

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

3  
4 BUFFALO-BEND ASSOCIATES, LLC,  
5 *Petitioner,*

6  
7 vs.

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9 CLACKAMAS COUNTY,  
10 *Respondent,*

11  
12 and

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14 AARON JONES and EASTBANK DEVELOPMENT, LLC,  
15 *Intervenors-Respondents.*

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17 LUBA No. 2019-090

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19 AARON JONES and EASTBANK DEVELOPMENT, LLC,  
20 *Petitioners,*

21  
22 vs.

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24 CLACKAMAS COUNTY,  
25 *Respondent,*

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27 and

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29 BUFFALO-BEND ASSOCIATES, LLC,  
30 *Intervenor-Respondent.*

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32 LUBA No. 2019-091

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34 FINAL OPINION  
35 AND ORDER  
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1 Appeal from Clackamas County.

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3 Ty K. Wyman, Portland, filed a petition for review, a response brief, and  
4 a reply brief, and argued on behalf of petitioner/intervenor-respondent Buffalo-  
5 Bend Associates, LLC. With him on the briefs were Chelsea J. Glynn, Stacie L.  
6 Damazo, and Dunn Carney, LLP.

7

8 Nathan K. Boderman, Clackamas County Counsel, Oregon City, filed a  
9 response brief and argued on behalf of respondent. With him on the brief was  
10 Stephen L. Madkour, Clackamas County Counsel.

11

12 Michael C. Robinson, Portland, filed a petition for review, a response brief,  
13 and a reply brief, and argued on behalf of petitioners/intervenors-respondents  
14 Aaron Jones and Eastbank Development, LLC. With him on the briefs were  
15 Garrett H. Stephenson, J. Kenneth Katzaroff, and Schwabe, Williamson & Wyatt,  
16 P.C.

17

18 ZAMUDIO, Board Chair; RUDD, Board Member; RYAN, Board  
19 Member, participated in the decision.

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21 REMANDED 01/31/2020

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

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**NATURE OF THE DECISION**

Petitioners appeal a decision by the county hearings officer approving, with conditions, design review for a 286-unit apartment complex.

**FACTS**

The subject property is comprised of approximately 13 acres and is zoned High Density Residential (HDR) and Corridor Commercial (CC). Petitioners/intervenors-respondents Aaron Jones and Eastbank Development, LLC (collectively, Eastbank) applied for design review for a 286-unit multifamily development with 10 residential buildings and one community recreation and management building, parking areas, site access, circulation, landscape, and infrastructure.

The proposed development is a permitted use in the HDR and CC districts. Petitioner/intervenor-respondent Buffalo-Bend Associates, LLC (Buffalo-Bend) and the county appear to agree that the challenged decision is a “limited land use decision.” Eastbank does not dispute that the challenged decision is a “limited land use decision.” For purposes of this decision we assume that the challenged decision is a limited land use decision. ORS 197.015(12)(a)(B).<sup>1</sup>

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<sup>1</sup> ORS 197.015(12) provides, in part:

“‘Limited land use decision’:

1 The planning director approved design review and Buffalo-Bend appealed  
2 to the county hearings officer. After a *de novo* public hearing, the hearings officer  
3 approved the design review with conditions. This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR (EASTBANK)**

5 The planning director’s decision applied various criteria from the  
6 Clackamas County Zoning and Development Ordinance (ZDO), including  
7 sections 510 (CC District), 315 (HDR District), 706 (Habitat Conservation Area  
8 District), 1002 (protection of natural features), 1003 (hazards to safety), 1005  
9 (site and building design), 1006 (utilities, street lights, water supply, sewage  
10 disposal, surface water management, and erosion control), 1007 (roads and  
11 connectivity), 1009 (landscaping), 1010 (signs), 1012 (lot size and density), 1015  
12 (parking and loading), 1021 (refuse and recycling standards for commercial,  
13 industrial, and multifamily developments), 1102 (design review), and 1311  
14 (completion of improvements, sureties, and maintenance). Record 149, 183, 188,

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

“\* \* \* \* \*

“(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.”

