BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OLSEN DESIGN & DEVELOPMENT, INC.
and EUTERPE, INC.,
Petitioners,

vs.

CITY OF MONMOUTH,
Respondent,

and

JAMES R. MARR and PENNY L. MARR,
Intervenors-Respondents.

LUBA No. 2013-113

FINAL OPINION
AND ORDER

Appeal from City of Monmouth.

Alan M. Sorem, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief was Saalfield Griggs PC.

Lane P. Shetterly, filed a joint response brief and argued on behalf of respondent. With him on the brief was Shetterly Irick & Ozias.

Wallace W. Lien, Salem, filed a joint response brief and argued on behalf of intervenors-respondents.

RYAN, Board Member; BASSHAM, Board Member, participated in the decision.

HOLSTUN, Board Chair, did not participate in the decision.

AFFIRMED 03/20/2014

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal an ordinance approving a comprehensive plan map amendment changing the plan designation of 7.46 acres of property from Low Density Residential (LDR) to Industrial.

FACTS

Intervenors own a 26.29-acre property located at 875 Highway 99W South, in Monmouth. Intervenors operate a wood-material recycling facility on the southern 10 acres of the property. Intervenors' facility produces bark dust, hog fuel, compost, and sawdust.

Intervenors' property is located outside of the city's limits, in Polk County, but inside the city's urban growth boundary. An intergovernmental agreement (IGA) between the city and Polk County specifies that the city's comprehensive plan is "the controlling document in guiding development within the UGB," and requires the county to "appropriately zone any affected properties." Record 1206. The city's comprehensive plan map designates the southern 10 acres of intervenors' property Industrial and the remaining northern 16.29 acres LDR. The northern 16.29 acre portion of the property is currently zoned Suburban Residential by Polk County.

Intervenors submitted an application to amend the city's comprehensive plan map designation from LDR to Industrial for 7.46 acres of the property that are north of and adjacent to the Industrial-designated southern 10 acres. According to intervenors, the purpose of the expansion of their operation onto the adjacent 7.46 acres is to provide an area for sales of wood products from storage bins that is separate and away from the production facility, and to allow for more storage of existing piles of the wood product. The IGA requires that

an application for a comprehensive plan map amendment for property located inside the city's UGB but outside of the city's boundaries be processed by the city.

The city held hearings on the application, and adopted an ordinance and findings approving the 7.46-acre comprehensive plan map amendment. This appeal followed.

JURISDICTION

ORS 197.825 provides that LUBA has jurisdiction over appeals of "land use decision[s]" made by local governments. Under ORS 197.015(10)(a)(A), LUBA has jurisdiction over the decision only if the decision was "final."[1]

Intervenors argue that the city's decision changing the city's comprehensive plan designation for the subject property from LDR to Industrial is not "final" within the meaning of ORS 197.015(10)(a)(A). That is so, intervenors argue, because according to Section 10(a) of the IGA, the city's decision approving the Industrial plan designation is a recommendation to the county that the comprehensive plan designation for the subject property be

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[1] ORS 197.015(10)(a)(A) defines "land use decision" as:

> "[a] *final* decision or determination made by a local government * * * that concerns the adoption, amendment or application of:
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> "(i) [t]he goals;
>
> "(ii) [a] comprehensive plan provision;
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> "(iii) [a] land use regulation; or
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> "(iv) [a] new land use regulation." (Emphasis added.)

changed on the county's comprehensive plan map from LDR to Industrial.[2] According to intervenors "Polk County will make the final decision with regard to concurrence on the comprehensive plan designation, and is responsible for applying the final zone to the property depending on whether or not the County concurs with the City's decision to approve the comprehensive plan change." Intervenors' Motion to Dismiss 2.

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[2] Section 10(a) of the IGA provides:

> "The City and County will establish a process for review and action on development proposals; public improvement projects; and implementing regulations and programs which pertain to the urbanizable area:
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> "a. The City will make timely recommendations to the County with regarding to the following items which are under the decision making authority of the County:
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> "1) All land use actions including, but not limited to, land divisions (partitions and subdivisions), variances, zone changes, comprehensive plan changes, and conditional use permits.
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> "2) Capital improvement programs.
>
> "3) Public improvement projects.
>
> "4) Recommendations for the designation of health hazard areas.
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> "5) Subsurface sewage disposal (capability statement).
>
> "6) Building permits, when septic tank approval is requested for a residential building, the requirements of section 10.c.2) herein shall be met." Record 1207.

The city disagrees with intervenors' characterization of the meaning and effect of Section 10(a) of the IGA. The city points to Section 7 of the IGA:

> "Polk County recognizes Monmouth's Comprehensive Plan as the controlling document in guiding development within the UGB. Polk County shall appropriately zone any affected properties."

