BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID SETNIKER and JOAN SETNIKER,
Petitioners,

and

RICKREALL COMMUNITY WATER ASSOCIATION,
MADJIC FARMS, INC., MICHAEL S. CALEF,
SUSAN D. CALEF and E.M. EASTERLY,
Intervenors-Petitioners,

vs.

POLK COUNTY,
Respondent,

and

CPM DEVELOPMENT CORPORATION,
Intervenor-Respondent.

LUBA No. 2010-057

FINAL OPINION
AND ORDER

Appeal on remand from the Court of Appeals.

William H. Sherlock and Zack P. Mittge, Eugene, represented petitioners.

David C. Noren, Hillsboro, represented intervenor-petitioner, Rickreall Community Water Association.

E.M. Easterly, Salem, represented himself.

Corinne C. Sherton represented intervenors-petitioners Madjic Farms, Inc., Michael S. Calef and Susan D. Calef.

David Doyle, County Counsel, Dallas, represented respondent.

Wallace W. Lien, Salem, represented intervenor-respondent.

BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board Member,

participated in the decision.

REMANDED 01/13/2012

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 a decision approving comprehensive plan amendments, zoning map amendments and a conditional use permit to authorize mining on land zoned for exclusive farm use.

INTRODUCTION

This matter is before us on remand from the Court of Appeals. *Setniker vs. Polk County*, __ Or LUBA ___ (LUBA No. 2010-057, February 18, 2011), *rev'd and remanded* 244 Or App 618, 260 P3d 800, *rev den* 351 Or 216, 262 P3d 402 (2011). As relevant here, petitioners' first assignment of error advanced six sub-assignments of error. We sustained four of the sub-assignments of error in whole or part, but rejected the sixth sub-assignment of error, which argued that the county erred in finding compliance with the Transportation Planning Rule (TPR), at OAR 660-012-0060(2) (2010).[1] Briefly, we interpreted OAR 660-012-0060(1) and (2) to allow the county to approve plan and zone map amendments allowing land uses that "significantly affect" a transportation facility, if the county imposes measures under OAR 660-012-0060(2)(e) sufficient to eliminate the traffic impacts on the facility caused by the use allowed under the amendments, even if the facility is failing or is projected to fail due to existing traffic conditions or projected increases in background traffic not attributable to the use allowed under the amendments.[2] In the present case, the

[1] As discussed below, on December 9, 2011, the Land Conservation and Development Commission adopted proposed amendments to OAR 661-012-0060, effective January 1, 2012. Unless indicated otherwise, all references to the TPR in this opinion are to the 2010 version.

[2] OAR 660-012-0060(1) and (2) (2010) provide, in relevant part:

> "(1) Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. A plan or land use regulation amendment significantly affects a transportation facility if it would:

"transportation facility" at issue is the intersection of Highway 51 and Highway 22 (hereafter the 51/22 intersection). Highway 22 is a five-lane statewide highway running east and west. Highway 51 is a two-lane district highway running north and south, and the 51/22 intersection is controlled by stop signs at the northbound and southbound approaches of Highway 51 to Highway 22.

On appeal to the Court of Appeals, the Court affirmed our decision in all other respects, but disagreed with our interpretation of OAR 660-012-0060(1) and (2). According to the Court, if a local government relies on OAR 660-012-0060(2)(e) to mitigate the plan amendment's impacts on an intersection that is projected to fail within the planning period, the local government cannot stop at measures that merely eliminate or mitigate the impacts of the uses allowed by the plan amendment. Under the Court of Appeals interpretation of

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> "* * * * *
>
> (c) As measured at the end of the planning period identified in the adopted transportation system plan:
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> "* * * * *
>
> "(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or
>
> "(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan.
>
> "(2) Where a local government determines that there would be a significant effect, compliance with section (1) shall be accomplished through one or a combination of the following:
>
> "* * * * *
>
> "(e) Providing other measures as a condition of development or through a development agreement or similar funding method, including transportation system management measures, demand management or minor transportation improvements. Local governments shall as part of the amendment specify when measures or improvements provided pursuant to this subsection will be provided."

OAR 660-012-0060(1) and (2)(e), under those rules a local government can approve the plan amendment only if measures are put in place that correct failures or projected failures caused by existing traffic conditions or projected increases in background traffic, without regard to whether those existing and projected failures are attributable to the plan amendment, to ensure that allowed land uses consistent with the function, capacity and performance standards of affected facilities. The Court noted that OAR 660-012-0060(3), a provision added to the TPR in 2005, creates an exception to subsections (1) and (2), and specifically provides that a local government may approve an amendment that would significantly affect an existing transportation facility *without* assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility, in certain circumstances.[3] The Court explained the relationship between subsections (1), (2)(e) and (3):

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[3] OAR 660-012-0060(3) (2010) provides in full:

