

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 OREGON COAST ALLIANCE, THE LANDING  
5 AT NEWPORT CONDOMINIUM ASSOCIATION,  
6 and NANCY SMOCK,  
7 *Petitioners,*  
8

9 vs.

10  
11 CITY OF NEWPORT,  
12 *Respondent,*  
13

14 and  
15

16 TEEVIN BROS. LAND & TIMBER CO. LLC,  
17 PORT OF NEWPORT, SARA SKAMSER,  
18 ROB HALVERSON, GINNY GOBLIRSCH,  
19 DALE SAUSE, GERALD PELLETIER,  
20 GRANT SNYDER, STEVE CULLEN,  
21 YALE FOGARTY, ILWU LOCAL 53,  
22 PAT RUDDIMAN, BOB WIENERT,  
23 WAYNE DUDLEY and RUSS GLASSCOCK,  
24 *Intervenors-Respondents.*  
25

26 LUBA No. 2013-057  
27

28 FINAL OPINION  
29 AND ORDER  
30

31 Appeal from City of Newport.  
32

33 Sean T. Malone, Eugene, filed the petition for review and argued on behalf of  
34 petitioners.  
35

36 Emily Jerome, Eugene, filed a joint response brief on behalf of respondent. With her  
37 on the brief was Local Government Law Group.  
38

39 Steve C. Morasch, Vancouver, filed a joint response brief and argued on behalf of  
40 intervenor-respondent Teevin Bros. Land & Timber Co., LLC. With him on the brief was  
41 Schwabe, Williamson & Wyatt PC.  
42

43 Michael E. Haglund, Portland, filed a joint response brief on behalf of intervenors-  
44 respondents Port of Newport et al. With him on the brief was Haglund Kelly Jones &  
45 Wilder.

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

REMANDED

11/06/2013

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

**NATURE OF THE DECISION**

Petitioners appeal the city’s approval of a Traffic Impact Analysis for a proposed log yard.

**FACTS**

Intervenor Teevin Bros. Land and Timber Co., LLC (intervenor) proposes to operate an approximately fifteen-acre log yard at 1650 SE Bay Boulevard on property zoned Heavy Industrial (I-3) located in the City of Newport on Yaquina Bay. The subject property is owned by the Port of Newport and Rondys and Associates, Inc. Intervenor is the lessee. Previously, the property was used as a log yard until it closed in 2001. Record 45. The new log yard will receive logs from off-site, debark them, and ship them from an on-site truck terminal.

Newport Municipal Code (NMC) 14.45.010(D) requires a traffic impact analysis (TIA) to be submitted to the city where, as relevant here, “[a] proposal may increase use of any adjacent street by 10 vehicles or more per day that exceed[] 26,000 pound gross vehicle weight.” Intervenor submitted a land use application seeking approval of a TIA.<sup>1</sup> The city’s development director issued a written decision approving the TIA. Record 765. Petitioners appealed that decision to the planning commission, which upheld the development director’s decision. Petitioners appealed the planning commission’s decision to the city council, which adopted the planning commission’s written findings as the city’s final decision. Record 1.

**FIRST ASSIGNMENT OF ERROR**

A small portion of the subject property in its northeast corner is included on the Oregon Department of Geology and Mineral Industries’ (DOGAMI)’s Geologic Hazard map that is incorporated by the City of Newport into its Geologic Hazards Overlay map.

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<sup>1</sup> The TIA concluded that the proposed log yard development would add 100 weekday truck trips and 42 passenger car trips.

1 Supplemental Record 12. NMC 14.21.030 requires a Geologic Permit for proposed  
2 development, construction, or site clearing in a known geologic hazard area. NMC  
3 14.21.020(C) provides that no geologic permit is required if a property owner or a Geologic  
4 Report establishes that any proposed development, construction, or site clearing will occur  
5 outside a known geologic hazard area.

6 In their first assignment of error, petitioners argue that the city misconstrued  
7 applicable law by failing to require intervenor to obtain a Geologic Permit for the proposed  
8 log yard.<sup>2</sup> Petitioners also argue that the city erred in failing to adopt findings explaining  
9 why it concluded that NMC 14.21.030 does not apply to the application for approval of a  
10 TIA. In support of their argument, petitioners point to site plans submitted by intervenor with  
11 its TIA that show a “log roll out area” located in the northeast corner of the property that may  
12 overlap a small area located in the geologic hazards overlay.

