BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES NOBLE and DEBORAH NOBLE,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

JAMES H. BEAN and THE CORPORATION
OF THE PRESIDING BISHOP OF THE
CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS,
Intervenors-Respondent.

LUBA No. 2003-071

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

John H. Hammond, Jr., West Linn, filed the petition for review and argued on behalf of petitioners. With him on the brief was David F. Doughman and Hutchison, Hammond & Walsh PC.

Michael E. Judd, Assistant County Counsel, Oregon City, and James H. Bean, Portland, filed a joint response brief. With them on the brief was Daniel W. Howard and Lindsay, Hart, Neil & Weigler, LLP. James H. Bean argued on his own behalf and on behalf of intervenor-respondent The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints.

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

AFFIRMED 09/12/2003

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal county conditional use approval of a church on a 10-acre parcel zoned Rural Residential Farm and Forest, five-acre minimum.

MOTION TO INTERVENE

James H. Bean and The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is located south of the City of Oregon City on Henrici Road, an east-west two-lane minor arterial. Henrici Road intersects with Beavercreek Road one-tenth of a mile to the east of the subject property. The Beavercreek/Henrici Road intersection is signalized, with dedicated turn lanes. Henrici Road forms a T-intersection with Cascade Highway (Highway 213) approximately eighth-tenths of a mile to the west of the subject property. Highway 213 is a heavily traveled north-south highway that averages 20,125 vehicles per day. The Highway 213/Henrici Road intersection is not signalized, and currently has no dedicated turn lanes from Henrici Road onto Highway 213.

Intervenors propose to construct a 16,558-square foot church on the subject property with a maximum occupancy of 572 persons. The proposed building is designed to serve two "wards" or congregations, the Willamette Falls ward, located in the southern portion of the City of Oregon City urban growth boundary, and the Beavercreek Ward, which consists of a large rural area to the east of Oregon City. The boundaries of each ward follow school district boundaries. The subject property is located roughly between these two wards, in the south-western corner of the Beavercreek Ward, and southeast of the Willamette Falls ward.

The county's Zoning and Development Ordinance (ZDO) 1022.07 requires a finding that transportation facilities are adequate to serve the proposed development or will be made

adequate in a timely manner (hereafter, concurrency standard).[1] ZDO 1022.07(B) defines "adequate" as a minimum Level of Service (LOS) D.[2] Intervenors submitted a traffic study that initially evaluated only the Beavercreek/Henrici Road intersection. In response to a

[1] ZDO 1022.07 provides, in relevant part:

> "A. Approval of a development shall be granted only if transportation facilities are adequate or will be made adequate in a timely manner.
>
> "B. As used in Subsection 1022.07(A), 'adequate' means a minimum of Level-of-Service (LOS) D, except as identified below.
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> "1. LOS designations shall have the definitions given to them by the latest edition of the Highway Capacity Manual.
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> "2. Minimum LOS standards established by this subsection shall apply to all roadways and intersections.
>
> "3. LOS shall be evaluated for motor vehicle traffic only.
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> "4. Except as identified below, LOS shall be calculated at the A.M. peak hour and the P.M. peak hour using the methodology set forth in the latest edition of the Highway Capacity Manual.
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> "* * * * *
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> "D. As used in Subsection 1022.07(C), 'necessary improvements' are:
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> "1. Improvements identified in a transportation impact study as being required in order to comply with the adequacy standard identified in Subsection 1022.07(B). Roads to be reviewed for adequacy shall be those identified in a transportation impact study as being within the impact area of the proposed development.
>
> "a. A determination regarding whether submittal of a transportation impact study is required shall be made based on the Clackamas County Roadway Standards, which also establish the minimum standards to which a transportation impact study shall adhere.
>
> "2. If a transportation impact study is not required, county traffic engineering or transportation planning staff shall identify necessary improvements or the applicant may opt to provide a transportation impact study."

[2] 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). The parties point us to a portion of the 2000 Highway Capacity Manual (HCM) that appears to quantify LOS. For unsignalized intersections such as the Highway 213/Henrici Road intersection, the HCM indicates that LOS D represents an average control delay per vehicle of between 25 and 35 seconds, LOS E represents an average control delay per vehicle of 35 to 50 seconds, while LOS F represents a delay of greater than 50 seconds. HCM 17-2, App 6 to the Joint Response Brief.

request from planning staff, intervenors' traffic engineers submitted a supplemental study to evaluate the Highway 213/Henrici Road intersection. The February 11, 2003 supplemental study determined that 60 percent of traffic generated by the proposed church would travel through the Highway 213/Henrici Road intersection, with the remaining 40 percent passing through the Beavercreek/Henrici Road intersection. The February 11, 2003 study also found that the Highway 213/Henrici Road intersection is currently operating at a LOS of E during the Sunday mid-day peak hour and that the intersection with or without the proposed development is expected to operate in the future at LOS F. In particular, the February 11, 2003 study found that some of the delay at the Highway 213/Henrici Road intersection results from Henrici Road's single-lane westbound approach, which forces vehicles attempting to turn right (north) to wait in a queue with vehicles attempting to turn left (south) onto Highway 213. The heavy traffic volume on Highway 213 apparently results in considerable delay in making a left turn from Henrici Road onto Highway 213.