The city argues that because Polk County has agreed that the city's comprehensive plan is the "controlling document," the city's decision to amend the city's comprehensive plan designation for the subject property is "final" within the meaning of ORS 197.015(10)(a)(A). The city points to findings in the decision that take the position that Section 10 merely describes the cooperative process agreed on by the city and county to give effect to Section 7 of the IGA when the city has applied a comprehensive plan designation to land within its UGB but not annexed to the city.[3] According to the city, the record

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[3] The city found:

> "According to the Intergovernmental Agreement (IGA) between the City and Polk County, when a comprehensive plan map amendment is sought for lands like the subject property that are inside the [UGB], but outside the city limits, the request shall be processed by the City. Section 7 of the IGA provides that the Monmouth comprehensive plan is the 'controlling document in guiding development within the UGB,' and that 'Polk County shall appropriately zone any affected properties.' Section 10 of the IGA provides for a cooperative process for review and action on development proposals, public improvement projects and implementing regulations and programs that pertain to the UGB. As such, upon approval of this application it will be incumbent on the applicant to apply to Polk County for a zone change for the subject property, for an appropriate zone, and to obtain the county's approval of such zone change before making any commercial use of the subject property; and such use shall be

includes statements from both the city and the county regarding their intent in entering into the IGA. The city argues that as the only parties to the IGA, the city's and the county's statements regarding the intended meaning of Section 7 and Section 10(a) should control when an ambiguity in the agreement arises.

We agree with the city that the city's decision to amend its comprehensive plan designation for the property is a "final" decision by the city within the meaning of ORS 197.015(10)(a). Intervenors' interpretation of Section 10(a) of the IGA as only authorizing the city to recommend to the county whether to change the city's comprehensive plan designation for a property reads too much into Section 10(a). Section 10(a) allows the city to make recommendations to the county for comprehensive plan amendments "which are under the decision making authority of the county[.]" But Section 7 of the IGA recognizes the city's comprehensive plan as the controlling comprehensive plan in the Urbanizable area. Nothing in the IGA grants the county any decision making authority over city comprehensive plan designations for property within the UGB. Accordingly, intervenors' motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

Monmouth Zoning and Development Ordinance (MZDO) 90.330 provides several approval criteria that apply to the comprehensive plan map amendment. MZDO 90.330(A)(2) provides in relevant part that the plan amendment must meet the following standard:

> "Conditions in the neighborhood surrounding the land for which the Plan amendment is initiated have changed to such a degree that

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subject to the terms of this approval and any terms, conditions and limitations imposed by Polk County." Record 13.

> the Comprehensive Plan designation is no longer appropriate, and the Plan amendment would conform to the new conditions in the neighborhood[.]"

Thus MZDO 90.330(A)(2) requires the city to (a) define the "neighborhood surrounding the land"; (b) find that conditions in that defined surrounding neighborhood have changed to such a degree that the current LDR comprehensive plan map designation is inappropriate; and (c) find that the proposed Industrial designation will conform to the surrounding neighborhood's new conditions.

A. Introduction

Intervenors' property is located adjacent to Highway 99W east of the highway. Directly east of the subject property and about 1,000 feet from Highway 99W is part of petitioners' 88-acre master planned residential community, Edward's Addition. Northeast of Edward's Addition are more residential uses and a church and vacant land. South of intervenors' property is vacant rural land.

Across Highway 99W to the west of the highway are an assisted living facility, large retail stores and drive-through restaurants oriented towards Highway 99W. Record 17. South of the assisted living facility and west of the highway is a mini-storage facility as well as industrial buildings and vacant land. *Id*. Another residential subdivision is located to the west of those properties, about 650 feet west of the subject property. Record 18. The residential uses located north of the subject property and east of Highway 99W are buffered by trees from intervenors' property and from Highway 99W. Record 16.

B. The "Surrounding Neighborhood"

The phrase "neighborhood surrounding the land for which the amendment is initiated" is not defined in the MZDO.[4] The city found:

> "While the surrounding neighborhood is generally considered to be the Highway 99W corridor, for this application, the neighborhood identified here is greatly expanded beyond that which is commonly considered to be the surrounding neighborhood, and goes significantly beyond the 250 [foot] notice area provided for in the MDZO, and much farther than the 700 [foot] current separation of uses that exists in this area. The expanded 'surrounding neighborhood' being considered here is bounded by Madrona Street, which is approximately 1,580 feet north of the subject property; the UGB boundary approximately 600 feet south of the subject property; Broad Street S. approximately 680 feet west of the subject property across Highway 99W, and a line extending from its terminus south to the UGB; and Edwards Road S. approximately 2,160 feet east of the subject property, and a line extending from its terminus south to the UGB. This defined area is approximately 3,300 feet in the east/west direction, and 2,700 feet in the north/south direction and encompasses over 200 acres of land. This identified neighborhood surrounding the subject property is also typical of the changing land use patterns in the entire [c]ity. * * *" Record 16.

