

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

LEGACY DEVELOPMENT GROUP, INC.,
Petitioner,

vs.

CITY OF THE DALLES,
Respondent,

and

DENISE LYNNE DIETRICH-BOKUM,
ROBERT CLAYTON BOKUM,
GARY GINGRICH, TERRI JO JESTER GINGRICH,
DAMON ROLLA HULIT, and
ROBERTA KAY WYMORE-HULIT,
Intervenors-Respondents.

LUBA No. 2020-099

FINAL OPINION
AND ORDER

Appeal from City of The Dalles.

James D. Howsley filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Jordan Ramis PC.

No appearance by City of The Dalles.

Steve C. Morasch filed the response brief and argued on behalf of intervenors-respondents. Also on the brief was Landerholm, P.S.

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

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REVERSED

02/24/2021

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

NATURE OF THE DECISION

Petitioner appeals a decision by the city council denying its application for a subdivision.

FACTS

The subject property is 6.92 acres and is zoned High Density Residential (RH). Petitioner applied to subdivide the property into 72 lots to include 83 dwelling units and a community park. The Dalles Municipal Code (TDMC) 10.5.020.060 allows up to 25 units per gross acre on land zoned RH and, accordingly, the maximum potential density on the subject property is 173 dwelling units.¹

The adjacent properties to the southwest, west, northwest, north, and northeast are also zoned RH. Adjacent properties to the east, southeast and south are zoned Low Density Residential. The property is bordered by Richmond Street to the east, East 10th Street to the north, and East 12th Street to the south. Petitioner's application proposed to construct half-street improvements on all of the streets bordering the subject property. The streets within one-half mile surrounding the property generally lack curbs, gutters, and sidewalks until they intersect with Thompson Street, a public street located over one-half mile to the west of the subject property. Thompson Street is a fully improved street with

¹ TDMC 10.5.020.060 also appears to include a minimum density requirement.

1 curbs, gutters, and sidewalks. U.S. Highway 197, an Oregon Department of
2 Transportation (ODOT) facility, is located approximately one-half mile to the
3 east of the subject property and is accessed from Fremont Street.²

4 Petitioner submitted its subdivision application in July 2019, and the city
5 mailed petitioner a letter notifying petitioner that the city deemed the application
6 complete on January 23, 2020. The planning department approved the application
7 on March 9, 2020. That approval included a condition that required petitioner to
8 submit a traffic impact study (TIS) prior to final plat approval.³ On March 19,
9 2020, intervenors-respondents (intervenors) appealed the planning department's
10 decision to the planning commission. On April 29, 2020, while that appeal was
11 pending, petitioner submitted a draft TIS prepared by its traffic consultant, DKS
12 Associates. The city's traffic consultant, Kittelson & Associates, Inc., reviewed

² The decision refers to the intersection of Highway 197 and Fremont Street as the US 197/Fremont Street/Columbia View Drive intersection because the street on the east side of Highway 197, directly across the highway from Fremont Street, is named Columbia View Drive.

The intersection of Highway 197/Fremont Street/Columbia View Drive currently carries 662 trips during the p.m. peak hour, 91 of which from the eastbound approach of Fremont Street. Record 356.

³ The condition provided:

“A Traffic Impact Study will be required to be completed and submitted for the proposed subdivision, with methodology in accordance with standard[] engineering practices. The study will be required to be reviewed and approved by the City Engineer.” Record 949.

1 the TIS on behalf of the city and concluded that the TIS was adequate to assess
2 the traffic impacts from the proposal. Petitioner and the city's planning staff met
3 to review the TIS and planning staff subsequently prepared a memorandum of
4 the meeting which concluded that the TIS adequately addressed the impacts from
5 the subdivision on the Highway 197/Fremont Street/Columbia View Drive
6 intersection. Record 667-68.

7 On July 16, 2020, the planning commission denied the appeal and upheld
8 the planning department's decision, and intervenors appealed that decision to the
9 city council. On September 14, 2020, the city council held a hearing and, at the
10 conclusion, voted to deny the subdivision application. We discuss in more detail
11 the bases for the city council's denial in our resolution of the first assignment of
12 error. This appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 The city council denied the application because it concluded that the
15 application failed to comply with four provisions of the TDMC which we set out
16 and discuss in detail below. In its first assignment of error, petitioner alleges that
17 the four TDMC provisions which the city council determined were not satisfied
18 are not "clear and objective" and therefore ORS 197.307(4) prohibits the city
19 from applying them to its application. As a result, petitioner argues, the city
20 council's decision to deny the application was "[o]utside the scope of authority
21 of the decision maker." ORS 197.828(2)(c)(A). Petitioner also argues that the
22 decision violates ORS 197.831 because the city has not satisfied its obligation

1 under that statute to “demonstrate that the approval standards * * * are capable
2 of being imposed only in a clear and objective manner.” We begin with a
3 discussion of ORS 197.307(4), ORS 197.831, and related statutes.

