BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRANN WOLFE, DOUG McCREARY,
and OLD EAST MEDFORD
NEIGHBORHOOD ASSOCIATION,
*Petitioners,*

vs.

CITY OF MEDFORD,
*Respondent,*

and

ALEX JAUREGUI,
*Intervenor-Respondent.*

LUBA No. 2013-080

FINAL OPINION
AND ORDER

Appeal from the City of Medford.

Carrie A. Richter, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief was Garvey Schubert Barer.

No appearance by City of Medford.

Gregory S. Hathaway, Portland, represented intervenor.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 02/21/2014

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

Opinion by Holstun.

## NATURE OF THE DECISION

Petitioners appeal a city council decision that exempts proposed construction of an assisted living facility from site plan review.

## FACTS

On November 26, 2012, intervenor submitted an application for Site Plan and Architectural Commission review (site plan review) to the City of Medford's planning department, proposing to build a 52,688 square foot assisted living facility on 1.5 acres in downtown Medford. Record 4. The subject property currently is developed with four buildings, with the addresses 825, 835, 837, and 839 East Main Street. Record 59.[1] Intervenor's application proposed to add two stories to the existing one-story structure at 825 East Main Street, combine the structures at 835 and 837 East Main Street and make the combined structure three stories tall. As proposed, the two structures would be connected with a third-floor skywalk over an existing lot, consisting of an enclosed walkway and an outdoor veranda. Record 63. The remaining building at 839 East Main Street would remain unchanged by the proposal. The proposed construction project would add 35,695 square feet to the existing 19,848 square feet of floor area, which is a 55 percent gross floor area increase. The subject property is zoned Commercial Service & Professional Office (C-S/P), and it is adjacent to the Geneva-Minnesota Historic District.

Medford Land Development Code (MLDC) 10.031(C)(2) exempts from site plan review development of "a new building" not resulting in more than

[1] An aerial photograph in the Supplemental Record presents a clear picture of the existing buildings. Supplemental Record 9.

ten increased average daily motor vehicle trips (ADTs). [2] Record 42. Following up on the initial November 26, 2012 application for site plan review, on February 14, 2013, intervenor's attorney asked city planning department staff whether its proposal qualified for the MLDC 10.031(C)(2) exemption. In that request, intervenor's attorney notified the city that intervenor's project changed, re-characterizing it as "construction of a new building since the existing structures will be torn down (including the removal of the foundations and any walls), and a new building will be constructed accommodating the new assisted living use." Record 42.

On March 11, 2013, intervenor's attorney clarified the substance of his February 14, 2013 inquiry, attaching intervenor's traffic engineer's conclusion that the proposed project would result in a reduction in ADTs compared to recent uses of the buildings, and asking the planning director whether he agreed that the proposed project is exempt from site plan review under MLDC 10.031(C)(2). Record 30-31. The planning director issued an interpretation and decision on March 22, 2013, in which the planning director concurred with the applicant's traffic engineer's conclusion that the proposal would decrease ADTs but nevertheless denied intervenor's request, because the planning

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[2] MLDC 10.031(C) provides in part:

> "The following uses or developments do not require a development permit[:]
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> "* * * * *
>
> "(2) Construction of a new building if it does not increase motor vehicle trip generation by more than ten (10) average daily trips, unless within a[n] Historic Overlay, in which case, Historic Review is required for all new construction."

director concluded that although the skywalk/veranda connected two separate new buildings, one at 825 East Main Street and one at 835 and 837 East Main Street, the skywalk/veranda did not transform the two buildings into one building. Record 32-33. The planning director concluded that because MLDC 10.031(C)(2) only applies where there is a single new building, the MLDC 10.031(C)(2) exemption did not apply.

