

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 WILLIAM F. GHENA,
5 *Petitioner,*

6
7 and

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9 HOLGER T. SOMMER,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 JOSEPHINE COUNTY,
15 *Respondent,*

16
17 and

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19 COPELAND PAVING, INC.,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2005-088

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from Josephine County.

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29 William F. Ghena, Grants Pass, and Holger T. Sommer, Merlin, filed a joint petition
30 for review. Holger T. Sommer argued on his own behalf.

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32 No appearance by Josephine County.

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34 James R. Dole, Grants Pass, filed the response brief and argued on behalf of
35 intervenor-respondent. With him on the brief was Cauble, Dole and Sorenson.

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

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40 AFFIRMED

05/04/2006

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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

Petitioner and intervenor-petitioner (petitioners) appeal a county decision that grants site plan approval to dedicate a right of way that will be used to provide access to a subdivision.

MOTION TO INTERVENE

Copeland Paving, Inc. moves to intervene on the side of respondent in this appeal. Holger T. Sommer moves to intervene on the side of petitioner in this appeal. There is no opposition to either motion, and they are allowed.

FACTS

In *Ghena v. City of Grants Pass*, 50 Or LUBA 552 (2005), we affirmed a City of Grants Pass decision that granted preliminary approval for River Road Estates Subdivision. River Road Estates lies next to the City of Grants Pass western city limits. The proposed access road for River Road Estates extends a short distance west of the subdivision and intersects with Upper River Road. From its intersection with Upper River Road, the first 120 feet of the proposed River Road Estates access road must cross a parcel that is located outside the City of Grants Pass in unincorporated Josephine County. Therefore, a separate Josephine County decision was required to create the right of way that will be needed to provide access to River Road Estates subdivision.

On January 6, 2005, the county planning director granted site plan approval for the proposed right of way and the proposed intersection of that right of way with Upper River Road. Petitioners appealed that decision to the board of county commissioners. On March 9, 2005, the board of county commissioners held a *de novo* public hearing on the appeal. Near the end of that public hearing, an issue arose about a transportation impact analysis for River Road Estates that had been prepared and submitted to the City of Grants Pass in support of

1 the subdivision application. The following exchange occurred between two members of the
2 board of county commissioners:

3 “Commissioner Ellis stated he hasn’t had a chance to look at it and doesn’t
4 like things that come in at the last minute. It’s several pages long, has some
5 detailed information, and he doesn’t feel right about entering it into the record
6 at this late date.

7 “Chair Riddle stated he would rule that we do not accept the traffic impact
8 study into the record due to the fact that by our own Code it’s not required. It
9 was a nice tool and he appreciates using it for map reference, but he would not
10 accept it into the record.” Record 47.

11 That public hearing was then continued to March 30, 2005.

12 The minutes of the March 30, 2005 hearing include the following:

13 “Commissioner Riddle then asked that the three exhibits be entered into [the]
14 record at this time; **Exhibit A**, a report from [the] County Engineer, Steve
15 Hodge dated March 17, 2005; **Exhibit B**, Evidence in Support of Previous
16 Submitted Reasons of Appeal, Holger Sommer received March 28th; and
17 **Exhibit C**, Appellant’s Response to County Engineer’s report, as well as the
18 Traffic Report from the previous hearing which needs to be included in the
19 record.” Record 21 (bold lettering in original; underline emphasis added).

20 We understand the reference to the “Traffic Report from the previous hearing” to be a
21 reference to the traffic impact analysis (TIA) that was not accepted into the record on March
22 9, 2005. Although the TIA is not among the listed exhibits at the end of the minutes, the
23 minutes show the TIA was discussed at the March 30, 2005 hearing. Record 22. That TIA
24 appears at Record 201-36.

25 The Board of County Commissioners ultimately approved the request, and this appeal
26 followed.

27 **FIRST ASSIGNMENT OF ERROR**

28 Petitioners’ first assignment of error is as follows:

29 “The county supported its decision with a Traffic Study. A Traffic Study was
30 offered by the Applicant but was not accepted into the record (Rec. 47)
31 (Although it can be found Rec. 201-233).” Petition for Review 4.

1 As far as we can tell, the Traffic Study that petitioners refer to in this assignment of error is
2 the TIA that we just noted, *i.e.*, the TIA that was not accepted at the March 9, 2005 public
3 hearing but was later accepted at the March 30, 2005 continued hearing.

