

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 FRIENDS OF COLLINS VIEW,  
5 KIRSTEN A. DOBLIE, SANDRA H. SHEETS,  
6 MICHAEL E. SCHIEWE, DOROTHY FAY,  
7 PRAKASH JOSHI and CHARLOTTE JOSHI,  
8 *Petitioners,*

9  
10 vs.

11  
12 CITY OF PORTLAND,  
13 *Respondent,*

14 and

15  
16 RIVERDALE SCHOOL DISTRICT NO. 51J,  
17 *Intervenor-Respondent.*

18  
19 LUBA No. 2001-137

20  
21  
22 FINAL OPINION  
23 AND ORDER

24  
25 Appeal from City of Portland.

26  
27 Peggy Hennessy, Portland, filed the petition for review and argued on behalf of  
28 petitioners. With her on the brief was Reeves, Kahn and Hennessy.

29  
30 Frank Hudson, Deputy City Attorney, Portland, filed a response brief on behalf of  
31 respondent.

32  
33 Timothy V. Ramis, Portland, and Heidi T. Decker, Portland, filed a response brief on  
34 behalf of intervenor-respondent. With them on the brief was Ramis, Crew, Corrigan and  
35 Bachrach. Timothy V. Ramis argued on behalf of intervenor-respondent.

36  
37 BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member,  
38 participated in the decision.

39  
40 AFFIRMED

01/10/2002

41  
42 You are entitled to judicial review of this Order. Judicial review is governed by the  
43 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal city approval of a conditional use permit to operate a high school at a former elementary school.

**MOTION TO INTERVENE**

Riverdale School District No. 51J (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

**FACTS**

The subject property is a six-acre parcel developed with buildings formerly used to operate a public elementary school. The property is zoned Open Space (OS); a school is a conditional use in the OS zone. The site currently accommodates a private grade school with 90 students, and an unrelated office use. The property is located adjacent to and gains access from Terwilliger Boulevard, south of the intersection between Terwilliger Boulevard and Taylors Ferry Road (Terwilliger/Taylors Ferry). The Terwilliger/Taylors Ferry intersection currently operates at a level of service (LOS) E during the morning peak hour (7:30 to 8:30 a.m.).<sup>1</sup>

Intervenor proposes to operate a public high school on the subject property, with 360 students and 28 staff members. The proposed high school would replace all current uses of the property. Of the proposed 360 students, intervenor anticipates that a large majority will reside within the Riverdale district or in the cities of Lake Oswego or West Linn, and will approach the school from the south. Approximately 75 students will reside within the Portland school district, and most of them will approach the school from the north, through the Terwilliger/Taylors Ferry intersection. Intervenor’s traffic consultant prepared a traffic

---

<sup>1</sup>Although no party provides us with a definition of “level of service” or any explanation of that term, we understand “level of service” to be a measure of the quality of traffic flow, on a scale of A (the best) to F (the worst).

1 study concluding that the proposed high school would generate a total of 165 trips during the  
2 morning peak hour, compared to the 70 trips generated by the current use of the property.  
3 Record 1374. The traffic study concluded that traffic generated by the proposed high school  
4 will have an insignificant impact on the Terwilliger/Taylor's Ferry intersection. Record 1388.

5 City transportation staff recommended denial of the application, concluding that  
6 without mitigation at the Terwilliger/Taylor's Ferry intersection, the proposed use would not  
7 satisfy Portland City Code (PCC) 33.815.100.B.2, which requires that the transportation  
8 system be capable of safely supporting the proposed use.<sup>2</sup> The traffic consultant then  
9 submitted a series of addenda that compared the direction and timing of trips generated by  
10 the elementary school on the site and those generated by the proposed high school. The final  
11 addendum estimated that the current use contributes 45 trips through the Terwilliger/Taylor's  
12 Ferry intersection during the morning peak hour, while the proposed use would generate 39  
13 trips. Record 893. Therefore, the addendum concludes, the proposed use will impact the  
14 intersection less than the current use. *Id.*

