

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

3  
4 JAMES WILLIAMS and CONNIE WILLIAMS,  
5 *Petitioners,*

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. 2007-210

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from City of Grants Pass.

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24 James R. Dole, Grants Pass, filed the petition for review and argued on behalf of  
25 petitioners.

26  
27 David F. Doughman, Portland, filed the response brief and argued on behalf of  
28 respondent. With him on the brief was Beery, Elsner & Hammond, LLP.

29  
30 Holger T. Sommer, Merlin, represented himself.

31  
32 BASSHAM, Board Member; RYAN, Board Chair, participated in the decision.

33  
34 HOLSTUN, Board Member, did not participate in the decision.

35  
36 AFFIRMED

08/22/2008

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**

Petitioners appeal the city’s denial of an application for major site plan review for the construction of two industrial buildings.

**FACTS**

Petitioners applied to the city for major site plan review approval to construct two industrial buildings totaling 73,600 square feet, on a vacant 4.36-acre parcel zoned Business Park (BP). The property is in southeastern Grants Pass near State Highway 199 (Hwy 199). The closest connection between the property and the highway is via the nearby intersection of Mill Street (a collector) and M Street (an arterial). A stop sign controls Mill Street, but there are no traffic controls on M Street and no traffic signals at the intersection. Because the intersection is a short distance from Hwy 199, only the Oregon Department of Transportation (ODOT) can authorize the installation of traffic signals. Under ODOT’s protocols, the intersection does not currently generate sufficient traffic to justify a traffic signal.

Policy 1.2.1 of the city’s transportation plan requires that a minimum level of service (LOS) D must be maintained for collectors and arterials, and the city’s code requires that streets and signalized intersections perform at LOS D or better. Petitioners submitted a traffic impact analysis (TIA) showing that under the year 2008 build and no-build options the Mill Street/M Street intersection functions at LOS D or better, with the exception of the left turn movement from Mill Street onto M Street. According to the TIA, during the P.M. peak hour the left turn movement functions at LOS E under the year 2008 build and no-build options. The TIA found that the proposed development would add eight additional left turns through that movement during the P.M. peak hour.

City planning staff have a policy to advocate denial of development affecting an intersection that functions below a LOS D unless the intersection is improved to LOS D or the applicant demonstrates that the development will not impact the intersection. Record

1 332. The city planning director denied the major site plan review application based in part  
2 on noncompliance with site plan review criteria related to transportation, citing the failing  
3 left turn movement at the Mill Street/M Street intersection. Petitioners appealed the decision  
4 to the city's urban area planning commission (UAPC), which held a hearing and denied the  
5 application for the same reasons. Petitioners appealed to the city council, which upheld the  
6 UAPC denial, again based on the same reasons.<sup>1</sup> This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioners argue that the city's denial of the application based on traffic impacts to  
9 the Mill Street and M Street intersection is an impermissible *de facto* moratorium contrary to  
10 the requirements of ORS 197.505 to 197.540. We addressed this precise issue regarding the  
11 city's traffic policies and denial of applications based on intersections that function below  
12 LOS D in *Vista Construction, LLC v. City of Grants Pass*, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
13 2007-197, January 18, 2008). Petitioners advance no reason to reach a different conclusion  
14 in this appeal, and we therefore deny the assignment of error for the reasons expressed in  
15 *Vista Construction*.

16 The first assignment of error is denied.<sup>2</sup>

17 **SECOND ASSIGNMENT OF ERROR**

18 Petitioners argue that the city misconstrued the applicable law in determining that  
19 Grants Pass Development Code (GPDC) 27.121, which imposes a minimum LOS D standard

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<sup>1</sup> The director, UAPC and the city council also found noncompliance with several other major site plan review criteria that relate to landscaping, sewer access, and a required setback. Petitioners argue that these are minor issues that can be resolved by conditions proposed by petitioners, and they do not constitute independent bases for denial. The only substantive basis for denial, petitioners argue, is the impacts to the Mill Street/M Street intersection. The city does not argue that the findings regarding landscaping, sewer access and the setback constitute independent bases for denial, and accordingly we do not consider those findings further.