Following the planning director's March 22, 2013 decision, on April 1, 2013, intervenor filed revised plans that changed the skywalk/veranda connecting the building to include an indoor dining area with a connected patio. Record 4, 47. In response to that design change, planning department staff asked the building safety department director whether the project plans depicted one building or two for purposes of the building code. The city's building safety department director stated "the [April 1, 2013 revised] Project would be considered a single building under the building code." Record 5, 39. Then, on April 4, 2013, the planning director reversed his earlier decision and concluded that the proposed project is for the construction of one building and, accordingly, is exempt from site plan review under MLDC 10.031(C)(2). Record 5. The planning director's decision states that "this letter constitutes an interpretation of the Code and therefore is considered a Class D, Administrative Decision" that is subject to appeal to the city council pursuant to MLDC 10.051. Record 8. Respondent provided notice of the planning director's decision only to intervenor, and did not provide notice of that decision to petitioners. Petition for Review 4. In response to the planning director's decision, intervenor withdrew his application for site plan review. Record 50.

On April 18, 2013, petitioners filed a local notice of appeal to the city council contending that the traffic engineering data submitted by intervenor and relied upon by the planning director to conclude the project would result in a net decrease in ADTs was flawed. Petitioners argued the MLDC 10.031(C)(2) exemption therefore was unavailable. Record 51.

On August 1, 2013, the city council held an appeal hearing limited in scope to determining whether substantial evidence supported the planning director's decision and whether the planning director's decision included any errors of law. Record 5. MLCD 10.053 further limited testimony to the issues presented in the notice of appeal. Record 17. Following the public hearing, the city council voted to affirm the planning director's decision, and on August 15, 2013, the city council issued written findings supporting its decision. Record 1, 4-6.

**FIRST ASSIGNMENT OF ERROR**

Neither the city nor intervenor submitted briefs to LUBA or otherwise appeared in this proceeding to defend the decision on appeal. However, when no response brief is filed, we still address the merits of the assignments of error in the petition for review. *Tennant v. Polk County*, 56 Or LUBA 455, 456 (2008).

Petitioners argue the city erred in failing to follow the procedures in ORS 227.175 for statutory permits or, alternatively, in ORS 197.195 for limited land use decisions.

If the challenged decision is a statutory permit decision that was rendered without a public hearing, the city was required to provide notice of the decision to property owners within 100 feet of the subject property, opportunity for a local appeal, and a *de novo* hearing in the event of a local

appeal, ORS 197.763; ORS 227.175(5), (10). The city did not provide the required notice of decision, and while the city provided a local appeal, it did not provide the *de novo* local appeal that is required by ORS 227.175(10)(a)(D) and (E).

ORS 227.160(2) provides that a statutory permit is the "discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation." ORS 227.215(1) defines "development" to include "making a material change in the use or appearance of a structure or land * * *." Petitioners argue that intervenor's proposal is "development" and, thus, the city's discretionary decision exempting the development from site plan review is a statutory permit. Petition for Review 13.

While intervenor's proposal almost certainly qualifies as "development," within the meaning of ORS 227.215(1) and as that term is used in ORS 227.160(2), and while the decision almost certainly qualifies as "discretionary," the decision that is before us in this appeal does not constitute "discretionary approval of a proposed development of land," within the meaning of ORS 227.160(2). Rather the decision merely interprets MLDC 10.031(C)(2) and concludes that it applies to exempt the proposal from site plan review. The challenged decision does not approve intervenor's proposal and because the challenged decision does not approve or deny any development, the challenged decision does not qualify as a statutory "permit," as ORS 227.160(2) defines that term. It follows that the city did not err by failing to follow the ORS 197.763; ORS 227.175(5), (10) procedural requirements for making decisions on statutory permits.

We next consider whether the city should have followed limited land use decision procedures. As potentially relevant here, a limited land use decision is

a "local government [decision] pertaining to a site within an urban growth boundary that concerns * * * [t]he approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review. ORS 197.015(12)(a).

