

1 `BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 NEIGHBORS FOR DALLAS,
5 JEREMIAH MULDER, RANDALL HOUSER,
6 and LYDIA GRABER,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF DALLAS,
12 *Respondent,*

13
14 and

15
16 WAL-MART STORES, INC.,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2012-026

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from City of Dallas.

25
26 Sean Malone, Eugene, filed the petition for review and argued on behalf of
27 petitioners.

28
29 Lane P. Shetterly, Dallas, filed a joint response brief and argued on behalf of
30 respondent. With him on the brief was Shetterly, Irick & Ozias.

31
32 E. Michael Connors, Portland, filed a joint response brief and argued on behalf of
33 intervenor-respondent. With him on the brief were Gregory S. Hathaway and Hathaway,
34 Koback Connors LLP.

35
36 RYAN, Board Member; BASSHAM, Board Chair; participated in the decision.

37
38 HOLSTUN, Board Member, did not participate in the decision.

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40 AFFIRMED

 07/19/2012

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

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NATURE OF THE DECISION

Petitioners appeal a decision by the city approving an application to expand and remodel an existing Wal-Mart store.

MOTION TO INTERVENE

Wal-Mart Stores, Inc. (intervenor), the applicant below, moves to intervene on the side of the respondent. There is no opposition to the motion and it is granted.

FACTS

Wal-Mart applied to add approximately 18,300 square feet to its existing 80,583 square foot store that is located in Dallas between East Ellendale Avenue and Kings Valley Highway, both of which are state highways subject to the jurisdiction of the Oregon Department of Transportation (ODOT). Vehicle access to the site is provided in four locations: two from East Ellendale Avenue, one from Kings Valley Highway, and one from Bovard Avenue, which connects the store to N.E. Polk Station Road. No modifications to the access points were proposed, but an existing bus stop located in the middle of the parking lot is proposed to be relocated adjacent to the store with a dedicated pull out.

The planning commission approved the application and petitioners appealed the decision to the city council. The city council held a hearing on the appeal and affirmed the planning commission’s decision with two additional conditions of approval. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

A. Introduction

Dallas Development Code (DDC) 4.1.090 is entitled “Traffic Impact Analysis” and establishes when a traffic impact analysis is required for development. As relevant here, DDC 4.1.090 provides:

1 **“A. When a Traffic Impact Analysis is Required.** The City or other road
2 authority with jurisdiction may require a Traffic Impact Analysis (TIA)
3 as part of an application for development, a change in use, or a change
4 in access. The current version of the Institute of Transportation
5 Engineers *Trip Generation Manual* shall be used as a source for
6 estimating development-generated traffic. A TIA shall be required
7 when a land use application involves one or more of the following
8 actions:

9 ****

10 “3. An increase in site traffic volume generation by 300 Average
11 Daily Trips (ADT) or more;

12 ****

13 **“B. Traffic Impact Analysis Preparation.** A Traffic Impact Analysis
14 shall be prepared by a professional engineer in accordance with the
15 requirements of the road authority. If the road authority is the Oregon
16 Department of Transportation (ODOT), the applicant shall consult
17 ODOT’s development review planner and OAR 734-051-180.” (Italics
18 in original.)

19 **B. First Assignment of Error**

20 DDC 4.1.090(A) specifies that the “current version of the Institute of Transportation
21 Engineers [ITE] *Trip Generation Manual* shall be used as a source for estimating
22 development-generated traffic.”¹ Intervenor submitted a traffic study that estimated the
23 number of trips to be generated by the expanded store. Intervenor’s traffic engineer used the
24 current version of the ITE trip generation manual to calculate the traffic to be generated by
25 the proposed 98,000 square foot store, using the ITE land use category 813 (Free Standing

¹ DDC 4.1.090 provides:

“The purpose of this section of the code is to assist in determining which road authorities participate in land use decisions, and to implement Section 660-012-0045 (2) (e) of the State Transportation Planning Rule that requires the City to adopt a process to apply conditions to development proposals in order to minimize impacts and protect transportation facilities. This Chapter establishes the standards for when a proposal must be reviewed for potential traffic impacts; when a Traffic Impact Analysis must be submitted with a development application in order to determine whether conditions are needed to minimize impacts to and protect transportation facilities; what must be in a Traffic Impact Analysis; and who is qualified to prepare the analysis.”