15 On May 15, 2001, a city hearings officer approved the proposed use with conditions.  
16 To ensure compliance with PCC 33.815.100.B.2, the hearings officer imposed condition B,  
17 which requires class starting times for most students before 7:15 a.m. Petitioners appealed  
18 the hearings officer decision to the city council. Before the city council, intervenor proposed  
19 a modification to condition B to also allow class starting times for most students no earlier  
20 than 9:00 a.m. On July 30, 2001, the city council denied the appeal, approving the proposal  
21 with additional conditions. Among the additional conditions was condition X, which  
22 prohibits student drop-off at the school between 7:30 and 8:30 a.m. The city council also

---

<sup>2</sup>PCC 33.815.100.B.2 provides:

“The transportation system is capable of safely supporting the proposed use in addition to the existing uses in the area. Evaluation factors include street capacity and level of service, access to arterials, transit availability, on-street parking impacts, access requirements, neighborhood impacts and pedestrian safety.”

1 modified condition B to require that class starting times for most students be either no later  
2 than 7:15 a.m. or no earlier than 9:00 a.m. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioners contend that the city misconstrued PCC 33.815.100.B.2, in finding that the  
5 standard is satisfied as long as the proposed high school does not worsen existing traffic  
6 conditions at the Terwilliger/Taylor's Ferry intersection during the morning peak hour.

7 PCC 33.815.100.B.2 requires a finding that the existing transportation system is  
8 "capable of safely supporting the proposed use." According to petitioners, the  
9 Terwilliger/Taylor's Ferry intersection is *currently* unsafe, because it operates at LOS E.  
10 Petitioners contend that the city's decision finds that the minimum acceptable level of service  
11 for signalized intersections such as the Terwilliger/Taylor's Ferry intersection is D. It  
12 follows, petitioners argue, that LOS E is unacceptable and unsafe. Therefore, petitioners  
13 argue, the city's view of PCC 33.815.100.B.2, *i.e.*, it is not violated where the proposed use  
14 will not worsen existing traffic conditions at a facility that is already below acceptable  
15 standards, is inconsistent with the terms of PCC 33.815.100.B.2.

16 Intervenor disputes petitioners' premise that city standards mandate a particular level  
17 of service as a threshold level of safety. According to intervenor, it argued below, and the  
18 hearings officer and city council agreed, that nothing in the city's code mandates a particular  
19 level of service that the intersection must meet in order to "safely support the proposed  
20 use."<sup>3</sup> Instead, intervenor argues, the hearings officer and city council viewed level of

---

<sup>3</sup>The city council's findings are an amended version of the hearings officer's findings. The city council's findings state in relevant part:

"\* \* \* Per City standards, the minimum acceptable LOS is D for signalized intersections and E for unsignalized intersections.

"Applicant argued that there is 'nothing in the [PCC] that indicates a specific level of service that the intersection must meet.' The Hearings Officer agreed with applicant's statement but, with the comment that [PCC] 33.815.100.B.2 does require a finding that 'the transportation system is capable of safely supporting the proposed use in addition to the existing uses in the

1 service as simply one of eight factors used in evaluating the safety of the transportation  
2 system under PCC 33.815.100.B.2. Intervenor argues that the city’s findings devote 11  
3 pages to evaluating those eight factors, and conclude that, with the conditions imposed, the  
4 transportation system is capable of safely supporting the proposed high school. Intervenor  
5 contends that petitioners’ preferred interpretation of PCC 33.815.100.B.2 elevates one factor  
6 above all others, and assigns a mandatory threshold to that factor that is not required by city  
7 standards or adopted in the city’s decision. According to intervenor, the city’s view of the  
8 meaning of PCC 33.815.100.B.2 is well within its discretion under ORS 197.829(1) and  
9 *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).