The challenged decision does not approve or deny an application for site review or design review. Rather, it determines that such review is not necessary. The challenged decision is not a limited land use decision. It follows that the city did not err by failing to follow, statutory limited land use decision making procedures.

Petitioners' first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

Petitioners argue the city's decision that intervenor's proposed project is "a new building" rather than two new buildings misinterprets MLDC 10.031(C)(2). Petitioners point to the city council's findings on this issue, which are as follows:

> "[W]e find that the Planning Director did not err in deciding that the [p]roject consists of only one building. The Planning Director testified at the public hearing that the definition of "building" was ambiguous, and not helpful in determining the issue at hand. He therefore sought out the expert opinion of the Building Safety Department Director, who concluded that the [p]roject—after the applicant's April 1, 2013 revision—would be considered one building under the building code." Record 6.

The planning director's decision, with which the city council agreed, provided the following explanation for why the project should be viewed as one building:

> "The plain language of this section refers to 'a' new building. On April 1, 2013, we received revised drawings via e-mail from Dave Evans, the project architect. The drawings show a dining room on the third floor connection between the east and west buildings. Originally, the connection contained only an enclosed passageway and outdoor veranda space. Chris Reising, the City's Building Official, has determined that the proposed construction is, in fact, one building. You have stated that no improvements will be made to the single structure that is to remain.[3] Based on this information, I have determined that the proposed construction is exempt from the development permit requirement and review by the Site Plan and Architectural Commission under MLDC 10.031(C)(2)." Record 7-8.

The city building official's determination that the project is "a new building" for purposes of MLDC 10.031(C)(2) is limited to a ten-word e-mail message, in which the city building official responded to a question from another city staff member asking whether the building official considered the project to be one building. The city building official said "Yes, I would now consider this to be one building." Record 39.

For purposes of this opinion, we assume the city council adopted the planning director's and building official's interpretations as its own. In reviewing the city council's interpretation of its own code provision under ORS 197.829(1),[4] *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010)

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[3] This is a reference to the existing building at 839 E. Main, which is unaffected by the proposal and is not at issue in this appeal.

[4] ORS 197.829(1) says "[LUBA] 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;

requires that we defer to a plausible interpretation "unless the interpretation is inconsistent with *all* of the 'express language' that is relevant to the interpretation, or inconsistent with the purposes or policies underpinning the regulations." (Emphasis in original). Determining if an interpretation is plausible depends on the principles of interpretation articulated by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). *Siporen*, 349 Or at 255. Those principles for determining legislative intent include considering the text and context of the relevant statute, as well as "other provisions of the same statute and other related statutes." *PGE*, 317 Or at 611. We interpret provisions of ordinances in the same way. *Cf. Siporen*, 349 Or at 255.

As explained earlier in this opinion, the planning director's first interpretation of MLDC 10.031(C)(2) in his March 22, 2013 message to intervenor determined the project proposed two separate buildings connected by the skywalk/veranda and therefore was not eligible for the MLDC 10.031(C)(2) site plan review exemption. The planning director offered the following textual and contextual bases for that interpretive determination:

> "* * * I do not agree that the project is exempt from the development permit requirement for the following reasons.

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> "(b) Is inconsistent with the purpose of the comprehensive plan or land use regulation;
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> "(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."

"Currently, there are four (4) buildings on the site and the proposal is to demolish three (3) of them, including foundations, and retain the fourth. It also includes construction of two (2) new buildings joined together by a third-story skywalk. *From a plain reading of the applicable provisions of the MLDC, the application is for construction of more than one new building*. As such, this application is subject to the development review process.

"Even if MLDC 10.031(C)(2) is ambiguous, the above analysis is a plausible interpretation of the code. *This interpretation is consistent with other provision of the code, such as the opening statement under Article V.* It states, in part, that site development standards are intended to '[a]ssure visual and functional compatibility between adjacent * * * land uses[.]' While staff can apply the standards of the code in its review of a project, it is the function of the Site Plan and Architectural Commission (SPAC) to address compatibility issues between adjacent land uses. Changing your client's application to a building permit precludes SPAC from addressing those very issues. *We do not believe that was the intent of Section 10.031(C)(2) for a project of this scope*.