We understand petitioners to argue that the city improperly construed MZDO 90.330(A)(2) in defining the surrounding neighborhood, and that its findings are inadequate to explain why the city included certain areas and excluded other areas.[5] Petitioners argue, as they argued below, that the city

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[4] We use the phrase "surrounding neighborhood" as shorthand for the lengthier phrase.

[5] LUBA is authorized to reverse or remand a local government's land use decision if the local government "[m]ade a decision not supported by

should have relied on the dictionary definition of "neighborhood."[6] Specifically, we understand petitioners to argue that the definition of "neighborhood" requires the city to include the entirety of Edwards Addition, and to exclude commercial properties across Highway 99W from the subject property. Petitioners also argue that the city's emphasis on the access of the subject property to Highway 99W and similar access of other properties along Highway 99W to the highway as a reason to include a number of those properties in the surrounding neighborhood is misplaced.

Respondents respond that the city properly interpreted MZDO 90.330(A)(2) to mean that the city is required to look in all directions approximately equidistantly from the subject property. Respondents point out that under the city's definition of "surrounding neighborhood," the subject

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substantial evidence in the whole record" or "[i]mproperly construed the applicable law[.]" ORS 197.835(9)(a)(C) and (D).

[6] *Webster's Third New Int'l Dictionary* 1514 (unabridged ed. 2002) defines "neighborhood:"

> "* * * [A] number of people forming a loosely cohesive community within a larger unit (as [in] a city or town) and living close or fairly close together in more or less familiar association with each other within a relatively small section or district of [usually] somewhat indefinite boundaries and [usually] having some common or fairly common identifying feature (as approximate equality of economic condition, similar social status, similar national origins or religion, similar interests) * * *[;] the particular section or district that is lived in by these people and that is marked by individual features (as type of homes and public establishments) that together establish a distinctive appearance and atmosphere * * *[;] an area or region of [usually] vague limits that is [usually] marked by some fairly distinctive feature of the inhabitants or terrain * * *."

property is almost in the middle of the identified 200-acre area. Respondents argue that petitioners' interpretation is inconsistent with the plain meaning of "surrounding" as used in MZDO 90.330(A)(2) because petitioners' proffered interpretation and resulting analysis area would place the subject property on the western edge of the surrounding neighborhood and extend the neighborhood disproportionately to the east. Respondents also point to the city's findings at Record 16-18 that explain how the city identified the surrounding neighborhood.[7] Finally, respondents respond that the city's

[7] The city found:

> "21.3 The defined area includes a representative mixture of uses and zone. Along the Highway 99W corridor is a large Commercial Retail (CR) area on the west side of the highway and Medium Density Residential on the east side of the highway that is buffered from the highway by a mature line of trees. To the west of the CR area is land that is zoned for Commercial Office (CO) uses. At the corner of Gwinn and Highway 99W on the west side is a new assisted living facility that is zoned High Density Residential. South of Gwinn Street, but still on the western side of the highway, is a large area zoned for Industrial Park and Light Industrial uses. Further west of that industrial area are lands zoned for High Residential, Mixed Density Residential and Low Density Residential uses. To the east of Highway 99W, from Madrona south, is a strip of Medium Density Residential zoning, and to the east of that is a portion of Edwards Addition which is zoned for Low Density Residential uses. South from this area is the established church (which is allowed in the LDR zone as a conditional use, and commits a large part of that tract to church related uses that are non-residential in nature). To the east of the church is an area zoned for Mixed Density Residential uses. South of the church is the subject property which is

reliance on the subject property's direct access to Highway 99W that is similar to the direct access to Highway 99W of other commercial and industrial properties to define the surrounding neighborhood is consistent with MZDO 90.330(A)(2).

Review under ORS 197.829(1)(a) is a deferential standard, and LUBA must affirm a governing body's interpretation of its land use regulations unless the interpretation is "inconsistent with the express language of the

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currently zoned SR (the county's transition zone) but designated LDR in the comprehensive plan, and the southern portion of this tract is zoned IL and designated Industrial in the plan.

"21.4 Uses within the defined area follow the zoning pattern. In the area west of Highway 99W and north of Gwinn Street there is the aforementioned assisted living facility. North of that facility are large retails stores and drive-through restaurants all oriented towards Highway 99W. South of the assisted living facility is a mini-storage facility, some industrial buildings and vacant land designated for industrial use. There is a duplex subdivision approved, but it is only sparsely developed at this time. The remainder of the land in the southwest quadrant of the defined area is basically vacant. In the area east of Highway 99W, the northerly residential areas are fully developed, and the southerly area is only developed with the church and applicants' wood processing business.

