

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

3
4 WILLAMETTE OAKS LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF EUGENE,
10 *Respondent,*

11
12 and

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14 ALEXANDER LOOP, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2017-058

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Eugene.

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24 Frederick A. Batson, Eugene, filed the petition for review and argued on
25 behalf of petitioner. With him on the brief was Gleaves Swearingen LLP.

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27 No appearance by City of Eugene.

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29 Michael C. Robinson and Allison J. Reynolds, Portland, filed the
30 response brief on behalf of intervenor-respondent. With them on the brief was
31 Perkins Coie LLP. Seth J. King argued on behalf of intervenor-respondent.

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

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36 REMANDED 10/05/2017

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38 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner appeals a hearings official’s decision concluding that proposed Phase 5 of a planned unit development (PUD) complies with a PUD condition of approval.

FACTS

In 2010, the city rezoned the subject property and issued tentative PUD approval for the Goodpasture Island PUD, which authorized development of five parcels with a large multi-family/mixed use development, in five phases. The 2010 PUD approval was subject to Condition 3, which imposed a “trip cap” applicable to all five phases, limiting maximum development on the site to produce no more than 287 trips in the a.m. peak hour and 321 trips in the p.m. peak hour.¹ The trip cap was intended to ensure that traffic generated by the

¹ As adopted in 2010, Condition 3 stated:

“Prior to executing the performance agreement, the applicant shall revise the final site plan to add the following note: ‘The maximum development on the site shall be limited so that it would not produce more than 287 trips in the AM peak hour and 321 trips during [the] PM peak hour as determined by the Institute of Transportation Engineers Trip Generation Manual.’ The city may allow development intensity beyond this maximum number of peak hours vehicle trips only if the applicant submits to the city and [Oregon Department of Transportation] a traffic impact analysis that demonstrates that the proposed intensification of use would be consistent with the Transportation Planning Rule (TPR) at OAR 660-012-0060. The applicant shall seek and the city shall

1 proposed PUD allowed under the rezoning would not exceed the traffic that
2 could have been generated under the prior zoning. The trip cap was imposed to
3 avoid the analysis and possible mitigation that might otherwise have been
4 required under OAR 660-012-0060, the Transportation Planning Rule (TPR),
5 to approve the 2010 rezoning.

6 In 2012, during a remand proceeding, the applicant modified the
7 application to propose a somewhat different and more traffic-generative mix of
8 development on parcel 4, to be developed as Phase 4. The applicant estimated
9 how much traffic would be generated under the modified proposal, to be
10 allocated to Phase 4 under the trip cap, using a different use code under the
11 Institute of Transportation Engineers (ITE) Trip Generation Manual than was
12 originally used to determine the trip cap. The 2012 hearings official rejected
13 the applicant's use of a different ITE code for that purpose:

14 “[C]hanging the use code at this time appears to the hearings
15 official that the applicant is attempting to avoid the trip cap
16 specified in condition 3 and the requirement in condition 3 to
17 produce a revised traffic impact analysis in response to its
18 proposed increase in intensity of use on Parcel 4. The hearings
19 official will not apply the Eugene Code in a manner that condones
20 this practice. The hearings official believes the intent of condition
21 3 was to establish a baseline by which to compare traffic impacts
22 of future changes of use. This comparison could not occur if the
23 assumptions (i.e., the ITE use code) for the baseline changes. The
24 hearings official concludes that the applicant's updated traffic

consider such approval using the city's Type II land use
application procedure.” Record 544.

1 analysis for its proposed modification does not demonstrate
2 compliance with condition 3 of the Tentative PUD.” Record 545.

3 Accordingly, the hearings official modified Condition 3 to specify that the trip
4 cap would be determined “using code 220-Apartments for all unrestricted
5 residential apartments on the development site.” See n 2.

6 As part of that 2012 modification proceeding, the applicant argued that
7 Condition 3’s trip cap would allow an increase in the number of trips from
8 parcel 4 at that time, because the trip cap is for the overall development, which
9 would occur in many phases. The hearings official agreed with that argument,
10 but concluded that under that approach “the applicant would need to evaluate
11 the actual number of trips before constructing the later phases and revise the
12 traffic analysis if necessary.” Record 545. Accordingly, the hearings official
13 modified Condition 3 to add the requirement that:

14 “Prior to construction of the final phase, the applicant shall
15 conduct a current traffic study that counts the actual number of
16 trips currently occurring to determine if the final phase would
17 require a revised traffic impact analysis and additional
18 improvements to comply with the Transportation Planning Rule.”²

² As modified in the 2012 decision, Condition 3 reads (new language in **bold**; bracketed numbers added by LUBA):