"*Further, other developments listed under Section 10.031 generally are much smaller in scale than this one*. Examples include parking lots, expansions of buildings not more than 20% or a 2,500 sq. ft. increase (whichever is less), emergency measures resulting from an act of God, certain defined temporary uses, etc. From our calculations the square footage of the buildings to be removed is approximately 17,107 sq. ft. and the square footage of the proposed new buildings is 52,688 sq. ft., a difference of over 35,000 sq. ft. Again, *the scale and scope of the assisted living facility far exceeds the other uses that legitimately should be exempted from the development permit requirement*." Record 32-33 (emphases added).

In the planning director's initial interpretation and decision, he addressed the text of MLDC 10.031, and for context he looked at the other types of development that MLDC 10.031 exempts from site plan review, and he looked to the purpose section of the Site Development Standards to determine the

legislative intent and the policy embodied in MLDC 10.031(C)(2) within the site plan review framework. The building official, planning director and city council presumably later rejected that reasoning.

As far as we can tell, the only change between the planning director's initial interpretation and the city council's reversal was intervenor's submission of the architect's revised drawing showing that the proposed skywalk/veranda connecting the two buildings changed to the proposed dining room/patio skywalk. Without reference to the planning director's March 22, 2013 initial interpretations addressing the text, context, and policy embodied by MLDC 10.031(C)(2) within the framework of site plan review, the planning director and the city council apparently deferred to the building director's one sentence statement that the proposed project depicts one building. That one-sentence statement is unexplained.

The omission of an explanation is problematic because the design change from the skywalk/veranda to the dining room/patio appears to be unrelated to the justifications that the planning director gave in his March 22, 2013 initial interpretation when he determined that the skywalk/veranda connected two separate buildings and that MLDC 10.031(C)(2) was not intended to exempt such an extensive project from site plan review. For instance, neither the planning director nor the city council addressed why the planning director's reasoning that the demolition and rebuilding of three buildings into two buildings connected by a skywalk/veranda is two separate buildings under a "plain reading" of MLDC 10.031(C)(2) but that the demolition and rebuilding of three buildings in exactly the same manner but instead connected by a skywalk that happens to include a dining room/patio is appropriately viewed as one building.

Likewise, the planning director's reliance on the purpose statement in MLDC Article V of "[a]ssur[ing] visual and functional compatibility between adjacent * * * land uses" to conclude the project is beyond the scope of the intended MLDC 10.031(C)(2) exemption would appear to be equally relevant after intervenor changed the skywalk/veranda to a skywalk with a dining area/patio. The purpose of the city's site plan review includes considering the consistency of the "design, placement and arrangement of buildings" and "encourag[ing] development and use of lands in harmony with the character of the neighborhood within which the development is proposed." MLDC 10.285. It is unclear how the design change that is limited to the interior features of the skywalk alters the planning director's reasoning that the applicant's project "far exceeds" the other "generally much smaller * * * scale" development exemptions listed in MLDC 10.031, which include parking lot additions, temporary uses, single-family residential development, public utility facility expansions, and solar panel installations. The scale of the project did not change, and neither the building official, nor the planning director, nor the city council provided any explanation for their apparent contrary conclusions regarding the significance of the relatively large scale of the proposal.

The building official's one-sentence conclusion also omits mention of code definitions of potentially relevant terms like that of "building" or "addition" in MLDC 10.010. Moreover, as petitioners contend, it is unclear why the building official's unexplained conclusion that the proposal would be considered a single building under the building code should receive controlling weight in determining whether the proposal constitutes "a new building,' within the meaning of MLDC 10.031(C)(2).