The February 11, 2003 traffic study assumed that, given the boundaries and locations of the Beavercreek and Willamette Falls wards, the proposed church would generate no traffic that would attempt turn left at the Highway 213/Henrici Road intersection, and that all church-generated westbound traffic using that intersection would turn right. Therefore, the February 11, 2003 study proposed widening the shoulder of Henrici Road to provide storage capacity for vehicles turning right at the intersection. While that mitigation would not improve the left-turn movement, the study found that it would improve the right-turn movement, and bring the intersection as a whole up to LOS C during the Sunday peak hour. Record 262. County traffic engineering staff concurred, recommending construction of a dedicated right turn lane on Henrici Road.

A traffic consultant hired by petitioners reviewed the February 11, 2003 study, and raised a number of objections to its methodology, assumptions and conclusions. Among other things, petitioners' consultant questioned whether it reasonable to assume that no

traffic generated by the proposed church would turn left (south) at the Highway 213/Henrici Road intersection. Further, petitioners' consultant questioned whether the concurrency standard is met when the proposed mitigation would leave the critical left-turn movement at LOS F.

In response, intervenors' traffic engineers submitted a supplemental study dated March 26, 2003. The March 26, 2003 study assumed that five percent of westbound traffic on Henrici Road generated by the proposed church would turn left onto Highway 213.[3] The March 26, 2003 study also argued that the concurrency standard is not concerned with individual turning movements, or the intersection as a whole, but rather with the adequacy of the "approach." Record 371. According to the study, even assuming five percent of generated westbound traffic on Henrici Road turns left onto Highway 213, the intersection's westbound approach will operate at LOS D or better during the Sunday midday peak hour. Record 374.

The county hearings officer agreed with intervenors' traffic engineers that it was reasonable to assume that only five percent of westbound traffic generated by the church would turn left at the Highway 213/Henrici Road intersection. The hearings officer also agreed that the concurrency standard requires a minimum LOS D on the intersection's approach, rather than for individual turning movements. Accordingly, the hearings officer found that the application complied with the concurrency standard and approved the proposed church, conditioned on construction of a dedicated right-turn lane at the Highway 213/Henrici Road intersection.

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[3] Specifically, the March 26, 2003 study found that currently 26 westbound vehicles turn left from the Highway 213/Henrici intersection during the Sunday midday peak hour, and 112 westbound vehicles turn right. Record 376. The study found that the proposed church would generate 77 westbound trips on Henrici Road, with an additional 4 trips (5 percent) making the left-turning movement, and 73 trips (95 percent) making the right-turning movement of that intersection. After taking increases in background traffic into account, the study found that a total of 31 vehicles would turn left and 187 trips turn right from Henrici Road during the Sunday peak hour Record 381-82.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer's misconstrued the applicable law, in determining that the concurrency standard requires measurement of the LOS of an intersection's "approach" rather than the intersection itself. According to petitioners, ZDO 1022.07(B)(1), (2) and (4) clearly require that the county calculate the LOS of the intersection, not the "approaches" to the intersection.

Petitioners point out that ZDO 1022.07.B(1) requires use of the LOS definitions given in the HCM, and that ZDO 1022.07.B(4) requires that the county calculate LOS using the methodology set forth in HCM. Petitioners argue that the HCM defines and calculates LOS for each minor movement, such as a individual turning movement, and does not define or calculate LOS for the intersection as a whole, much less the "approach" to an intersection.[4] Under the HCM, petitioners argue, the turning movement with the lowest LOS will set the LOS for the entire intersection.

The hearings officer disagreed, concluding that, read in context, ZDO 1022.07(B) requires that the applicant provide a minimum LOS D on the intersection's approaches, rather than individual turning movements.[5] The immediate context relied upon is

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[4] Petitioners quote the 2000 edition of the HCM, at 17-1, found at App 29 to the Petition for Review:

> "Level of Service (LOS) for a TWSC [two-way stop-controlled] intersection is determined by the computed or measured control delay and is defined for each minor movement. LOS is not defined for the intersection as a whole. * * *"

[5] The hearings officer's finding state, in relevant part:

> "a. There is a dispute about how LOS is determined. The HCM defines LOS for each minor movement. See p. 17-1 of the HCM. However, the Roadway Standards define LOS for each intersection approach. See p. 3 of Appendix C of the Roadway Standards. The hearings officer finds that the term 'minimum LOS D' is ambiguous, because the ZDO does not clearly identify how LOS is determined. The hearings officer finds that, read in context, ZDO 1022.07 requires that the applicant provide a minimum LOS D on the intersection's approaches, rather than individual turn movements.

