

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

08/06/18 PM12:16 LUBA

3  
4                   WILLAMETTE OAKS LLC,  
5                                   *Petitioner,*

6  
7                                   vs.

8  
9                   CITY OF EUGENE,  
10                                  *Respondent,*

11  
12                                  and

13  
14                   ALEXANDER LOOP, LLC,  
15                                  *Intervenors-Respondent.*

16  
17                                  LUBA No. 2018-035

18  
19                                  FINAL OPINION  
20                                  AND ORDER

21  
22                   Appeal from City of Eugene.

23  
24                   Frederick A. Batson, Eugene, filed the petition for review and argued on  
25 behalf of petitioner. With him on the brief were Joshua K. Smith and Gleaves  
26 Swearingen LLP.

27  
28                   No appearance by City of Eugene.

29  
30                   Michael C. Robinson and Garrett H. Stephenson, Portland, filed the  
31 response brief and Michael C. Robinson argued on behalf of intervenor-  
32 respondent. With them on the brief was Schwabe, Williamson & Wyatt, P.C.

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

36  
37                   AFFIRMED

08/06/2018

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

**NATURE OF THE DECISION**

Petitioner appeals a hearings officer’s decision determining that Phase 5 of a planned unit development (PUD) complies with a condition of the PUD approval.

**MOTION TO INTERVENE**

Alexander Loop, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. No party opposes the motion, and it is granted.

**FACTS**

This appeal concerns compliance of the Goodpasture Island PUD with Condition of Approval 3 (Condition 3), which in relevant part limits maximum development of the PUD, to limit vehicle trips generated by development to no more than 287 trips during the a.m. peak hour and 321 trips during the p.m. peak hour, as determined by the Institute of Transportation Engineers Trip Generation Manual (ITE Manual).

Condition 3 was originally imposed in 2010, as part of a decision approving the rezoning of the subject property, to facilitate approval of a proposed PUD for a large multi-family/mixed use development, in five phases. To establish that the rezoning was consistent with the Transportation Planning Rule (TPR), at OAR 660-012-0060, the applicant proposed a “trip cap” limiting the number of vehicle trips the PUD could generate during peak hours.

1 The trip cap was designed to keep PUD traffic generation at or below what the  
2 subject property could have generated under the previous zoning, in order to  
3 avoid mitigation and other obligations the TPR would otherwise require. The  
4 trip cap numbers were based on a 2009 traffic impact analysis (2009 TIA),  
5 which used three codes from the 7th edition of the ITE Manual to estimate the  
6 number of trips the PUD would generate on full build-out, assuming a  
7 particular mix of three types of uses categorized under the ITE Manual: code  
8 220 (Apartments), code 252 (Senior Adult Housing), and code 814 (Specialty  
9 Commercial).

10 In 2011, the applicant applied to the city for final PUD approval and  
11 submitted a second TIA to demonstrate that the proposed 5-phase development  
12 would comply with Condition 3. However, the 2009 TIA used ITE Manual  
13 code 223 (Mid-Rise Apartments) instead of code 220 (Apartments) to estimate  
14 trips generated by the unrestricted apartments proposed in several phases. The  
15 2011 hearings officer rejected this approach, concluding that one of the  
16 purposes of Condition 3 was to “establish a baseline by which to compare  
17 traffic impacts of future changes of use.” Record 11. Accordingly, the 2011  
18 hearings officer amended the first sentence of Condition 3 to specify that the  
19 trip cap must be determined “using code 220-Apartments for all unrestricted  
20 residential apartments on the development site.” Record 7 (emphasis omitted).

