

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

3
4 ANNETTE TALBOTT and JAMES JORDAN,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF HAPPY VALLEY,
10 *Respondent,*

11 and

12
13
14 SCOUTERS MOUNTAIN, LLC,
15 and CASCADE PACIFIC COUNCIL,
16 BOY SCOUTS OF AMERICA,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2016-028

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from City of Happy Valley.

25
26 Sean T. Malone, Eugene, filed the petition for review and argued on
27 behalf of petitioners.

28
29 No appearance by City of Happy Valley.

30
31 Michael C. Robinson, Portland, filed a response brief and argued on
32 behalf of intervenor-respondent Scouters Mountain, LLC. With him on the
33 brief were Seth J. King and Perkins Coie LLP.

34
35 Phillip E. Grillo, Portland, filed a response brief on behalf of intervenor-
36 respondent Cascade Pacific Council, Boy Scouts of America. With him on the
37 brief was Davis Wright Tremaine LLP.
38

1 RYAN, Board Member; BASSHAM, Board Member, participated in the
2 decision.

3

4 HOLSTUN, Board Chair, did not participate in the decision.

5

6 AFFIRMED 08/09/2016

7

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

NATURE OF THE DECISION

Petitioners appeal a decision by the city council approving (1) a planned unit development application, (2) environmental review permits, and (3) an amendment to the city’s transportation system plan (TSP) to change the functional classification of a city road and add new streets to the TSP.

FACTS

Intervenor-respondent Scouters Mountain, LLC (intervenor) applied for approval of a 600-lot residential planned development on a 223-acre site that is zoned R10, R15, and R20. The property also includes a Steep Slopes Development Overlay and a Natural Resources Overlay, and development in those overlays requires two environmental review permits. The property is the former site of the Scouters Mountain Boy Scout Camp and is generally located to the east of S.E. 145th Avenue (at its intersection with S.E. 147th Avenue), to the south of a residential subdivision, the Pioneer Highlands Subdivision, to the west of property owned by Metro, and to the north of another residential subdivision, the Green Hills Subdivision. The property is developed with five single family residences and includes moderate to steep slopes, forested acreage, grassy areas, riparian corridors, and wetlands.

Intervenor proposed to develop 595 single family residential detached lots ranging in size from approximately 3,300 square feet to 16,000 square feet, in six phases, and to retain approximately 90 acres of the property as open

1 space that will include a trail network, community park, and natural resource
2 areas. Intervenor proposed, and the city imposed as a condition of approval,
3 adding a new traffic signal at the intersection of S.E. 145th Avenue and a new
4 collector road, S.E. Scouters Mountain Road, that replaces the current private
5 driveway that provides access to the property.

6 S.E. Vradenburg Road is located to the north of the property, through the
7 Pioneer Highlands Subdivision, and bisects the subject property's northern
8 portion from north to south. Due to the substandard width and quality of S.E.
9 Vradenburg Road and concerns about limiting traffic through the subdivision
10 to the north, the city imposed a condition of approval that requires S.E.
11 Vradenburg Road to be gated north of Compass Course Street, south of the
12 northern property boundary, to allow only pedestrian and bicycle and
13 emergency vehicle access. Supplemental Record 141.

14 In connection with the proposed development, intervenor also sought an
15 amendment to the city's transportation system plan (TSP) to (1) change the
16 functional classification of S.E. Vradenburg Road from a collector facility to a
17 local facility, and (2) to add two new neighborhood facilities, Reverent Road
18 and Webelos Way, to the city's TSP.

19 The city council approved the application, and this appeal followed.

20 **FIRST ASSIGNMENT OF ERROR**

21 In its final argument to the city council, intervenor argued that the PUD
22 application is an application for "needed housing" as that term is defined in

1 ORS 197.303(1).¹ Accordingly, intervenor argued, the city is prohibited from
2 applying any criteria other than “clear and objective standards, conditions and
3 procedures regulating the development of needed housing[.]” ORS
4 197.307(4).² Supplemental Record 289-94, 300. The city council’s decision
5 includes a finding that:

¹ ORS 197.303(1) provides:

“As used in ORS 197.307, ‘needed housing’ means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least the following housing types:

- “(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
- “(b) Government assisted housing;
- “(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;
- “(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
- “(e) Housing for farmworkers.”

² ORS 197.307(4) provides:

“Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

1 “[T]he City Council may apply only clear and objective standards,
2 not subjective standards, to the PUD application. Many of the Plan
3 policies discussed below and in the staff report are not clear and
4 objective and may not be applied to the PUD Application.”
5 Supplemental Record 6.