13 The city’s decision states:

14 “Comments were also received requesting that geotechnical analysis be  
15 performed to determine if heavy truck traffic on the affected roads might  
16 impact residential properties on the nearby hillside. Such analysis is beyond  
17 the scope of what is required to be included in a TIA pursuant to [NMC  
18 14.45.050]. Further, statements that a geologic hazards permit is required cite  
19 to the Newport Subdivision Ordinance (NMC Chapter 13) which is  
20 inapplicable to the project since the property is not being subdivided or  
21 partitioned, or they refer to a recommendation in the TIA that vegetation be  
22 cleared at the access points to improve vehicle line of sight. The removal of  
23 understory vegetation is not regulated by the geologic hazards chapter of the

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<sup>2</sup> NMC 14.21.030 provides:

**Geologic Permit Required.** All persons proposing development, construction, or site clearing (including tree removal) within a geologic hazard area as defined in 14.21.010 shall obtain a Geologic Permit. The Geologic Permit may be applied for prior to or in conjunction with a building permit, grading permit, or any other permit required by the city.

“Unless otherwise provided by city ordinance or other provision of law, any Geologic Permit so issued shall be valid for the same period of time as a building permit issued under the Uniform Building Code then in effect.” (Emphasis in original.)

NMC 14.21.040 provides some exemptions from the NMC 14.21.030 requirement to obtain a Geologic Permit.

1 [NMC] (NMC Chapter 14.21). Tree removal can trigger the requirement for a  
2 permit; however, it is limited to trees over 8-inches dbh (diameter breast  
3 height, and then only if the amount of the canopy area of the trees that are to  
4 be removed is more than 25 percent of the lot area (NMC 14.21.040(G)). The  
5 amount of clearing recommended in the TIA does not meet this threshold;  
6 therefore, a geologic hazard permit is not required on that basis. Comments  
7 were made that a geologic hazards permit should be required because of the  
8 additional truck traffic on the roads. This is not a condition that would trigger  
9 a geologic permit under the City’s code. *Lastly, testimony was provided at the*  
10 *hearing that NMC 14.45.060 authorizes the City to require the applicant*  
11 *prepare a geologic hazards permit as a condition of approving the TIA. This*  
12 *code provision authorizes the City to impose conditions needed to ensure that*  
13 *criteria for approving a TIA are satisfied. It cannot be used to require an*  
14 *applicant [to] submit [] a geologic permit [application], where the provisions*  
15 *of the City’s code that are applicable to geologic hazards do not require that*  
16 *a permit be obtained.” Record 36-37 (Emphasis added).*

17 ORS 197.829(1) provides in relevant part that LUBA must affirm a local  
18 government’s interpretation of local law, unless the interpretation is inconsistent with the  
19 express language, purpose or underlying policy of that law. The Oregon Supreme Court has  
20 construed ORS 197.829(1) to require LUBA to affirm a local government code interpretation  
21 if the interpretation is “plausible.” *Siporen v. City of Medford*, 349 Or 247, 255, 243 P3d 776  
22 (2010). The city council adopted the planning commission’s findings and decision as its  
23 decision, and therefore adopted the planning commission’s interpretations of NMC  
24 14.21.030. *Derry v. Douglas County*, 132 Or App 386, 391, 888 P2d 588 (1995) (where the  
25 governing body’s decision adopts a lower body’s decision on appeal as its own, any  
26 interpretation of local legislation that the lower body rendered in its decision that was  
27 necessary to the decision is regarded as having obtained governing body approval).

28 In the above findings, the city concluded that NMC 14.21.030 does not apply to the  
29 city’s review of an application for approval of a TIA where no development is proposed  
30 concurrently with the TIA approval. That interpretation is consistent with the text of NMC  
31 14.21. Petitioners do not point to any language in NMC 14.45 that would trigger a  
32 requirement to assess geologic hazards from the traffic impacts addressed in the TIA, or that  
33 undermines the city’s interpretation that NMC 14.45 allows the city to apply the provisions of

1 NMC 14.21.030 only where a TIA application proposes development, construction, or site  
2 clearing. Petitioners do not take the position that the TIA proposed or that the city approved  
3 any “development, construction, or site clearing” in approving the TIA. The site plans  
4 included in the TIA do not propose site development, but appear to have been included for  
5 illustrative purposes. Accordingly, the city’s interpretation is plausible and we affirm it.

6 The first assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 NMC 14.45.030 provides in relevant part:

9 **“Study Area.** The following facilities shall be included in the study area for  
10 all TIAs:

11 “(A) All site-access points and intersections (signalized and unsignalized)  
12 adjacent to the proposed site. If the proposed site fronts an arterial or  
13 collector, the analysis shall address all intersections and driveways  
14 along the site frontage and within the access spacing distances  
15 extending out from the boundary of the site frontage.”<sup>3</sup>

16 In their second assignment of error, we understand petitioners to argue that the city’s decision  
17 that approves the TIA misconstrues NMC 14.45.030 and is not supported by substantial  
18 evidence in the record, because the TIA fails to address all intersections required to be  
19 addressed under NMC 14.45.030(A).<sup>4</sup> Specifically, petitioners argue that the TIA fails to  
20 address the intersection of Yaquina Bay Road and SE Running Springs Road, located about  
21 150 feet from the westernmost driveway of the proposed log yard. Petitioners point out that  
22 Yaquina Bay Road is a minor arterial roadway that fronts intervenor’s proposed log yard, and

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<sup>3</sup> NMC 14.45.050(B) requires that the TIA “demonstrate[] that adequate transportation facilities exist to serve the proposed development or identif[y] mitigation measures that resolve the traffic safety problems \* \* \*.” NMC 14.45.050(D) requires, in relevant part, that the TIA analyze the proposed development to assure that it does “not cause excessive queuing or delays at affected intersections, as determined in the [c]ity [e]ngineer’s sole discretion \* \* \*.”