10 We agree with intervenor that the city council effectively rejected the interpretation  
11 that petitioners offer as the only permissible interpretation of PCC 33.815.100.B.2. The city  
12 clearly did not view the code to allow approval of the proposed school only if all affected  
13 intersections currently meet acceptable levels of service. *See also Heine v. City of Portland*,  
14 27 Or LUBA 571, 576 (1994) (affirming the city’s interpretation of a code provision  
15 identical to PCC 33.815.100.B.2 to not require that a particular level of service be maintained  
16 at affected intersections at all times). As discussed below, under the second and third  
17 assignments of error, the city did seem to view whether the proposed use worsened traffic  
18 through the Terwilliger/Taylor’s Ferry intersection, when compared to the previous use, as an  
19 important, if not critical, consideration in evaluating the “level of service” factor under  
20 PCC 33.815.100.B.2. Petitioners’ challenge to that understanding of the code rests largely

---

area.’ B.2 goes on to say that when evaluating whether or not the transportation system is  
capable of safely supporting the proposed and current uses the decision maker should  
consider street capacity and level of service. As a matter of practice, the City of Portland  
considers the level of service at the Terwilliger/Taylor’s Ferry intersection to be ‘E’ during the  
a.m. peak period. \* \* \*

“\* \* \* \* \*

“The Hearings Officer found that the level of service at the Terwilliger/Taylor’s Ferry  
intersection during the a.m. peak to be a relevant point of analysis to determine if the criteria  
set forth in [PCC] 33.815.100.B.2 is satisfied.” Record 20.

1 on their preferred interpretation, which the city’s decision rejects. Petitioners’ interpretation  
2 may be plausible as a policy matter, but even if so that would not demonstrate that the city’s  
3 interpretation is reversible under ORS 197.829(1) and *Clark*. We agree with intervenor that  
4 the city’s view of the meaning and requirements of PCC 33.815.100.B.2 is not inconsistent  
5 with the text, purpose or underlying policy of that provision, and must be affirmed.  
6 ORS 197.829(1).

7 The first assignment of error is denied.

8 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

9 Under the second assignment of error, petitioners argue that, even under the city’s  
10 interpretation of PCC 33.815.100.B.2, substantial evidence in the record does not support the  
11 city’s finding of compliance with PCC 33.815.100.B.2, because the evidence does not  
12 support a finding that the proposed high school will have no additional impact on the  
13 Terwilliger/Taylors Ferry intersection as compared to the current use of the property. Under  
14 the third assignment of error, petitioners contend that the conditions of approval are not  
15 adequate to ensure there will be no increase in traffic through the Terwilliger/Taylors Ferry  
16 intersection.

17 As noted above, the traffic study concluded that the proposed use will not add any  
18 more vehicles to the Terwilliger/Taylors Ferry intersection during the morning peak hour  
19 than does the current use. Petitioners challenge that conclusion, and the city’s reliance on it.  
20 According to petitioners, the study’s estimates of the proposed school’s impacts on the  
21 intersection are based on analysis of the projected 75 Portland area students, most of whom  
22 are presumed to reach the subject property from the north through the Terwilliger/Taylors  
23 Ferry intersection. Petitioners argue that such an analysis is insufficient, given the fact noted  
24 in the study and in the city’s decision that the parents of many students who reside to the  
25 south of the school work in downtown Portland. Petitioners contend that the study fails to  
26 quantify or take into account the number of such parents who are likely to drop students off

1 at the school and then continue north to Portland along Terwilliger through the disputed  
2 intersection. Petitioners point out that northbound through traffic is one of the critical  
3 movements impacting the intersection during the morning peak hour. Record 923. Because  
4 the traffic study did not take these impacts into consideration in concluding that the proposed  
5 use will not increase traffic through the intersection, petitioners argue, the city's finding to  
6 that effect is not supported by substantial evidence.

