

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 VISTA CONSTRUCTION, LLC,
5 *Petitioner,*

6
7 vs.

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9 CITY OF GRANTS PASS,
10 *Respondent,*

11 and

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13
14 HOLGER T. SOMMER,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2008-070

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Grants Pass.

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24 Gregory S. Hathaway, Portland, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief were Jeff N. Evans and Davis Wright Tremaine LLP.

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27 David F. Doughman, Portland, filed the response brief and argued on behalf of
28 respondent. With him on the brief was Beery, Elsner & Hammond, LLP.

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30 Holger T. Sommer, Merlin, represented himself.

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

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35 AFFIRMED

07/02/2009

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

NATURE OF THE DECISION

Petitioner appeals the city’s decision denying its site plan application for an assisted living facility.

FACTS

Petitioner seeks to build an 82-unit, 70,000-square foot assisted living facility on a 2.5-acre parcel near the unsignalized intersection of Hubbard Lane and Highway 199. Highway 199 is also known as Redwood Highway. Petitioner originally applied for site plan approval in 2007, but the city council denied the application because it did not comply with a city ordinance requirement that intersections serving the proposed development meet level of service (LOS) D standards. Petitioner appealed the city’s decision to LUBA, and we remanded the decision to address certain issues regarding petitioner’s traffic impact analysis (TIA). *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

On remand, the city again denied the application on the basis that the Redwood Highway/Hubbard Lane intersection does not currently meet the city’s LOS D standard, and petitioner again appealed to LUBA. The city withdrew the decision for reconsideration in light of our opinion in *Williams v. City of Grants Pass*, ___ OR LUBA ___ (LUBA No. 2007-210, August 22, 2008), which involved denial of a different land use application under the same LOS D standard. In *Williams*, we commented in *dicta* that applying the LOS D standard to require an applicant to restore a failing intersection to full compliance, as opposed to mitigating or eliminating the traffic impacts of the proposed development on the intersection, might run afoul of constitutional prohibitions on uncompensated takings. On reconsideration, petitioner proposed traffic demand management (TDM) strategies that petitioner argued would eliminate the project’s impact on the failing intersection. The city found that the proposed TDM strategies were not sufficient to eliminate the impact of the

1 proposed development on the Redwood Highway intersection, and again denied the
2 application. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 The city denied the application because it did not comply with Grants Pass
5 Development Code (GPDC) 27.121(2), which provides:

6 “The overall minimum performance standard for streets is Level of Service
7 ‘D’, and Level of Service ‘D’ for signalized intersections. Level of service is
8 determined by using the latest edition of the Highway Capacity Manual,
9 Chapter 11 (Transportation Research Board).”

10 Petitioner’s revised TIA indicated that, without mitigation, the proposed development
11 would increase traffic at the already failing Redwood Highway intersection by 14 vehicle
12 trips during the A.M. peak hour and by 24 vehicle trips during the P.M. peak hour. Petitioner
13 proposed TDM strategies to eliminate those peak hour vehicle trips, including 1) adjusting
14 employee schedules to ensure that shift changes did not occur during the A.M or P.M. peak
15 hours and requiring that any incidental employee trips during peak hours avoid the
16 intersection; 2) advising visitors to take an alternate route to the assisted living facility that
17 would avoid the Redwood Highway intersection; and 3) obtaining pledges from 30 residents
18 of the neighboring retirement community to avoid using the Redwood Highway intersection
19 during peak hours. The proposed strategies are consistent with the TDM strategies discussed
20 in the city’s transportation system plan.

21 The city council decision found that “the traffic impacts of the project cannot be
22 adequately mitigated through conditions of approval,” based on four reasons, including that
23 the proposed TDM strategies are “difficult to enforce and therefore are not 100%
24 effective[.]” Record 8. The city’s findings explain:

25 “The TDM strategies are a valid method outlined in the City’s Master
26 Transportation Plan. The Council was not confident in the enforcement or
27 implementation of the TDM measures as proposed by the applicant. It was
28 uncertain if the shift change would account for all new vehicle trips entering
29 the intersection during the AM and PM peak hour. Also, it was unclear how
30 the management of the facility would ensure employees, visitors and

1 deliveries would use the alternate routes to and from the facility to avoid the
2 intersection of Hubbard Lane and Redwood Highway. The Council did not
3 have an understanding about how the TDM measures would be enforced by
4 staff or what the consequences would be if the measures were not
5 implemented properly.” Record 8.

6 Petitioner challenges that finding, arguing that its traffic engineer, a traffic engineer
7 retained by the city, city planning staff and representatives from the Oregon Department of
8 Transportation (ODOT) all concluded that the proposed TDM strategies were sufficient to
9 eliminate the project’s modest traffic impacts on the intersection. According to petitioner,
10 there is not a shred of evidence in the record suggesting that the TDM strategies are not
11 enforceable or will not collectively succeed in completely mitigating traffic impacts on the
12 intersection. In addition, petitioner notes that it proposed a condition of approval requiring
13 petitioner to enter into a binding contract with the city. Petitioner argues that, in addition to
14 other enforcement measures available to the city, such a contract would allow the city to
15 initiate an enforcement action against petitioner in the event that the proposed TDM
16 strategies did not entirely eliminate all of the project’s traffic impacts on the intersection.