1 216. The planning director decided that the following additional standards  
2 outside the ZDO apply: Clackamas County Roadway Standards (CCRS),  
3 Clackamas County Excavation and Grading Ordinance, and Oregon Structural  
4 Specialty Code. Record 149. On June 6, 2019, the planning director’s decision  
5 approved design review, with conditions. Buffalo-Bend appealed that decision.

6 On June 27, 2019, the county mailed a notice of hearing for the July 18,  
7 2019 hearing before the hearings officer on Buffalo-Bend’s local appeal of the  
8 planning director’s decision. That notice listed the applicable criteria as follows:  
9 “Applicable Zoning and Development Ordinance and Comprehensive Plan  
10 Criteria: 202, 315, 510, 703, 704, 706, 1000 series, 1102, 1105 & 1307.” Record  
11 141.

12 The parties disputed whether certain criteria constituted applicable criteria.  
13 Before the planning director, and during the proceeding before the hearings  
14 officer, Eastbank’s attorney argued that the county may apply only “clear and  
15 objective” standards and conditions because the application is for development  
16 of needed housing subject to ORS 197.307(4), which requires local governments  
17 to apply only “clear and objective” development standards, conditions and  
18 procedures to applications to develop needed housing.<sup>2</sup> The hearings officer

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<sup>2</sup> ORS 197.307(4) provides:

“(4) 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

1 declined to apply the limitations in the need housing statute. The hearings officer  
2 reasoned that the “issue was not raised until very late in the process. I do not see  
3 that the applicant may rely on such arguments at such a late juncture.” Record  
4 15, n 10. Accordingly, the hearings officer did not consider whether the standards  
5 that the hearings officer ultimately applied to the application are “clear and  
6 objective.”

7 In its first assignment of error, Eastbank argues that the hearings officer  
8 erred by refusing to analyze whether applicable criteria are “clear and objective.”  
9 In its second assignment of error, Eastbank argues that six approval standards in  
10 the ZDO and CCRS that the hearings officer applied to the application are not  
11 clear and objective. Eastbank Petition for Review 14–15. In its third assignment  
12 of error, Eastbank argues that the hearings officer failed to apply only clear and  
13 objective conditions of approval. The county concedes that the hearings officer’s  
14 failure to apply the needed housing statute is error that requires remand.

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development of housing, including needed housing. The standards, conditions and procedures:

- “(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.
- “(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

1 **WAIVER**

2 Eastbank first raised the issue of the needed housing statute on May 22,  
3 2019 in a letter to county planning staff, prior to the planning director’s decision  
4 and two months prior to the hearing before the hearings officer. Record 330.  
5 Eastbank argued, generally, that the county could apply only clear and objective  
6 standards. Eastbank more specifically argued that the county could not apply  
7 county safety standards regulating roads and connectivity, because the term  
8 “safety” is subjective. *Id.* Eastbank specifically challenged ZDO 1007.01.E,  
9 which provides:

10 “All roads shall be designed and constructed to adequately and  
11 safely accommodate vehicles, pedestrians, and bicycles according  
12 to Chapters 5 and 10 of the Comprehensive Plan and the Clackamas  
13 County Roadway Standards. Development-related roadway  
14 adequacy and safety impacts to roadways shall be evaluated  
15 pursuant to the Clackamas County Roadway Standards [(CCRS)].  
16 and also to Oregon Department of Transportation [(ODOT)]  
17 standards for state highways.”

18 Eastbank argued that “safety” is undefined in the county code, and that the ODOT  
19 standards referenced in ZDO 1007.01 are undefined and not clear and objective.  
20 Record 330. Eastbank also opposed a proposed ODOT condition of approval as  
21 not clear and objective. *Id.*

22 Eastbank’s attorney again raised the needed housing limitations during  
23 testimony before the hearings officer:

24 “The only thing I would say about safety is \* \* \* this is an  
25 application subject to the needed housing provisions in 197.303 and  
26 307 and subject to the needed housing condition requirements in

1 197.522. ‘Safety’ is a subjective term. I don’t think it is capable of  
2 being applied in a clear and objective way. So, I’ve not seen staff  
3 raise that issue and I’m not sure staff would adopt my argument. I’m  
4 not asking that they do but to the extent there is an argument about  
5 safety, I wanted to preserve that issue and make the Hearings Officer  
6 aware of our point.” Audio Recording, Hearing, July 18, 2019, at  
7 1:12:35 (statement of Eastbank attorney Michael Robinson).