"21.5 The reason for this pattern of growth is the need for industry and commerce to have clear and easy access to the Highway to get supplies to the business and to get products out to the larger markets to the north, south, and east. Customers travel on the Highway, so visibility for a business to attract those customers is critical. * * *" Record 16-17.

comprehensive plan or land use regulation." Petitioners disagree with the city's interpretation of the phrase "surrounding neighborhood" and its line drawing, and essentially argue that their proffered interpretation of the phrase should have been the one that the city adopted, but do not point to anything in the MLDC or the Monmouth Comprehensive Plan (MCP) that the city's interpretation is inconsistent with. We agree with respondents that the city's interpretation of the phrase surrounding neighborhood is not inconsistent with MZDO 90.330(A)(2). The provision requires the city to look in all directions from the subject property, and the city's analysis area is consistent with that interpretation. We also agree with respondents that the city's findings are adequate to explain the reasons why it defined the analysis area in the way that it did, and that the city's reliance on the subject property's direct access to Highway 99W as one factor in defining the surrounding neighborhood is reasonable.

C. Changed Conditions

In a subassignment of error under the first assignment of error, we understand petitioners to argue that the city improperly construed MZDO 90.330(A)(2) when it determined that "[c]onditions in the neighborhood surrounding the land * * * have changed to such a degree" that the LDR designation is no longer an appropriate designation, and that the city's findings are inadequate to explain why it reached that conclusion. Petition for Review 17-18.

The city adopted extensive findings that explain its ultimate conclusion that "the new pattern of land use development in this neighborhood is for commercial and industrial lands and uses to be located adjacent to Highway 99W, and residential uses to be located away from (or oriented away from) the

commercial corridor that is Highway 99W."[8] Record 18. Petitioners argue that the predominant change in the surrounding neighborhood is that more

[8] The city found:

> "21.6 [T]hose same circumstances prompt residential developers to want to move away from the Highway. Residential areas are averse to high traffic and the noise generated from a busy highway and nearby business operations. Residential developers have planned and developed their subdivisions a considerable distance away from the Highway, despite land that is property zoned and planned for residential use being located along the Highway frontage. This process of selective development led to subdivision construction over 1,000 feet to the east of the highway. This is the pattern of growth over the last 30 years. No new subdivisions have been oriented toward the Highway during the last 30 years, and one subdivision that did border the Highway oriented itself in the opposite direction and made the highway frontage the back yards, and then buffered those with vegetation.
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> "21.7. From the time the original comprehensive plan was adopted in the early 1980s, the defined area * * * has changed in significant ways. The trend is for the Highway 99W corridor to become the north/south commercial and industrial trade route for the entire area, with the corresponding effect that this corridor has changed from the predominantly residential (with regard to local traffic) before the comprehensive plan was adopted to today where businesses line the highway corridor and all new subdivisions have been located or facing away from the highway on interior streets. All of the businesses in the area have taken over residential lands along the highway since 1986, in much the same way that the applicants' own plan and zone change from LDR and SR to I and IL took place on the southerly 10 acres of TL1000 in 1986. The assisted

living facility, the ministorage units, the new duplex subdivision and the parts of Edwards Addition included in the defined neighborhood, all were re-zoned, and or constructed since the comprehensive plan was adopted in the early 1980s.

"21.8. In addition, the commercial corridor that is Highway 99W has developed with many new businesses since 1986, also changing the character of the area. The evolution of the [c]ity is that residential subdivisions have been established on interior streets and away from (or oriented away from) the commercial areas. Since 1986, two subdivisions have been developed in the vicinity of the subject property, Edwards Addition, located approximately 1,000 feet east of Highway 99W and Gwinn Street Village, located approximately 650 feet west of Highway 99W. The Highway 99W corridor that had many residential dwellings in 1986 now in 2013 has very few; most having either been demolished to make way for commercial buildings, or converted to commercial buildings themselves. During this relevant period the following commercial/industrial operations have been changed to allow construction on the west side of Highway 99W including: Kentucky Fried Chicken; Bi-Mart, OSU Federal Credit Union; a drive[-]up coffee stand; an assisted living facility, and a 5-acre mini storage operation.

"21.9 At present, the new pattern of land use development in this neighborhood is for commercial and industrial lands and uses to be located adjacent to Highway 99W, and residential uses to be located away from (or oriented away from) the commercial corridor that is Highway 99W. Amidst this current predominant land use pattern, the applicants' property still has LDR lands adjacent to the highway; across from and adjacent to industrial lands and directly on the commercial highway corridor. This is in conflict with the emerging land use patterns in this neighborhood over the last 30 years. The fact that the applicants' LDR-designated

residential uses than commercial uses have developed within the 200-acre analysis area in the last 30 years. Petitioners also point to a duplex subdivision located adjacent to Highway 99W and an assisted living facility located adjacent to Highway 99W that petitioners maintain is a residential use, and argue that the city erred in finding that residential uses are located away from or oriented away from Highway 99W.

