

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

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

6
7 vs.

8
9 CITY OF GRANTS PASS,
10 *Respondent,*

11 and

12
13
14 HOLGER T. SOMMER,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2007-197

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Grants Pass.

23
24 James R. Dole, Grants Pass, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief was Cauble, Dole & Sorenson.

26
27 David F. Doughman, Portland, filed the response brief and argued on behalf of
28 respondent. With him on the brief were Kris Woodburn, Grants Pass, and Beery, Elsner &
29 Hammond, LLP.

30
31 Holger T. Sommer, Merlin, represented himself.

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

35
36 REMANDED

01/18/2008

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

NATURE OF THE DECISION

Petitioner appeals the city’s denial of an application for major site plan review to develop an assisted living facility.

FACTS

Petitioner applied to the city to approve a proposed assisted living facility on a 2.5-acre parcel zoned for residential use (R-3). The subject parcel is located at the southwest corner of the intersection of Hwy 199 and Hubbard Lane. Hwy 199 is a four-lane state highway, also known as the Redwood Hwy. Hubbard Lane north of the highway is a city collector; south of the highway adjacent to the subject property Hubbard Lane is a local street. The Hwy 199/Hubbard Lane intersection is currently unsignalized, controlled only by stop signs on Hubbard Lane.

In 2006, the city manager issued a policy directive advising that henceforward city planning staff would recommend denial of any development affecting an intersection that the city deemed to function below a minimum level of service (LOS) D, a level of service prescribed for city streets in Grants Pass Development Code (GPDC) and in the city’s Transportation Plan.¹

In 2007, petitioner submitted its application for major site plan review, supported by a traffic impact analysis (TIA). The TIA evaluated three intersections along Highway 199, and for each intersection studied existing traffic conditions in 2007, projected 2008 conditions without the proposed development, and projected 2008 conditions with the proposed development. The TIA concluded that all intersections functioned at or better than

¹ As discussed further below, “Level of Service” is a means to quantify how well transportation facilities function. According to the traffic impact analysis in the record, it is generally defined by the total elapsed time from when a vehicle stops at the end of a queue until the vehicle departs from the stop line. Record 454. For an unsignalized intersection, LOS D corresponds to a stopped delay per vehicle of between 25 and 35 seconds. *Id.*

1 LOS D, except for certain approaches to the Hwy 199/Hubbard Lane intersection. The TIA
2 found that, under existing 2007 traffic conditions, the southbound Hubbard Lane approach
3 functions at LOS E during the a.m. peak hour, and at LOS F during the p.m. peak hour, while
4 during the p.m. peak hour the northbound approach functions at LOS E. Record 539, 548.
5 Under 2008 no-build and build conditions, the TIA concluded that although the proposal
6 would increase the number of trips through the intersection during peak hours, those
7 additional trips would not cause a change in the LOS from 2007 existing conditions. The
8 TIA noted that traffic volumes through the intersection do not satisfy state requirements for
9 signalization, and recommended that the proposed development be approved to increase
10 traffic volumes toward future signalization, with a condition requiring the developer to pay a
11 proportional share of costs for future signalization.

12 The city planning commission denied the application, concluding in relevant part that
13 because the proposed development would send additional peak hour traffic through the Hwy
14 199/Hubbard Lane intersection, and the intersection does not and will not meet the minimum
15 LOS D, the proposal therefore fails to comply with applicable GPDC criteria.

16 Petitioner appealed the planning commission denial to the city council, which
17 conducted a hearing and affirmed the planning commission decision, with adoption of
18 additional findings. This appeal followed.

19 **FIRST ASSIGNMENT OF ERROR**

20 Petitioner asserts that the city's denial based on traffic impacts to the Hwy
21 199/Hubbard Lane intersection is an impermissible *de facto* moratorium contrary to the
22 requirements of ORS 197.505 to 197.540.

23 ORS 197.524 provides:

24 “(1) When a local government engages in a pattern or practice of delaying
25 or stopping the issuance of permits, authorizations or approvals
26 necessary for the subdivision or partitioning of, or construction on, any
27 land, including delaying or stopping issuance based on a shortage of
28 public facilities, the local government shall:

- 1 “(a) Adopt a public facilities strategy under ORS 197.768; or
2 “(b) Adopt a moratorium on construction or land development
3 under ORS 197.505 to 197.540.
4 “(2) The provisions of subsection (1) of this section do not apply to the
5 delay or stopping of the issuance of permits, authorizations or
6 approvals because they are inconsistent with the local government’s
7 comprehensive plan or land use regulations.”