<sup>2</sup> Petitioner also argues 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 the imposition of reasonable conditions. We reject that argument for the reasons expressed in *Vista Construction. Id.* at slip op 15-16.

1 for “streets” and “signalized intersections, applies to unsignalized intersections.<sup>3</sup> We  
2 addressed this precise issue in *Vista Construction* and held that the city’s interpretation of  
3 that code provision was not reversible under ORS 197.829(1). *Vista Construction*, slip op 8.  
4 Again, petitioners offer no reason to reach a different conclusion in this appeal, and we  
5 therefore deny the assignment of error for the reasons expressed in *Vista Construction*.

6 The second assignment of error is denied.

7 **THIRD ASSIGNMENT OF ERROR**

8 The city denied the major site plan review application in relevant part because (1) it  
9 found, based on the TIA and the city’s transportation consultant, that the proposed  
10 development would worsen the failing left turn movement further below the LOS D standard  
11 imposed by the city transportation plan and GPDC 27.121(2), and (2) petitioners proposed no  
12 means to bring the intersection to a LOS D standard.

13 Petitioners argue that the city’s findings are inadequate and not supported by  
14 substantial evidence. According to petitioners, the only reliable evidence in the record is that  
15 the proposed development would have “minimal impact” on the left turn movement or the  
16 intersection, and that that evidence is sufficient to demonstrate compliance with the city’s  
17 LOS D standard as a matter of law.

18 The third assignment of error is framed as an evidentiary challenge, although it  
19 includes embedded findings arguments and a challenge to the city’s interpretation of the LOS  
20 D standard. In general, to overcome a denial of a permit on evidentiary grounds, a petitioner  
21 must show that the burden of proof was met as a matter of law. *Wal-Mart Stores, Inc. v. City*

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<sup>3</sup> Grants Pass Development Code (GPDC) 27.121 provides, in relevant part:

- “(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. \* \* \*”

1 *of Hillsboro*, 46 Or LUBA 680, 699-700, *aff'd* 194 Or App 211, 95 P3d 269 (2004). To  
2 overturn the city council's plan and code interpretation, petitioners must demonstrate that the  
3 city's interpretation is inconsistent with the express language, purpose or policy of the local  
4 provisions. ORS 197.829(1).<sup>4</sup> LUBA reviews that interpretation under a somewhat  
5 deferential standard of review. *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992);  
6 and *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003).

7 Petitioners' traffic expert concluded that, while the proposed development would add  
8 eight additional trips through the failing left-turn movement during the P.M. peak hour, the  
9 "impact of project traffic is minimal, and does not change the existing operational level of  
10 service at this intersection." Record 226. The city's expert reviewed the TIA and found the  
11 TIA's data and analysis reasonable and adequate. The city's expert disagreed only with the  
12 conclusion that the proposed development would have "minimal impact" on the left turn  
13 movement. The city's expert concluded that the development would cause a "modest  
14 degradation of performance." Record 79.

15 According to petitioners, the critical issue is not whether the impacts of development  
16 are "minimal" or "modest," but whether the impacts will *cause* the intersection to fall below  
17 the minimum LOS D performance standard or to change the existing level of service.  
18 Because there is no dispute that the left-turn movement is already below the LOS D standard  
19 and the impacts of the proposed development will worsen its performance but will not cause

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<sup>4</sup> ORS 197.829(1) provides, in relevant part:

"[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

- "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

1 it to fall below the minimum LOS D or from LOS E to F, petitioners argue that the only  
2 conclusion that can be drawn from the evidence is that the proposed development is  
3 consistent with the city’s performance standard.