“[1] Prior to executing the performance agreement, the applicant shall revise the final site plan to add the following note: “The maximum development on the site shall be limited so that it would not produce more than 287 trips in the AM peak hour and 321 trips during [the] PM peak hour as determined by the Institute of Transportation Engineers Trip Generation Manual, **using code 220-Apartments for all unrestricted residential apartments on**

1 As modified in 2012, Condition 3 has three distinct requirements,
2 indicated by the bracketed numbers we inserted into the quote in footnote 2.
3 The first requirement is the trip cap established in the 2010 rezoning decision,
4 as amended by specifying the ITE code to be used for all unrestricted
5 residential apartments. The second requirement is that, if the applicant seeks to
6 intensify development beyond that consistent with the trip cap, the application
7 must demonstrate that the intensified development is consistent with the TPR,
8 using the city’s Type II process. This second requirement was not modified in
9 2012. The third requirement, added in 2012, is that in order to obtain building
10 permit approval for the final phase, the applicant must conduct a current traffic
11 study of the traffic generated by the already built phases “to determine if the

the development site.’ [2] The city may allow development intensity beyond this maximum number of peak hours vehicle trips only if the applicant submits to the city and [Oregon Department of Transportation] a traffic impact analysis that demonstrates that the proposed intensification of use would be consistent with the Transportation Planning Rule (TPR) at OAR 660-012-0060. The applicant shall seek and the city shall consider such approval using the city’s Type II land use application procedure. [3] **Prior to construction of the final phase, the applicant shall conduct a current traffic study that counts the actual number of trips currently occurring to determine if the final phase would require a revised traffic impact analysis and additional improvements to comply with the Transportation Planning Rule. The city shall not issue building permits for the final phase until the applicant has received approval of the revised traffic impact analysis.” Record 3.**

1 final phase would require a revised traffic impact analysis and additional
2 improvements to comply with the Transportation Planning Rule.” *See* n 2.

3 At some point, the applicant finished construction of the first four
4 phases. On November 17, 2016, intervenor-respondent (intervenor), the
5 successor-in-interest to the applicant, filed a request with the planning
6 department seeking a determination that development of Phase 5, to include
7 186 unrestricted apartments, would be consistent with Condition 3. As
8 determined by ITE use code 220-Apartments, the 186 new dwellings in Phase 4
9 would generate an additional 95 a.m. trips and 115 p.m. trips. The 186 new
10 dwellings in Phase 5 would combine with the existing dwellings built in Phases
11 1-4 to total 568 dwellings, plus a minor assortment of non-residential uses.
12 However, intervenor did not produce evidence directly evaluating whether the
13 “maximum development” on the site complies with the first requirement of
14 Condition 3, *i.e.*, would produce more than 287 trips in the a.m. peak hour and
15 321 trips during the p.m. peak hour, as determined using ITE code 220 for all
16 unrestricted apartment uses.

17 Instead, intervenor submitted a report from its traffic engineer that
18 includes a current traffic study of the actual number of trips generated during
19 the peak a.m. and p.m. hours on a single day (October 25, 2016) from the
20 existing Phase 1-4 development (hereafter October 25, 2016 current traffic
21 study), pursuant to the third requirement of Condition 3. Intervenor’s engineer
22 subtracted the October 25, 2016 current traffic study actual trip counts from the

1 trip cap of 287 a.m. trips and 321 p.m. trips, and concluded that there remained
2 up to 121 a.m. trips and 196 p.m. trips for new development. Based on those
3 remaining trips, intervenor's engineer then calculated, using the ITE 220 code,
4 that developing up to 237 apartment units in Phase 5 would be consistent with
5 the trip cap. Intervenor submitted the October 25, 2016 current traffic study to
6 the city as evidence that the proposed development of 186 dwellings in Phase 5
7 would be consistent with the trip cap imposed by Condition 3.

8 On March 2, 2017, the city planning director issued a decision agreeing
9 with intervenor that the October 25, 2016 current traffic study demonstrated
10 that development of Phase 5 was consistent with Condition 3. Petitioner, who
11 owns adjoining development, appealed to the hearings official. Petitioner
12 submitted testimony from its traffic engineer asserting that if the traffic
13 generated by the existing and proposed development in all five phases is
14 determined under the appropriate ITE codes, the maximum development of the
15 site would exceed the trip cap set out in the first requirement of Condition 3.
16 Petitioner also identified several flaws in intervenor's October 25, 2016 current
17 traffic study, including use of the wrong p.m. peak hour. In response,
18 intervenor's traffic engineer conducted a second study, on March 22, 2017, to
19 correct the identified flaws. The second traffic study again found that the
20 actual traffic count from Phases 1-4, added to the estimated traffic generated
21 from Phase 5 as determined under the ITE manual, resulted in a sum that would
22 not exceed the trip cap.