Respondents respond, and we agree, that the city considered the location of new residential growth in the surrounding neighborhood, and found that the residential properties that have developed are generally characterized by being oriented away from Highway 99W and buffered with trees, while properties similarly situated to the subject property with direct access to the highway are generally commercial or industrial uses. Such a growth pattern is sufficient justification for the city to conclude that "[c]onditions in the neighborhood surrounding the land * * * have changed to such a degree" that the LDR designation for the property that is adjacent to the highway and across the highway from other non-residential uses is no longer appropriate.

> land has itself not converted to residential use in nearly 30 years, despite its residential zone and plan designation, indicates that land once thought to be residential is no longer appropriate for that use.
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> "21.10Based on all these facts and considerations the neighborhood surrounding the subject property (as defined here) has changed, thereby satisfying the first aspect of this criterion. * * *."

D. The Industrial Designation Conforms to the Changed Conditions

The city found that "[a]llowing the conversion of LDR land to the Industrial plan designation follows [the above stated] pattern of development in the [c]ity generally, and in the defined area specifically, and therefore satisfies the second aspect of this criterion." Record 19. The city reasoned that the remainder of intervenors' property that remains designated LDR will act as an 8.8-acre buffer that separates intervenors' property from the nearest residential use to the east, and that a 700-foot distance between intervenors' property and the nearest residence, which includes a berm and vegetative buffer, will maintain the same pattern of development. Record 15-16. Petitioners argue that the city's findings are inadequate to explain how the Industrial plan designation will conform to the surrounding neighborhood's new residential uses. Petitioners also contend that the city erred in failing to impose conditions of approval to mitigate the effects of the new designation on nearby residential uses.

The city's conclusion, quoted above, follows three pages of findings that define the surrounding neighborhood and document the surrounding neighborhood's growth pattern. Record 16-18. The city's findings are adequate to explain why the city concluded that the Industrial designation would conform to the changed character of the surrounding neighborhood, within the meaning of MZDO 90.330(A)(2).

Relatedly, petitioners argue that the city's findings fail to explain "how *uses* allowed under the Industrial designation will conform to the new conditions in the surrounding neighborhood[.]" Petition for Review 18 (emphasis added.) However, MZDO 90.330(A)(2) requires the city to find that

the plan *designation* will conform to the new conditions in the neighborhood, and does not require the city to consider all *uses* that could result from the new designation. Accordingly, petitioners' argument provides no basis for reversal or remand of the decision.

Finally, petitioners argue that the city erred in failing to impose approval conditions to mitigate the effects of the new plan designation on the surrounding neighborhood. The city considered and rejected imposing conditions on the plan designation and adopted findings explaining its decision, which petitioners do not address.[9] Petitioners do not cite any

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[9] The city found:

> "It was proposed that approval of this application be made subject to conditions of approval limiting activities and operations on the subject property and [intervenors' existing operation on] TL 1000, including conditions related to hours of operation (to limit noise), construction of public facilities, granting of right-of-way, and measures to limit dust and odor. To the extent that such conditions are proposed to be addressed to [intervenors' existing operation] on TL 1000, they are not germane to this application. In addition, even to the extent such conditions may be applicable to the subject property, such conditions are more appropriately addressed to Polk County in the context of a zone change application than they are in the context of this application to amend the comprehensive plan. Under the IGA between the City and Polk County, the County has the authority to zone the property, and that includes the authority to impose appropriate conditions of approval as may be appropriate in the context of any zone change application that the applicants submit to the County after this approval. The City defers to the County the imposition of such conditions of approval as may be appropriate in the context of any zone change application that [intervenors] submit to the County after this approval, subject to the City's right to comment, as provided in Section 9 of the IGA, and the process for

provision of the MZDO or the MCP that requires the city to condition its approval of a plan amendment to Industrial.

Petitioners' first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

MZDO 90.330(D) requires the city to find that "[t]he proposed change is appropriate considering the surrounding land uses and the density and pattern of development in the area." The city found:

> "24.1 This criter[ion] is substantially similar to the second part of that found in MZDO 90.330(A)(2), and the compliance discussion above on that criterion applies equally to the compliance of this criterion. * * *
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> "24.2 This criterion focuses on the appropriateness of the change. 'Appropriate' is generally considered to mean 'suitable' or 'fitting' or 'proper under the circumstances.'
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> "24.3 For purposes of this criteria, the 'surrounding land uses' and the 'area' to be considered as to the density and pattern of development are the same as that established for MZDO 90.330(A)(2). That is the specific area bounded by Bentley Street E. to the north; the UGB boundary to the south; Broad Street St. and a line extending from its terminus to the UGB to the west; and Martin Way S. and a line extending from its terminus to the UGB to the east.
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> "24.4 As noted in the findings and conclusions for compliance with MZDO 90.330(A), the defined area is a mixture of land uses centered along Highway 99W corridor. Businesses predominate along the highway, with residential uses tending to be located or oriented away from the highway. The northerly portion of the area is almost entirely developed, with large commercial uses to the west and single family residential to the east. The southerly portion