7 As discussed above, the city's decision appears to view whether the proposed school  
8 will increase the number of trips through the intersection compared to the existing use as an  
9 important, perhaps critical consideration for purposes of the "level of service" factor under  
10 PCC 33.815.100.B.2. It is not clear to us that the city views that factor as imposing an  
11 absolute "no net increase" standard, such that a net increase of even one trip through the  
12 intersection would require a finding of noncompliance with PCC 33.815.100.B.2, as  
13 petitioners' arguments appear to presume. Be that as it may, petitioners' challenges to the  
14 evidentiary sufficiency of the traffic study are not well taken. As we understand the city's  
15 findings, the city did not rely unquestioningly upon the traffic study's conclusion of no net  
16 increase to find compliance with PCC 33.815.100.B.2. Indeed, as discussed below, the city  
17 questioned that conclusion, for the same reason petitioners do: because it failed to take into  
18 account student drop-offs by parents bound for downtown Portland through the intersection.  
19 To address the issue of these impacts, the city imposed and relied upon conditions B and X,  
20 particularly the latter, which is designed to eliminate drop-offs during the morning peak  
21 hour.

22 The traffic study's analysis assumed that the school's starting class times would occur  
23 during the morning peak hour. The hearings officer questioned the traffic study's ultimate  
24 conclusion that the proposed school would not increase traffic through the intersection during  
25 the peak hour, in relevant part because that conclusion failed to take into account impacts  
26 from students residing south of the school whose parents drop them off and then continue

1 through the intersection to Portland.<sup>4</sup> The hearings officer’s response to that evidentiary  
2 omission was to impose condition B, a requirement that the class starting time for the  
3 majority of students must occur no later than 7:15 a.m. The hearings officer reasoned that,  
4 under that condition, “virtually all morning traffic will occur prior to the Terwilliger/Taylor’s  
5 Ferry a.m. peak,” and that PCC 33.815.100.B.2 would be satisfied. Record 590.

6 On appeal to the city council, intervenor proposed modifying condition B to allow the  
7 school the option of starting class times for most students no earlier than 9:00 a.m., which  
8 would also avoid the morning peak hour. Opponents reiterated their concerns regarding the  
9 impacts of drop-offs from vehicles arriving from the south but continuing north. The city  
10 council apparently agreed that the hearings officer’s condition as modified was insufficient,  
11 in itself, to assure compliance with PCC 33.815.100.B.2, because the condition did not

---

<sup>4</sup>The city council’s decision adopts a slightly reworded version of the following hearings officer’s findings:

“\* \* \* If 100 [percent] of the 75 students (maximum number allowed) from the Portland Public School attendance area were dropped off (the Hearings Officer concedes that some Portland Public School attendance area students would utilize transit or carpools) that would mean a total of 50 trips would travel through the Terwilliger/Taylor’s Ferry intersection. The Hearings Officer finds it reasonable to assume that at least [one-half] of the 75 trips would be northbound through the Terwilliger/Taylor’s Ferry intersection (approximately 37 trips). Add even a small percentage of the students who are being dropped off by parents who reside in the Dunthorpe, Lake Oswego, and West Linn areas and a reasonable conclusion would be that there would be a net increase in activity through the Terwilliger/Taylor’s Ferry intersection if the class starting time and peak a.m. traffic at the Terwilliger/Taylor’s Ferry intersection overlapped. It stretches applicant’s credibility to believe that the proposed high school will have ‘less’ than the estimated 45 a.m. peak trips through the Terwilliger/Taylor’s Ferry intersection if the school opens and classes begin as originally proposed in the application.

“\* \* \* \* \*

“\* \* \* Under the original proposal a meaningful percentage of the students arriving in the morning would do so during the critical a.m. peak traffic time (7:30 to 8:30 a.m.). The uncertainties left by applicant’s traffic analysis would, in the opinion of the Hearings Officer, be sufficient to find that the criteria set forth in PCC 33.815.100.B.2 is not satisfied. However, if the Hearings Officer permits the application to be modified to reflect a start time for the majority of students’ first class period of 7:15 a.m. then virtually all of the students and staff will be onsite and present at the school prior to the Terwilliger/Taylor’s Ferry intersection peak a.m. time period.” Record 588-89.