1 On May 15, 2017, the hearings official denied petitioner’s appeal,
2 rejecting petitioner’s argument that the final phase applicant must satisfy the
3 first requirement of Condition 3, *i.e.*, must show that the maximum
4 development of the site does not exceed the trip cap, as determined under the
5 ITE manual.³ This appeal followed.

6 **ASSIGNMENT OF ERROR**

7 **A. First Subassignment of Error**

8 Petitioner argues that the hearings official misconstrued Condition 3, in
9 interpreting it to be satisfied by relying on the current traffic study described

³ The hearings official’s decision states, in relevant part:

“[T]he appellant argues that, to the extent Condition 3 requires the actual count, that count would be *in addition to* anticipated trip counts using estimates from [the] ITE trip generation manual. However, the Planning Director determined, and the hearing official agrees, that the language of the applicable 2012 revised Condition 3 does not require both. The 2012 hearing official specifically agreed that the applicant could satisfy the ‘baseline’ of the ITE manual by ‘evaluating the actual number of trips before constructing later phases.’ That finding is reflected in his express language in the revised Condition 3, which specifically requires that [quoting the third requirement]. The hearings official rejects the appellant’s argument that Condition 3 should be read to require more. The hearings official agrees with the Planning Director’s determination that the applicant correctly interpreted the requirements of Condition 3 when it showed compliance with the condition by conducting a traffic study that counts the actual number of trips currently occurring to determine if the final phase would require a revised traffic impact analysis.” Record 7-8 (italics in original).

1 under the third requirement of Condition 3. According to petitioner, the third
2 requirement of Condition 3 does not replace the first requirement, and the
3 applicant for Phase 5 must also demonstrate that the first requirement of
4 Condition 3 is met, *i.e.*, that maximum development of all five phases does not
5 exceed the trip cap, as determined under the ITE manual.

6 Intervenor responds that the hearing official correctly interpreted
7 Condition 3. Intervenor argues that once the first four phases are developed,
8 and the applicant seeks approval for the final phase, it is the third requirement
9 of Condition 3 that governs how compliance with Condition 3 is evaluated.
10 Under this view, the applicant for the final phase must initially provide the
11 current traffic study required under the third requirement of Condition 3. If the
12 actual trip count in the current traffic study, combined with the estimated traffic
13 generated by the final phase, would exceed the trip cap, then the applicant must
14 follow the process described in the second requirement of Condition 3 (*i.e.*,
15 provide a revised traffic impact analysis showing consistency with the TPR).
16 However, intervenor argues, if the current traffic study, combined with
17 estimated traffic generated by the final phase, shows that the maximum
18 development of the site would not exceed the trip cap set out in the first
19 requirement of Condition 3, then Condition 3 is satisfied without further
20 analysis or evidence. Under this interpretation, the applicant for final phase
21 approval is never required to directly address the first requirement of Condition
22 3, *i.e.*, that “maximum development on the site” is “limited so that it would not

1 produce more than 287 trips in the AM peak hour and 321 trips during [the]
2 PM peak hour as determined by the Institute of Transportation Engineers Trip
3 Generation Manual.”

4 Condition 3 as amended in 2012 is ambiguous, and could be interpreted
5 as the hearings official and intervenor do, such that the third requirement
6 implicitly substitutes or replaces the first requirement when evaluating whether
7 the final phase is consistent with Condition 3. However, if that were the 2012
8 hearings official’s intent, it would likely have been expressed more clearly. In
9 our view, the more straightforward reading, and the one that gives effect to the
10 entire text of Condition 3, is that the third requirement is in *addition* to the first
11 and second requirements. Under this view, the final phase applicant must
12 submit both (1) an analysis of whether the maximum development on the site
13 (all five phases) does not exceed the trip cap specified in the first requirement,
14 as determined under the ITE manual, and (2) a current traffic study of traffic
15 generated by the prior built phases. The limited purpose of the traffic study,
16 under this view, is to determine whether the actual traffic generated under the
17 built phases represents an intensification of development that exceeds the
18 traffic estimates, generated under the ITE manual, that were used to approve
19 the first four phases. If that is the case, then the second requirement of
20 Condition 3 is triggered, and the final phase applicant must submit a revised
21 traffic impact analysis that demonstrates that the proposed intensification of
22 use would be consistent with the TPR, *even if* analysis of estimated trip

1 generation under the first requirement shows that maximum development of the
2 entire site (all five phases) would fit within the trip cap, as determined under
3 the ITE manual.

