

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

3
4 FRANK H. READING,
5 *Petitioner,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent,*

11 and

12
13 CALLAHAN RIDGE, LLC,
14 *Intervenor-Respondent.*

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16
17 LUBA No. 2014-081

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Douglas County.

23
24 Frank H. Reading, Roseburg, filed the petition for review and argued on
25 his own behalf.

26
27 No appearance by Douglas County.

28
29 Stephen Mountainspring, Roseburg, filed the response brief and argued
30 on behalf of intervenor-respondent. With him on the brief was Dole, Coalwell,
31 Clark, Mountainspring & Mornarich PC.

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

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36 AFFIRMED 12/24/2014

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

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NATURE OF THE DECISION

Petitioner appeals a county decision approving a comprehensive plan map amendment, zone change, and conditional use permit for an RV Park on 21.83 acres, and a conditional use permit for a golf course on 137.57 adjacent acres.

MOTION TO INTERVENE

Callahan Ridge, LLC (intervenor), the applicant below, moves to intervene on the side of the respondent. The motion is granted.

FACTS

The subject property is a 159.4-acre property bordered by the South Umpqua River on its north and northeast boundaries and by farmland and a residential subdivision on its south and west boundaries. To the east of the subject property is additional property that is used as a gravel mine. Access to the property is over Shady Drive. Shady Drive is comprised of a public segment running from its intersection with Melrose Road approximately 1,300 feet to a private segment that runs approximately 300 feet to the north. Petitioner owns property located to the east of the subject property, east of Shady Drive.

The property has been an ongoing aggregate operation for fifty years. Intervenor submitted an application for a comprehensive plan map amendment to change the map designation on 21.83 acres of the subject property where the gravel has been removed from Agricultural to Commercial, and to change the zoning map designation from Exclusive Farm Use (FC) to Rural Commercial. Intervenor also applied for a conditional use permit to develop a 163-space recreational vehicle park in three phases on the 21.83-acre property and a

1 conditional use permit for a golf course on the remaining 137 acres zoned FC.
2 The existing gravel operation will continue on property adjacent to the subject
3 property.

4 The planning commission approved the applications, and the board of
5 county commissioners adopted the planning commission's findings of fact and
6 decision approving the applications. This appeal followed.

7 **MOTION TO STRIKE**

8 Petitioner included Exhibits E, F, G, and H as appendices to his petition
9 for review. The exhibits are not included in the record and petitioner relies on
10 the exhibits to support some of his arguments in the petition. Intervenor moves
11 to strike Exhibits E, F, G, and H from the petition for review and certain
12 portions of the petition for review that cite these exhibits. At oral argument,
13 petitioner responded that the exhibits are used to illustrate his arguments in the
14 petition for review that are based on issues that were raised in his testimony
15 before the county.

16 LUBA's review is limited to the record filed by the local government.
17 ORS 197.835(2). The exhibits are not included in the record, and based on
18 petitioner's response, they appear to be offered for their evidentiary value.
19 Intervenor's motion to strike the exhibits is granted.

20 With regard to striking the portions of the petition for review that
21 intervenor contends relies on those exhibits, LUBA disregards any allegations
22 of material fact that are not supported by the record. However, a lack of
23 evidentiary support for arguments and factual allegations in a petition for
24 review is not a basis for striking those portions of the brief. *Hammack &*
25 *Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff'd* 89 Or App
26 40, 747 P2d 373 (1987).

1 **FIRST ASSIGNMENT OF ERROR**

2 In his first assignment of error, we understand petitioner to argue that the
3 county’s conclusion that the applications comply with the Transportation
4 Planning Rule (TPR) is not supported by substantial evidence in the record.¹
5 ORS 197.835(9)(a)(C). That is so, we understand petitioner to argue, because
6 intervenor’s transportation impact analysis (TIA) that the county relies on is
7 deficient in measuring the traffic impacts from the applications in several ways.

8 At the outset, we note that intervenor generally responds to petitioner’s
9 first assignment of error by arguing that the assignment of error fails to cite the
10 TPR or any of its operative language, and fails to develop an argument that
11 demonstrates how any deficiencies in the TIA call into question the county’s
12 conclusion that the applications satisfy the TPR, *i.e.*, that the plan amendment
13 and zone change will not “significantly affect” an existing or planned
14 transportation facility. As we explained in *Savage v. City of Astoria*, 68 Or
15 LUBA 225, 227 (2013):

16 “OAR 660-012-0060(1) requires certain specified mitigation
17 measures if a land use regulation amendment ‘would significantly
18 affect an existing or planned transportation facility.’ Determining
19 whether a land use regulation amendment would significantly
20 affect a transportation facility requires a rather complicated
21 inquiry under OAR 660-012-0060(1).”