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resolving any disagreement between the city and county under Section 10.e. of the IGA." Record 31-32.

of the area is less developed, with few uses established to the west and east. The orientation of this property toward Highway 99W, and the need for that access for industrial purposes fits the area, as there is sufficient buffering to the north where the church is located; to the east by the 8.8 acres owned by the applicant that will remain vacant and the open field to the east of [intervenors'] property; to the west by industrial zoning and uses; and to the south by the applicants' own business operation and the UGB beyond that.

"24.5 The change in use from residential to industrial is appropriate (i.e., suitable, fitting, and proper under these circumstances) for this portion of TL 1000, as it allows a local business to expand and become a safer operation. It is appropriate as it provides the best utilization of ground that has significant frontage along Highway 99W. The lesser traffic generation from this use compared to what would be generated by the present zoning prevents traffic congestion and therefore is best for this area, making it appropriate as well." Record 25-26.

We understand petitioners to argue that the city's conclusion that MZDO 90.330(D) is met improperly construes the MZDO, and that the city's findings are inadequate and are not supported by substantial evidence in the record. ORS 197.835(9)(a)(C) and (D). Petitioners first argue that the city erred in relying on its finding of compliance with MZDO 90.330(A)(2) to find compliance with MZDO 90.330(D). Respondents respond, and we agree, that although the city referenced its findings for MZDO 90.330(A)(2) in its discussion of MZDO 90.330(D), the city adopted several additional independent findings (24.2 to 24.5, quoted above) that MZDO 90.330(D) is met that are adequate to explain its conclusion.

Second, petitioners argue that the city's interpretation of the phrase "surrounding land uses" and the term "area" in MZDO 90.330(D) is

inconsistent with the city's interpretation of the phrase "surrounding neighborhood" in MZDO 90.330(A)(2). Petitioners argue that the first sentence in finding 24.3 says that the "surrounding land uses" and "area" to be analyzed in MZDO 90.330(D) are the same as the "surrounding neighborhood" the city identified in MZDO 99.330(A)(2), but the second sentence in finding 24.3 then describes the area to be analyzed and that area is somewhat smaller than the surrounding neighborhood.

Respondents agree that the area the city considered for purposes of determining the "surrounding land uses" is smaller than the "surrounding neighborhood" that the city analyzed in MZDO 90.330(A)(2). The area eliminates two blocks on the northern edge of the area that is included in the "surrounding neighborhood" and two blocks on the eastern edge of the area that is included in the "surrounding neighborhood." However, as far as we can tell, petitioners do not explain why the difference between the two analysis areas relates to the approval criteria, or otherwise demonstrate that the difference matters. Absent any allegation that the difference is relevant to an approval criterion, any difference is at most harmless error that does not provide a basis for reversal or remand of the decision.

Finally, we understand petitioners to argue that the findings that explain the city's conclusion that the change to Industrial is "appropriate considering the surrounding land uses and the density and pattern of development" are inadequate because the city did not impose mitigating conditions to address noise, dust and odor from intervenors' operations on the entire property. For the same reasons we explain above, we reject that argument.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners' third assignment of error is difficult to understand, but in it, we understand petitioners to challenge the 1986 decision that redesignated the southern 10 acres of intervenors' property (that is south of the subject 7.46 acre property for which the plan amendment is sought) from LDR to Industrial. Petitioners argue that the city erred in failing, after it approved the 1986 plan amendment, to timely amend its official comprehensive plan map to reflect the 1986 plan amendment for the southern 10 acres.

In response, respondents argue that petitioners' argument is a collateral attack on the city's final, 1986 land use decision, a decision not before us. We agree with respondents. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, 296, *aff'd* 195 Or App 763, 100 P3d 218 (2004) (assignments of error that collaterally attack a decision other than the decision on appeal do not provide a basis for reversal or remand). The city's 1986 decision to amend the comprehensive plan designation for adjacent property that is not the subject of the application is final and is not subject to challenge in the appeal of the challenged decision.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners' fourth assignment of error cites two provisions of law which, generally described, require the city to consider traffic impacts from the proposed development.

A. MZDO 90.330(C)

MZDO 90.330(C) provides in relevant part that the city may not approve the plan amendment unless "[a]dequate * * * transportation networks are in

place or are planned to be provided concurrently with the development of the property."[10] The city concluded that MZDO 90.330(C) was met:

> "As currently proposed, there is little if any traffic increase involved. * * * The proposed use will generate significantly less traffic than what would be allowed if the site was developed for single family houses under the current zoning and Plan designation." Record 24.