1 adequately address the impacts from drop-offs.<sup>5</sup> Accordingly, the city council imposed an  
2 additional condition, condition X, that no drop-offs occur during the morning peak hour.<sup>6</sup>  
3 The city council also imposed a modified version of condition B.<sup>7</sup>

---

<sup>5</sup>The city council's findings state, in relevant part:

“[The Terwilliger/Taylor's Ferry] intersection is signalized and operates at LOS E in the a.m. peak period. Although the intersection does not meet the City's acceptable LOS standards, the applicant's reevaluated trip generation/distribution information shows that the proposed high school is not expected to add trips to this intersection during the a.m. peak period. \* \* \* The applicant's analysis indicates that the proposed high school will not generate more trips through the [Terwilliger/Taylor's Ferry] intersection than what the current site generates.” Record 20.

“Despite some misgivings about the accuracy of the applicant's traffic estimates, in particular during the morning student drop-off period, the Hearings Officer found evidence in the record that if the majority of students had a first period beginning no later than 7:15 a.m., then virtually all morning traffic would occur prior to the Terwilliger/Taylor's Ferry a.m. peak. Therefore, if a condition was added requiring the first class for the majority of students to begin not later than 7:15 a.m. [PCC 33.815.100.B.2] could be satisfied.

“On appeal, the applicant provided testimony \* \* \* that a class starting time no earlier than 9:00 a.m. for the majority of students would also avoid the problematic 7:30-8:30 a.m. peak traffic hour. \* \* \*

“Neighbors and City Council members expressed concern that students would be dropped off earlier than 9:00 a.m. to accommodate parents working downtown or for other reasons, and this would aggravate the peak hour traffic problems at the [Terwilliger/Taylor's Ferry] intersection. The City Council finds that this is a valid concern that could be offset with strict implementation of the Transportation Demand Management and Parking Management Plans along with prohibiting drop-off between 7:30 and 8:30 a.m. and shuttle service for students with pick-up at [two locations]. Conditions requiring the shuttle and drop-off prohibition are added to the Hearings Officer's conditions of approval.” Record 23-24.

<sup>6</sup>Condition X is as follows:

“Student drop off is prohibited at the school or on streets in the vicinity of the school during the morning peak traffic hour between 7:30 and 8:30 a.m. Penalties for violation of this condition shall be included in the Traffic Demand Management Plan and shall include suspension for repeat offenders.” Record 7.

<sup>7</sup>As modified by the city council, condition B states in relevant part:

“Classes at the school shall have the majority of the students having their first class start either no later than 7:15 a.m. or no earlier than 9:00 a.m. The school may open earlier than 7:00 a.m. to provide for orderly drop-off of students. The first class of the day for the majority of the students may not start between 7:30 a.m. and 8:30 a.m. as such starting times will increase traffic during the peak a.m. time period at the SW Terwilliger/Taylor's Ferry intersection which would violate PCC 33.815.100.B.2. \* \* \*” Record 5.

1            Assuming conditions B and X are effective, we see no evidentiary insufficiency in the  
2 city's findings of compliance with PCC 33.815.100.B.2. Petitioners do not dispute the traffic  
3 study's premise that most of the 360 students at the school will arrive from the south and,  
4 other than the possibility of some drop-offs continuing north, the vehicles in which those  
5 students arrive will not impact the Terwilliger/Taylor's Ferry intersection at all during the  
6 morning peak hour. If condition X is effective, then the impacts on the intersection of drop-  
7 offs continuing north at the morning peak hour are reduced to zero. The only other identified  
8 impacts are those from the students approaching the school from the north. Although  
9 petitioners express general disbelief at the traffic study's calculations, the only focused  
10 challenge petitioners make to it is based on failure to take into account drop-offs from  
11 students residing to the south. As discussed above, if condition X is effective, the impacts of  
12 those drop-offs become zero.