4 We turn first to the legal standard that underlies petitioners' first assignment of error,
5 before addressing the assignment of error itself.

6 **A. Public Safety**

7 Petitioners identify no legal standard that requires a "Traffic Study" or a TIA as such.
8 It appears that petitioners believe the TIA is necessary to establish that the proposed
9 intersection will be *safe*. Petitioners apparently find a "safety" criterion in Josephine County
10 Rural Land Development Code (RLDC) 81.010.¹ While it seems questionable that RLDC
11 81.010 itself imposes a legal requirement that the board of county commissioners adopt a
12 prior finding that any new streets and street intersections will be safe, the challenged decision
13 applies RLDC 81.050 in approving the disputed right of way and intersection.² It is
14 reasonably clear that RLDC 81.050 was the legal requirement that generated the discussion
15 below about whether the proposed intersection is safe. We therefore will assume without
16 deciding that the county was legally required to establish that the proposed roadway and

¹ Article 81 of the RLDC sets out county access standards. RLDC 81.010 set out the "Purpose" of those standards:

"The purpose of these standards is to ensure safe ingress and egress to and from properties; to minimize street congestion and traffic hazards, to protect the future operation of transportation facilities, to provide *safe* and convenient access to businesses, public services, and places of public assembly; and to make vehicular circulation more compatible with surrounding land uses." (Emphasis added.)

² New streets are often created as part of the land division process. Where a proposed new street right of way is not being created as part of a land division, as is the case here since River Road Estates was approved earlier by the City of Grants Pass, RLDC 81.050 applies. RLDC 81.050(B) provides, in part, as follows:

"In all cases, the creation of a street shall be consistent with the elements of the comprehensive plan; shall not disrupt the stability of the land use pattern in the area; and will promote and conserve the public health, safety, and welfare."

1 intersection will be safe. However, as intervenor-respondent correctly points out, neither
2 RLDC 81.010, 81.050 nor any other legal standard cited to LUBA requires a TIA, as such.

3 **B. Petitioners' Assignment of Error**

4 Earlier, intervenor-petitioner objected to the record that was filed by the county in
5 this appeal. Intervenor-petitioner objected that the documents that appear at page 121-273 of
6 the record should not be included in the record in this appeal. At least 28 separate documents
7 appear at Record pages 121-273. Intervenor-petitioner argued that those documents were
8 part of the planning department's file in this matter and that the planning department's file
9 was not placed before the board of county commissioners at its March 9, 2005 *de novo* public
10 hearing in this matter.

11 We ultimately rejected intervenor-petitioner's record objections, based on his failure
12 to consult with the county before filing his record objections, as required by OAR 661-010-
13 0026(1). *Ghena v. Josephine County*, ___ Or LUBA ___ (LUBA No. 2005-088, Order,
14 January 31, 2006). We therefore did not consider intervenor-petitioner's record objections
15 concerning Record pages 121-273 on the merits.

16 Petitioners' first assignment of error, and the argument that follows that assignment
17 of error, appear to assert two related errors. First, petitioners argue that the county
18 improperly based its decision, in part, on the TIA that appears at Record 201-36. Petitioners
19 contend that because the TIA was rejected at the March 9, 2005 hearing, it is not part of the
20 record in this appeal. Second, petitioners argue that without that TIA, the testimony of the
21 county engineer concerning sight distances at the proposed intersection on Upper River Road
22 does not constitute substantial evidence that the intersection will be safe.

23 **1. Petitioners' First Argument**

24 Petitioners' first argument is that the county erred by basing its decision in part on a
25 TIA that is in the local government record in this appeal, but that petitioners believe should
26 not be there. That is a belated attempt to revive and refine intervenor-petitioner's record

1 objection that we denied earlier. We reject the attempt. Even if we were inclined to consider
2 petitioners' belated and refined argument concerning the TIA, petitioners do not explain why
3 the board of commissioners could not have rejected the TIA on March 9, 2005 but later
4 changed its mind and accepted the TIA on March 30, 2005, as apparently happened in this
5 case. We reject petitioners' first argument under the first assignment of error.