8 Eastbank reiterated its needed housing argument in its final written  
9 argument submitted to the hearings officer on August 8, 2019:

10 “[O]nly relevant approval standards in the ZDO, the County’s  
11 acknowledged land use regulations, that are clear and objective may  
12 be applied to this Application by the Hearings Officer. The  
13 Applicant does not challenge the Application of other incorporated  
14 Standards to this Application. The Applicant has satisfied all  
15 relevant approval criteria regardless of whether the approval  
16 criterion or condition of approval satisfies the clear and objective  
17 test in ORS 197.307(4) but the Applicant reserves the right to assert  
18 that an approval standard or condition of approval is not clear and  
19 objective.” Record 41–42.

20 Buffalo-Bend does not defend the hearings officer’s finding that  
21 Eastbank’s needed housing argument was raised too late. Instead, Buffalo-Bend  
22 argues that Eastbank failed to raise the issue with sufficient specificity to preserve  
23 it for review. Buffalo-Bend argues that Eastbank waived its needed housing  
24 assignments of error because Eastbank did not identify to the hearings officer  
25 which specific county standards it was arguing are not clear and objective.

26 Eastbank replies that the needed housing issue was sufficiently raised  
27 because Eastbank’s arguments below provided fair notice to the hearings officer  
28 that the hearings officer needed to determine whether the criteria applied to the

1 application were “only clear and objective standards,” as required by ORS  
2 197.307(4). We agree.

3 ORS 197.835(3) provides: “Issues shall be limited to those raised by any  
4 participant before the local hearings body as provided by ORS 197.195 or  
5 197.763, whichever is applicable.” The waiver provision in ORS  
6 197.195(3)(c)(B) applies and provides, in part:

7 “[I]ssues which may provide the basis for an appeal to the Land Use  
8 Board of Appeals shall be raised in writing prior to the expiration of  
9 the comment period. Issues shall be raised with sufficient specificity  
10 to enable the decision maker to respond to the issue[.]”

11 In addition, because the county allowed a *de novo* local appeal, the waiver  
12 provision in ORS 197.763(1) applies. ORS 197.195(5).<sup>3</sup> ORS 197.763(1)  
13 provides:

14 “An issue which may be the basis for an appeal to the Land Use  
15 Board of Appeals shall be raised not later than the close of the record

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<sup>3</sup> ORS 197.195(5) provides:

“A local government may provide for a hearing before the local government on appeal of a limited land use decision under this section. The hearing may be limited to the record developed pursuant to the initial hearing under subsection (3) of this section or may allow for the introduction of additional testimony or evidence. A hearing on appeal that allows the introduction of additional testimony or evidence shall comply with the requirements of ORS 197.763. Written notice of the decision rendered on appeal shall be given to all parties who appeared, either orally or in writing, before the hearing. The notice of decision shall include an explanation of the rights of each party to appeal the decision.”

1 at or following the final evidentiary hearing on the proposal before  
2 the local government. Such issues shall be raised and accompanied  
3 by statements or evidence sufficient to afford the governing body,  
4 planning commission, hearings body or hearings officer, and the  
5 parties an adequate opportunity to respond to each issue.”

6 Eastbank raised the needed housing issue prior to the close of the record  
7 with sufficient specificity to alert the hearings officer that the needed housing  
8 statute applies to the application, and specifically challenged the application of  
9 the CCRS and other “safety” standards. Eastbank also challenged a proposed  
10 ODOT condition of approval. The hearings officer was required to respond to  
11 Eastbank’s arguments. The hearings officer failed to do so, and the county  
12 correctly conceded that error requires remand.