<sup>4</sup> LUBA is authorized to reverse or remand a local government’s land use decision if the local government “[m]ade a decision not supported by substantial evidence in the whole record” or “[i]mproperly construed the applicable law[.]” ORS 197.835(9)(a)(C) and (D).

1 that SE Running Spring Road forms an unsignalized intersection with Yaquina Bay Road  
2 along the site frontage.

3 During the proceedings before the planning commission, petitioners submitted written  
4 comments and a technical traffic memorandum prepared by Greenlight Engineering  
5 (Greenlight) that concluded that the TIA failed to address the intersection of SE Running  
6 Spring Road and Yaquina Bay Road. Record 323-350, 465-70, 773-774. Intervenor’s traffic  
7 engineer, Kittleson, responded to those comments with a supplemental TIA, dated April 29,  
8 2013. The city found that the Kittleson supplemental TIA was sufficient to respond to the  
9 issue:

10 “Section 14.45.030 ‘Study Area’ identifies the types of facilities that must be  
11 included as part of the study for all \* \* \* TIA reports. This includes *all site*  
12 *access points and intersections (signalized and unsignalized) adjacent to the*  
13 *proposed log yard; roads through and adjacent to the site; all intersections*  
14 *needed for signal progression analysis, and any additional intersections or*  
15 *roadway links that the City Engineer believes may be adversely affected as a*  
16 *result of the proposed development.* The City Engineer identified  
17 intersections and roadways requiring analysis in a pre-application meeting.  
18 The TIA prepared by [Kittleson] included these facilities in the scope of their  
19 analysis.

20 “The April 18, 2013 letter from Greenlight \* \* \* notes that the TIA failed to  
21 analyze \* \* \* the intersection of Yaquina Bay Boulevard and Running Springs  
22 Road. Kittleson \* \* \* supplemented the TIA to address this issue in a letter,  
23 dated April 29, 2013. \* \* \*

24 “\* \* \* \* .” Record 35 (Emphases added).

25 “The April 29, 2013 letter from Kittleson \* \* \* notes that the TIA’s analysis of  
26 the larger intersections along the haul route establish that existing and  
27 projected volumes are sufficiently low to facilitate efficient turn movements  
28 into and out of the smaller road and driveway intersections along the same  
29 route with very little delay. \* \* \*” Record 38.

30 As relevant here, the April 29, 2013 Kittleson supplemental TIA addresses two issues. In  
31 addressing the issue that “[d]riveways along Moore Drive and SE Bay Boulevard were not  
32 considered,” the supplemental TIA responds:

1           “As shown in the January, 2013 TIA \* \* \* the existing traffic volumes along  
2 Yaquina Bay Road and SE Bay Boulevard are in the range of 100 to 300  
3 vehicles \* \* \* during each of the typical weekday a.m. and p.m. peak hours.  
4           \* \* \* The proposed development is forecast to add approximately 16 total  
5 vehicles during the a.m. peak hour and 10 total vehicles during the weekday  
6 p.m. peak hour. The existing and projected volumes are sufficiently low to  
7 facilitate efficient turning movements into and out of *driveways* along these  
8 streets, with very little delay. Moreover, the low volume of additional traffic  
9 contributed by the proposed project is not anticipated to have a measurable  
10 effect on *driveway* capacities along said roadways. \* \* \*” Supplemental  
11 Record 147 (Emphases added.)

12 Later, the supplemental TIA addresses the issue raised by Greenlight regarding the TIA’s  
13 failure to address required intersections:

14           “The study intersections and time periods were scoped with City staff.  
15 Ultimately, City’s interpretation of code is what determines study intersections  
16 and time periods, not a third party reviewer who has not been part of the  
17 public process from the beginning of the project.” Supplemental Record 147.

18           Intervenor responds that the city properly relied on the Kittleson supplemental TIA to  
19 determine that the TIA addressed all intersections required to be addressed under NMC  
20 14.45.030(A). Intervenor points to the conclusion in Kittleson’s supplemental TIA that  
21 additional traffic volumes would not negatively affect the large intersections along the haul  
22 route and argues that if the additional traffic volumes would not negatively affect large  
23 intersections, then smaller intersections with less traffic volumes along Yaquina Bay Road  
24 would not be negatively affected. Intervenor argues that that conclusion means that the TIA  
25 necessarily addresses the intersection at SE Running Spring Road.

