

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

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4                   BUTA SANGA,  
5                   *Petitioner,*

6  
7                   vs.

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9                   CITY OF EUGENE,  
10                  *Respondent,*

11  
12                  and

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14                  EDGAR RIZKALLAH and  
15                  PREMIUM PETROLEUM GROUP, LLC,  
16                  *Intervenors-Respondents.*

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18                  LUBA No. 2019-111

19  
20                  FINAL OPINION  
21                  AND ORDER

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23                  Appeal from City of Eugene.

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25                  Michael J. Paluska, Salem, filed the petition for review and argued on  
26                  behalf of petitioner. With him on the brief was Michael J. Paluska P.C.

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28                  Lauren A. Sommers, Assistant City Attorney, Eugene, filed a response  
29                  brief and argued on behalf of respondent.

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31                  Micheal M. Reeder, Eugene, filed a response brief and argued on behalf of  
32                  intervenors-respondents. With him on the brief was the Law Office of Mike  
33                  Reeder.

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35                  RYAN, Board Member; RUDD, Board Chair, participated in the decision.

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37                  ZAMUDIO, Board Member; did not participate in the decision.  
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AFFIRMED

03/11/2020

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

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**NATURE OF THE DECISION**

Petitioner appeals a hearings officer decision approving a traffic impact analysis.

**FACTS**

On April 9, 2019, intervenors-respondents (intervenors) applied for review of a traffic impact analysis (TIA) and an adjustment in connection with their proposal to develop a convenience store and gas station on property located at the southwest corner of the intersection of Highway 99 and Roosevelt Boulevard.<sup>1</sup> The property is currently accessed directly from both Roosevelt Boulevard and from Highway 99. Intervenors proposed removal of the existing 25-foot wide driveway access from Roosevelt Boulevard to the property, and replacing the existing access with access via a shared easement on property that is adjacent to the subject property’s western boundary. Intervenors also proposed relocating the existing access to the property from Highway 99 further south, away from the intersection of Highway 99 and Roosevelt Boulevard. The city sent notice of the application to petitioner.<sup>2</sup> Supplemental Record 5.

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<sup>1</sup> Petitioner does not challenge the city’s approval of the adjustment.

<sup>2</sup> At oral argument, petitioner confirmed that petitioner received notice of the application. Audio Recording, LUBA Oral Argument Jan 28, 2020, at 9:40-10:45 (statement of petitioner’s attorney).

1 The planning director concluded that the TIA met the applicable  
2 requirements of the Eugene Code (EC), and approved the applications. Record  
3 153-60. The city sent notice of the planning director's decision to petitioner.  
4 Record 143-44; Petition for Review 34. Petitioner appealed the planning  
5 director's decision. Record 146-52.

6 The hearings officer held a hearing on August 28, 2019, and left the record  
7 open for three additional weeks. At the conclusion of the open record period, the  
8 hearings officer issued a decision affirming the planning director's decision. This  
9 appeal followed.

10 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

11 In his first assignment of error, petitioner argues that the hearings officer  
12 improperly construed EC 9.8650 and EC 9.8680 because he failed to require  
13 improvements that petitioner maintains are necessary to address the additional  
14 traffic that will be generated by the development that may contribute to traffic  
15 problems in the area.<sup>3</sup> Petition for Review 13-14. In his second assignment of

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<sup>3</sup> EC 9.8650 provides the purpose of TIA review:

“The purpose of Traffic Impact Analysis Review is to ensure that developments which will generate a significant amount of traffic, cause an increase in traffic that will contribute to traffic problems in the area, or result in levels of service of the roadway system in the vicinity of the development that do not meet adopted level of service standards provide the facilities necessary to accommodate the traffic impact of the proposed development. In addition, any Traffic Impact Analysis Review addressing streets in the jurisdiction of

1 error, petitioner argues that the hearings officer's decision is not supported by  
2 substantial evidence in the record because, for purpose of its trip distribution  
3 models, the TIA relied on the future access easement across the adjacent  
4 property's eastern boundary, and no access easement existed at the time of  
5 approval. Also in his second assignment of error, petitioner argues that the  
6 hearings officer erred in failing to impose a condition of approval requiring  
7 intervenors to secure an access easement. In his third assignment of error,  
8 petitioner argues that EC 7.410 applies to intervenors' application, and that the  
9 hearings officer erred in failing to address it.