6 In their first assignment of error, we first understand petitioners to argue
7 that the city committed a procedural error that prejudiced their substantial
8 rights when the city’s notice of hearing or staff reports failed to list ORS
9 197.303 *et seq.* as applicable criteria. Petition for Review 18-19. We
10 understand petitioners to argue that the city’s failure to list ORS 197.303 *et seq.*
11 as applicable criteria prejudiced their rights to submit evidence and testimony
12 related to “needed housing.”

13 Second, we understand petitioners to argue that the city’s acceptance of
14 intervenor’s final argument, which included the above-described “needed
15 housing” argument, was a procedural error that prejudiced their substantial
16 rights because that final argument raised a new issue to which petitioners were
17 entitled to respond. Petition for Review 21-22. Third, we understand petitioners
18 to argue that the city erred in concluding that it “may only apply clear and
19 objective standards, not subjective standards, to the PUD application” because
20 according to petitioners the PUD application is not an application for “needed
21 housing” as defined in ORS 197.303(1).

22 Intervenor first responds that ORS 197.763(3)(b) does not require the
23 city to list all potentially applicable state statutes in its notice of hearing and
24 therefore any failure to list the needed housing statutes is not a procedural

1 error. We agree. ORS 197.763(3)(b) (notice of hearing must list “the applicable
2 criteria from the ordinance and the plan that apply to the application at
3 issue[.]”) Accordingly, any failure of the city’s notices to list ORS 197.303(1)
4 would not provide a basis for reversal or remand of the decision.

5 Intervenor next responds that the city council properly accepted
6 intervenor’s final argument, that its argument related to the needed housing
7 statutes is not “evidence” as defined in ORS 197.763(9)(a), and that petitioners
8 point to nothing in state statutes or the local ordinance that entitled petitioners
9 to respond to that argument. We agree.³

10 Finally, and most importantly, intervenor responds that the city council
11 applied all approval criteria identified in the notices of hearing to the PUD
12 application, and concluded that all approval criteria were met, and accordingly
13 petitioners’ arguments provide no basis for reversal or remand. Stated
14 differently, intervenor argues that even if the above-quoted city council finding
15 is incorrect, that error is harmless where the city did not fail to apply any
16 criteria to the PUD application.

17 We agree with intervenor. At most, the two-sentence finding that
18 petitioners challenge appears to respond to an argument that intervenor raised
19 below. Petitioners do not point to any approval criterion that the city did not

³ ORS 197.763(9)(a) defines “[e]vidence” to mean “facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision.”

1 apply because the city determined it was not “clear and objective.” Rather, the
2 decision makes clear that the city applied all of the approval criteria that apply
3 to a PUD application to intervenor’s application and found that all criteria were
4 satisfied. Accordingly, petitioners have not demonstrated that any error the
5 city council might have made in agreeing with intervenor’s needed housing
6 argument is a basis for reversal or remand.

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 As explained above, the city’s decision approved three applications: (1)
10 an application for a comprehensive plan amendment to amend the city’s TSP to
11 change the functional classification of S.E. Vradenburg Road to a local street
12 (TSP Amendment); (2) an application for PUD approval; and (3) an application
13 for environmental review permits.⁴ The criteria at Happy Valley Land
14 Development Code (LDC) 16.67 as well as the statewide planning goals apply
15 to the TSP Amendment. ORS 197.175(2)(a) (city is required to “[p]repare,
16 adopt, amend and revise comprehensive plans in compliance with goals
17 approved by the [LCDC]”). For the PUD application, the criteria at LDC
18 Chapter 16.63 - Land Divisions and Property Line Adjustments, apply.

19 **A. First Subassignment of Error**

20 LDC 16.67.060 – Transportation Planning Rule Compliance, provides:

⁴ Petitioners do not challenge the two environmental review permits.