1 Discount Superstore). The lowest square footage for the trip rates under category 813
2 (Freestanding discount superstore) is approximately 123,000, which is approximately 20
3 percent higher than the total square footage of the proposed expanded store (98,000 square
4 feet). Accordingly, intervenor’s traffic engineer calculated the trips to be generated by the
5 expanded store by extrapolating the trip rates based on the proposed square footage of the
6 expanded store and the rates set out in the manual (4.76 trips per 1,000 square feet of store
7 space) for a freestanding discount superstore. Record 376. Intervenor’s traffic engineer
8 concluded that the expanded store would generate 642 daily trips (or 342 new trips) and 53
9 new weekday p.m. peak hour trips.

10 In their first assignment of error, petitioners argue that the city council erred in relying
11 on intervenor’s traffic study to estimate vehicle trips from the proposed development.
12 According to petitioners, intervenor’s traffic study improperly used trip count estimates that
13 were extrapolated based on category 813 trip rates. According to petitioners, because the
14 lowest square footage set out in the ITE manual for a category 813 store is approximately
15 123,000 square feet, and that number is higher (by approximately 20 percent) than the
16 proposed expanded store of approximately 98,000 square feet, the size of the proposed store
17 is outside the “range of data” for category 813, and intervenor’s traffic engineer should have
18 collected “local data” and established a “local rate.”² Petitioners rely on *Keep Keizer Livable*

² Petitioner attaches three pages from the ITE Trip Generation Handbook, 2nd Edition, Chapter 3 as an appendix to the petition for review, and asks that LUBA take official notice of those pages. Petition for Review 6.

The attached pages of the ITE handbook are copies of Section 3.3 “Guiding Principles,” and a portion of Section 3.4 “Recommended Procedure for Estimating Trip Generation” and provide in relevant part:

“The value of the independent variable for the study site must fall within the range of data included to use either the [weighed average] rate or [the regression] equation. Otherwise local data are needed.”

“Collect Local Data When:

“Study Site is not compatible with ITE land use code definition

1 v. *City of Keizer*, ___ Or LUBA ___ (LUBA No. 2011-041, August 19, 2011), *aff'd* 246 Or App
2 788, 268 P3d 162 (2011) to support their argument. In *Keep Keizer Livable*, we agreed with
3 the petitioners that the city’s findings were inadequate to explain why a provision of the city’s
4 development code allowed the city to rely on a traffic study that similarly estimated trip rates
5 based on category 813 rates for a store that was seven percent smaller than the smallest store
6 in the category 813 range, particularly where the record showed that local data was available
7 and there were one or more similar stores within the city from which local data could be
8 collected.

9 The city and intervenor (together, respondent) respond that during the proceedings
10 below, in response to testimony from petitioners’ traffic engineer, intervenor’s traffic
11 engineer explained that local data is not available to collect and use to establish a “local rate”
12 because there are no similarly sized discount superstores within the city. Record 204.
13 Accordingly, intervenor responds, the methodology used in intervenor’s traffic study is not
14 inconsistent with the ITE manual or with DDC 4.1.090(A). Intervenor also argues that the
15 city council’s conclusion that intervenor’s trip generation methodology is consistent with the
16 ITE manual where no “local data” can be obtained is supported by substantial evidence in the

“Only 1 or 2 data points; preferably when five or fewer data points

“Independent Variable does not fall within range of data

“Neither weighted average rate line or fitted curve fall within data cluster at size of development.”

“Is the development under analysis consistent with the description of the land use code in *Trip Generation* and with the described or presumed characteristics of development sites for which data points are provided?

“If **yes**, proceed to Step 2.

“If **no**, collect local data for the land use being analyzed and establish a local rate. Refer to Chapter 4 for guidelines.”

Petition for Review Appendix 7 (emphasis in original.)

1 record. Finally, intervenor argues, petitioners’ arguments do not establish that failure to
2 follow the ITE manual’s procedures for estimating trip generation should result in reversal or
3 remand of the decision.