In view of the city council's reliance on the building official's unexplained conclusion and the building official's and city council's failure to address the text, context, or policy of the MLDC 10.031(C)(2) exemption, the city council's interpretation is not adequate for review. *See Green v. Douglas County*, 245 Or App 430, 438-40, 263 P3d 355 (2011) (to be adequate for review, a local government's implicit interpretation of an ordinance "must carry with it only one possible meaning of the ordinance provision and an easily inferred explanation of that meaning"). Therefore, the city council's decision must be remanded. On remand, the city must provide an explanation for why it believes that intervenor's project qualifies as "a new building" rather than two new buildings.

Petitioners' second assignment of error is sustained.

**THIRD ASSIGNMENT OF ERROR**

Petitioners argue the city's determination that intervenor's project would not "increase motor vehicle trip generation by more than ten (10) average daily trips" misinterprets MLDC 10.031(C)(2). For purposes of the third assignment of error, we put aside the issue of whether the proposal is for a new building or for two new buildings, because if the proposal is for two buildings, MLDC 10.031(C)(2) would not apply even if the ten trip limit is satisfied.

Rather than attempt to address all of petitioners' arguments under this assignment of error, we again sustain this assignment of error, as we did the second assignment of error, because the city council inadequately explained its interpretation of the MLDC 10.031(C)(2) exemption for a new building that does "not increase motor vehicle trip generation by more than ten (10) average daily trips."

MLDC 10.031(C)(2) has two parts; one part is clear and one part is ambiguous. MLDC 10.031(C)(2) is clear that the new building may "not increase motor vehicle trip generation by more than ten (10) average daily trips." If motor vehicle trips are increased by 11 or more, the exemption is not available; but if the increase is 10 or less the exemption applies. There is nothing ambiguous about that part of MLDC 10.031(C)(2).

But MLDC 10.031(C)(2) offers no assistance in determining what to measure that limit of ten additional daily trips against, since the ten additional daily trips presumably must be "added" to something. We can think of at least two plausible interpretations. One plausible interpretation would be that the increase is to be measured against (added to) the background daily trips there may be from any sources, with the result that the new building would only be exempt under MLDC 10.031(C)(2) if the new building, viewed by itself, generated no more than 10 ADTs. It is undisputed that the proposal will generate far more than 10 ADTs, but the city council apparently did not consider this interpretation or, if it did, for unexplained reasons it chose not to adopt the interpretation.

A second plausible interpretation is that ADTs generated by the proposal must be compared with the ADTs of the uses currently occupying the site, and so long as the proposal will not generate more than 10 ADTs more than the existing uses that are to be displaced by the uses in the proposed building the MLDC 10.031(C)(2) exemption applies. This interpretation arguably requires that the city read the following underlined bold language into MLDC 10.031(C)(2)—Construction of a new building that does not increase motor vehicle trips by more than ten (10) average daily trips **compared to the motor vehicle trips that are generated by the existing uses in the existing**

**buildings the proposed building will displace.** Reading MLDC 10.031(C)(2) as though it includes that language arguably violates ORS 174.010 which provides that language should not be read into or out of a statute. But that interpretation seems reasonable here since something must be supplied to MLDC 10.031(C)(2) for the required addition of trips to be accomplished. Looking to the traffic generated by the existing building seems a particularly plausible reading of MLDC 10.031(C)(2), since the proposed use is replacing the existing buildings and in the process is substituting its traffic for whatever traffic the existing buildings are generating. But the city did not adopt this interpretation either. If it had, the MLDC 10.031(C)(2) exemption would not apply since the buildings the proposed building would replace are largely vacant and it appears undisputed the proposed building will generate far more than 10 more motor vehicle trips than the current occupants of the existing buildings.