22 We agree with intervenor that an overarching deficiency in petitioner’s first
23 assignment of error is its failure to tie its arguments to any of the operative

¹ OAR 660-012-0060, part of the Transportation Planning Rule (TPR), provides in relevant part that if a plan amendment or zone change would “significantly affect” an existing or planned transportation facility, the local government must put in place measures to mitigate the impacts.

1 provisions of the TPR. However, we address the arguments in petitioner’s first
2 assignment of error to the extent we understand them.

3 Petitioner first argues that the TIA fails to measure projected traffic from
4 the golf course that is proposed to be developed as a conditional use on the
5 137-acre FC-zoned portion of the subject property. Intervenor responds, and
6 we agree, that the analysis under the TPR seeks to measure the traffic impacts
7 that could result from development that is allowed by a comprehensive plan
8 amendment or zone change, not the impacts of conditional uses allowed under
9 the current FC zoning. Because the golf course is a conditional use under the
10 current FC zoning, the TPR does not require the traffic impacts from the
11 proposed golf course to be included in the analysis of whether the plan
12 amendment significantly affects a transportation facility within the meaning of
13 OAR 660-012-0060(1).

14 Petitioner next argues that the TIA’s traffic estimates are inaccurate
15 because the TIA fails to accurately measure traffic counts based on the number
16 of axles present on haul trucks that will continue to use the affected
17 transportation facilities. Intervenor first responds that petitioner failed to raise
18 any issue challenging the TIA’s traffic measurements, based on the number of
19 axles present on each vehicle using the transportation facilities prior to the
20 close of the initial evidentiary hearing, and therefore petitioner may not raise
21 the issue for the first time at LUBA. ORS 197.763(1) and ORS 197.835(3). At
22 oral argument, petitioner generally responded that he raised issues regarding
23 traffic multiple times during the proceedings below. That response is not
24 sufficient to demonstrate that the issue was raised with the particularity that is
25 required. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078
26 (1991) (the purpose of ORS 197.763 is to ensure that the local government is

1 put on notice of a particular issue during local proceedings, so it can respond to
2 the issue). Accordingly, we agree with intervenor that the issue raised in the
3 first assignment of error that challenges the TIA's measurement of traffic as
4 inaccurate for failing to measure traffic by projecting the number of axles
5 present on each vehicle using the facilities is waived.

6 However, even if the issue was not waived, we agree with intervenor's
7 alternative response that petitioner has not established that the TIA inaccurately
8 counted the axles of vehicles using the affected transportation facility, or
9 established that a different way of counting axles is necessary in order to
10 conduct traffic counts or the TPR significant affects analysis.

11 Third, petitioner argues that additional traffic counts that measured
12 existing traffic fifty feet north of the intersection of Shady Lane and Melrose
13 Road in March are an inaccurate measurement of existing traffic because
14 March is a low-volume traffic period for the adjacent gravel operation.
15 However, the record demonstrates that traffic at the affected intersections was
16 initially measured in October, which petitioner concedes is a high volume
17 traffic month for the gravel operation, and that the March traffic counts were
18 additional measurements taken based on concerns raised during the
19 proceedings below. Record 818, 896. Petitioner does not explain why
20 additional traffic counts taken during a low-volume time of year result in
21 reversible error, or any error.

22 Fourth, petitioner argues that the TIA is inaccurate because it failed to
23 measure the circulation and queuing impact of large trucks and RVs at affected
24 intersections. Intervenor responds initially that the issue was not raised with
25 specificity during the proceedings below and that therefore the issue is waived.
26 ORS 197.763(3); ORS 197.835(3). At oral argument, petitioner simply

1 responded that he raised issues regarding traffic multiple times during the
2 proceedings below, without indicating where he raised the issues. Based on
3 that inadequate response, we agree with intervenor that the issue is waived.
4 *Williamson v. City of Salem*, 52 Or LUBA 615 (2006) (LUBA will not search
5 the record to determine if an issue was raised). However, even if the issue is
6 not waived, we agree with intervenor that petitioner has not established that the
7 TIA erred in the manner in which it conducted the traffic counts or that a
8 different approach is necessary in order to conduct traffic counts for purposes
9 of the TPR's significant affects analysis.