In their fourth assignment of error, we understand petitioners to argue that the city's finding under MZDO 90.330(C) that "adequate * * * transportation networks are in place * * *" is not supported by substantial evidence in the record. We understand petitioners to argue that a reasonable decision maker would not conclude that "adequate * * * transportation networks are in place" where the only evidence in the record about the adequacy of the transportation network consists of (1) a statement from intervenors that the proposed use of the property will not add any new trips to the transportation network and will result in less trips than would be generated under the LDR designation; and (2) a statement from ODOT that the proposed use of the property will not result in a change of use of Highway 99W. Record 879, 1034-1035.

In conducting the inquiry required under MZDO 90.330(C), we understand the city to interpret MZDO 90.330(C) to allow it to consider intervenors' intended use of the property that is the subject of the plan amendment in determining whether the facilities are "adequate," and to have

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[10] MZDO 90.330(C) further provides that "[a] Traffic Impact Analysis, pursuant to Section 96.415, may be required by the Public Works Director to determine the adequacy of existing or planned transportation facilities and demonstrate compliance with OAR 660-012-0060."

relied on intervenors' evidence that the expansion of their existing facility would not produce additional traffic. Petitioners do not explain why that interpretation is inconsistent with the express language of MZDO 90.330(C) or any other relevant MZDO or MCP provision. Petitioners also do not explain why the evidence that the city relied on that takes the position that the proposed expansion of intervenors' existing facility onto the property will generate less trips than the LDR designation would generate is inaccurate or unreliable, and they do not point to any evidence in the record that contradicts intervenors' evidence. We understand petitioners to argue that the city could not reach the conclusion that it did without a traffic impact analysis prepared by a traffic engineer. If that is the argument, we disagree. Absent citation to anything in the record that contradicts or undercuts intervenors' evidence regarding the lack of traffic impacts from expansion of their facility onto the subject property, we think a reasonable decision maker would rely on intervenors' proposed use of the property and its estimate of few or no additional trips from that proposed use to conclude that the transportation network is adequate for purposes of MZDO 90.330(C).

B. OAR 660-012-0060

The second provision petitioners cite in their fourth assignment of error, OAR 660-012-0060, requires in relevant part that plan amendments that have a significant effect on an existing transportation facility comply with the further requirements of the rule. Determining whether a plan amendment would significantly affect a transportation facility potentially requires a complicated inquiry under OAR 660-012-0060(1).[11]

[11] OAR 660-012-0060(1) provides in part:

The city concluded that the proposed plan amendment will not "significantly affect" an existing transportation facility and that therefore, OAR

> "A plan * * * amendment significantly affects a transportation facility if it would:
>
> "(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);
>
> "(b) Change standards implementing a functional classification system; or
>
> "(c) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.
>
> "(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
>
> "(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or
>
> "(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan."

660-012-0060(1) does not apply.[12] In their fourth assignment of error, petitioners argue:

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[12] The city found:

> "28 Transportation Planning Rule – Opponents cite the Transportation Planning Rule (Goal 12 and its implementing OARs, commonly referred to as the TPR) and argue first it is applicable here, and second that it is not complied with. Neither argument is accepted. The applicants have an already approved access permit to Highway 99W issued by ODOT. This application will not generate appreciable (let alone 'significant') new traffic to the site. No new access point is proposed. ODOT was notified of this application and submitted written comments that no new access permit or amendment thereof would be required, and that ODOT had no objection to the proposed plan change. Highway 99W is a state highway, under ODOT's jurisdiction.
>
> "28.1 The TPR does not apply in this case. In order to apply, a proposal has to 'significantly affect an existing transportation facility.' OAR 660-012-0060(1). To 'significantly affect' a transportation facility, a land use application has to change the functional classification of the facility; change the implementing standards of the classification; add types or levels of traffic that are inconsistent with the classification; or degrade the performance of the facility. This application contains none of the impacts that would trigger the TPR. Since there is no significant impact to an existing transportation facility, no mitigation or other action is required and the TPR is complied with. ODOT is the road authority for Highway 99W. The city accepts ODOT's position that it does not object to this change as evidence that it will not significantly affect Highway 99W." Record 27-28.

> "Moreover, the city's adopted Transportation System Plan demonstrates that there are several expected intersection failures during the planning period along Highway 99W. * * * OAR 660-012-0060(1)(c)(C) states that a plan amendment significantly affects a transportation facility if it would 'degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or the comprehensive plan.' The City's finding that the proposed use will generate less traffic than a development under the current designation is based on the false assumption that the Decision prevents additional trips. * * *" Petition for Review 31.