> "Notwithstanding sections (1) and (2) of this rule, a local government may approve an amendment that would significantly affect an existing transportation facility without assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility where:
>
> "(a) The facility is already performing below the minimum acceptable performance standard identified in the TSP or comprehensive plan on the date the amendment application is submitted;
>
> "(b) In the absence of the amendment, planned transportation facilities, improvements and services as set forth in section (4) of this rule would not be adequate to achieve consistency with the identified function, capacity or performance standard for that facility by the end of the planning period identified in the adopted TSP;
>
> "(c) Development resulting from the amendment will, at a minimum, mitigate the impacts of the amendment in a manner that avoids further degradation to the performance of the facility by the time of the development through one or a combination of transportation improvements or measures;
>
> "(d) The amendment does not involve property located in an interchange area as defined in paragraph (4)(d)(C); and
>
> "(e) For affected state highways, ODOT provides a written statement that the proposed funding and timing for the identified mitigation improvements or measures are, at a

> "Subsections (1) and (2)(e) require measures that ensure a facility's consistency with its function, capacity, and performance standards, that is, that ensure that the facility will not fail. Subsection (3) creates an exception: 'Notwithstanding sections (1) and (2),' the local government does *not* have to require measures ensuring that the facility is in compliance with standards, etc., *if* the facility was already out of compliance when the application was filed, it would be out of compliance by the end of the planning period in the transportation system plan, and the amendment will itself mitigate its own adverse impact."

The Court concluded:

> "In sum, LUBA erred in ruling that the county could comply with subsection (2)(e) of the TPR by mitigating only [intervenor's] significant adverse effects. As the rule is written, *if* LUBA decides on remand that (1) the 51/22 intersection was consistent with relevant function, capacity, and performance standards when [intervenor] filed its application, and (2) the intersection will become inconsistent with the relevant function, etc., by 2030, due to the effect of the amendments *or* due to independent growth or background traffic, then the county must put in place measures that will not only mitigate the inconsistencies caused by the amendments but also the inconsistencies resulting independently." 244 Or App at 630-31 (emphases in original.).

The Court remanded the decision back to LUBA "for reconsideration of transportation planning rules mitigation requirements; otherwise affirmed." *Id.* at 634. Accordingly, we now reconsider our disposition of the sub-assignment of error remanded by the Court.

MOTION TO FILE REPLY BRIEF

On November 23, 2011, LUBA granted intervenor's request for intervenor and petitioners to file supplemental briefing on the issue remanded by the Court. The request was accompanied by intervenor's proposed supplemental brief. In relevant part, intervenor's supplemental brief took the position, based on a 2001 traffic study in the record, that on July 3, 2001, the date the application was filed, the 51/22 intersection was already failing, and

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> minimum, sufficient to avoid further degradation to the performance of the affected state highway. However, if a local government provides the appropriate ODOT regional office with written notice of a proposed amendment in a manner that provides ODOT reasonable opportunity to submit a written statement into the record of the local government proceeding, and ODOT does not provide a written statement, then the local government may proceed with applying subsections (a) through (d) of this section."

therefore the county could, and did, properly rely on mitigation of only the applicant-generated impacts to the 51/22 intersection, under OAR 660-012-0060(3), and need not rely upon OAR 660-012-0060(1) and (2) to satisfy the TPR.

Petitioners filed their supplemental brief 14 days later, in which petitioners dispute that the 51/22 intersection was failing on the date the application was submitted. According to petitioners, the 2001 traffic study shows that only five of the seven turning movements in the 51/22 intersection were failing in 2001. Importantly, petitioners argue that the critical turning movement most significantly affected by intervenor's mining operation and the subject of the principal mitigation, the left-turn movement from the westbound approach on Highway 22 onto Highway 51, was *not* failing in 2001 (although that turning movement was projected to fail during the planning period, and in fact apparently started failing by 2004). Petitioners argue that, to rely on OAR 660-012-0060(3) to limit mitigation to only applicant-generated impacts, the particular *turning movements* that applicant-generated traffic will significantly affect and for which mitigation is required must be failing on the date the application was submitted.. Petitioners' supplemental brief thus raises an issue of interpretation under the TPR, whether the "transportation facility" analyzed for purposes of OAR 660-012-0060(3) is limited only to those particular turning movements affected by applicant-generated traffic.

On December 13, 2011, intervenor filed a motion to reply to petitioners' supplemental brief, accompanied by the proposed reply brief. The reply brief argues (1) petitioners have affirmatively waived the issue of whether the 51/22 intersection was failing in 2001, and (2) "transportation facility" for purposes of OAR 660-012-0060(3) is not limited to the particular turning movements affected by applicant-generated traffic. Petitioners object to the portion of the reply brief that attempts to raise the issue of affirmative waiver.