6 **2. Petitioners' Second Argument**

7 Petitioner's second argument posits that without the disputed TIA, the testimony of
8 the county engineer, who is a professional engineer but apparently is not a traffic engineer,
9 cannot constitute substantial evidence concerning the safety of the proposal. The premise
10 that underlies petitioners' second argument—that the TIA is not in the record and cannot
11 provide support for the county's decision—is erroneous. For that reason alone, petitioners'
12 second argument must be denied.³

13 In any event, we reject petitioners' largely undeveloped argument that a professional
14 engineer, who is not also trained or certified as a traffic engineer, is unqualified to offer
15 testimony concerning the safety of a proposed intersection. We also reject petitioners'
16 contention that the county engineer's testimony does not constitute substantial evidence
17 concerning the safety of the proposed intersection. The county engineer apparently did not
18 review the TIA before presenting his testimony on March 9, 2005. However, we do not
19 agree that it was unreasonable for the board of county commissioners to rely on the largely
20 unchallenged testimony of the county engineer in considering whether the proposed
21 intersection would be safe if it were constructed without the left-turn lane that petitioners
22 believe is needed to keep the intersection from being dangerous.

23 The first assignment of error is denied.

³ The county engineer supplemented his March 9, 2005 testimony with a March 17, 2005 memorandum in which he considered data from the TIA and provided information in response to concerns that left-turn and right-turn lanes should be required at the intersection of Upper River Road and the unnamed subdivision access road. Record 25-30.

1 **SECOND ASSIGNMENT OF ERROR**

2 Under their second assignment of error petitioners repeat their contention that the
3 county is bound to ensure that the proposed access road and intersection with Upper River
4 Road is safe.⁴ As approved by the county, the access road intersection with Upper River
5 Road will include a right-turn lane for northbound traffic on Upper River Road to enter the
6 subdivision, but the intersection will not include a left-turn lane for southbound traffic on
7 Upper River Road.

8 Petitioners argue that the county declined to require that a left-turn lane be
9 constructed on Upper River Road, based on its cost. The county engineer estimated that
10 adding both right-turn and left-turn lanes would cost \$90,610. Record 27. The county
11 engineer estimated that adding a right-turn lane only would cost \$30,932. The county
12 engineer indicated to the board of commissioners that while the data he reviewed did not
13 indicate that a right-turn lane is “absolutely necessary,” “deceleration lanes are always
14 advantageous.” Record 27. The county engineer also indicated that a left-turn lane would be
15 needed if there were to be more than 18 left turns into the subdivision during peak hour
16 traffic, but noted that the applicants’ engineer estimated there would be only one such left
17 turn during peak hour traffic. Record 26. The applicant ultimately agreed to provide the
18 right-turn lane, and the board of county commissioners ultimately concluded that the cost of
19 the left-turn lane was “unwarranted based on the existing and expected traffic volumes and
20 site conditions.” Record 10.

⁴ Petitioners again cite RLDC 81.010, *see* n 1, as well as Josephine County’s “Guiding Principles.”
Petition for Review 7 n 2. Petitioners do not explain precisely what the cited Guiding Principles are or what
direct legal bearing they have on the appealed decision, if any. One of the cited Guiding Principles, which
petitioners emphasize, is as follows:

“We [presumably meaning the board of county commissioners] shall work to enhance the
health and safety of our community. Above all, we shall give priority to prevention.” *Id.*

1 Petitioners argue that the board of county commissioners unreasonably relied on the
2 county engineer's estimate of the cost of constructing the left-turn lane. Petitioners contend
3 that the county engineer's estimate is not substantial evidence of what it would actually cost
4 to construct the disputed left-turn lane. However, petitioners' substantial evidence argument
5 is based almost entirely on evidence that postdates the board of county commissioners'
6 decision in this matter. Because that evidence postdates the board of county commissioners'
7 decision, it could not have been considered by the board of county commissioners in making
8 the appealed decision. In an earlier order, we denied petitioners' request that we consider
9 this post-decision evidence. We adhere to our earlier order.

10 However, even if it were permissible for LUBA to now consider evidence that was
11 not available to the board of county commissioners in determining whether the board of
12 county commissioners' decision was supported by substantial evidence when it was
13 rendered, that later evidence only demonstrates that the estimated \$60,000 cost of the left-
14 turn lane was later reduced to \$16,000. We do not know what reasons led to the estimate
15 reduction, and the fact that the estimated price was reduced, alone, does not mean it was
16 unreasonable for the board of county commissioners to rely on the estimate in the county
17 engineer's March 17, 2005 memorandum when it rendered its decision in this matter.

18 The second assignment of error is denied.

19 The county's decision is affirmed.