8 Petitioner contends that, as evidenced by the 2006 city manager memorandum and by
9 the challenged decision, the city is engaged in a pattern or practice of denying development
10 applications based on a shortage of public facilities, specifically inadequate transportation
11 facilities. Accordingly, petitioner argues, ORS 197.524(1) requires the city to adopt either a
12 public facilities strategy under ORS 197.768 or a moratorium that is consistent with the
13 requirements of ORS 197.505 to 197.540. Because the city has done neither, petitioner
14 argues, it cannot deny development proposals based solely on inadequate public facilities.

15 The city responds that, under ORS 197.524(2), the requirements of ORS 197.524(1)
16 do not apply to denials of development applications based on inconsistency with a local
17 government’s comprehensive plan or land use regulations. According to the city, the
18 challenged decision denies the major site review application because it is inconsistent with
19 GPDC land use regulations governing major site review, at GPDC 19.052(2) and (9) and
20 GPDC 27.121(2).

21 We generally agree with the city that the challenged decision denies the application
22 for noncompliance with applicable approval criteria, and thus by operation of ORS
23 197.524(2) the decision is not subject to the requirements of ORS 197.524(1). Although
24 ORS 197.524 could be clearer, ORS 197.524(1) appears to cast a fairly large net, and
25 whenever a shortage of public facilities is relied on to deny multiple land use applications,
26 the obligations set out in ORS 197.524(1)(a) or (b) could be triggered. However, ORS
27 197.524(2) creates a fairly significant exception to the large net cast by ORS 197.524(1).
28 Public facility related denials that are based on applicable comprehensive plan or land use

1 regulation criteria that require adequate public facilities before permit, land division or
2 construction approval are not included in the net cast by ORS 197.524(1) and the obligations
3 in ORS 197.524(1)(a) and (b) do not follow from such denials. In other words, the same
4 activity that would require a local government to comply with ORS 197.524(1)(a) or (b)
5 would not result in that requirement if the public facility based denial is required by a
6 comprehensive plan or land use regulation criterion. With that understanding of how ORS
7 197.524 works, we turn to the parties' arguments.

8 Applications for major site review are governed by GPDC 19.052, which requires in
9 relevant part that the application must comply with applicable provisions of the
10 comprehensive plan and GPDC.² Most pertinently, the applicant must demonstrate that
11 “[t]raffic conflicts and hazards are minimized on-site and off-site, as provided in Article 27.”
12 GPDC 19.052(9).

13 GPDC Article 27 provides standards designed to “provide safe, efficient and
14 noncongested traffic conditions for the community and the general traveling public.” GPDC
15 27.010. GPDC 27.121 sets forth general design standards for streets. GPDC 27.121(2)
16 provides in relevant part that “[t]he overall minimum performance standard for streets is
17 Level of Service ‘D,’ and Level of Service ‘D’ for signalized intersections.”³ Further,

² GPDC 19.052 provides, in relevant part:

“Criteria for Approval. The Review Body shall approve, conditionally approve, or deny the request based upon the following criteria:

“* * * * *

“(2) Complies with applicable elements of the Comprehensive Plan, including: Traffic Plan, Water Plan, Sewer Plan, Storm Drainage Plan, Bicycle Plan, and Park Plan.

“* * * * *

“(9) Traffic conflicts and hazards are minimized on-site and off-site, as provided in Article 27.”

³ GPDC 27.121 provides, in relevant part:

1 GPDC 27.121(3) requires that a site review applicant submit a traffic analysis report under
2 specified circumstances, including when the city determines that “the development will
3 impact known safety, congestion or capacity problems.” GPDC 27.121(3)(a)(1).