1 “Review of Applications for Effect on Transportation Facilities.
2 When a development application includes a proposed
3 Comprehensive Plan amendment or land use district change, the
4 proposal shall be reviewed to determine whether it significantly
5 affects a transportation facility, in accordance with Oregon
6 Administrative Rule (OAR) 660-012-0060 (the Transportation
7 Planning Rule – TPR) and the traffic impact study provisions of
8 Section 16.61.090. ‘Significant’ means the proposal would:

9 “1. Change the functional classification of an existing or
10 planned transportation facility (exclusive of correction of
11 map errors). This would occur, for example, when a
12 proposal causes future traffic to exceed the levels associated
13 with a ‘collector’ street classification, requiring a change in
14 the classification to an ‘arterial’ street, as identified by the
15 City’s Transportation System Plan (‘TSP’); or

16 “2. Change the standards implementing a functional
17 classification system; or

18 “3. As measured at the end of the planning period identified in
19 the TSP, allow types or levels of land use that would result
20 in levels of travel or access that are inconsistent with the
21 functional classification of an existing or planned
22 transportation facility; or

23 “4. Reduce the performance of an existing or planned
24 transportation facility below the minimum acceptable
25 performance standard identified in the TSP; or

26 “5. Worsen the performance of an existing or planned
27 transportation facility that is otherwise projected to perform
28 below the minimum acceptable performance standard
29 identified in the TSP.”

30 As stated in the provision, LDC 16.67.060 implements the Transportation
31 Planning Rule at OAR 660-012-0060. OAR 660-012-0060 applies to “an

1 amendment to a functional plan, an acknowledged comprehensive plan, or a
2 land use regulation (including a zoning map)[.]”

3 During the proceedings below, petitioners argued that because the PUD
4 application was submitted with the TSP Amendment application, the provisions
5 at LDC 16.67.060 and the TPR require analysis of the impacts of traffic
6 generated by the PUD to determine whether development of the PUD
7 “significantly affects a transportation facility.” In their first subassignment of
8 error, petitioners repeat their contentions.

9 The city council found that the TSP Amendment itself — the change to
10 the functional classification of Vradenburg Road — did not significantly affect
11 a transportation facility under LDC 16.67.060 or the TPR, and petitioners do
12 not challenge that finding. With respect to the PUD application, the city
13 council interpreted the express language of LDC 16.67.060 as not requiring
14 review of traffic effects from the PUD in order to determine whether it
15 “significantly affects” a transportation facility:

16 “* * * Ms. Talbott asserts that the TPR is applicable to the
17 Application. She cites LDC 16.67.060.A to support her argument.
18 The City Council interprets the provision, which provides that
19 ‘when a development application includes proposed Plan
20 amendment or land use district change, the proposal should be
21 reviewed to determine whether it significantly affects a
22 transportation facility’ to be applicable only to the TSP and [East
23 Happy Valley Community Plan (EHVCP)] amendment concerning
24 Vradenburg Road. The only Plan amendment proposed in the
25 Application is the TSP and EHVCP amendment. No other
26 amendments to the City’s acknowledged land use regulations or
27 Plan are proposed. The word ‘proposal’ means, in this
28 Application, the TSP and EHVCP amendments.

1 “Further LDC 16.67.0[60]A implements the TPR. The LDC
2 provision must be read in the context of OAR 660-012-0060. OAR
3 660-012-0060(1) describes when the Transportation Planning Rule
4 is applied to an application. It states in relevant part:

5 “If an amendment to a functional plan, an acknowledged
6 comprehensive plan or land use regulation (including
7 zoning map) * * *

8 “The only Plan amendment proposed in the Application are the
9 amendments to the TSP and the EHVCP. Therefore, consistent
10 with OAR 660-012-0060(1), the Transportation Planning Rule
11 applies only to the TSP and EHVCP amendments. *See Oregon*
12 *Shores Cons. Coalition City of Brookings*, 49 Or LUBA 273
13 (2005) (Transportation Planning Rule does not apply to
14 development approval where it was approved concurrently with
15 comprehensive plan amendment). There is no basis under the LDC
16 for applying the Transportation Planning Rule to permit
17 Application; in fact doing so would be inconsistent with ORS
18 197.175(2)(d) and ORS 197.195(1).

19 “The City Council finds based on substantial evidence in the
20 whole record, that the change of the classification of Vradenburg
21 Road will not cause significant impact to affected transportation
22 facilities under OAR 660-012-0060(1). Therefore mitigation is
23 [not] required under OAR 660-012-0060(2).” Supplemental
24 Record 18.

25 The city council interpreted the phrase “the proposal” as meaning the proposed
26 TSP Amendment.

27 Intervenor responds that the city council correctly interpreted LDC
28 16.67.060 as not applying to the PUD application, and that the city council’s
29 interpretation should be affirmed under ORS 197.829(1) as interpreted in
30 *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010). We agree
31 with intervenor. The city council’s interpretation of LDC 16.67.060 is

1 consistent with the text of LDC 16.67.060 and the context provided by the
2 provision’s express purpose to implement the TPR, which applies only to
3 amendments to a comprehensive plan or land use regulation. Petitioners have
4 not demonstrated the city council misinterpreted LDC 16.67.060.