4 **A. The Needed Housing Statutes**

5 The statutes that are set out at ORS 197.295 to ORS 197.314 are commonly
6 referred to as the Needed Housing Statutes. With their initial enactment forty
7 years ago this year, in 1981,⁴ those statutes incorporated into law the “St. Helens
8 Policy,” which was adopted as a policy by the Land Conservation and
9 Development Commission (LCDC) in 1979. *See Robert Randall Company v.*
10 *City of Wilsonville*, 15 Or LUBA 26 (1986) (so explaining).⁵

11 ORS 197.307(1) provides, “The availability of affordable, decent, safe and
12 sanitary housing opportunities for persons of lower, middle and fixed income,
13 including housing for farmworkers, is a matter of statewide concern.” ORS
14 197.307(4) provides:

15 “Except as provided in subsection (6) of this section, a local
16 government *may adopt and apply only clear and objective*
17 *standards, conditions* and procedures regulating the development of
18 housing, including needed housing. The standards, conditions and

⁴ Or Laws 1981, ch 884, §§ 5-6.

⁵ *See also* Testimony, Senate Environment and Land Use Committee, SB 419, June 10, 1981, Ex A (statement of F. Van Natta). The initial purpose behind the St. Helens Policy was to end local government attempts to exclude certain housing types that met lower, moderate or “least cost” housing needs. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 148 (1998).

1 procedures:

2 “(a) May include, but are not limited to, one or more provisions
3 regulating the density or height of a development.

4 “(b) May not have the effect, either in themselves or cumulatively,
5 of discouraging needed housing through unreasonable cost or
6 delay.”⁶ (Emphasis added).

7 In *Rogue Valley Assoc. of Realtors v. City of Ashland*, we explained that
8 approval standards are not clear and objective if they impose “subjective, value-
9 laden analyses that are designed to balance or mitigate impacts of the
10 development on (1) the property to be developed or (2) the adjoining properties
11 or community.” 35 Or LUBA 139, 158 (1998), *aff’d*, 158 Or App 1, 970 P2d 685,
12 *rev den*, 328 Or 594 (1999). We also noted that ORS 197.307(4) requires the
13 standards and conditions that apply to needed housing to be *both* “clear” *and*
14 “objective.” *Id.* at 155-56 (“Dictionary definitions of ‘clear’ and ‘objective’
15 suggest that the kinds of standards frequently found in land use regulations lack
16 the certainty of application required to qualify as ‘clear’ or ‘objective.’”); *Id.* at
17 156 n 23 (quoting the dictionary definitions of “clear” and “objective”).⁷

⁶ ORS 197.307(6) allows a local government to adopt an alternative approval process for applications for needed housing if the alternative approval process authorizes a density that is greater than the density authorized under the “clear and objective standards” described in ORS 197.307(4). There is no dispute that the city has not adopted such an alternative approval process.

⁷ We note again here, as we noted in *Rogue Valley*, that the two words have different meanings. The dictionary includes the following definition for “clear”:

1 Petitioner also argues that the city’s decision violates the standard in ORS
2 197.831, which places the burden on the local government to demonstrate, in an
3 appeal before LUBA, that standards and conditions imposed on “needed
4 housing” “are capable of being imposed only in a clear and objective manner.”
5 By its terms, ORS 197.831 applies to decisions that “impos[e] the provisions of
6 the ordinance[]” on “needed housing.”⁸

7 In the response brief, intervenors opine that the record lacks evidence
8 supporting a conclusion that the development is “needed housing,” as defined in
9 ORS 197.303, but concede that that distinction does not matter for purposes of
10 ORS 197.307(4), which requires that local governments apply only clear and
11 objective standards to applications for all housing, not just “needed housing.”

“**3 a** : easily understood : without obscurity or ambiguity * * * : thoroughly understood or comprehended * * * : easy to perceive or determine with certainty * * * : sharply distinguished : readily recognized : UNMISTAKABLE[.]” *Webster’s Third New Int’l Dictionary* 419 (unabridged ed 2002).