4 We agree with respondent that the city correctly concluded that intervenor’s trip
5 generation methodology does not run afoul of the ITE manual’s guidelines for estimating trip
6 generation or of DDC 4.1.090(A)’s mandate to use the manual to estimate trips. First,
7 petitioners have not pointed to anything in the ITE manual that requires that local data be
8 collected and used or that calls into question the extrapolation method that intervenor’s
9 engineer used, where it is undisputed that there are no similarly situated stores within the city
10 from which that data could be obtained. While petitioners argue that data could be obtained
11 from freestanding discount superstores in other cities or in the region, that argument fails to
12 account for the manual’s use of the word “local,” and does not explain why data collected
13 from such stores would be “local.” Additionally, in *Keep Keizer Livable* we remanded the
14 decision in order for the city to interpret its code provisions in the first instance, and we noted
15 that the record contained evidence that there were other similar stores within the city from
16 which local data could be obtained. For those reasons, *Keep Keizer Livable* is inapposite.
17 Intervenor’s traffic engineer’s explanation of why local data could not be obtained and why it
18 used the methodology it did use is reasonable, and the city is entitled to rely on it rather than
19 on petitioners’ engineer’s testimony. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA
20 261, 277 (2006).

21 Additionally, we agree with respondent that petitioners have not explained why, even
22 if intervenor’s trip generation methodology fails to follow the ITE manual guidelines, that
23 failure necessitates remand of the decision. Petitioners do not explain how collection and use
24 of local data would result in the failure to satisfy an applicable approval criterion in a way
25 that would require remand of the decision.

26 The first assignment of error is denied.

1 **C. Second Assignment of Error**

2 As explained above, intervenor’s traffic study found that the number of average daily
3 trips to and from the site would increase by 342 to 642. DDC 4.1.090(A)(3) provides that a
4 traffic impact analysis (TIA) is required where a land use application will result in an increase
5 in average daily trips of 300 or more. However, the city concluded that intervenor was not
6 required to submit a Traffic Impact Analysis:

7 “‘In conjunction with its application, the applicant consulted with * * * the
8 ODOT Region 2 Development Review Coordinator, regarding traffic impacts.
9 The applicant sent [him] a ‘Traffic Impact Study Scope’ memorandum dated
10 February 23, 2011, which showed the trip generation estimates for the
11 proposed project based on [ITE] manuals and handbooks * * *.

12 “‘Among other things, the scoping memorandum showed an anticipated
13 increase of more than 300 daily trips, which implicated the TIA requirement
14 of [DDC] subsection 4.1.090(A)(3).

15 “‘ODOT evaluated the applicant’s scoping memorandum in accordance with
16 its ‘Change of Use Evaluation’ criteria in [OAR] chapter 734-051, and
17 determined that the project ‘did not meet the change of use criteria’ that would
18 require a new road approach application, nor did ODOT otherwise require a
19 TIA. The road authority, after consultation and review, determined that it
20 would *not require* a TIA. That determination effectively, and for all practical
21 purposes, discharged and satisfied the applicant’s obligation under section
22 4.1.090.

23 “‘The Planning Commission determined in its Final Order that Section
24 4.1.090(A)(3) – (5) has to be read in conjunction with [DDC] 4.1.090(B) that
25 provides that a full traffic impact analysis is not required unless determined to
26 be necessary by the road authority. In this case, ODOT is the road authority
27 and determined that a full traffic impact analysis was not required. As a
28 result, the Planning Commission concluded that Section 4.1.090(B) was
29 controlling and superseded the general provisions in Section 4.1.090(A)(3)-
30 (5).

31 “‘Appellants further assert that ODOT ‘has not demonstrated why a traffic
32 study is not required and has not demonstrated whether the decision not to
33 require a traffic study conforms to their rules.’ In fact, ODOT did provide a
34 copy of its ‘Change of Use Evaluation’ applying the criteria of [OAR] 734-
35 051-0045, which is in the record. The Planning Commission also determined
36 that the road authority has the full discretion to determine whether a full TIA
37 is required. Once that determination is made, ODOT does not have to prove

1 why its determination is correct since it is the road authority.” Record 3-4
2 (emphasis in original.)