4 As discussed below under the second and third assignments of error, petitioner
5 disputes the city’s interpretation of the minimum LOS D standard for streets set forth in
6 GPDC 27.121(2), and the city’s evaluation of the evidence directed at compliance with that
7 standard. However, we do not understand petitioner to dispute that GPDC 27.121(2) is an
8 applicable approval standard with respect to its major site plan review application, pursuant
9 to GPDC 19.052(9). Petitioner submitted a TIA, pursuant to GPDC 27.121(3), to
10 demonstrate compliance with GPDC 19.052(2) and (9), and the LOS D standard for streets in
11 GPDC 27.121(2). The city concluded, based on that TIA and its understanding of the
12 relevant criteria, that the proposed development did not comply with those applicable
13 approval criteria with respect to the Hwy 199/Hubbard Lane intersection, and accordingly
14 denied the application. We address petitioner’s challenges to those conclusions and
15 interpretations below. However, for present purposes, we conclude that denial of a
16 development application on such a basis falls squarely within the exception set out in
17 ORS 197.524(2), for “stopping of the issuance of permits, authorizations or approvals
18 because they are inconsistent with the local government’s comprehensive plan or land use
19 regulations.” *ODOT v. City of Klamath Falls*, 177 Or App 1, 10-11, 34 P3d 667 (2001).
20 Accordingly, the city’s denial is not subject to the requirements of ORS 197.524(1).

“(1) All streets shall provide for safe and efficient circulation and access for motor vehicles, bicycles, pedestrians, and transit.

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

1 The first assignment of error is denied.⁴

2 **SECOND ASSIGNMENT OF ERROR**

3 As noted above, GPDC 27.121(2) provides in relevant part that “[t]he overall
4 minimum performance standard for streets is Level of Service ‘D,’ and Level of Service ‘D’
5 for signalized intersections.” The city council’s decision found that the application is subject
6 to GPDC 27.121(2), as well as a similar standard in the city’s transportation plan.⁵ Later in
7 the decision, the city council explicitly adopts a staff interpretation of GPDC 27.121(2),
8 based on an interpretation of a traffic engineer that staff consulted with, that determines how
9 the LOS D standard is applied to unsignalized intersections.⁶ Under that interpretation,
10 signalized intersections are evaluated based on the performance of the entire intersection,

⁴ Petitioner also advances under the first assignment of error an argument that the city’s denial is inconsistent with ORS 197.522, which requires that local governments approve development applications that are consistent with applicable criteria or can be made consistent with imposition of reasonable conditions. We consider that argument, and the city’s responses, under the fourth assignment of error.

⁵ The city council’s decision states, in relevant part:

“The project is subject to the requirements in the Development Code under Section 27.121(2) which sets a Level of Service standard ‘D’ for streets and signalized intersections. In addition, the Grants Pass Urban Area Master Transportation Plan stipulates that a Level of Service ‘D’ or better must be maintained for all arterial and collector streets. Hubbard Lane north of [Highway 199] is classified as a collector street.” Record 8-9.

⁶ In discussing GPDC 19.052(9), the city council’s decision quotes GPDC 27.121(2) and then finds:

“Staff has examined this code provision in great detail over the past few weeks. City staff sought a professional interpretation of this section by a traffic engineer in order to compare staff’s use and interpretation of the section with that of a professional in the field. Staff took a strict interpretation of the section in that if one movement (for example, the left turn movement) in an intersection was below Level of Service ‘D’ then the project did not meet the standard and it was recommended for denial. The City’s traffic consultant hired to interpret the Code provision indicated that this may be too strict of an interpretation. It was recommended that for signalized intersections the entire intersection be evaluated based on the Highway Capacity Manual (HCM) Level of Service intersection summary standard. In addition, for unsignalized intersections it was recommended that the ‘Approach LOS’ which evaluates each directional approach (north, east, south, or west) be used to determine if the Level of Service standard is being met.” Record 14.

1 while unsignalized intersections are evaluated based on the performance of each directional
2 “approach” (north, east, south or west) to the intersection.⁷

3 Under this assignment of error, petitioner first argues that the city council
4 misinterpreted GPDC 27.121(2) to supply a minimum LOS for unsignalized intersections,
5 such as the Hwy 199/Hubbard Lane intersection. According to petitioner, GPDC 27.121(2)
6 unambiguously supplies a minimum LOS only for *signalized* intersections.