ZDO 1022.07(D)(1)(a), which provides that "[a] determination regarding whether submittal of a transportation impact study is required shall be made based on the Clackamas County Roadway Standards[.]" *See* n 1. Based on the excerpt of the Clackamas County Roadway Standards (Roadway Standards) provided to us by the parties, it appears that the Roadway Standards set out the requirements for determining whether a traffic impact study is required and what that study must address. Several portions of the excerpt indicate that the traffic study, if required, must evaluate the "intersection approach" and demonstrate that LOS D is provided "on the approaches."[6] The hearings officer found that evaluation of the

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> "[b] The concurrency ordinance expressly requires compliance with the Roadway Standards. Although ZDO 1022.07.B(2) provides that minimum LOS standards '[a]pply to all roadways and intersections,' the ZDO goes on to limit this standard to intersections and roadways within the 'impact area' of the proposed development. ZDO 1022.07.D(1). The impact area is defined through a transportation impact study. *Id.* The Roadway Standards establish the minimum standards for transportation impact studies. ZDO 1022.07.D(1)(a).
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> "[c] Both the Roadway Standards and ZDO 1022.07.B require use of HCM procedures. ZDO 1022.07.B(1) provides that 'LOS *designations* shall have the definitions given to them by the latest edition of the [HCM].' ZDO 1022.07.B(4) requires use of HCM methodology to calculate A.M. and P.M. peak hour LOS. The Roadway Standards require that applicants use HCM procedures to calculate intersection capacity. See p. 3 of Appendix C of the Roadway Standards.
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> "[d] The Roadway Standards go on to state that minimum LOS requirements, established through HCM procedures, must be met on intersection *approaches*. The concurrency ordinance is silent on this issue. Therefore the hearings officer relies on the express requirements of the Roadway Standards. This is consistent with the explicit advice of the HCM, which provides that 'by focusing on a single measure of effectiveness for the worst movement only, such as delay for the minor street left-turn, [HCM] users may make less effective traffic control decisions.' p. 17-27 of the HCM. '[A]nalysts who use the HCM LOS thresholds to determine the design adequacy of TWSC [two-way stop controlled] intersections should do so with caution.' p. 17-26 of the HCM.
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> "[e] The Hearings Officer finds, based on the context of the ordinance, that the phrase 'LOS *designations*' refers to the LOS A-F letter designations set out in Exhibit 17-2 of the HCM and does not refer to the manner in which LOS is computed (*i.e.* by movement or approach)." Record 10 (emphasis added by hearings officer).

[6] We quote pertinent portions of the Roadway Standards:

> "The following components of the transportation impact study shall be included as a minimum:

"approaches" rather than individual turning movements is consistent with the HCM and the concurrency standard.

As the hearings officer notes, the concurrency standard itself does not prescribe a methodology for evaluating LOS. It simply defers that point to the HCM and, more obliquely, to the Roadway Standards. Like the hearings officer, we do not see that the HCM and the Roadway Standards, at least the portions to which we are directed, are in conflict with regard to how LOS is determined. The HCM does not state, as petitioner suggests, that the turning movement with the lowest LOS will set the LOS for the entire intersection, or even for one approach to an intersection.[7] Rather, the portion cited by petitioners requires evaluation of individual turning movements, and further indicates that "LOS is not defined for the intersection as a whole." *See* n 4. If we understand intervenor's traffic study correctly, it evaluates individual turning movements, averages the control delays for those movements, and thus determines the LOS for the westbound approach to the intersection,

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"* * * * *

"7. An evaluation of project impacts on roadway operating conditions including:

"a. An analysis of level-of-service at critical intersections and access points. Capacity deficiencies shall be identified by intersection approach. In some cases other level-of-service- procedures may be applicable." App 1-2 to the Joint Response Brief.

"Site related transportation impacts which contribute to conditions where the following thresholds are exceeded indicate the need for roadway improvements or mitigation measures to be included in the recommendations.

"1. At signalized intersections, the analysis must demonstrate that the major intersection approaches can operate at a level of service 'D.' * * *

"2. At unsignalized intersections or driveways, a level of service 'D' must be provided on the approaches. * * *" App 3 to the Joint Response Brief.