3 The city council interpreted DDC 4.1.090(A) and (B) to not require a TIA where the
4 jurisdiction with authority over the road, in this case, ODOT, does not require a TIA. The
5 city council reasoned that because ODOT has jurisdiction over both of the affected state
6 highways that are adjacent to the subject property and provide access to it, and ODOT did not
7 require a TIA in order to determine that no new approaches or other improvements were
8 required under ODOT’s rules, there is no point in requiring the applicant to submit a traffic
9 impact analysis to the city, which has no authority over those roads.

10 Petitioners argue that the city’s interpretation of DDC 4.1.090(A) and (B)
11 misconstrues the applicable provisions of the DDC and in particular that it misconstrues
12 DDC 4.1.090(A)(3).³ Additionally, petitioners argue, the city’s finding that ODOT did not
13 require intervenor to provide a TIA is not supported by substantial evidence in the record.

14 ORS 197.829(1) provides:

³ As relevant here, DDC 4.1.090 provides:

“A. **When a Traffic Impact Analysis is Required.** The City or other road authority with jurisdiction may require a Traffic Impact Analysis (TIA) as part of an application for development, a change in use, or a change in access. The current version of the Institute of Transportation Engineers Trip Generation Manual shall be used as a source for estimating development-generated traffic. A TIA shall be required when a land use application involves one or more of the following actions:

“* * * * *

“3. An increase in site traffic volume generation by 300 Average Daily Trips (ADT) or more;

“* * * * *

“B. **Traffic Impact Analysis Preparation.** A Traffic Impact Analysis shall be prepared by a professional engineer in accordance with the requirements of the road authority. If the road authority is the Oregon Department of Transportation (ODOT), the City of Dallas 4-36 Development Code, applicant shall consult ODOT’s regional development review planner and OAR 734-051-180.”

1 “The Land Use Board of Appeals shall affirm a local government’s
2 interpretation of its comprehensive plan and land use regulations, unless the
3 board determines that the local government’s interpretation:

4 “(a) Is inconsistent with the express language of the comprehensive plan or
5 land use regulation;

6 “(b) Is inconsistent with the purpose for the comprehensive plan or land use
7 regulation;

8 “(c) Is inconsistent with the underlying policy that provides the basis for
9 the comprehensive plan or land use regulation; or

10 “(d) Is contrary to a state statute, land use goal or rule that the
11 comprehensive plan provision or land use regulation implements.”

12 The city council’s interpretation of the DDC must be affirmed if it is “plausible.” *Siporen v.*
13 *City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

14 We agree with respondent that the city’s interpretation of DDC 4.1.090(A) and (B) is
15 plausible and that the city’s interpretation must be affirmed. ORS 197.829(1). The city read
16 DDC 4.1.090 in its entirety and concluded that under DDC 4.1.090(B), if ODOT is the road
17 authority with jurisdiction over the affected roads, and it does not require a TIA to determine
18 whether new approaches or other improvements are necessary under its administrative rules,
19 then a TIA is also not required under the DDC. Petitioners’ argument for their proffered
20 interpretations amounts to a mere disagreement with the city’s interpretation.

21 Further, we are not persuaded by petitioners’ argument that the evidence in the record
22 does not support the city’s finding that ODOT determined that a TIA was not required.
23 While the correspondence between ODOT and intervenor that the city relies on does not
24 specifically state that ODOT does not require a TIA, that correspondence states that the
25 proposed expansion “does not meet the change of use criteria that would require a new road
26 approach application to be processed [under OAR 734-051-0045(3)].” Record 380. Under
27 OAR 734-051-0070(6)(e) and (f), under certain circumstances ODOT can require a TIA in
28 conjunction with a new road approach application. It is reasonably clear that ODOT

1 understands its rules to not require a TIA when ODOT determines that no new road approach
2 is necessary under ODOT's change of use criteria.⁴ The city did not err in concluding that
3 ODOT had, in effect, determined that no TIA was necessary.

4 The second assignment of error is denied.

5 The city's decision is affirmed.

⁴ Intervenor provided to ODOT a traffic impact study scope, Record 376-79, and a supplemental analysis that increased the assumed trip rate by 25% from 4.61 trips per 1,000 square feet of store space to 5.76 per 1,000 square feet of store space. Record 206-07. Under either assumed rate, all access driveways will operate within ODOT's and the city's mobility requirements. Record 208.