A third interpretation, which we are not convinced is plausible, is the interpretation the city adopted. The city's findings address trip generation as follows:

> "[W]e find that the Planning Director did not err in deciding that the [p]roject would not generate more than ten ADTs. The Planning Director did not merely accept the trip generation analysis provided by [intervenor], but had city staff review that analysis for accuracy before making his decision.
>
> "Likewise, the Planning Director did not err in accepting [intervenor's] classification of the methadone clinic as a 'Medical Office' for the purpose of calculating trips per the ITE trip generation report. Even if the methadone clinic were more properly classified as a 'Medical Clinic' per the ITE Manual, we concur with the Planning Director's conclusion that the [p]roject would still not generate more than ten ADTs. We do not accept

> [petitioners'] argument that the methadone clinic should have been classified as a 'General Office' per the ITE Manual." Record 6.[5]

The staff report before the city council offered further explanation for resort to the ITE Manuel, which is set out below:

> "Each developed site generates a certain number of vehicle trips. Trip generation is calculated using the Institute of Transportation Engineers Trip Generation Manual, 9th Edition (ITE Manual). The ITE Manual contains trip generation factors for various uses[,] which are calculated on a per-thousand square foot rate.
>
> "Staff concurs with the Appellant's statement that the buildings are largely vacant. However, a certain number of trips apply to a developed site regardless of whether the building is vacant. Because the buildings are largely vacant, staff reviewed the historic uses of the site using business license information dating back to 1996, which is when licensing and permitting became electronic processes. The uses have been largely office in nature. Currently, there are five active business licenses, four office uses and one medical use."

Record 26.

The staff explanation, which was adopted by the city council, glosses over the key issue. Under MLDC 10.031(C)(2), we assume it is appropriate to compare the additional trips that will be generated by the new building with the trips generated by the existing buildings to determine whether the ten new motor vehicle trip limit is exceeded. But the key issue is whether that

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[5] The reference to the ITE Manuel is a reference to the Institute of Transportation Engineers Trip Generation Manual. The parties disputed below whether a methadone clinic that formerly occupied one of the buildings on the site was properly analyzed as a 'Medical Office,' 'Medical Clinic,' or 'General Office' for the purpose of calculating trips per the ITE trip generation report. In view of our disposition of this assignment of error, we need not resolve that dispute.

comparison is with (1) the trips now being generated by the existing buildings, or (2) the trips that might be generated by the types of business that have occupied the site since 1996, when electronic records of business licenses first became available.

The first alternative which would compare real trips with real trips seems by far the most plausible. We recognize that under *Siporen* we must defer to the city's selection of the second alternative if it is also plausible, even if we believe the first alternative is more plausible. But the second alternative requires significant additions to the language of MLDC 10.031(C)(2) and that enhancement is supported by no textual or contextual analysis in the challenged decision. It is also entirely devoid of any explanation for why that interpretation is consistent with the "purpose" or "underlying policy" of the exemption. The look-back to business licenses since 1996 is based on their electronic format availability, a factor that as far as we can tell is entirely unrelated to the meaning of MLDC 10.031(C)(2). It would also require the city to come up with some way to account for changes in uses following 1996 that might have generated quite different numbers of ADT.

Based on the planning director's initial interpretation, the interpretation ultimately accepted by the city council seems to be inconsistent with the "purpose" and "underlying policy" of MLDC 10.031(C)(2), which is to exempt smaller buildings or other improvements with smaller impacts. Without offering any alternative view of the purpose or underlying policy of the exemption, the planning staff and city council have simply rejected looking at the traffic generated by the existing uses in favor of making assumptions about the traffic that would be generated by the uses that have historically occupied the buildings since 1996. Without making any final determination here about

whether such an interpretation might be plausible and therefore sustainable, provided there was a sufficient explanation for the interpretation, that explanation is simply lacking here. *See Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466, 484 (2005) (holding that the county's ultimate interpretation of its ambiguous code provision might be sustainable, but remanding the county's interpretation because the decision lacked an adequate explanation for the distinctions the county read into the provision).

The third assignment of error is sustained.

The city's decision is remanded.