7 The city responds that GPDC 27.121(2) is ambiguous, and the city council reasonably
8 interpreted it to supply a minimum LOS D standard not only for signalized intersections, but
9 also for “streets,” which the city apparently understands to include the Hwy 199/Hubbard
10 Lane intersection and its approaches. The city argues that the council’s interpretation to that
11 effect is not inconsistent with the text of the GPDC 27.121(2) and must be affirmed.
12 ORS 197.829(1).

13 We agree with the city that GPDC 27.121(2) is ambiguous and requires some
14 interpretation as applied in the present case. GPDC 27.121(2) can be read, as petitioner does,
15 to impose a minimum LOS D only on signalized intersections and leave unsignalized
16 intersections without a minimum LOS standard. However, GPDC 27.121(2) also imposes a
17 separate minimum LOS D standards on “streets,” which the city apparently understands to
18 include unsignalized intersections. Petitioner does not explain why it is error to understand
19 the term “streets” to include unsignalized intersections. We cannot say that the city council’s
20 interpretation to that effect is inconsistent with the text of GPDC 27.121(2) or otherwise

⁷ The finding quoted in n 6 does not explain how signalized intersections are evaluated, other than to state that the “entire intersection is evaluated based on the [HCM] Level of Service intersection summary standard.” It is not clear how that summary standard works, although we presume that it somehow averages the performance of each directional approach and determines an LOS for the entire intersection, rather than an LOS for each individual approach.

1 reversible under the somewhat deferential standard of review we must apply under
2 ORS 197.829(1). *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003).⁸

3 Under this assignment of error, petitioner also challenges the city’s interpretation that
4 compliance with the minimum LOS D standard is determined for unsignalized intersections
5 by evaluating the performance of each directional approach to the Hwy 199/Hubbard Lane
6 intersection (i.e. northbound, southbound, eastbound, westbound). In the finding quoted at n
7 6, the city council adopted that “Approach LOS” method for unsignalized intersections,
8 rejecting the staff’s initial view that the LOS is determined based on the adequacy of
9 individual turning movements within each directional approach.⁹ Petitioner contends that
10 the city’s findings on this point provide no explanation or “underlying rationale or logic” for
11 adopting this method. Petition for Review 9. Further, petitioner argues that it is
12 inappropriate to rely on an interpretation based on discussions with an unidentified traffic
13 engineer that are outside the public record.

14 The city responds that the city council’s adoption of the “Approach LOS” method of
15 determining whether an unsignalized intersection satisfies the LOS D standard is reasonable
16 and should be affirmed. *See Noble v. Clackamas County*, 45 Or LUBA 366, 374-75 (2003)
17 (rejecting an argument that the county must evaluate the adequacy of an intersection based
18 on individual turning movements within an approach to an intersection rather than the
19 adequacy of a directional approach).

20 We agree with the city that petitioner has not explained why adoption of the
21 “Approach LOS” method of determining whether an unsignalized intersection complies with

⁸ GPDC 27.121(2) is so oddly written that no interpretation is likely to make complete sense of it. For example, there is no obvious reason why the city would impose separate, but identical, minimum LOS standards on “streets” and “signalized intersections.”

⁹ The decision does not explain how an “Approach LOS” method differs from the turning movement method favored by staff, but as explained below we understand it to involve evaluating the performance of all movements within a directional approach and averaging them in some way.

1 the LOS D standard is reversible error, or why remand is necessary to provide a more
2 adequate explanation of why the county chose that method over other methods. Apparently,
3 there are at least three possible ways to determine the LOS of an intersection: (1) by
4 evaluating the delays associated with each individual movement (southbound left turn, for
5 example), such that the worst performing movement defines the LOS of the intersection, (2)
6 by evaluating the delays associated with each directional approach (east, west, south or
7 north), apparently by averaging the delays associated with each movement within a
8 directional approach, or (3) by evaluating all approaches to an intersection together,
9 apparently by averaging the delays associated with each approach. We note, in this respect,
10 that petitioner’s traffic expert evaluated the adequacy of each intersection studied in the TIA,
11 including the Hwy 199/Hubbard Lane intersection, based on what appears to be an
12 “Approach LOS” method. *See, e.g.*, Record 539 (table assigning an “Approach LOS” of E to
13 the southbound approach to the Hwy 199/Hubbard Lane intersection during the a.m. peak
14 hour under existing conditions). Petitioner does not explain why it is unreasonable to adopt a
15 method that was apparently employed by its own expert, or explain what other method
16 should be used to determine compliance with GPDC 27.121(2).

