireless Communication Facilities, he does not have an argument
20 under ORS 197.829(1)(c) that the city's interpretation that the disputed facility qualifies as a
21 utility is inconsistent with the policies that support regulation of utilities and Wireless
22 Communication Facilities. The city identified the policies that underlie utilities and public
23 utility service facilities and petitioner does not even attempt to argue that the city's
24 interpretation regarding the challenged facility is inconsistent with those policies. The city
25 simply has different policies that in this case distinguish between certain commercial and
26 public wireless communication systems. Petitioner's first assignment of error does not
27 establish a basis for rejecting the city's interpretation under ORS 197.829(1)(a) or (c).

28 The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, petitioner assigns error to the planning director's reasoning in his January 6, 2011 memorandum, in two regards. First, petitioner challenges the planning director's finding that the city is not a Wireless Communication Provider. Second, petitioner challenges the planning director's related finding that the disputed facility is not a Wireless Communication Support Facility.

The planning director found that the city is not a Wireless Communication Provider:

> "The [MLDC] defines a 'Wireless Communication Provider' as: 'A person or company in the business of designing, installing, marketing and maintaining wireless communication systems and services * * *.' Staff concluded that this is not an accurate definition of the services provided by the City of Medford, a municipality and not a person or company." Record 16-17.

Petitioner argues that as defined by MLDC, the city is a "person," and the city erred by finding to the contrary. MLDC 10.010(6).[7] Petitioner appears to be correct. However, the city's reasoning that the city does not qualify as a Wireless Communication Provider was not limited to the planning director's finding that the city is not a "person." The city council elaborated on the planning director's reasoning and explained:

> "[W]hether the City under the definition of 'Wireless Communication Provider' is a person or not, the City is not in the business of wireless communication systems as the definitions dealing with wireless communications involve commercial endeavors, and the City is not acting in a commercial endeavor with the public safety communications facility in this instance." Record 11.

Petitioner argues the city should be viewed as a Wireless Communication Provider because it is "partially in the business of installing and maintaining wireless communication systems." Petition for Review 20. However, the city's interpretation of the MLDC 10.012

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[7] The version of MLDC 10.010(6) that apparently applied at the time of the challenged decision provided as follows:

> "The word 'person' includes individuals, firms, corporations, associations, trusts, local agency, city, county, state or federal government or any district or division thereof."

definition of "Wireless Communication Provider" to be limited to persons who are engaged in the commercial business of providing wireless communication services is consistent with the text of the definition and is certainly plausible.

Petitioner next challenges the planning director's finding that the disputed facility is not a Wireless Communication Support Structure, because the MLDC 10.012 definition of Wireless Communication Support Structure provides that such structures are operated by Wireless Communication Providers. *See* n 4. It is undisputed that the challenged facility includes a lattice tower. But the MLDC definition of Wireless Communication Support Structure also states that such structures are "operated by a [W]ireless [C]ommunication [P]rovider." We have already rejected petitioner's challenge to the city's finding that the city is not a Wireless Communication Provider. The city found that because the city is not a Wireless Communication Provider and the MLDC 10.012 definition of Wireless Communication Support Structure provides that such structures are "operated by a [W]ireless [C]ommunication [P]rovider" the disputed facility is not a Wireless Communication Support Structure. The city's interpretation is consistent with the text of the MLDC 10.012 definition of Wireless Communication Support Structure.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As we have already noted, MLDC 10.031 identifies "developments [that] do not require a development permit" and MLDC 10.031(6) exempts "[t]he establishment, construction or termination of a public utility service facility that is being developed to provide service to development authorized by this chapter." *See* n 3. The city reasoned that although the MLDC does not include a definition of public utility service facility, the disputed facility qualifies as a "utility" and therefore also qualifies as a public utility service facility.

1 We do not understand petitioner to dispute the part of the city's interpretation of the
2 MLDC to equate facilities that qualify as "utilities" with "public utility service facilities," for
3 which the MLDC provides no definition; at least petitioner makes no cognizable argument to
4 challenge that equation. Rather, petitioner appears to rely on his first assignment of error
5 here to argue that the city erred in concluding that the disputed facility is a utility rather than
6 a Wireless Communication Facility. Because petitioner's third assignment of error relies on
7 his first assignment of error, which we have already rejected, petitioner's third assignment of
8 error provides no basis for reversal or remand.
9 The third assignment of error is denied.
10 **FOURTH ASSIGNMENT OF ERROR**
11 Petitioner's fourth assignment of error is that the "City erroneously applied the
12 [MLDC] Standards applicable to 'Utilities'." Petition for Review 23. The only argument
13 petitioner provides in support of the fourth assignment of error is to repeat his argument
14 under the first assignment of error that the city's interpretation is inconsistent with the
15 MLDC 10.824(A) purpose and intent of the Wireless Communication Facility regulations,
16 which was set out at the beginning of our discussion of the first assignment of error. We
17 reject those arguments here for the same reasons we rejected them under the first assignment
18 of error.
19 The only other argument we can see under the fourth assignment of error is that the
20 MLDC 10.830 classification for utilities is "less specific" than the MLDC 10.012 definition
21 of Wireless Communication Facilities. *See* ns 2 and 4. The MLDC 10.830 description of
22 utilities and the MLDC 10.012 definition of Wireless Communication Facilities are both
23 quite broad. Petitioner's undeveloped "less specific" argument is not sufficiently developed
24 to provide a basis for reversal or remand.
25 The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