4 Some indication that the 2012 hearings official intended the third
5 requirement to supplement, rather than replace, the first requirement is that in
6 the 2012 proceeding the then-applicant proposed to modify the Phase 4
7 development with more traffic-generative uses, compared to what had
8 previously been used to estimate trip generation and the trip cap for the original
9 rezoning approval. The 2012 hearings official expressly linked the proposed
10 intensification with the third requirement, concluding that the proposed
11 intensification prompted the need for the applicant to “evaluate the actual
12 number of trips before constructing the later phases and revise the traffic
13 analysis if necessary.” Record 545. An inference is that the 2012 hearings
14 official was concerned with how the proposed intensification of dwelling units
15 in Phase 4 would affect the development of the final phase, and the allocation
16 of dwelling units over the entire development consistent with the trip cap.
17 Because the then-applicant was introducing uncertainty into the size of
18 maximum development and the allocation of trips to each phase, the 2012
19 hearings official may have wished to ensure that the second requirement of
20 Condition 3 was triggered, if a current traffic study showed that actual traffic
21 generated by prior phases, combined with estimated final phase traffic, would
22 exceed the trip cap. Under this view, the first and third requirements of

1 Condition 3 are independent requirements, and compliance with the third does
2 not necessarily demonstrate compliance with the first, and vice versa.

3 By contrast, under the interpretation adopted by the hearings official in
4 the challenged decision, the first requirement has been effectively superseded,
5 and compliance with Condition 3 can be evaluated without any inquiry into
6 whether “maximum development on the site” is “limited so that it would not
7 produce more than 287 trips in the AM peak hour and 321 trips during the PM
8 peak hour as determined by the Institute of Transportation Engineers Trip
9 Generation Manual.” The hearings official’s interpretation does not give effect
10 to the express requirement to determine compliance of “maximum
11 development” with the trip cap *pursuant to the ITE Manual*. An approach that
12 evaluates Phases 1-4 using actual counts and evaluates only Phase 5
13 development using the ITE manual, while sufficient to comply with the third
14 requirement, is not consistent with the first requirement of Condition 3.

15 We conclude that the hearings official’s interpretation improperly
16 construes Condition 3 and effectively eliminates a requirement of Condition 3,
17 and is therefore not consistent with the text, context and apparent purpose of
18 Condition 3, as modified. ORS 197.835(9)(a)(D).

19 The first subassignment of error is sustained.

20 **B. Second Subassignment of Error**

21 Petitioner advances two additional arguments related to the text and
22 context interpretational challenge presented in the first subassignment of error.

1 Specifically, petitioner argues that even if the hearings official's interpretation
2 of Condition 3 is consistent with its text and context, that interpretation is
3 inconsistent with the purpose and intent of the TPR, the law that the Condition
4 was intended to ensure consistency with. Given our conclusion above that the
5 hearings official misconstrued the text of Condition 3, we see no point in
6 addressing this alternative or additional argument.

7 Petitioner also argues that the current traffic studies that intervenor used
8 to demonstrate consistency with the third requirement of Condition 3 are
9 flawed in several ways, and thus the hearings official erred in relying on those
10 studies to evaluate compliance with the third requirement. First, petitioner
11 notes that the two traffic studies show significantly fewer trips from Phases 1-4
12 than would be predicted under application of the ITE manual, which petitioner
13 finds puzzling. However, we agree with intervenor that the fact that the actual
14 traffic counts differ somewhat from what would be predicted under the ITE
15 manual is not a flaw, but rather the whole point of the third requirement: to
16 determine whether actual traffic generation differs from that predicted under
17 the ITE manual.

18 Second, petitioner argues that the initial October 25, 2016 traffic study
19 incorrectly assumed 100 percent occupancy in the 272 apartments built in
20 Phases 1-3, and that the October 25, 2016 traffic study used the incorrect p.m.
21 peak hour. Intervenor does not contend otherwise, but argues that these errors

1 were corrected in the second traffic study. As far as we can tell, intervenor is
2 correct.

3 Finally, petitioner argues that both traffic studies were flawed in failing
4 to count traffic at all driveways to each phase along Alexander Loop, instead
5 counting traffic only at the two intersections where the two ends of Alexander
6 Loop connect to Goodpasture Island Road. Intervenor responds that because
7 all vehicle traffic from the PUD must pass through one of the two intersections
8 at the end of Alexander Loop the traffic studies did not fail to count all traffic
9 generated by the built phases. As far as we can tell, intervenor is correct.

10 Petitioner's arguments under the second sub-assignment of error do not
11 provide a basis for reversal or remand.

12 The assignment of error is sustained, in part.

13 The city's decision is remanded.