13            In short, assuming conditions B and X are effective, the record contains substantial  
14 evidence that under the conditions imposed, the proposed school will not increase traffic  
15 impacts on the Terwilliger/Taylor's Ferry intersection during the morning peak hour. Under  
16 the city's interpretation of PCC 33.815.100.B.2 that we sustained above, that evidence is  
17 sufficient to demonstrate compliance with PCC 33.815.100.B.2, insofar as it requires  
18 evaluation of the level of service and capacity of the intersection.

19            We turn, then, to petitioners' challenges to conditions B and X, under the third  
20 assignment of error. Petitioners first argue that, under condition B as modified, up to 49  
21 percent of the students may have class starting times that occur during the morning peak  
22 hour. *See* n 7. For example, petitioners argue, under condition B the first class of the day for  
23 up to 179 students of the 360-student body could start during the morning peak hour, which  
24 presumably means those students will arrive at the school during the morning peak hour.  
25 Petitioners submit that it is unlikely that 179 students can arrive during the morning peak  
26 hour without increasing the number of trips through the Terwilliger/Taylor's Ferry

1 intersection, over the current use, during that period. As for condition X, petitioners argue  
2 that it is simply unrealistic to assume that condition X will be complied with or that it can be  
3 enforced. Petitioners also argue that there is an inherent inconsistency between condition B,  
4 which would allow up to 179 students to arrive at the school during the morning peak hour,  
5 and condition X, which prohibits drop-offs during that period.

6 Intervenor responds, and we agree, that there is no necessary inconsistency between  
7 conditions B and X. Read together, the conditions require that any student whose class starts  
8 during the morning peak hour must either be dropped off before the morning peak hour or  
9 arrive by means other than automobile drop-off. As for condition X, intervenor cites to  
10 testimony from the school regarding how it would enforce and monitor the condition, and  
11 argues that such evidence demonstrates that condition X is realistic and likely to succeed.  
12 Record 349. In addition, intervenor notes that condition X itself requires that penalties for its  
13 violation shall be included in the traffic demand management plan and shall include  
14 suspension of repeat offenders. *See* n 6. We agree with intervenor that, other than by  
15 expressing doubt that condition X will be complied with or enforced, petitioners have not  
16 provided any reason to conclude that condition X will not be effective at prohibiting drop-  
17 offs during the morning peak hour.

18 The relevant issue under the city's interpretation is not the total numbers of students  
19 arriving at the school during the morning peak hour, but the number of school-related trips  
20 that pass through the Terwilliger/Taylor's Ferry intersection during the morning peak hour,  
21 compared to the current use. With regard to the students that travel to school from the south,  
22 students who drive or carpool to school are not likely to pass through the disputed  
23 intersection. It is drop-offs where an automobile then proceeds north through the intersection  
24 that pose the concern. Conditions B and X operate in conjunction to eliminate such potential  
25 additional drop-off trips through the Terwilliger/Taylor's Ferry intersection during the critical  
26 morning hour. We understand condition B to be intended to significantly reduce trips

1 through that intersection, including such drop-offs, by requiring that most classes begin  
2 either before 7:15 a.m. (in which case trips associated with those classes will likely pass  
3 through the intersection before 7:30 a.m.) or after 9 a.m. (in which case trips associated with  
4 those classes will likely pass through the intersection after 8:30 a.m.). Condition X ensures  
5 that the reduced number of trips under condition B that might still occur during the morning  
6 peak hour includes no drop-offs, which effectively eliminates any concern regarding the  
7 impacts of student drop-offs from parents traveling from the south bound for downtown  
8 Portland during the peak period.

9 With regard to the 75 students approaching from the north, the traffic study found that  
10 the impacts of trips associated with those students would be less than that of the current use  
11 (39 trips compared to 45 trips), even assuming all classes started during the morning peak  
12 hour. Petitioners have not made any focused challenge to that calculation, insofar as it  
13 projects the impacts of trips associated with those 75 students. Condition B ensures that for  
14 the majority of students, presumably including the majority of the 75 students approaching  
15 from the north, classes will start before or after the morning peak hour, and therefore those  
16 students will not impact the intersection during the peak hour. Condition X further reduces  
17 the trips associated with students traveling to the school from the north by eliminating drop-  
18 off trips during the morning rush hour. Of the estimated 39 trips associated with these  
19 students, the only trips that will not be eliminated by condition X are trips where students  
20 drive themselves or carpool.