10 Finally, the county's Land Use and Development Ordinance (LUDO)
11 does not contain specific road standards for private roads such as the private
12 portion of Shady Drive that is adjacent to petitioner's property. The county
13 concluded that, based on the projected number of users of Shady Drive to
14 access the RV park, the most appropriate standards are the LUDO road
15 standards for streets within mobile home park developments, which require a
16 twenty foot paved width. Petitioner argues that the county erred in allowing a
17 paved road surface width of 20 feet for the private section of Shady Drive
18 rather than a 24-foot width. In support of his argument, petitioner relies on
19 AASHTO Geometric Design of Highways and Streets Section 4.3.

20 Intervenor responds that the AASHTO design guidelines are inapplicable
21 to the applications and that the board of county commissioners plausibly
22 interpreted the LUDO standards for mobile home park developments to apply
23 those standards to the private portion of Shady Drive. We agree with
24 intervenor.

25 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 The subject property is located within the 100-year floodplain of the
3 South Umpqua River and is within the county’s Floodplain Overlay Zone.
4 Structural development is planned for areas of the subject property that are
5 located above the existing base flood elevation but within the floodplain
6 depicted on the Flood Insurance Rate Map adopted in 1978. Record 24. The
7 county imposed a condition of approval that requires intervenor to obtain a
8 revision to the Flood Insurance Rate Map (a Letter of Map Amendment or
9 LOMA) that will modify the floodplain boundaries and change the base flood
10 elevation, based on the changed topography of the property since the county’s
11 original floodplain maps were adopted in 1978.

12 In his second assignment of error, petitioner challenges the county’s
13 finding that the applications satisfy Statewide Planning Goal 7 (Natural
14 Disasters and Hazards) and LUDO 3.30.000.² First, petitioner argues that the

² LUDO 3.30.000 provides in relevant part that “[i]t is the purpose of this article to promote the public health, safety and general welfare, and to minimize public and private losses due to flood conditions in specific areas. The provisions of this article are designed to:

“1. Protect human life and health;

“ * * * * *

“8. Ensure that those who occupy the areas of special flood hazard assume responsibility for their actions.”

LUDO 3.30.230, also cited by petitioner, provides:

“No structure shall hereafter be constructed, located, extended, converted or altered nor shall any land be developed, subdivided or partitioned without full compliance with the terms of this article and other applicable regulations.”

1 county erred in relying on information that petitioner argues was not prepared
2 by a “licensed professional.” In support of his argument, petitioner cites Goal
3 7, Guideline B, Implementation Paragraph 4, which provides:

4 “When reviewing development requests in high hazard areas, local
5 governments should require site-specific reports, appropriate for
6 the level and type of hazard (e.g., hydrologic reports, geotechnical
7 reports or other scientific or engineering reports) prepared by a
8 licensed professional. Such reports should evaluate the risk to the
9 site as well as the risk the proposed development may pose to
10 other properties.”

11 Petitioner argues that intervenor’s flood hazard information was not prepared
12 by a “licensed professional” within the meaning of the above-quoted section of
13 Goal 7, and that intervenor’s analysis of flood hazards fails to analyze the
14 hazards that the development could pose to other properties as required by that
15 Goal 7 provision. Petitioner also argues that the applications fail to satisfy
16 LUDO 3.30.230 because the county erred in relying on “non-professional
17 reporting[.]” Petition for Review 18.

18 Intervenor responds that the cited provision of Goal 7 is not an
19 applicable approval criterion that intervenor is required to demonstrate
20 compliance with. In the alternative, intervenor responds that the record
21 demonstrates that intervenor’s registered engineer prepared an analysis of
22 floodplain hazards and that a registered engineer qualifies as a “licensed
23 professional” within the meaning of Goal 7. Record 896.

24 We agree with intervenor that the cited provision of Goal 7 is not a
25 mandatory standard that must be applied. Goal guidelines are advisory and do
26 not constitute mandatory standards that must be applied in making land use

1 decisions subject to the goals. *Downtown Comm. Assoc. v. City of Portland*, 80
2 Or App 336, 722 P2d 1258 (1986); ORS 197.015(9). Accordingly, petitioner’s
3 arguments that challenge intervenor’s registered engineer’s credentials as
4 failing to support the county’s conclusion that Goal 7 and LUDO 3.30.000 and
5 3.30.230 are satisfied provide no basis for reversal or remand of the decision.