17 With respect to petitioner’s argument that it is inappropriate to rely on an
18 interpretation based on discussions with an unidentified traffic engineer that are outside the
19 public record, the county responds that petitioner does not explain why doing so constitutes
20 reversible error. In any case, the county notes that the findings adopted by the city council
21 on this point were incorporated verbatim from the staff report, which was made available to
22 the public seven days in advance of the public hearing before the city council. The city
23 argues that at no point below did petitioner object to the city’s reliance on the staff
24 discussion with the traffic consultant, or argue that the substance of the discussions between
25 staff and the traffic consultant must be placed in the record. Therefore, the city argues, this
26 issue has been waived. ORS 197.763(1).

1 Petitioner does not respond to the city’s waiver or failure to object argument. The
2 city is correct that the city council findings quoted at n 6 that discuss how staff consulted
3 with an outside traffic engineer are copied, verbatim, from the August 28, 2007 staff report to
4 the city council, which was provided to the public seven days prior to the city council
5 hearing. Record 24.

6 The waiver issue aside, petitioner does not explain why it is error to adopt an
7 interpretation or approach that is based on an interpretation or approach advocated in a staff
8 report, that is itself based on a source outside the record. The city council did not rely on any
9 statement of the consulting traffic engineer; instead, the city council adopted the
10 interpretation or approach advocated in the staff report, which was available prior to the
11 public hearing. Thus, the challenged findings are based directly on documents in the public
12 record. Further, petitioner was presumably aware that staff advocated for that interpretation
13 or approach, and petitioner does not argue that it had no opportunity to argue for a different
14 interpretation or approach, if desired. As noted above, as far as we can tell, the “Approach
15 LOS” method advocated by staff for determining the LOS of the Hwy 199/Hubbard Lane
16 intersection is the same method petitioner’s expert used. Whatever the case, petitioner’s
17 arguments under this assignment of error do not demonstrate a basis for reversal or remand.

18 The second assignment of error is denied.

19 **THIRD ASSIGNMENT OF ERROR**

20 Following the findings quoted at n 6 above, which adopt the “Approach LOS”
21 method of applying the LOS D standard, the city council then applied that method to the
22 evidence submitted in the TIA regarding the Hwy 199/Hubbard Lane intersection:

23 “Taking this new interpretation into consideration and applying it to this
24 project, the project still does not meet the Level of Service standard. The
25 traffic impact analysis provides a breakdown of the approach LOS for 2007
26 and 2008 conditions. The problematic intersection is [the Hwy 199/Hubbard
27 Lane intersection]. The study identifies the northbound approach currently
28 operating at LOS ‘C’ and the southbound approach operating at LOS ‘E.’ For
29 2008 conditions, the table shows the northbound approach LOS degrading to

1 an 'E' and the southbound approach degrading to an 'F.' The [petitioner]
2 defends that the intersection operates below the LOS 'D' standard with or
3 without the development. The tables however indicate differently as noted
4 above with the northbound approach going from an acceptable standard of
5 LOS 'C' to below standard at LOS 'E' and the southbound approach moving
6 from LOS 'E' to LOS 'F' in 2008 with the development." Record 14.

7 Petitioner objects that this finding misconstrues the TIA and is unsupported by the
8 evidence. According to petitioner, it is not clear what "tables" the finding refers to, but the
9 apparent referents are two tables photocopied from the TIA and attached to the staff report
10 that the city council adopted as part of its findings, at Record 31-32. However, petitioner
11 argues that the two tables at Record 31-32 do not indicate, as the above finding states, that
12 the northbound approach goes from LOS C in 2007 to LOS E in 2008 with the proposed
13 development, and the southbound approach goes from LOS E in 2007 to LOS F in 2008 with
14 the proposed development.. According to petitioner, neither of those tables and in fact none
15 of the tables in the TIA indicate any such thing. Rather, petitioner argues, the TIA is clear
16 that the northbound and southbound approaches to the intersection will function at the same
17 LOS in 2007 and 2008 at peak hours, with or without the proposed development. For
18 example, petitioner notes, the 2007 existing, 2008 no-build and 2008 build conditions for the
19 southbound morning peak hour all predict an LOS of E for that approach. Record 539, 558,
20 576. Not only are there no LOS changes from 2007 to 2008, petitioner argues, but it is clear
21 under the TIA that the proposed development will not *cause* the function of any approach to
22 the intersection to change from one LOS to another. Petitioner cites *ODOT v. Coos County*,
23 158 Or App 568, 976 P2d 68 (1999), for the proposition that, unless the proposed
24 development causes the intersection to fall below the minimum acceptable level of service,
25 then there is no basis to conclude that the proposed development significantly impacts the
26 intersection.