21 The 2009 TIA and the 2010 tentative PUD approval assumed  
22 construction of 125 senior adult housing units in Phase 4. In the 2011

1 proceeding, the applicant instead proposed Phase 4 construction to include a  
2 mix of 22 senior adult housing units and 132 units (beds) of assisted living,  
3 which is represented by a different ITE Manual code, code 254 (Assisted  
4 Living) and which is a code category that generates more traffic than code 252  
5 (Senior Adult Housing).<sup>1</sup> Apparently because of this change in the type of  
6 restricted residential uses, the hearings officer also amended Condition 3 to  
7 require that prior to construction of the final phase, Phase 5, the applicant  
8 conduct a current traffic study that counts the actual number of trips generated  
9 by the constructed phases 1-4, to determine if additional analysis or mitigation  
10 may be required under the TPR prior to construction of Phase 5.<sup>2</sup> With that

---

<sup>1</sup> Under the ITE Manual, trip generation numbers are derived by multiplying a peak hour number by the unit associated with the relevant code. For example, for code 252 (Senior Adult Housing), the unit is the dwelling unit, and the number for the a.m. peak hour is .08 per dwelling unit. For code 254 (Assisted Living), the relevant unit is the number of beds, and the applicable a.m. peak hour number is .14. The higher number for assisted living units (beds) presumably reflects traffic associated with increased numbers of support staff.

<sup>2</sup> As amended in 2011, and as applicable here, Condition 3 now reads, with the amended language bolded, and with numbers inserted corresponding to three distinct requirements:

“[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**

1 amendment, the 2011 hearings officer granted final PUD approval.  
2 Subsequently, on appeal, LUBA rejected all challenges to the amended  
3 Condition 3. *Willamette Oaks LLC v. City of Eugene*, 64 Or LUBA 24 (2011),  
4 *aff'd* 248 Or App 212, 273 P3d 219 (2012).

5 At some point thereafter, the first four phases were constructed. In 2017,  
6 intervenor applied for phase 5 approval, proposing 186 unrestricted apartments.  
7 Pursuant to the third requirement of amended Condition 3, intervenor  
8 submitted a current traffic count of traffic generated during peak hours under  
9 the constructed phases 1–4. That current traffic count, added to the estimated  
10 peak hour traffic to be generated in phase 5 using ITE Manual code 220, was  
11 less than the trip cap set out in the first sentence of Condition 3. Intervenor  
12 argued, and the 2017 hearings officer agreed, that no more was required to

---

**220-Apartments for all unrestricted residential apartments on 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 7 (emphasis in original).

1 demonstrate that the five-phase PUD complied with all requirements of  
2 Condition 3. On appeal, LUBA disagreed, concluding that the actual traffic  
3 count requirement of Condition 3 was not intended to supersede the  
4 requirement in the first sentence, to limit maximum development to a defined  
5 trip cap, as determined under the ITE Manual. *Willamette Oaks LLC v. City of*  
6 *Eugene*, \_\_ Or LUBA \_\_ (LUBA No. 2017-058, October 5, 2017).  
7 Accordingly, LUBA remanded the decision for the hearings officer to make  
8 that determination.

9 On remand, intervenor submitted a letter from its traffic engineer. The  
10 letter explained:

11 “In keeping with [] LUBA[’s] interpretation of the 2012  
12 modification of Condition 3, the following trip generation  
13 assumptions are made:

14 “\* All ITE Land Uses are consistent with those assumed in the  
15 applicant’s [2009 TIA]. This is the basis for the original trip  
16 generation estimates and established trip cap.

17 “\* All trip generation estimates are based on data from the ITE  
18 *Trip Generation Manual*, 7<sup>th</sup> Edition. This data was used in  
19 the 2009 TIA and was current at the time of the 2012 land  
20 use approvals.” Record 172.

21 In other words, the traffic engineer used the same three ITE Manual codes used  
22 in the 2009 TIA: 220 (Apartments), 252 (Senior Adult Housing), and 814  
23 (Specialty Commercial), but updated the number of units to reflect those  
24 actually built during phases 1–4 and proposed in phase 5. Thus, instead of  
25 multiplying the senior housing rate by the 125 units of senior adult housing

1 assumed in the 2009 TIA, the traffic engineer multiplied the rate by the number  
2 of senior adult housing units and assisted living units (beds) actually built in  
3 phase 4. Based on those calculations, the traffic engineer ultimately concluded  
4 that up to 193 unrestricted apartment units could be built in phase 5 without  
5 exceeding the trip cap, and therefore the proposed 186 unrestricted apartment  
6 units fit within the cap. Record 173.