10 Intervenor respond, initially, that petitioner is precluded from raising the  
11 issues raised in the first, second, and third assignments of error under the  
12 exhaustion-waiver principle articulated in *Miles v. City of Florence*, 190 Or App  
13 500, 79 P3d 382 (2003), *rev den*, 336 Or 615 (2004), because petitioner failed to  
14 identify those issues in his appeal statement. For the reasons set forth below, we  
15 agree.

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Lane County is also designed to ensure that cross sectional elements of streets, such as the wearing coarse or pavement, base material, soils, or storm water structures (bridges or culverts) have the adequate capacity to accommodate developments that utilize vehicles of heavy weight and associated vehicle traffic as part of their activity.”

1           ORS 197.825(2)(a) provides that “[t]he jurisdiction of the board [i]s  
2 limited to those cases in which the petitioner has exhausted all remedies available  
3 by right before petitioning the board for review[.]” In *Miles*, the Court of Appeals  
4 held that “exhaustion principles traditionally require not only that an avenue of  
5 review be pursued, but also that the particular claims that form the basis for a  
6 challenge [at LUBA] be presented to the administrative or local government body  
7 whose review must be exhausted. \* \* \*.” *Id.* at 506. The court explained that

8           “a party does not exhaust his or her remedies ‘simply by stepping  
9 through the motions of the administrative process without affording  
10 the [administrative or local government body] an opportunity to rule  
11 on the substance of the dispute.” *Id.* at 507 (quoting *Mullenaux v.*  
12 *Dept. of Revenue*, 293 Or 536, 541, 651 P2d 724 (1982).

13 In *McKeown v. City of Eugene*, 46 Or LUBA 494, 503, *aff’d* 193 Or App 512, 93  
14 P3d 845 (2004), we held that where EC 9.7605(3) required the appeal statement  
15 to include a statement of the issues on appeal and to “explain specifically how  
16 the planning director’s decision is inconsistent with applicable criteria,” and  
17 where the petitioners’ local appeal statement failed to raise the issues raised in  
18 their petition for review in their appeal statement, the petitioners failed to exhaust  
19 their administrative remedies and the issues were waived.<sup>4</sup>

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<sup>4</sup> EC 9.7605(3) provides that for an appeal of a planning director’s decision:

“The appeal shall include a statement of issues on appeal and be limited to the issues raised in the appeal. The appeal statement shall explain specifically how the planning director’s decision is inconsistent with applicable criteria.”

1           Petitioner does not respond to intervenors' argument that petitioner is  
2 precluded under the principle of exhaustion-waiver from raising the issues raised  
3 in the first, second and third assignments of error. Accordingly, absent any  
4 response from petitioner, we agree with intervenors that the principle of  
5 exhaustion-waiver precludes petitioner from raising the issues raised in the first  
6 through third assignments of error at LUBA.

7           In addition, in the absence of a response from petitioner, we have  
8 independently reviewed petitioner's local appeal statement at Record 148, and  
9 we agree with intervenors that the appeal statement does not raise the issues that  
10 are raised in the first through third assignments of error. The first assignment of  
11 error challenges the hearings officer's interpretation of EC 9.8650 and EC 9.8680  
12 as allowing the city to rely on the projected level of service at affected  
13 intersections in order to determine whether the development should provide  
14 public or private improvements.<sup>5</sup> The second assignment of error challenges the  
15 access easement that intervenors' traffic engineer relied on to prepare the TIA  
16 and the hearings officer's failure to require the access easement as a condition of

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<sup>5</sup> The planning director's decision concluded that the TIA provided evidence that after build out, all affected intersections would operate at or above acceptable levels of service. Record 156. The planning director's decision also interpreted EC 9.8650 and EC 9.8680 as allowing the city to rely on the projected level of service at affected intersections. Record 155.

1 approval.<sup>6</sup> The third assignment of error argues that the hearings officer failed to  
2 apply EC 7.410 to intervenors' application. The appeal statement does not  
3 "explain specifically how the planning director's decision is inconsistent with  
4 applicable criteria" but rather includes general statements regarding petitioner's  
5 concern with the increased traffic that the development will create. EC 9.7605(3).  
6 The appeal statement does not address the access easement at all, and does not  
7 address, either by citation or by reference to the operative language, EC 7.410 at  
8 all.<sup>7</sup> Accordingly, the principles of exhaustion-waiver preclude petitioner from  
9 raising the issues raised in the first, second and third assignments of error.