26           There are a number of problems with the city’s findings and intervenor’s response.  
27 First, the portion of the Kittleson supplemental TIA quoted above that takes the position that  
28 it can be assumed from the low traffic volumes on SE Yaquina Bay Boulevard and other  
29 collectors and arterials that the additional traffic will not have a measureable effect on  
30 driveways does not mention street intersections with SE Yaquina Bay Boulevard, such as SE  
31 Running Spring Road intersection. It may be that Kittleson would take the same position  
32 regarding the SE Running Spring Road/SE Yaquina Bay Boulevard intersection, and that if



1 Kittleson took that position it might be sufficient to comply with the NMC 14.45.030(A)  
2 requirement that the TIA “address all intersections and driveways along the site frontage and  
3 within the access spacing distances extending out from the boundary of the site frontage.”  
4 But this part of the supplemental TIA addresses only *driveways*; it does not address the SE  
5 Running Spring Road/SE Yaquina Bay Boulevard *intersection* or any other intersection.

6 The portion of the supplemental TIA that addresses the TIA’s failure to include and  
7 address the SE Running Spring Road/SE Yaquina Bay Boulevard intersection appears to take  
8 the position that the intersections that must be included in a TIA’s study area and that must be  
9 addressed in the TIA are determined by city staff scoping. To the extent the supplemental  
10 TIA takes that position, we disagree.

11 The intersection that a TIA must “include[]” and the intersections that a TIA “shall  
12 address” is governed by NMC 14.45.030(A). Although NMC 14.45.030(D) gives the city  
13 engineer discretion in requiring the TIA to address “any *additional* intersections or roadway  
14 links” that the City Engineer believes “may be adversely affected as a result of the proposed  
15 development,” nothing in NMC 14.45.030 authorizes the City Engineer or other city staff to  
16 allow an applicant to exclude intersections that NMC 14.45.030(A) otherwise requires to be  
17 included and addressed in a TIA. The proposed log yard fronts Yaquina Bay Road, an  
18 arterial or collector street that meets SE Running Springs Road and, together, they form an  
19 intersection that is “along the site frontage and within the access spacing distance[] extending  
20 out from the boundary of [the proposed log yard’s] frontage.” NMC 14.45.030(A).  
21 Accordingly, the TIA was required to include and address that intersection. The city’s  
22 finding that the supplemental TIA addresses the SE Running Spring Road/SE Yaquina Bay  
23 Boulevard intersection is not supported by substantial evidence in the record. The city’s  
24 finding that the SE Running Spring Road/SE Yaquina Bay Boulevard intersection need not  
25 be considered, simply because it was not included under city staff scoping, is inconsistent  
26 with the text of NMC 14.45.030(A).

1           The second assignment of error is sustained.

2           **THIRD ASSIGNMENT OF ERROR**

3           NMC 14.45.020(F) provides that “[t]he TIA shall address the condition of the  
4 impacted roadways and identify structural deficiencies or reduction in the useful life of  
5 existing facilities related to the proposed development.” The city found that the TIA satisfies  
6 NMC 14.45.020(F) based on a pavement analysis conducted by intervenor’s engineer,  
7 Stuntzner, that addressed the condition of impacted roadways. Stuntzner evaluated several  
8 core samples taken from the impacted roadways and determined that the roadways lack  
9 structural deficiencies and are adequate for truck traffic. Supplemental Record 145.

10           In their third assignment of error, we understand petitioners to argue that the city’s  
11 decision that the TIA satisfies NMC 14.45.020(F) misconstrues NMC 14.45.020(F) and that  
12 it is not supported by substantial evidence in the record, because Stuntzner’s pavement  
13 analysis fails to address the “reduction in the useful life of existing facilities related to the  
14 proposed development” that petitioners argue is required by NMC 14.45.020(F). Intervenor  
15 responds that the NMC 14.45.020(F) requirement is disjunctive and therefore, the TIA was  
16 required to either (1) identify structural deficiencies in the roadways, or (2) address the  
17 reduction in the useful life of the roadways from the impacts of the proposed log yard.  
18 Intervenor points out that the pavement analysis included with the TIA identified no  
19 structural deficiencies in the affected roadways.

20           At oral argument, petitioners agreed that NMC 14.45.020(F) is disjunctive and that  
21 the TIA was not required to address both inquiries. Petitioners do not dispute that the  
22 Stuntzner analysis concluded that there are no structural deficiencies in the roadways, or  
23 challenge that conclusion. Given the agreement on that point, petitioners’ arguments under  
24 this assignment of error do not provide a basis for reversal or remand.

25           The third assignment of error is denied.

26           The city’s decision is remanded.