4 Petitioners base their argument on the Court of Appeals’ decision in *Dept. of*  
5 *Transportation v. Coos County*, 158 Or App 568, 976 P2d 68 (1999). In that case, the Court  
6 held that for purposes of *former* OAR 660-012-0060 a plan amendment could not  
7 “significantly affect” a transportation facility if the facility was already below the minimum  
8 acceptable LOS and the traffic impacts allowed by the amendment would simply make the  
9 facility worse. Petitioners contend that the city’s LOS D standard must be interpreted, like  
10 *former* OAR 660-012-0060, such that it is violated only if the development’s traffic impacts  
11 cause the facility to fall below the minimum performance standard.

12 The city rejected that argument in its findings.<sup>5</sup> While the city might have chosen to  
13 interpret the LOS D standard in the transportation plan and GPDC 27.121(2) in the manner  
14 petitioners suggest, petitioners have not established that the city’s different view of the  
15 standard is erroneous, or that the evidence compels the conclusion that the proposed  
16 development complies with the standard as a matter of law. As the city explains, *Department*  
17 *of Transportation v. Coos County* involved an analysis of the particular terms of *former* OAR  
18 660-012-0060, under which an amendment “significantly affects” a transportation facility if  
19 it reduces the facility below the applicable performance standard. The Court held that the  
20 rule included a causative element such that an amendment “significantly affects” a facility  
21 only if traffic allowed by the amendment would cause the facility to fall below the minimum

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

“[Petitioners] argue that the intersection failures at Mill & ‘M’ fall outside of the requirements of the [GPDC] and that approval of the submitted site plan will have ‘no significant impacts on the intersection and is consistent with Oregon Court of Appeals precedent.’ It is important to note that the verbiage ‘no significant impact’ is not found in the [GPDC] or the Transportation Plan as the Code and the Plan set a minimum threshold under which the traffic network must work. \* \* \*” Record 23.

1 performance standard. As the city notes, the GPDC does not have language similar to the  
2 “significantly affects” language of *former* OAR 660-012-0060, or impose an explicit  
3 causation requirement.<sup>6</sup>

4 In our view, petitioners have not demonstrated that the city is required to interpret the  
5 plan and code LOS D standard in the same manner as the Court interpreted the significant  
6 affects standard in *former* OAR 660-012-0060, or that the city council’s interpretation of the  
7 LOS D standard is reversible under ORS 197.829(1). Petitioners’ evidentiary arguments  
8 depend entirely on petitioners’ preferred interpretation of the LOS D standard, and those  
9 arguments therefore fail to demonstrate a basis for reversal or remand.

10 One aspect of the city’s decision that petitioners do not challenge, as far as we can  
11 tell, is the city’s apparent view that in order to satisfy the major site plan review criteria and  
12 the city’s LOS D standard, the applicant must necessarily propose improvements or  
13 conditions that will return the intersection to performing at a LOS D or better standard.  
14 There appears to be no dispute in the present case that bringing the intersection or at least the  
15 failing left-turn movement back to LOS D will require signalization, which is not under the  
16 city’s or the applicant’s control. Apparently no improvements within the city’s or the  
17 applicant’s control can fully restore the intersection to LOS D. Perhaps for that reason  
18 petitioners proposed no improvements or conditions with respect to the intersection, and the  
19 city made no serious effort to consider such improvements or conditions. *See* Record 39-40  
20 (conditions proposed by applicants, none of which involve the affected intersection); Record  
21 9 (finding that “[e]ven the installation of additional lanes dedicated solely to turning traffic  
22 will not bring the intersection to a LOS ‘D’ or better”).

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<sup>6</sup> Furthermore, we note that the administrative rule was amended in response to the *Dept. of Transportation v. Coos County* case to provide that an amendment “significantly affects” a facility when allowed land uses would worsen the performance of the facility that already performs below the minimum accepted performance standard. *See* OAR 660-012-0060(1)(c)(C).