21 In sum, a reasonable person could conclude that conditions B and X are likely to  
22 succeed and that, under those conditions, the proposed use will not increase traffic through  
23 the critical movements of the Terwilliger/Taylor's Ferry intersection during the morning peak  
24 hour, compared to the current use. Accordingly, we reject petitioners' evidentiary challenges  
25 to the city's findings and conditions.

26 The second and third assignments of error are denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 Intervenor submitted, and the city reviewed, draft versions of transportation and  
3 parking management plans for the proposed school. The city relied upon “strict  
4 implementation” of transportation and parking management plans as a partial basis to find  
5 compliance with PCC 33.815.100.B.2. Record 23-24; *see* n 5.<sup>8</sup> Consequently, the city’s  
6 decision imposed conditions I and J, which (1) state the minimum contents of required plans;  
7 (2) note that the draft versions are included in the record; (3) require modification to the draft  
8 parking plan; (4) require that the final plans be reviewed and approved by the city  
9 transportation division; and (5) require that the final plans be implemented prior to  
10 occupancy.<sup>9</sup>

---

<sup>8</sup>Apparently, the city’s comprehensive plan transportation policies require that the applicant address transportation and parking demand strategies. Nothing in PCC 33.815.100.B.2 requires that the applicant submit or the city approve a transportation or parking management plan, in order for the city to conclude that the “transportation system is capable of safely supporting the proposed use[.]” However, the city’s findings link implementation of transportation and parking management plans to compliance with PCC 33.815.100.B.2. Accordingly, our analysis follows the parties in assuming that the transportation and parking management plans required by the city’s comprehensive plan have a direct bearing on the issue of compliance with PCC 33.815.100.B.2.

<sup>9</sup>Conditions I and J state:

“I. The Transportation Demand Management (TDM) shall be implemented, prior to initial occupancy which includes but is not limited to, provisions for carpools, bicycles, pedestrians, transit/bus ridership, and parking. An initial plan is included in the record. The final plan and changes to the plan must be reviewed and approved by Portland Transportation. Changes are not subject to land use review unless they trigger changes to the site or other conditions of approval requiring such approval. The applicant will provide the Collins View Neighborhood Association with copies of the final TDM and any proposed future changes prior to review and approval by Portland Transportation.

“J. A Parking Management plan shall be implemented prior to initial occupancy which includes but is not limited to, provisions for on-site space assignment, visitor parking, student drop-off/pick-up, special event parking and monitoring and enforcement of nearby on-street parking usage. An initial plan is included in the record. A final plan and future changes to the plan must be reviewed and approved by Portland Transportation. The initial plan will be modified to include language requiring the applicant to provide off-site parking at a satellite parking lot or lots and a shuttle service to/from the Collins View site when the applicant reasonably can conclude that the coincidence of school events/activities \* \* \* will result in demand for more parking spaces than provided on-site. Changes are not subject to land use review unless they trigger changes to the site or other conditions of approval

1           Petitioners argue that because the city relied upon *draft* transportation and parking  
2 plans to find compliance with PCC 33.815.100.B.2, and because conditions I and J require  
3 the applicant to submit and the city to approve final plans at a later approval stage that does  
4 not provide notice and opportunity for public participation, the city erroneously deferred a  
5 finding of compliance with PCC 33.815.100.B.2. *Rhyne v. Multnomah County*, 23 Or LUBA  
6 442, 447 (1992) (county erred in deferring finding of compliance with hazard limitation  
7 criterion to later stage without notice and hearing).