5 The city council also concluded that the TPR does not apply to the PUD
6 application. Supplemental Record 24. The city council’s interpretation of state
7 law is owed no particular deference on appeal. *Kenagy v. Benton County*, 115
8 Or App 131, 838 P2d 1076 (1992). However, even without deference, we
9 agree with the city’s conclusion that the TPR does not apply to the PUD
10 application. By its express language, the TPR applies to “an amendment to a
11 functional plan, an acknowledged comprehensive plan, or a land use regulation
12 (including a zoning map)[.]” The PUD application does none of these.

13 **B. Second Subassignment of Error**

14 As noted, LDC 16.61.090 requires the applicant for a PUD to submit a
15 Traffic Impact Study (TIS) that assesses the effect of projected traffic from the
16 PUD on affected transportation facilities.⁵ However, LDC 16.61.090 does not

⁵ LDC 16.61.090 provides in relevant part:

“The purpose of this section of the code is to assist in determining which road authorities participate in land use decisions, and to implement Section 660-012-0045(2)(e) of the State Transportation Planning Rule that requires the City to adopt a process to apply conditions to development proposals in order to minimize impacts and protect transportation facilities. *This chapter establishes the standards for* when a proposal must be reviewed for potential

traffic impacts; *when a traffic impact study must be submitted with a development application in order to determine whether conditions are needed to minimize impacts to and protect transportation facilities*; what must be in a traffic impact study; and who is qualified to prepare the study.

“A. When a Traffic Impact Study is Required. The City or other road authority with jurisdiction may require a traffic impact study (TIS) as part of an application for development, a change in use, or a change in access. A TIS shall be required when a land use application involves one or more of the following actions:

- “1. A change in zoning or a plan amendment designation;
- “2. Any proposed development or land use action that a road authority states may have operational or safety concerns along its facility(ies);
- “3. An increase in site traffic volume generation. Increase in site traffic volume generation shall be subject to the City’s transportation impact study guidelines;
- “4. An increase in peak hour volume of a particular movement to and from the State highway by twenty (20) percent or more;
- “5. An increase in use of adjacent streets by vehicles exceeding the twenty thousand (20,000) pound gross vehicle weights by ten (10) vehicles or more per day;
- “6. The location of the access driveway does not meet minimum sight distance requirements, or is located where vehicles entering or leaving the property are restricted, or such vehicles queue or hesitate on the State highway, creating a safety hazard; and,

1 really contain substantive criteria against which traffic from a proposed
2 development is reviewed. Rather, the provision allows the city to require a TIS
3 and use that TIS to “determine whether conditions are needed to minimize
4 impacts to and protect transportation facilities[.]”

5 In projecting traffic from the proposed PUD under LDC 16.61.090, the
6 TIS submitted by intervenor assumed an annual growth rate of 2 percent in
7 background traffic in the affected area. In the second subsassignment of error,
8 petitioners argue that the TIS should have assumed a background traffic growth
9 rate of 4.5 percent rather than the 2 percent rate that it assumed. That is so,
10 petitioners argue, because the city’s TSP assumes an annualized growth rate of
11 4.5 percent throughout the city between the years 2000 and 2025. Petitioners
12 argue that using a lower growth rate calls into question whether traffic from the
13 PUD will have a significant effect on transportation facilities within the
14 meaning of OAR 660-012-0060(1). Petition for Review 39.

“7. A change in internal traffic patterns that may cause safety problems, such as back up onto a street or greater potential for traffic accidents.

“B. Traffic Impact Study Preparation. A traffic impact study shall be prepared by a professional engineer in accordance with the requirements of the road authority. If the road authority is the Oregon Department of Transportation (ODOT), consult ODOT’s regional development review planner and OAR 734-051-180.” (Emphasis added.)

1 Petitioners’ argument appears to be dependent on petitioners’ first
2 subassignment of error that argues that traffic impacts from the proposed PUD
3 are subject to review under LDC 16.67.060 and/or the TPR for significant
4 effects, an argument that we reject above. Even if petitioners’ argument is not
5 dependent on its LDC 16.67.060/TPR argument, petitioners have failed to
6 establish that the TIS’ assumed growth rate of 2 percent is not substantial
7 evidence that supports the city council’s assessment of the traffic impacts from
8 the proposed PUD and its decision to impose a number of conditions to
9 “minimize impacts and protect transportation facilities” under LDC 16.61.090,
10 or that LDC 16.61.090 requires the city to use an annual growth rate of 4.5
11 percent.