We understand the argument set out above to take the position that without a traffic study or a limit on the amount of new trips that could be generated under the new Industrial designation, the city's conclusion that no additional trips will result from the new Industrial designation is not supported by substantial evidence in the record. For the same reasons set out above, we reject that argument. Absent any evidence in the record that contradicts intervenors' evidence, a reasonable decision maker could rely on intervenors' evidence that no additional traffic will result from the new Industrial designation compared to the current LDR designation to conclude that the plan amendment will not "significantly affect[]" a transportation facility within the meaning of OAR 660-012-0060(1)(c).[13]

Petitioners' fourth assignment of error is denied.

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[13] The city's TPR analysis and conclusion appear to rely on evidence that less new traffic would be generated by intervenors' expansion of its existing operation onto the subject property, compared to the amount of traffic that would be generated by full build out of the subject property under the current LDR designation. Whether that type of comparison is sufficient to demonstrate compliance with the TPR is not raised as an issue in this appeal.

FIFTH ASSIGNMENT OF ERROR

MZDO 90.330(B) requires the city to find that "[t]he proposed change is consistent with the applicable goals and policies of the [MCP]." In their fifth assignment of error, petitioners challenge the city's conclusions regarding various provisions of the MCP that petitioners argue are "applicable goals and policies" under MZDO 90.330(B).

A. MCP Land Use Policy 5

MCP Land Use Policy 5 requires the city to "insure that new industrial uses will be compatible with surrounding uses." The city found that the new industrial designation for the subject property is compatible with surrounding uses because there remains an 8.8-acre buffer between the subject property and the nearest residential uses, and that the proposed change is compatible with surrounding uses. Record 20. Petitioners first argue that the city's findings are inadequate because the city failed to consider the impacts on surrounding uses from the expansion of intervenors' operation onto the subject property. However, the city's findings make clear that it considered impacts from noise, dust, and odor from the proposed new use of the subject property and concluded that the 8.8 acre buffer area is sufficient to minimize any impacts from the use so that the use is compatible.

Petitioners next argue that the city's finding that the new use will be compatible with the surrounding residential uses is not based on substantial evidence in the whole record. As part of the application, intervenors submitted a noise study prepared by an acoustical engineer. We understand petitioners to argue that no reasonable decision maker would rely on intervenors' noise study because noise from intervenors' existing operation was measured adjacent to

existing dwellings, at a point that is farther from the noise source than Oregon DEQ rules allow.

As we understand it, the noise study measured noise generated by the bark shredder used in intervenors' current operation because it is the loudest piece of equipment used. As we also understand it, the bark shredder operates on the southern 10 acres of intervenors' property that is already designated Industrial, and the bark shredder is not proposed to be moved to the subject property after the new Industrial designation is in place. Record 1478. The noise study concluded that noise generated from the bark shredder is in compliance with DEQ noise regulations at the nearest existing residences. Absent any evidence or argument that the new industrial uses on the subject property will create noise that exceeds the levels of the bark shredder, petitioner's argument provides no basis for reversal or remand of the decision.

B. Transportation System Plan Policies

TSP Policies 4 and 5 provide:

> "4. The City of Monmouth shall utilize the Transportation System Plan for guidance in all land use planning and project development activities.
>
> "5. The City of Monmouth shall protect transportation facilities, corridors, and sites for the functions identified in this plan."

The city found that the application is consistent with the TSP. Record 21. In their fifth assignment of error, we understand petitioners to argue that the city's finding that the plan amendment is consistent with the TSP is not supported by substantial evidence in the record. However, petitioners' argument under the fifth assignment of error appears to be entirely derivative of their fourth assignment of error. Petition for Review 34. Because we reject above the portion of petitioners' fourth assignment of error that argues that the city's

conclusion that no additional traffic will result from the plan amendment is not based on substantial evidence in the record, we reject petitioners' argument here as well.

C. MCP Economic Policies

The city found that MCP Economic Development Element policies are not applicable to the plan amendment application. Record 23. Citing *Bothman v. City of Eugene*, 51 Or LUBA 426, 439 (2006), petitioners argue that the city should have considered whether the plan amendment is consistent with various MCP Economic Development policies.

Respondents first respond that the city's interpretation of MZDO 90.330(B) and the MCP Economic Development policies cited by petitioners is not inconsistent with the express language of the MZDO or the MCP, and that LUBA is required to affirm the city's interpretation. ORS 197.829(1)(a). We agree.

In addition, respondents respond that *Bothman* is inapposite here. We agree. In *Bothman*, the applicable refinement plan and the express language of the disputed refinement plan policy that we held the city was required to consider assigned a specific role to that policy in land use decision making. Here in contrast, petitioners point to nothing in the MCP itself or the text of the disputed MCP Economic Development Element policies that assigns a role to those policies that would require the city to consider those policies in land use decision making. Accordingly, *Bothman* does not assist petitioners.

The fifth assignment of error is denied.

The city's decision is affirmed.