8           Petitioners’ reliance on *Rhyne* is misplaced. *Rhyne* involved a case where the local  
9 government failed to adopt a finding of compliance or feasibility of compliance with an  
10 approval criterion, and instead deferred such a finding to a later stage that did not comply  
11 with statutory notice and hearing requirements. 23 Or LUBA at 449.<sup>10</sup> Where, as here, the  
12 local government adopts a finding of compliance with an approval criterion, and imposes

---

requiring such approval. The applicant will provide Collins View Neighborhood Association with copies of the final plan and any proposed future changes prior to review and approval by Portland Transportation.” Record 5-6.

<sup>10</sup>In *Rhyne*, we described the following three options available to local governments:

“Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances.” 23 Or LUBA at 447-48 (footnotes and citations omitted).

In *Rhyne*, the local government exercised the third option, but without ensuring that the subsequent stage of review provides for notice and hearing. In the present case, the city clearly exercised the first option.

1 conditions to ensure compliance with that criterion, that compliance with those conditions  
2 requires additional review by local government staff does not mean that the local government  
3 “defers” a finding of compliance with that criterion to a stage without notice or hearing. *See*  
4 *Meyer v. City of Portland*, 67 Or App 274, 280, 678 P2d 741, *rev den* 297 Or 82 (1984)  
5 (affirming finding that planned unit development complied with public safety criterion, based  
6 on evidence regarding identified solutions to landslide problems and conditions that required  
7 subsequent technical review and approval of solutions by city staff); *Eppich v. Clackamas*  
8 *County*, 26 Or LUBA 498, 509 (1994) (affirming finding that proposed school complied with  
9 requirement for adequate transportation facilities, based on evidence that solution to sight  
10 distance problem was feasible, and conditions that the applicant submit and county staff  
11 approve a plan for improvements to address sight distance problems).

12         Where, as here, the local government adopts a finding of compliance with an  
13 approval criterion, based on conditions requiring additional staff review, a challenge that the  
14 local government impermissibly deferred a finding of compliance is more logically framed as  
15 an inquiry into whether the finding of compliance is adequate and supported by substantial  
16 evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999). Petitioners’ arguments  
17 under this assignment of error include arguments that the city’s findings are inadequate and  
18 not supported by substantial evidence, and their arguments regarding deferral are readily  
19 framed in that manner. Therefore, our analysis focuses on those arguments.

20         Petitioners contend that because the terms of the draft plans have not been  
21 incorporated as conditions of approval, and because those terms may be changed and even  
22 entirely rewritten as part of staff’s review, the city’s finding of compliance with  
23 PCC 33.815.100.B.2 is not supported by substantial evidence, to the extent it is based on the  
24 draft plans and conditions I and J.

25         Intervenor responds that the city reasonably relied on the draft transportation and  
26 parking management plans to support its finding of compliance with PCC 33.815.100.B.2.

1 According to intervenor, because intervenor submitted the draft plans as part of its  
2 application, and the city relied on the draft plans to find compliance with the code, those  
3 plans are binding on intervenor and cannot be changed without city approval, even without  
4 express conditions to that effect. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or  
5 LUBA 106, 123-24, *rev'd on other grounds* 129 Or App 33, 877 P2d 1205, *rev den* 320 Or  
6 453 (1994); *Perry v. Yamhill County*, 26 Or LUBA 73, 87-88, *aff'd* 125 Or App 588, 865  
7 P2d 1344 (1993). Further, intervenor argues that the draft plans constitute substantial  
8 evidence in the record that the transportation and parking plans can be implemented in a  
9 manner that helps ensure compliance with PCC 33.815.100.B.2.

10 We agree with intervenor that the draft plans constitute substantial evidence, *i.e.*,  
11 evidence a reasonable person would rely on, supporting the city's finding of compliance with  
12 PCC 33.815.100.B.2. That the city did not expressly condition approval on the terms of the  
13 draft plans, and that conditions I and J permit the city to impose additional or different terms  
14 in approving the final plans, does not demonstrate any evidentiary insufficiency in the city's  
15 decision.

16 The fourth assignment of error is denied.

17 The city's decision is affirmed.