17 In challenging a denial based on evidentiary grounds, petitioner must establish that it
18 has sustained its burden as a matter of law. *Jurgenson v. Union County Court*, 42 Or App
19 505, 510, 600 P2d 1241 (1979). In other words, petitioner must establish that no reasonable
20 person could reach the conclusion the city council reached, based on the whole record. *Ehler*
21 *v. Washington County*, 52 Or LUBA 663, 672 (2006). Under the city’s view of GPDC
22 27.121(2), which petitioners do not challenge, that effectively means petitioner has the
23 burden of establishing as a matter of law that the proposed TDM strategies will ensure that
24 the project will not add any additional vehicle trips through the intersection during morning
25 and evening peak hours.

26 The above-quoted city council finding expresses uncertainty as to how petitioner
27 would ensure that employees, visitors and deliveries would avoid the intersection during
28 peak hours. With respect to employees, petitioner argues that it has complete control over

1 work schedules, and sufficient authority over employees to ensure that any incidental trips
2 during peak hours would avoid the intersection. We agree with petitioner that neither the
3 findings nor the response brief identifies any basis in the record to doubt that petitioner's
4 control over its employees would be insufficient to ensure that employee trips do not impact
5 the intersection during peak hours. In our view, the city's unexplained skepticism on that
6 point, in the face of overwhelming contrary evidence, is an insufficient basis to deny the
7 application. If that were the only basis for the city's denial, we might well agree with
8 petitioner that the city council erred in denying the application on that basis.

9 However, the city council also expressed doubt that petitioner could ensure that
10 visitors would use alternate routes to and from the facility during peak hours, and uncertainty
11 about how either petitioner or the city could enforce that requirement. In its response brief,
12 the city quotes a statement from petitioner's attorney that petitioner would try to enforce that
13 requirement on visitors, but petitioner was not sure "if anybody can guarantee the ultimate
14 performance of that particular TDM measure[.]" Record 52. The city argues that petitioner
15 obviously cannot control visitors in the same manner as it does its employees, and that
16 petitioner's own testimony casts doubt on whether that TDM is enforceable and will succeed
17 in ensuring compliance with GPDC 27.121(2).

18 The TIA concluded that visitor trips (a category which apparently includes vendors
19 and deliveries) will account for two-thirds of the p.m. peak hour traffic generated by the
20 facility. As the city construes GPDC 27.121(2), petitioner has the very difficult burden of
21 demonstrating that no additional trips from the facility, including visitor trips, will impact the
22 intersection. We agree with the city that petitioner has not demonstrated that it met that
23 burden as a matter of law with respect to visitor trips. While encouraging visitors to use
24 alternative routes would presumably be effective for some visitors, petitioner cites no
25 evidence that mere encouragement is sufficient to ensure that *no* visitors would travel
26 through the failing intersection during morning or evening peak hours. Without an

1 enforcement mechanism or evidence that that TDM would be completely effective without
2 an enforcement mechanism, a reasonable decision maker could conclude based on this record
3 that petitioner failed to demonstrate that the second TDM would be effective.

4 We understand petitioner to argue that the third TDM strategy, obtaining pledges
5 from 30 residents of a neighboring retirement community not to use the intersection during
6 peak hours, is more than sufficient to offset any traffic impacts on the intersection if the
7 second TDM strategy is not completely effective. Petitioner cites to testimony of its
8 engineer that the pledges will result in a “net loss of trips” through the intersection,
9 combined with the other TDM strategies. Record 166. That testimony is certainly
10 substantial evidence which the city council could have relied upon to conclude that the third
11 TDM strategy would be effective as a backstop to the first and second TDM strategies.
12 However, we cannot say that petitioner has demonstrated that that conclusion is the only one
13 a reasonable decision maker could reach based on the whole record. Petitioner cites to no
14 evidence that any of the pledging residents would have used the intersection during peak
15 hours, but as a result of taking the pledge would instead use an alternate route, so it is unclear
16 whether and how many trips through the intersection would actually be eliminated to offset
17 trips generated by the proposed facility. Further, as with the second TDM strategy, petitioner
18 identifies no enforcement mechanism or other means of assuring that the pledges would in
19 fact be honored.

20 Finally, petitioner argues that any remaining uncertainty regarding the effectiveness
21 or enforceability of the TDM strategies is not a basis to deny the application, because
22 petitioner offered to memorialize the TDM strategies in a binding contract between petitioner
23 and the city, under which the city could bring an enforcement action, in the event petitioner
24 failed to implement the strategies or the strategies did not succeed in eliminating all facility-
25 generated trips through the intersection. The city responds that petitioner offered no specific
26 condition of approval or contractual language demonstrating how such a contract could be

1 enforced to ensure compliance with GPDC 27.121(2). In any case, the city argues, such a
2 contract would simply duplicate the conditions of approval that the city would presumably
3 impose on approval, requiring that petitioner implement the TDM strategies, and thus a
4 contract would offer no additional assurance of compliance with GPDC 27.121(2). The city
5 argues that petitioner identifies no effective means for the city to enforce either conditions of
6 approval requiring implementation of the TDM strategies, or a contract to that effect, in a
7 manner that would ensure compliance with GPDC 27.121(2). We agree with the city that
8 petitioner has not demonstrated that petitioner's offer to enter into a contract with the city
9 demonstrates that petitioner met its burden to show compliance with GPDC 27.121(2) as a
10 matter of law.

11 The first assignment of error is denied.

12 **CONCLUSION**

13 The second, third, and fourth assignments of error challenge three additional reasons
14 the city council cited for denying the application. We need not address those assignments of
15 error, because its decision to deny the application must be sustained if there is a single
16 adequate basis for denial. *Gionet v. City of Tualatin*, 30 Or LUBA 96, 98 (1995). Because
17 we have rejected petitioner's challenge to the city's first basis for denial, there is no point in
18 addressing petitioner's challenges to the remaining bases.

19 The city's decision is affirmed.