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<sup>6</sup> The planning director's decision explained that the existing access from Roosevelt Boulevard would be closed and a new access to Roosevelt Boulevard "would be in an easement abutting the west side of the development site." Record 153.

<sup>7</sup> We quote the appeal statement in full here:

"In accordance with the procedures listed in Section 9.7605 of the Eugene Code, we submit this letter, along with the included appeal form and fee, for purposes of initiating an appeal of the Planning Director's Decision for files TIA 19-01 and ARA 19-6.

"My business partners and I are the owners of property located at 2797 Roosevelt Boulevard. We first became aware of this decision when we received the notice of land use decision postcard from the City. We are currently developing a site in close proximity to the proposed development that is subject to the applications identified above and are particularly concerned with the impacts that increased traffic will have on the intersection of Highway 99 and Roosevelt Boulevard, as well as surrounding roadways. We take issue with the conclusions set forth in the decision related to the following criteria:



1           The first, second and third assignments of error are denied.           .

2   **FOURTH ASSIGNMENT OF ERROR**

3           In his fourth assignment of error, we understand petitioner to argue that the  
4 city committed a procedural error in failing to provide him with notice of the  
5 application, and that failure prejudiced petitioner’s substantial right to prepare his  
6 case.

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“EC 9.8680 - Traffic Impact Analysis - Approval Criteria

“The intersection of Highway 99 and Roosevelt Boulevard is already quite busy and we have concerns that the new traffic trips created by the proposed development will create additional complications at this intersection. We disagree with the conclusion in the report that this new development will create no significant impacts to the public street system. Additional improvements could help mitigate the impacts of the new development. We would appreciate the opportunity to address the traffic situation at this intersection.

“EC 9.8030 - Adjustment Review - Approval Criteria

“Along the same lines as our objection above, since the new development will create additional complications at this intersection, we similarly disagree with the conclusion under EC 9.8030. The proposed adjustment to the standards will not provide safe ingress and egress to the development site and will present a hazardous condition to users of the right of way.

“Thank you for an opportunity to more fully explain our concerns before the hearings officer. Please let us know if we can provide any additional information in order to move forward with this appeal.”  
Record 148.

1 LUBA will reverse or remand a limited land use decision if “[t]he local  
2 government committed a procedural error which prejudiced the substantial rights  
3 of the petitioner.”<sup>8</sup> ORS 197.828(2)(d). In order to establish a procedural error, a  
4 petitioner must identify the procedure allegedly violated. *Stoloff v. City of*  
5 *Portland*, 51 Or LUBA 560, 563 (2006). In order to demonstrate prejudice to the  
6 petitioner, a petitioner must explain “with some specificity what would have been  
7 different or more complete” had the local government followed the correct  
8 procedures. *Concerned Citizens of the Upper Rogue v. Jackson County*, 33 Or  
9 LUBA 70, 83 (1997).

10 In addition, and more importantly, in order to raise a procedural error at  
11 LUBA, a petitioner must preserve it by objecting to the procedural error below if

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<sup>8</sup> Intervenors take the position that the challenged decision is a “[l]imited land use decision,” which is defined in ORS 197.015(12) to mean:

“[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).

“(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.”

LUBA’s standard of review of an appeal of a limited land use decision is set out at ORS 197.828.

1 there is an opportunity to do so. *Friends of Canemah v. City of Oregon City*, 77  
2 Or LUBA 434, *aff'd*, 294 Or App 190, 427 P3d 1149 (2018). In his petition for  
3 review, petitioner cites Record 91, 107, and 148 as proof that petitioner objected  
4 to the procedural error. We have reviewed the cited record pages, and nothing in  
5 any of the cited record pages objects that the city failed to provide notice of the  
6 application to petitioner, which is the procedural error petitioner alleges that the  
7 city committed.<sup>9</sup>

8 The fourth assignment of error is denied.

9 The city's decision is affirmed.

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<sup>9</sup> Because we deny the fourth assignment of error, we need not address intervenors' motion to take evidence outside the record, which seeks to have LUBA consider extra-record evidence to demonstrate that the city provided notice of the application to petitioner in accordance with EC 9.7210(1)(c). In addition, as noted at *n* 1, *supra*, petitioner's attorney confirmed at oral argument that petitioner received notice of the application.