The definition for “objective” includes the following:

“**1 * * * b * * *** (2) : existing independent of mind : relating to an object as it is in itself or as distinguished from consciousness or the subject (3) : belonging to nature or the sensible world : publicly or intersubjectively observable or verifiable esp. by scientific methods : independent of what is personal or private in our apprehension and feelings : of such nature that rational minds agree in holding it real or true or valid[.]” *Id.* at 1556.

⁸ In *Home Builders Assoc. v. City of Eugene*, we discussed the genesis of the enactment of ORS 197.831. 41 Or LUBA 370, 377-83 (2002).

1 Response Brief 3 n 1. At oral argument, intervenors argued for the first time that
2 ORS 197.831 does not apply to the challenged decision because the city did not
3 find, and the record does not demonstrate, that the development is for “needed
4 housing.” *See* ORS 197.303(1) (defining “needed housing”).⁹ After intervenors
5 raised the issue at oral argument, petitioner then submitted a Motion to Take
6 Official Notice of the city’s 2017 Housing and Residential Land Needs
7 Assessment, which petitioner describes in its motion as “part of periodic review
8 of the [city’s] comprehensive plan.” Motion to Take Official Notice 3.

9 We agree with intervenors’ assessment in the response brief that whether
10 the housing development at issue in this appeal would provide “needed housing,”
11 as that term is defined in ORS 197.303(1), is immaterial to our conclusions,
12 explained below, that the city’s decision violates ORS 197.307(4). That violation
13 provides a sufficient basis for reversal of the city’s decision, independently from
14 ORS 197.831. Therefore, we do not express any opinion on whether the
15 application of ORS 197.831 is limited to appeals concerning applications for
16 needed housing. Petitioner’s Motion to Take Official Notice is denied as moot.

⁹ LUBA does not consider issues raised for the first time at oral argument. OAR 661-010-0040(1). However, we are independently responsible for correctly construing statutes, regardless of the parties’ arguments. *See* ORS 197.805 (providing the legislative directive that LUBA “decisions be made consistently with sound principles governing judicial review”); *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) (“In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties.”).

1 **B. TMDM 10.10.060(A)(3)(a) and TMDM 10.10.060(A)(5)(a)**

2 TMDM chapter 10.10 “provides general information regarding
3 improvements required with residential, commercial, public and quasi-public,
4 and industrial development. It is intended to clarify timing, extent, and standards
5 for improvements required in conjunction with development.” TMDM 10.10.10.

6 TMDM 10.10.060 sets out “Street Requirements” for development, and
7 TMDM 10.10.060(A)(1) requires a TIS for development of 16 or more dwelling
8 units, any development proposal that is likely to generate more than 400 average
9 daily motor trips, and any development proposal that is “within 500 feet of an
10 intersection that is already at or below level of service ‘D’.” As noted, petitioner
11 submitted a draft TIS while intervenors’ appeal to the planning commission was
12 pending. TMDM 10.10.060(A)(3), one of the provisions on which the city council
13 relied to deny the application, provides:

14 “The TIS shall be conducted in accordance with the following:

15 “a. A proposal establishing the scope of the traffic study shall be
16 submitted for review to the Director. The study requirements
17 shall reflect the magnitude of the project in accordance with
18 accepted traffic engineering practices. Projects should assess
19 all nearby key intersections.

20 “b. Once the scope of the traffic study has been approved, the
21 applicant shall present the results with an overall site
22 development proposal. The study shall be sealed and signed
23 by a licensed professional engineer specializing in traffic.”¹⁰

¹⁰ TMDM 10.10.060(A)(4) provides:

1 TDMC 10.10.060(A)(5)(a) provides:

2 “The City may deny, approve, or approve a proposal with conditions
3 necessary to meet operational and safety standards; provide the
4 necessary right-of-way for improvements; and to require
5 construction of improvements to ensure consistency with the future
6 planned transportation system.”

7 The city council adopted findings addressing TDMC 10.10.060(A)(3)(a) and
8 TDMC 10.10.060(A)(5)(a) together and denied the application based on its
9 conclusion that petitioner’s TIS did not satisfy TDMC 10.10.060(A)(3)(a). The
10 city council found, in relevant part:

11 “[Petitioner’s] TIS failed to provide a full analysis of an additional
12 nearby intersection, US 197/Fremont Street/Columbia View Drive,
13 and only providing a ‘queueing’ analysis for this intersection. Upon
14 hearing testimony, as well as the City’s [Transportation System Plan
15 (TSP)], the Council determined that the US 197/Fremont

“Approval Criteria.