13 Eastbank’s first assignment of error is sustained.<sup>4</sup>

14 **SECOND, THIRD, FOURTH, AND FIFTH ASSIGNMENTS OF ERROR**  
15 **(EASTBANK)**

16 Eastbank’s second and third assignments of error challenge the hearings  
17 officer’s application of standards and imposition of conditions that Eastbank  
18 argues are not clear and objective. In its fourth assignment of error, Eastbank  
19 argues that the hearings officer erred by failing to allow Eastbank to propose  
20 conditions of approval. Eastbank’s fifth assignment of error challenges certain

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<sup>4</sup> In this appeal, the parties dispute the applicability of certain standards from the ZDO and CCRS. We remand for the hearings officer to consider what standards and conditions may be applied under the limitations of the needed housing statute and any other applicable statutes. We express no opinion in this decision about which standards the county may or may not apply.

1 conditions of approval that Eastbank argues are not supported by substantial  
2 evidence in the record.

3 We have sustained Eastbank’s first assignment of error. On remand, the  
4 hearings officer must determine whether applicable standards, conditions, and  
5 procedures are clear and objective and may only apply those standards,  
6 conditions and procedures that are clear and objective. ORS 197.307(4). It is  
7 likely that on remand the applicable criteria and conditions of approval will differ  
8 from those in the decision challenged in this appeal. Accordingly, the correct  
9 disposition is remand without reaching Eastbank’s second through fifth  
10 assignments of error.

11 **FIRST ASSIGNMENT OF ERROR (BUFFALO-BEND)**

12 Buffalo-Bend’s first assignment of error challenges the June 27, 2019  
13 hearing notice because the notice failed to list the applicable criteria with  
14 sufficient specificity to allow parties to prepare for the hearing. For a limited land  
15 use decision, the local government notice must “[l]ist, by commonly used  
16 citation, the applicable criteria for the decision.” ORS 197.195(3)(c)(C). For a  
17 local quasi-judicial land use hearing such as the one before the hearings officer  
18 in this case, the local government notice must “[l]ist the applicable criteria from  
19 the ordinance and the plan that apply to the application at issue.” ORS  
20 197.763(3)(b). Buffalo-Bend argues that the county’s notice prejudiced its  
21 substantial rights to prepare and present its case to the hearings officer because it

1 was not clear what criteria the hearings officer intended to apply to the  
2 application.

3 LUBA will reverse or remand a limited land use decision if “[t]he local  
4 government committed a procedural error which prejudiced the substantial rights  
5 of the petitioner.” ORS 197.828(2)(d). In order to demonstrate prejudice, a  
6 petitioner must explain “with some specificity what would have been different or  
7 more complete” had the local government followed the correct procedures.  
8 *Concerned Citizens of the Upper Rogue v. Jackson County*, 33 Or LUBA 70, 83  
9 (1997).

10 Eastbank and the county respond that Buffalo-Bend has not established  
11 that its substantial rights were prejudiced because Buffalo-Bend had sufficient  
12 opportunity to review the applicable criteria identified in the planning director’s  
13 decision and prepare its presentation to the hearings officer. The county observes  
14 that Buffalo-Bend does not identify any applicable criteria that the hearings  
15 officer failed to apply. Eastbank argues that the hearings officer did not apply any  
16 standards that were not raised by the parties. We agree with the county and  
17 Eastbank that Buffalo-Bend has not established that the county’s June 27, 2019  
18 notice prejudiced its substantial rights.

19 Buffalo-Bend’s first assignment of error is denied.

1 **SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR**  
2 **(BUFFALO-BEND)**

3 Buffalo-Bend's second assignment of error challenges the county's  
4 findings with respect to Eastbank's voluntary contribution to the transportation  
5 system. Buffalo-Bend's third and fourth assignments of error challenge the  
6 county's findings that Eastbank's planned transportation improvements will  
7 achieve traffic safety. Buffalo-Bend requests remand for "more stringent  
8 application of various approval standards." Buffalo-Bend Petition for Review 3.

9 It is likely that on remand the county's decision will include new findings  
10 that vary significantly from the decision challenged in this appeal. Accordingly,  
11 the correct disposition is remand without reaching Buffalo-Bend's second  
12 through fourth assignments of error.

13 The county's decision is remanded.