7 Petitioner raised two objections below. First, petitioner argued that it is  
8 error to use the 7th edition of the ITE Manual, arguing that the most current  
9 edition (the 10th edition) should be used. Intervenor's traffic engineer  
10 responded with an analysis under the 10th edition also showing that the trip cap  
11 is met. In reply, petitioner then argued that the applicable edition should be  
12 whatever edition was in effect when the original tentative PUD application was  
13 filed in 2009, or perhaps when the final PUD application was filed in 2011,  
14 which would be the 8th or 9th editions. Petitioner based this latter argument on  
15 the so-called "goal-post" rule at ORS 227.178(3)(a), which requires in relevant  
16 part that "approval or denial of the application shall be based upon the  
17 standards and criteria that were applicable at the time the application was first  
18 submitted."

19 Second, petitioner objected that, whatever edition of the ITE Manual is  
20 used, it is error to use ITE Manual code 252 (Senior Adult Housing), to  
21 evaluate the traffic impacts of the 132 assisted living units that were actually  
22 constructed in phase 4. Petitioner argued that the trip cap analysis must use the

1 code and rate applicable to the units actually built, assisted living units,  
2 specifically ITE Manual code 254 (Assisted Living), not the code and rate  
3 applicable to senior adult housing. Using the correct code, petitioner  
4 calculated, there would be enough room under the trip cap for only 167  
5 additional apartment units, 19 fewer units than the 186 units proposed.

6 The hearings officer rejected both of petitioner's objections, concluding  
7 that the ITE Manual is not among the "standards and criteria" for purposes of  
8 ORS 227.178(3)(a), and that the intent of the 2011 amendments to Condition 3  
9 was to require a consistent "baseline" to evaluate compliance with the trip cap,  
10 by using the same ITE Manual codes used in initially setting the trip cap.  
11 Based on the traffic engineer's letter, the hearings officer concluded that the  
12 proposed 186 apartment units are consistent with the trip cap.

13 This appeal followed.

#### 14 **ASSIGNMENT OF ERROR**

15 In two subassignments of error, petitioner argues that the hearings officer  
16 erred in concluding that (1) the 7th edition of the ITE Manual, rather than the  
17 8th or 9th editions, should be used to evaluate compliance with the trip cap,  
18 and (2) the evaluation should use the same ITE Manual codes initially used to  
19 set up the trip cap, rather than ITE Manual codes that more accurately reflect  
20 the uses actually built in phases 1-4.

##### 21 **A. The ITE Manual is not "Standards and Criteria."**

22 As noted, ORS 227.178(3)(a) provides:

1 “If the application [a permit, limited land use decision or zone  
2 change] was complete when first submitted or the applicant  
3 submits the requested additional information within 180 days of  
4 the date the application was first submitted and the city has a  
5 comprehensive plan and land use regulations acknowledged under  
6 ORS 197.251, approval or denial of the application shall be based  
7 upon the standards and criteria that were applicable at the time the  
8 application was first submitted.”

9 Petitioner contends that the ITE Manual constitutes “standards and criteria” for  
10 purposes of ORS 227.178(3)(a), and therefore the city must apply the ITE  
11 Manual edition that was in effect on the date of the relevant application.  
12 According to petitioner, the 8th edition of the ITE Manual had been published  
13 by the time the original zone change and tentative PUD applications were filed  
14 in 2009, and the 9th edition had been published by the time the application for  
15 final PUD approval was filed in 2010.

16 Intervenor responds, and we agree, that petitioner has not demonstrated  
17 that the ITE Manual, of whatever edition, constitutes “standards and criteria”  
18 for purposes of the present proceeding. As the reference in ORS 227.178(3)(a)  
19 suggests, the scope of “standards and criteria” is limited to a city’s  
20 “comprehensive plan and land use regulations acknowledged under ORS  
21 197.251[.]” That understanding is supported by the context of ORS  
22 227.173(3)(a), including ORS 227.173(1), which provides that

23 “[a]pproval or denial of a discretionary permit application shall be  
24 based on standards and criteria, which shall be set forth in the  
25 development ordinance and which shall relate approval or denial  
26 of a discretionary permit application to the development ordinance  
27 and to the comprehensive plan for the area in which the

1 development would occur and to the development ordinance and  
2 comprehensive plan for the city as a whole.”