6 The second assignment of error is denied.

7 **THIRD ASSIGNMENT OF ERROR**

8 As described above, access to the subject property is via Shady Drive.
9 Shady Drive is a public road from its intersection with Melrose Road for
10 approximately 1,300 feet, where it becomes a private road for approximately
11 300 feet until it reaches the subject property and a parcel that is owned by
12 intervenor and used for gravel operations. That parcel is not part of the
13 proposed development but will remain part of the active gravel operation.

14 The easternmost portion of the private portion of Shady Drive is located
15 on a 10 foot wide easement that encumbers petitioner’s property for the benefit
16 of intervenor’s parcel that is used for gravel operations. The remainder of
17 Shady Drive is located to the west of petitioner’s property on a 20 foot wide
18 strip on the Guido property (Guido Strip). The decision includes the following
19 description of Shady Drive:

20 “Shady Drive becomes a private road north of the public section
21 that serves the Willow Ranch and Jay-Zee Acres subdivision. The
22 subject property is connected at the north terminus of the public
23 local road by the stem of a 20-foot wide flag shaped parcel. An
24 additional 10-foot easement to the east over neighboring property
25 provides a 30-foot right of way for vehicular traffic continuing
26 north from Shady Drive. In addition, the applicant acquired a 15’
27 easement to the west of the 20 foot strip during this proceeding.
28 The 10-foot easement, 20-foot strip, and 15-foot easement
29 continue north along Shady Drive for 300 feet * * * before the

1 property * * * opens allowing for the owner to fully maintain the
2 road without the necessity of an easement.” Record 32.

3 The county imposed a condition of approval that requires intervenor to provide
4 “a recorded easement providing vehicular access to the subject property for the
5 private portion of Shady Drive with a right of way width no less than 30 feet in
6 width to the boundary line of the subject property.” Record 44.

7 During the proceedings below, intervenor took the position that the
8 subject property can use the 10-foot wide easement that encumbers petitioner’s
9 property by virtue of common ownership of the subject property and the
10 dominant estate that benefits from the easement that encumbers petitioner’s
11 property, and in the alternative that intervenor possesses a prescriptive
12 easement over the easement. However, during the proceedings below,
13 intervenor also secured a 15-foot wide easement located to the west of the
14 Guido Strip for the benefit of the proposed development (Towner Easement).
15 So when the dust settled on the access to intervenor’s proposed development,
16 intervenor possessed undisputed rights to a 15-foot wide easement (Towner
17 Easement) and a 20-foot wide strip (Guido Strip). The roadway transition
18 from the public portion to the private portion of Shady Drive will require a
19 slight jog to the west if the Guido Strip and the Towner Easement comprise the
20 access to intervenor’s proposed development.

21 We understand petitioner to argue in his third assignment of error that
22 the county erred when it conditioned its approval on intervenor providing a
23 recorded easement no less than 30-feet wide with a 20-foot paved surface that
24 could potentially involve the easement over petitioner’s property and that the
25 county should have rejected intervenor’s position that intervenor possesses
26 rights to use the easement that encumbers petitioner’s property for access to the

1 proposed development. Petition for Review 22. We understand petitioner to
2 argue that if the county’s decision requires intervenor to obtain an easement,
3 the decision results in a taking of petitioner’s property.

4 Intervenor responds that the county’s decision has not taken any action
5 to affect petitioner’s interest in his property, and that the condition of approval
6 does not require use of petitioner’s property. Instead, the condition only
7 requires intervenor to obtain an easement that provides the 30 foot width that is
8 required by Condition 5. According to intervenor, that condition can be
9 satisfied in at least one of two ways, neither of which would involve a taking of
10 petitioner’s property. We agree with intervenor that petitioner has failed to
11 establish any error with respect to the disputed condition. The county’s
12 decision does not require intervenor to obtain an easement over petitioner’s
13 property. Petitioner does not challenge the sufficiency of the Towner Easement
14 and the Guido Strip to provide 35 feet of width to ensure the access that is
15 required by Condition 5. Even if for some reason an easement from petitioner
16 becomes necessary, either that easement will be obtained or it will not. If not,
17 then the condition is not satisfied and no construction occurs. In neither case
18 has petitioner established that a “taking” of petitioner’s property would occur.
19 Accordingly, we agree with intervenor that petitioner’s arguments in the third
20 assignment of error provide no basis to reverse or remand the decision.

21 The third assignment of error is denied.

22 The county’s decision is affirmed.