27 The city responds that the city council correctly understood the TIA, specifically the
28 tables attached to the decision at Record 31-32, to indicate that the northbound approach will

1 go from LOS C to E from 2007 to 2008 with the proposed development, and the southbound
2 approach will go from E to F over the same time period. With respect to *ODOT v. Coos*
3 *County*, the city argues that that case involved the former version of OAR 660-012-0060,
4 which imposed various requirements if a proposed comprehensive plan amendment or zone
5 change would “significantly affect” a transportation facility, a term which was defined in
6 relevant part by whether the proposed amendment would allow uses that generate enough
7 traffic to cause a facility to fall below the minimum acceptable LOS. The Court of Appeals
8 held that, as defined, a plan amendment could not “significantly affect” a facility if the
9 facility was already below the minimum acceptable LOS, and the traffic impacts allowed by
10 the amendment would simply make the facility worse. Here, the city argues, GPDC 19.052
11 and 27.121(2) do not include a similar “significant affect” element or impose a similar
12 causative requirement.

13 We agree with petitioner that the city appears to have misconstrued the TIA, or at
14 least the tables at Record 31-32. It is important to note that the tables at Record 31 and 32
15 address *different* peak hours. Record 31 is a table indicating the 2007 or existing a.m. peak
16 hour conditions for the Hwy 199/Hubbard Lane intersection approaches. Record 32 is a
17 table indicating the 2008 no-build p.m. peak hour conditions for the intersection approaches.
18 Comparing the *morning* no-build LOS for the northbound and southbound approaches in
19 2007 with the *evening* no-build LOS for the northbound and southbound approaches in 2008
20 compares apples and oranges. The tables at Record 31 and Record 32 do not tell you
21 whether or to what degree the morning and evening LOS is expected to change between 2007
22 and 2008 under a no-build scenario. The city apparently misread the two tables to address
23 the same peak hour conditions.

24 We have examined all of the other tables in the TIA cited to us by both parties, and
25 we agree with petitioner that none of those tables indicate, as the findings state, “the
26 northbound approach going from an acceptable standard of LOS ‘C’ to below standard at

1 LOS ‘E’ and the southbound approach moving from LOS ‘E’ to LOS ‘F’ in 2008 with the
2 development.” Record 24. To the contrary, petitioner appears to be correct that for the
3 northbound and southbound approaches there are no changes in LOS between the 2007 a.m.
4 and p.m. peak hour existing conditions, the 2008 a.m. and p.m. peak hour no-build
5 conditions, and the 2008 a.m. and p.m. peak hour build conditions.¹⁰

6 Accordingly, remand is necessary for the city to adopt amended findings addressing
7 compliance with GPDC 19.052 and 27.121(2), under a correct understanding of the TIA.

8 The only other issue that requires comment is petitioner’s reliance on the principle
9 described in *ODOT v. Coos County*. As the city points out, that case involved an
10 administrative rule with an explicit causative element, such that certain requirements were
11 imposed only if the uses allowed by the plan amendment would reduce a facility below the
12 minimum acceptable performance standard.¹¹ GPDC 19.052 and 27.121(2) are structured
13 differently, and do not include a similar explicit causative element. There is no dispute that
14 the proposed assisted living facility in the present case will generate traffic that will travel
15 through the northbound and southbound approaches to the Hwy 199/Hubbard Lane
16 intersection during the a.m. and p.m. peak hours. According to the TIA, that additional
17 traffic will not cause either of those approaches to change its expected LOS grade during any
18 peak hour, from E to F for example, although presumably the additional traffic will further
19 degrade the functioning of those approaches to some extent within the LOS grade.
20 However, what that evidence means for purposes of compliance with GPDC 19.052 and