3 The ITE Manual is a professional treatise that sets out methods for making  
4 evidentiary judgments regarding the traffic impacts of development, but it is  
5 not part of the city’s acknowledged comprehensive plan or land use  
6 regulations, and therefore is not itself “standards and criteria” for purposes of  
7 ORS 227.178(3)(a) or 227.173(1), at least as applied in the present  
8 circumstance. No city land use regulation cited to us requires reference to the  
9 ITE Manual in the present proceeding, which concerns only consistency with  
10 the trip cap set out in Condition 3. The ITE Manual (and the subsidiary  
11 question of which edition to use) is relevant and applicable only because the  
12 text of Condition 3 makes it so.

13 Accordingly, petitioner’s arguments under ORS 227.178(3)(a) provide  
14 no basis for reversal or remand. As to Condition 3, it does not specify which  
15 edition of the ITE Manual to use, but as the hearings officer explained, “in  
16 order to serve as a ‘baseline’ from which to evaluate future potential changes in  
17 use, the version of the ITE Manual in effect when the applicant conducted the  
18 initial TIA must be used.” Record 12. Petitioner has not demonstrated that for  
19 purposes of determining compliance with the trip cap in Condition 3 the  
20 hearings officer erred in relying upon the 7th edition of the ITE Manual, which  
21 was the edition used to conduct the initial TIA.

22 This subassignment of error is denied.

1           **B. Change from Senior Adult Housing to Assisted Living.**

2           Finally, petitioner argues that, no matter which edition of the ITE  
3 Manual is used, the city erred in determining consistency with the trip cap in  
4 Condition 3 based on the three ITE Manual codes used initially to determine  
5 the trip cap. Instead, petitioner argues the city should have used the ITE  
6 Manual codes that match the particular uses that were actually built in phases  
7 1–4, specifically the 132 assisted living units built in phase 4, which replaced  
8 many of the initially proposed senior adult housing units. As noted, under the  
9 ITE Manual (in any edition), assisted living units are subject to a different ITE  
10 Manual code with a different, higher, trip generation rate per unit, compared to  
11 senior adult housing.

12           As discussed above, intervenor’s traffic engineer apparently understood  
13 LUBA to previously interpret Condition 3 to require use of the same three ITE  
14 Manual codes assumed when setting the trip cap, in determining whether the  
15 PUD as built is consistent with the trip cap, notwithstanding the changes in use  
16 in phase 4. However, LUBA’s most recent decision in *Willamette Oaks LLC v.*  
17 *City of Eugene*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2017-058, October 5, 2017),  
18 did not opine which ITE Manual codes must be used. The hearings officer  
19 ultimately disagreed with petitioner that ITE Manual code 254 (Assisted  
20 Living) must be used to evaluate the assisted living units (beds), based on the  
21 hearings officer’s understanding of the intent of the 2011 amendments to  
22 Condition 3. The hearings officer explained:

1 “In 2011, that hearings official agreed with Willamette Oaks’  
2 objection to the applicant’s change in use code (from 220 to 223)  
3 and determined that the applicant was required to use the ITE  
4 codes used in the 2009 TIA. To that end, the hearings official  
5 modified Condition 3 to clarify that the applicant *must* use the  
6 original code in effect when the TIA was originally conducted. In  
7 addition to requiring the applicant to use ITE code 220 for the  
8 apartments, that hearings official noted that ITE code 252 (Senior  
9 Adult Housing) and ITE code 814 (Specialty Commercial) were  
10 the other appropriate use categories. Now Willamette Oaks faults  
11 the applicant for doing exactly what the 2011 hearings official  
12 required it to do. Willamette Oaks’ current argument, that the  
13 applicant ‘should’ have used a different code for the senior adult  
14 housing, contradicts the analysis upon which the 2011 hearings  
15 officer based that decision and ignores the specific instruction that  
16 the applicant not change the use codes for its baseline analysis.”  
17 Record 12–13 (*italics in original*).