Our November 23, 2011 order did not authorize a reply memorandum of the type intervenor submits here, but LUBA generally allows and considers replies if they are limited

to new issues raised in a response. *Frevach Land Company v. Multnomah County*, 38 Or LUBA 729, 732 (2000). The interpretational dispute raised in petitioners' supplemental brief is such a new issue, and we allow that part of the reply brief. The part of the reply brief that raises the issue of affirmative waiver is not allowed. We shall not consider page 1 to page 2, line 20 of the reply brief.

FIRST ASSIGNMENT OF ERROR (PETITIONERS)

A. Sixth Sub-Assignment of Error

As noted, under the sixth sub-assignment of error petitioners argued that the county erred by failing to impose sufficient mitigation under OAR 660-012-0060(2)(e) to both (1) mitigate impacts of the proposed development and (2) mitigate existing and forecasted impacts to the 51/22 intersection caused by existing and projected background traffic. To the extent the county continues on remand to rely on OAR 660-012-0060(2) to satisfy the TPR, that argument is correct under the Court's interpretation of OAR 660-012-0060(1) and (2).

However, the county's 2010 decision also relied, albeit briefly and without explanation, on OAR 660-012-0060(3). As noted, that provision allows the county to find compliance with the TPR if (1) the transportation facility was already performing below the applicable performance standard on the date of application, and (2) the applicant mitigates the impacts of the development by the time of development. *See* n 3. In the supplemental briefing on remand from the Court of Appeals, the parties focus exclusively on whether the county can approve the amendment pursuant to OAR 660-012-0060(3), specifically whether the 51/22 intersection was failing on July 3, 2001, the date the application was filed, and thus whether the applicant can demonstrate compliance with OAR 660-012-0060(3)(a). As noted, intervenor takes the position that the 51/22 intersection was failing on that date; petitioners take the position that the intersection, or the relevant component of it, the left-turn movement from the westbound approach on Highway 22 onto 51, was not failing on that date and that an applicant can take advantage of OAR 660-012-0060(3) only if the particular components

of the facility that require mitigation under OAR 660-012-0060(3)(c) were failing on that date.

There does not appear to be a factual dispute about the evidence that bears on whether the 51/22 intersection was failing in 2001; both parties cite and rely upon the same 2001 traffic study. The parties' dispute is an interpretational one: whether a "transportation facility" for purposes of OAR 660-012-0060(3) is failing, i.e., "already performing below the minimum acceptable performance standard identified in the TSP or comprehensive plan on the date the amendment application is submitted," when some but not all of its individual turning movements were failing on the application date.

However, we need not resolve that interpretational dispute, because as noted above LCDC recently adopted amendments to OAR 660-012-0060, effective January 1, 2012. In relevant part, those amendments entirely delete OAR 660-012-0060(3)(a) (2010). Under the amended TPR effective January 1, 2012, there is no longer a requirement that a transportation facility be failing on the date of the application, as a condition precedent to operation of OAR 660-012-0060(3).

Further, it is clear that the amended TPR, and not OAR 660-012-0060 (2010), will govern the county's proceedings on remand. *See Setniker v. Polk County*, 244 Or App at 626-27 (because the zone change and conditional use permit application are consolidated with and dependent upon a comprehensive plan amendment, the "goal-post" rule at ORS 215.427 does not operate to freeze the standards that apply as of the date of application, and the county must apply amended standards adopted after the application was filed). Therefore, we see no point in resolving the parties' dispute in the supplemental briefing regarding the proper interpretation of OAR 660-012-0060(3)(a) (2010). We note in this

regard that the TPR amendments effective January 1, 2012 also amended OAR 660-012-0060(1) and (2) in ways that may affect application of those sections in the present case.[4]

In sum, we agree with intervenor that on remand the county can potentially rely on OAR 660-012-0060(3) (2012) to find compliance with the TPR, if it adopts findings supported by substantial evidence with respect to the criteria at OAR 660-012-0060(3)(a) through (d) (2012). Otherwise, if the county continues to rely on the mitigation option provided under what is now codified at OAR 660-012-0060(2)(d) (2012), the county can approve the amendment only if it imposes measures sufficient to ensure that allowed land uses are consistent with the function, capacity and performance standards of affected transportation facilities.

The sixth sub-assignment of error is sustained.

The first assignment of error is sustained, in part.

OTHER ASSIGNMENTS OF ERROR

The Court's decision requires no changes to our disposition of other assignments of error.

The county's decision is remanded.

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[4] Among other things, the 2012 TPR amendments recodified OAR 660-012-0060(2)(e) as subsection (d), and added a new subsection (e), which provides that compliance with the TPR may be established by:

> "Providing improvements that would benefit modes other than the significantly affected mode, improvements to facilities other than the significantly affected facility, or improvements at other locations, if the provider of the significantly affected facility provides a written statement that the system-wide benefits are sufficient to balance the significant effect, even though the improvements would not result in consistency for all performance standards."