¹⁰ Specifically, the tables show the northbound *morning* peak hour LOS is C during 2007 and remains C through both the 2008 no-build and build scenarios. Record 539, 558, 576. The southbound *morning* peak hour LOS is E in 2007 and remains E under both the 2008 no-build and build scenarios. *Id.* The northbound *evening* peak hour LOS is E during 2007, and remains E under both the 2008 no-build and build scenarios. Record 548, 567, 584. The southbound *evening* peak hour LOS is F in 2007 and remains F under both the 2008 build and no-build scenarios. *Id.*

¹¹ Following *ODOT v. Coos County*, OAR 660-012-0060 was amended to provide that the rule’s requirements also apply when allowed land uses would worsen the performance of a facility that already performs below the minimum accepted performance standard. *See* OAR 660-012-0060(1)(c)(C).

1 27.121(2) is not clear, and was not resolved in the decision before us, given the city’s
2 erroneous understanding of the TIA.

3 Specifically, it is not clear whether GPDC 19.052 and 27.121(2) include an implicit
4 causative element of some kind, and if so under what circumstances that element is triggered.
5 We understand petitioner to argue that there is an *implicit* causative element in GPDC 19.052
6 and 27.121(2), and that that element is triggered *only* if the traffic generated by the proposed
7 development causes an intersection’s LOS to change from D to a lower grade, similar to the
8 former administrative rule at issue in *ODOT v. Coos County*. We understand petitioner to
9 argue that the causative element is not met if the intersection or an approach to an
10 intersection is already at E and will not drop to F, or is already at F and no lower grade exists
11 to drop further. The city’s position on these points is unknown, but it seems likely, if not
12 inevitable, that the city will need to address these interpretative issues in adopting the
13 additional findings required above. We write only to clarify that we suggest no answers to
14 foregoing questions, but that the city must, if necessary, resolve them in the first instance.

15 The third assignment of error is sustained.

16 **FOURTH ASSIGNMENT OF ERROR**

17 Under the fourth assignment of error, petitioners argue that the city’s findings are
18 inadequate to sustain a denial of the application. Because the findings are inadequate,
19 petitioner argues, ORS 197.522 “requires approval of the application.” Petition for Review
20 14. Petitioner then incorporates arguments under the previous assignments of error, which
21 we understand to include incorporation of the arguments regarding ORS 197.522 under the
22 first assignment of error.

23 ORS 197.522 requires a local government to approve a development application that
24 is consistent with applicable criteria or, if possible, impose reasonable conditions to make the

1 proposed development consistent with applicable criteria.¹² We have held that, where
2 ORS 197.522 applies, it imposes the burden on the applicant to propose reasonable
3 conditions that make the development consistent with applicable criteria. *Oien v. City of*
4 *Beaverton*, 46 Or LUBA 109, 126-27 (2003). According to petitioner, it proposed
5 reasonable conditions to ensure compliance with applicable criteria, in the form of a
6 condition requiring petitioner to share the cost of any future signalization of the Hwy
7 199/Hubbard Lane intersection. The city rejected that argument, finding that “reasonable
8 conditions cannot be imposed to satisfy” GPDC 19.052(2) and (9). Record 9.

9 The city makes several responses, but we address only one. The city argues that a
10 condition requiring that petitioner share the cost of any future signalization of the Hwy
11 199/Hubbard Lane intersection is not sufficient to ensure that the proposed development is
12 consistent with GPDC 19.052 and 27.121(2). According to the city, to constitute a
13 “reasonable condition” in the present case, the condition must make the proposal consistent
14 with GPDC 19.052 and 27.121(2). That is, the city argues, the proposed condition must
15 reasonably ensure that the affected intersections will function at LOS D following
16 development. The city contends that petitioner’s proposed condition failed to do so; it
17 merely provided that *if* the intersection warranted a signal at some future time petitioner
18 would agree to share the cost of installing the signals.

19 We assume for purposes of this opinion that ORS 197.522 applies. We generally
20 agree with the city that the speculative and contingent nature of petitioner’s proposed

¹² ORS 197.522 provides:

“A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval.”

1 condition was insufficient to constitute a “reasonable condition” that would “make the
2 proposed activity consistent with the plan and applicable regulations” and therefore compel
3 the city to approve the application.

4 The fourth assignment of error is denied.

5 The city’s decision is remanded.