18 Petitioner challenges that understanding of the 2011 hearings officer’s intent,  
19 arguing that the 2011 hearings officer did not state or suggest that ITE Manual  
20 code 252 must be used to evaluate the 132 assisted living units (beds) that he  
21 approved as part of the proposed change to phase 4.<sup>3</sup> While the 2011 hearings  
22 officer clearly rejected the applicant’s attempt to use a different ITE Manual

---

<sup>3</sup> Petitioner also argues that the present hearings officer’s understanding of Condition 3 is inconsistent with the way LUBA understood how Condition 3 would be enforced, expressed in an earlier appeal of the tentative PUD approval, *i.e.*, before Condition 3 was modified in the final PUD approval. *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2010), *rev’d on other grounds*, 245 Or App 47, 261 P3d 85, *rev den*, 351 Or 586 (2011). We disagree with petitioner that LUBA’s understanding of how Condition 3 prior to its 2011 modification would be enforced has much bearing on resolving the issues raised in the present appeal, involving the meaning of Condition 3 as modified in 2011.

1 code for unrestricted apartments, the hearings officer's 2011 decision did not  
2 expressly require use of the three ITE Manual codes used in the 2009 TIA, or  
3 indicate that the assisted living units must be evaluated under code 252 for  
4 senior adult housing.

5       It is not clear to us what the 2011 hearings officer intended regarding  
6 which ITE Manual codes should be used to evaluate compliance with the trip  
7 cap for uses other than unrestricted apartments. The hearings officer clearly  
8 wanted to use code 220 (Apartments) for all unrestricted residential uses, even  
9 though the applicant was actually proposing to build multi-family residential  
10 buildings with a lower trip generation rate that are more accurately reflected  
11 under ITE Manual code 223 (Mid-Rise Apartments). If that intent to establish  
12 a consistent baseline is extended to other codes used to establish the trip cap,  
13 then the hearings officer in the present case is correct that an evaluation of  
14 compliance with the trip cap must use the same ITE Manual codes used in the  
15 2009 TIA to establish the trip cap. While using the same codes would make  
16 evaluation under the first sentence of Condition 3 potentially less useful and  
17 accurate in estimating actual traffic impacts, if there are significant changes  
18 between initially proposed and actually constructed uses, the 2011 hearings  
19 officer may well have believed that the other amendment written into Condition  
20 3—the requirement to conduct a study of actual trip numbers generated by the  
21 constructed phases—would suffice to ensure, in a belt and suspenders manner,

1 that traffic generated by the PUD stayed within the margins necessary to ensure  
2 compliance with the TPR.

3 Similarly, the 2011 hearings officer may not have been concerned with  
4 which precise codes are used to evaluate different types of restricted senior  
5 housing, because by requiring all unrestricted residential housing (the majority  
6 of the units in the PUD) to be evaluated under ITE Manual code 220, the  
7 hearings officer was effectively imposing a significant and conservative margin  
8 of error. Under modified Condition 3, all of the 400+ unrestricted apartment  
9 units to be constructed in the entire PUD must be evaluated under the higher  
10 trip generation rates applicable to code 220 (Apartments), even though most or  
11 all of the actual units constructed might more accurately be evaluated under  
12 code 223 (Mid-Rise Apartments), which has a lower trip generation rate. This  
13 conservative margin of error, applied to the most prevalent and traffic-  
14 impactive category of use allowed in the PUD, would go a long way to explain  
15 why the 2011 hearings officer was apparently less concerned with the relatively  
16 modest difference between senior adult housing and assisted living units.

17 At this remove, it is difficult to determine the 2011 hearings officer's  
18 intent with precision. Nonetheless, we agree with intervenor and the present  
19 hearings officer that, given the expressed desire to establish a consistent  
20 baseline, and the considerations noted above, the 2011 hearings officer likely  
21 intended that compliance with the trip cap be determined by consistent

- 1 applications of the same ITE Manual codes used to establish the trip cap.
- 2 Petitioner has not demonstrated that the city erred in so concluding.
- 3       This subassignment of error is denied.
- 4       The assignment of error is denied.
- 5       The city's decision is affirmed.