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 Happy Valley Comprehensive Plan (HVCP) Policy 28 is to “[c]onserve
15 the area’s unique natural resources through their inclusion in the
16 Comprehensive Plan, and development approvals, in a manner which considers
17 surrounding uses and provides a continuity of open space character and natural
18 features, throughout the City.” In their third assignment of error, petitioners
19 argue that the city erred in determining that Policy 28 does not apply to the
20 application because the application is for a “limited land use decision” as

1 defined in ORS 197.015(12).⁶ Under ORS 197.195, unless a local government
2 complies with the statute’s requirements, comprehensive plan policies may not
3 be applied directly as decision making standards to limited land use decisions.

4 Intervenor responds that petitioners’ argument provides no basis for
5 reversal or remand, because the city adopted alternative findings that the PUD
6 complies with Policy 28. We agree with intervenor that if the findings of
7 compliance with Policy 28 are sustained, any city error in initially concluding
8 that Policy 28 does not apply is not a basis for reversal or remand.

9 Petitioners also challenge the city’s findings that the PUD complies with
10 Policy 28. Petitioners argue that Policy 28 requires the PUD to maintain
11 continuous wildlife corridors. However, the city council found that nothing in
12 the language of Policy 28 or any other comprehensive plan policy requires
13 maintenance of continuous wildlife corridors. Supplemental Record 10, 36. The
14 city council also found that intervenor’s plan complies with Policy 28 and
15 maintains “continuity of open space character and natural features[.]”
16 Supplemental Record 19. The proposed PUD maintains 40% of the property as

⁶ ORS 197.015(12) provides in part:

“‘Limited land use decision’:

“(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

“(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).”

1 open space, leaving open space abutting all property lines and leaving the
2 portions of the property that are subject to the Natural Resources Overlay
3 undisturbed. Further, the PUD will protect wildlife habitat and wetlands areas.
4 Supplemental Record 36. The city’s findings are supported by substantial
5 evidence in the record and are adequate to explain why Policy 28 is met.

6 The third assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 Statewide Planning Goal 7 (Areas Subject to Natural Hazards) is in
9 relevant part “[t]o protect people and property from natural hazards.” In their
10 fourth assignment of error, petitioners argue that the city’s findings are
11 inadequate to explain why the city’s condition requiring the gating of S.E.
12 Vradenburg Road is consistent with Goal 7. Petition for Review 49-50.
13 According to petitioners, gating the road is not consistent with Goal 7 because
14 S.E. Vradenburg Road is necessary in order to provide a second exit from the
15 PUD in the event of a wildfire.

16 The city’s findings conclude that Goal 7 is not applicable to the PUD
17 application. Supplemental Record 24. Intervenor responds that the city imposed
18 the condition requiring the gating of S.E. Vradenburg Road due to its
19 substandard condition and in order to “minimize impacts and protect
20 transportation facilities” to the residential subdivision located to the north of
21 the PUD from the traffic impacts of the PUD, under LDC 16.61.090 discussed
22 above. According to intervenor, the requirement to gate the road is unrelated to

1 the TSP Amendment's change to the functional classification of S.E.
2 Vradenburg Road from a collector to a local street, and therefore the city
3 correctly concluded that Goal 7 does not apply.⁷ In support, intervenor points
4 to Condition 1, which requires the city to implement the TSP Amendment by
5 adopting an ordinance. Supplemental Record 137. That condition does not
6 require S.E. Vradenburg Road to be gated. Similarly, the condition requiring
7 gating does not refer to the TSP Amendment or Condition 1. Supplemental
8 Record 141.

9 We agree with intervenor that the city was not required to adopt findings
10 explaining why gating S.E. Vradenburg Road is consistent with Goal 7 because
11 Goal 7 does not apply to the PUD application. ORS 197.175(2)(d) (after
12 acknowledgement, city is required to make land use decisions in compliance
13 with its land use regulations and comprehensive plan). The gating condition
14 addresses the city's desire to limit traffic impacts from the PUD on adjacent
15 streets and on S.E. Vradenburg Road in its current condition. It is unrelated to
16 the TSP Amendment.

17 The fourth assignment of error is denied.

18 The city's decision is affirmed.

⁷ Prior to the TSP Amendment, S.E. Vradenburg Road was designated as a collector street, a type of functional classification that typically handles heavier traffic volumes and is wider than a local street. However, S.E. Vradenburg Road is not improved to, and apparently could not be improved without significant expense, to function as a collector road.