The planning director found that because MLDC 10.830 allows towers to exceed MLDC required height limits and MLDC 10.705 allows certain uses to exceed height limits, the applicable SFR-4 rear yard setback does not apply:

> "[T]he property in question is zoned SFR-4, with a height limit of 35 feet. The minimum rear yard setback is 4 feet plus ½ foot for each foot in building height over 15 feet. Applying this standard would yield a 61.5 foot setback from the rear property line (130 ft. – 15 ft. 0.5 = 57.5 ft. Adding the 4 ft. setback yields a total of 61.5 ft.) In this case according to staff of the Police Department, the actual setback from the closest leg of the tower to the nearest fence of an adjoining property is approximately 53 feet.
>
> "As noted before, [MLDC] 10.830 allows towers to exceed the height limits established by the code. ('Utility transmission and distribution lines, poles, and towers may exceed the height limits otherwise provided for in this code.')
>
> "Additionally, Section 10.705 of the [MLDC] states in part: 'Building height limitation shall not apply to chimneys, church spires, belfries, cupolas, flag poles, antennas, and other similar projections that are accessory to the permitted use.' * * *
>
> "Also, while normally located in public rights-of-way, poles for electrical distribution and transmission lines may be located in easements across private property. Those poles also are not subject to the underlying height limitations of the code.
>
> "Staff considered all of the above factors. The main consideration however, was that the setbacks are calculated based on the height and because the height limits do not apply in this case, then the additional setback also do[es] not apply." Record 18-19.

Petitioner assigns error to the city's findings that the challenged public safety communication tower need not be set back 61.5 feet.

We take as a given that, but for the city's interpretation set out above, the 130-foot tower would have to be set back 61.5 feet from the rear property line. However, neither the decision nor the parties identify the section of the MLDC that imposes the setback formula that is set out in the decision, and we have been unable to find it. According to the decision on appeal, the tower has been constructed 53 feet from the rear property line, and therefore

1 intrudes 7.5 into the required rear yard setback, if the setback applies. The only rationale
2 given for the city's conclusion that the 130-foot tower is subject only to a four-foot rear yard
3 setback is that the MLDC exempts utility towers from MLDC building *height* limitations.
4 MLDC 10.830; *see* n 2. The city council adopted the planning director's reasoning that since
5 the MLDC height limits do not apply to towers, the additional ½ foot setback for each foot
6 the tower's height exceeds 15 feet also does not apply.

7 The city's interpretation of the MLDC rear yard setback is inconsistent with the text
8 of the MLDC. ORS 197.829(1)(a); *see* n 1. In adopting MLDC 10.830, the city expressly
9 exempted towers from the *height* limits that would otherwise apply under the MLDC. The
10 city did not adopt any express exemption for *setbacks*. The city's "interpretation" adds to the
11 MLDC 10.830 building height exemption, which the city expressly included in MLDC
12 10.830, a rear yard setback exemption, which the city did not include in MLDC 10.830 or
13 elsewhere in the MLDC. The city may not insert such a setback exemption by interpretation.
14 ORS 174.010.[8]

15 The decision's and the parties' failure to identify the MLDC section that establishes
16 the setback makes it impossible for us to know for sure the "purpose" or "underlying policy"
17 of the setback requirement, and whether the city interpretation is consistent with that purpose
18 or underlying policy. ORS 197.829(1)(b)-(c); *see* n 1. But the structure of that setback
19 requirement—increasing the required setback by one-half foot for each foot a structure's
20 height exceeds 15 feet—can only mean that the city wants structures that are taller than 15
21 feet tall to be set back *farther* than four feet from adjoining properties, not that the city is
22 unconcerned with the required additional setback if the height of the structure can exceed the

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[8] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, *not to insert what has been omitted*, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." (Emphasis added.)

1 35 foot height limit that normally applies in the SFR-4 zone.[9] The only logical inference that
2 can be drawn from the structure of the setback requirement regarding its purpose or
3 underlying policy is exactly the opposite of the inference the city drew. The city's
4 interpretation of the setback requirement is not affirmable even under the deferential standard
5 of review required by ORS 197.829(1) because it is inconsistent with the relevant text of the
6 MLDC and the apparent purpose and underlying policy.
7 The fifth assignment of error is sustained.
8 **SIXTH, SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR**
9 On the last page and a half of his petition for review, petitioner includes three largely
10 undeveloped assignments of error. In its response brief, the city provides responses to those
11 assignments of error that demonstrate that the assignments of error are without merit.
12 The sixth, seventh and eighth assignments of error are denied.
13 The city's decision is remanded based on our resolution of the fifth assignment of
14 error.

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[9] We note that if the disputed tower did qualify as a Wireless Communication Facility, the tower would have to be "set back from any parcel in a residential zone a distance equal to the overall height of the Wireless Communication Support Structure." MLDC 10.824(D)(2)(e). In this case the setback required by MLDC 10.824(D)(2)(e) would be 130 feet. Under MLDC 10.824(D)(2)(e), that setback can be reduced if visual impacts can be mitigated, but MLDC 10.824(D)(2)(e) provides that "in no case shall a new Wireless Communication Support Structure be setback less than the minimum requirement of the underlying zone."