[7] On the contrary, another portion of the HCM cited to us by respondents states:

"The control delay for all vehicles on a particular approach can be computed as the weighted average of the control delay estimates for each movement on the approach. * * *" HCM 7-25, App 7 to the Joint Response Brief.

among others, not the intersection as a whole.[8] We do not see that that method is inconsistent with either the HCM or the concurrency standard, or that the hearings officer misconstrued the latter.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, the hearings officer accepted the traffic studies' traffic counts and the assumption that no more than five percent of westbound traffic generated by the proposed church would turn left at the Highway 213/Henrici Road intersection. Petitioner argues that that the traffic counts and the five-percent assumption are not supported by the record, and that substantial evidence in the record shows that a much higher volume of traffic is likely to pass through the intersection, and that a much higher percentage of church-generated traffic is likely to turn left at that intersection than assumed.

Petitioners cite to evidence that 20 percent of existing westbound traffic on Henrici Road turns left at the intersection. Given that evidence, petitioners argue that it is unreasonable to assume that only five percent of westbound traffic generated by the proposed church will turn left at the intersection. Petitioners argue that a more reasonable estimate is 12 to 14 percent, which would cause the westbound approach to operate below LOS D. In addition, petitioners point out that the traffic study measured traffic counts in February, and cites to evidence that traffic levels at a different intersection 18 miles to the south showed a 22 percent increase during the summer compared to February. According to petitioner, even

[8] An intersection will generally have multiple approaches. As far as we can tell, evaluating the LOS of the "approach" to an intersection involves averaging the control delay per vehicle for each turning movement in a particular approach to an intersection. For example, the March 26, 2003 supplemental study examined the westbound approach to the Highway 213/Henrici Road intersection with the proposed dedicated right-turn lane, and calculated the weighted average of the control delays for vehicles turning left onto Highway 213 and those turning right onto Highway 213, the only movements that westbound traffic can make at that intersection. Record 417. Specifically, the study measured the average control delay for left turning vehicles (79.8 seconds, LOS F), and the average control delay for right turning vehicles (26 seconds, LOS D), and determined the weighted average control delay (weighted presumably to reflect the predominance of traffic turning right). The result is an "approach delay" of 33.7 seconds, which is LOS D. *Id.*

a slight increase in traffic on the westbound approach, particularly the left-turn movement, will cause the approach to operate below LOS D, in violation of the concurrency standard.

The hearings officer's findings address and reject both contentions.[9] The hearings officer found, and we agree, that the five percent estimate is reasonable, given the undisputed fact that very few, if any, members of the proposed church reside south of the Highway 213/Henrici Road intersection. There is also substantial evidence to support the traffic count. The hearings officer relied on testimony from intervenors' traffic engineers that seasonal fluctuations in traffic levels at a low-volume rural location are not necessarily present at a high-volume intersection near an urban area, such as the Highway 213/Henrici Road intersection. That testimony is evidence a reasonable person could rely upon. Petitioners have not demonstrated that the hearings officer's findings with regard to the concurrency standard are unsupported by substantial evidence.

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[9] The hearings officer found, in relevant part:

> "* * * The hearings officer finds that some church members are likely to turn left at the Highway 213/Henrici Road intersection, traveling southbound on Highway 213. Although this does not provide a direct route for Ward members traveling between [the] site and their homes, some members may choose to travel elsewhere after church services. The applicant's revised traffic analysis * * * assumed that 5 percent of the [westbound traffic] will choose to travel south on Highway 213. The opponents argued that the intersection of Henrici Road and Highway 213 is 'very sensitive to modest increases in traffic.' Therefore a slight increase in the number of left-turn movements, 12 to 14 percent of church traffic turning left at this intersection, will cause the intersection to fall to LOS E. * * * However, the hearings officer is persuaded that the applicant's assumption that five percent of the church traffic will turn left at this intersection is reasonable, given the lack of significant destinations south of the site and the location of the Ward members' residences to the north of this intersection.
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> "* * * * *
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> "* * * The opponents argued that the applicant's traffic counts, conducted in February, understate peak traffic volumes. Based on ODOT traffic counts on Highway 213 in Molalla, traffic volumes in July are 22 percent higher than in February. * * * However, as the applicant noted, the ODOT traffic counts were taken at a location in the rural area 18 miles south of the site where the average daily traffic volume is one-fifth the volume at Henrici Road. * * * In addition, the location of the site near the urban area reduces the impact of seasonal fluctuations, because 'urban areas have little seasonal fluctuation during the A.M. and P.M. peak hours.' * * * The hearings officer is not convinced by the opponents' evidence that the applicant's traffic study understates the existing traffic volumes in the area." Record 12 (citations omitted).

The second assignment of error is denied.

The county's decision is affirmed.