1           However, we question the correctness of the city’s apparent view that compliance  
2 with the city’s plan and code necessarily requires an applicant to restore a failing intersection  
3 to the LOS D standard, in circumstances where the proposed development plays only a part  
4 in the failure of that intersection. Nothing cited to us in the plan or code supports that view.  
5 Transportation Plan Policy 1.2.1 and GPDC 27.121(2) merely state that the performance  
6 standard for certain streets and intersections is LOS D, and do not suggest that development  
7 that worsens but does not cause the failure of a failing intersection can be approved only if  
8 the applicant fully restores the intersection to the LOS D standard. Similarly nothing cited to  
9 us in the major site plan review standards requires that the applicant in such circumstances  
10 must restore an already failing intersection to the LOS D standard, in order to gain major site  
11 plan review approval.

12           In such circumstances, there seems little doubt that if the city approved the  
13 application with conditions requiring that the applicant construct improvements to restore the  
14 intersection to LOS D—improvements not proportional to the development’s impact on the  
15 intersection—such conditions would be inconsistent with the Takings Clause of the United  
16 States Constitution, under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d  
17 304 (1994).

18           In our view, a more plausible interpretation of the applicable plan and land use  
19 regulations, and one more consistent with the city’s constitutional obligations, is to require  
20 the applicant to mitigate the impact of *its* proposed development on the affected intersection,  
21 even if that mitigation does not fully restore it to LOS D. We note that the city manager’s  
22 “policy” to recommend denial of development that worsens failing intersections can be read  
23 to advocate the same approach. *See* Record 332 (staff will recommend denial of projects  
24 affecting failing intersections unless the intersections are improved to LOS D *or* “acceptable  
25 evidence is provided demonstrating the development will not impact those intersections”);  
26 *see also* Record 128 (memorandum from the city attorney opining that the applicant has the



1 option of proposing “proportional off-site mitigation that alleviates the traffic impact”). If  
2 the applicant demonstrates that improvements or conditions can eliminate or fully mitigate  
3 the development’s impacts on a failing intersection, it would seem that the applicant has  
4 demonstrated that the development will not impact that intersection.

5 It is not clear whether improvements such as additional turning lanes that would  
6 eliminate the impact of the development on the Mill Street/M Street intersection are possible,  
7 short of restoring it to LOS D. The finding at Record 9 suggests there may be. An addendum  
8 to the TIA at Record 213-14 appears to identify one improvement that would improve the  
9 2008 build conditions to the same or better level as the 2008 no-build conditions, which if so  
10 would seem to eliminate the impact of proposed development on the intersection. There may  
11 be constitutional or other problems with requiring construction of such improvements in the  
12 present case. Nonetheless, for the reasons stated above, in circumstances where proposed  
13 development will worsen an already failing intersection, the general approach of requiring an  
14 applicant to eliminate the impacts of development on the intersection, by means of off-site  
15 improvements, limitations on the proposed use or similar means, seems more consistent with  
16 the applicable plan and land use regulations, than does the city’s apparent view that the  
17 application must be denied if the intersection cannot be fully restored to LOS D.

18 With all that said, the fact remains that petitioners do not challenge the city’s  
19 apparent view in that respect. Petitioners do argue, under the first assignment of error, that  
20 the city was required to approve the application with conditions. However, as noted, none of  
21 the conditions petitioners proposed related to or purported to mitigate impacts on the failing  
22 intersection, and in the petition for review petitioners do not argue that the city erred in  
23 failing to approve the application subject to conditions that would address the project’s  
24 impacts on the failing intersection. Accordingly, we have no basis to determine whether the  
25 city erred in that respect. For the reasons set out above, the arguments under this assignment  
26 of error do not provide a basis for reversal or remand.

1           The third assignment of error is denied.

2   **FOURTH ASSIGNMENT OF ERROR**

3           Petitioners' fourth assignment of error states a findings challenge, based entirely on  
4 incorporation of their earlier assignments of error. Petitioners offer no additional argument.  
5 Because we denied the first three assignments of error, the fourth assignment of error  
6 provides no basis for reversal or remand.

7           The fourth assignment of error is denied.

8           The city's decision is affirmed.