- “a. Location of new arterial streets shall conform to the Transportation System Plan, and traffic signals should generally not be spaced closer than 1,500 feet for reasonable traffic progression.
- “b. The TIS demonstrates that adequate transportation facilities exist to serve the proposed development or identifies mitigation measures that resolve identified traffic safety problems in a manner that is satisfactory to the City and, when state highway facilities are affected, to ODOT.
- “c. For affected non-highway facilities, the TIS establishes that level-of-service standards adopted by the City have been met.”

1 Street/Columbia View Drive intersection is also a ‘key intersection’
2 and should have been studied further.” Record 15.

3 In its first subassignment of error, petitioner argues that the city may not
4 apply TDMC 10.10.060(A)(3)(a) to its application for housing because the
5 provision is not “clear and objective,” as required by ORS 197.307(4). In its
6 second subassignment of error, petitioner argues that the city may not apply
7 TDMC 10.10.060(A)(5)(a) to its application for housing because it is also not
8 clear and objective. Because the city’s findings address those two TDMC
9 provisions together, we address petitioner’s challenges together here.

10 Petitioner points to the requirements in TDMC 10.10.060(A)(3)(a) that the
11 TIS “should assess all nearby key intersections” and “reflect the magnitude of the
12 project in accordance with accepted traffic engineering practices” and argues that
13 those provisions are neither clear nor objective. We agree.

14 The phrase “magnitude of the project” is not clear because that
15 determination cannot be made by reference to objective metrics set out in the
16 TDMC, such as a requirement that the TIS area include all intersections for which
17 the project would generate a specified number of additional vehicles per peak
18 hour. Similarly, the phrase “nearby key intersections” is not clear because there
19 are no objective measurements in the TDMC, such as a specified distance from
20 the subject property or a specified type of transportation facility, which make
21 clear the meaning of “nearby” or “key.” Those phrases are also not “objective”
22 because they require a subjective analysis in order to determine the meaning of

1 “magnitude,” “key,” and “nearby,” as well as the applicable “accepted traffic
2 engineering practices.”

3 The city’s finding that the Highway 197/Fremont Street/Columbia View
4 Drive intersection should have been studied relies on the ODOT Critical Crash
5 Rate and Level of Service (LOS) standards that are apparently set out in the city’s
6 adopted TSP.¹¹ Intervenors respond that the “ODOT Development Review
7 Guidelines” and the “ODOT Critical Crash Rate” supply a “clear and objective”
8 standard for the scope of a TIS. In the alternative, intervenors respond that the
9 ORS 197.307(4) requirement for clear and objective standards only applies to
10 standards that have been “adopted” by the local government.

¹¹ The city’s findings explain that the Highway 197/Fremont Street/Columbia View Drive intersection exceeds the ODOT Critical Crash Rate:

“For purposes of measuring operational and safety standards for an intersection, the City uses LOS ratings and ‘Critical Crash Ratings’ to identify study intersections that warrant further investigation and may represent opportunities to reduce crash frequency and severity. The LOS is a rating system (A through F) based on average delay at an intersection; with A-C representing traffic flows without significant delay during peak hours, D and E are progressively worse, and F representing excessive delay with demand exceeding capacity, essentially a ‘fail’. The City requires a minimum of LOS D for all signalized and unsignalized intersections. The Critical Crash Rate establishes a threshold for comparison among intersections with similar numbers of approaches and similar traffic control. As documented in the TSP, the intersection of US 197/Fremont Street/Columbia View Drive is one of two intersections in the City’s existing roadway system that exceeds the Critical Crash Rate.” Record 15.

1 We disagree with both premises. ORS 197.307(4) allows the city to
2 “adopt” *and* “apply” only clear and objective standards, and we have no reason
3 to believe that the legislature intended only standards “adopted” by the city to be
4 subject to the statute. Further, and more importantly, nothing in TDMC
5 10.10.060(A)(3)(a) references or identifies ODOT standards as the “accepted
6 traffic engineering practices.” Thus, it is immaterial to our analysis under ORS
7 197.307(4) whether the referenced ODOT standards are clear and objective
8 because the applicable approval standard, TDMC 10.10.060(A)(3)(a), does not
9 clearly incorporate those ODOT standards. TDMC 10.10.060(A)(3)(a) is not
10 clear and objective and, thus, the city erred in applying it to petitioner’s
11 application for housing.

12 Petitioner also argues that the city may not apply TDMC
13 10.10.060(A)(5)(a) to its application. Petitioner argues that the phrases
14 “necessary to meet operational and safety standards” and “ensure consistency
15 with the future planned transportation system” are not objective standards
16 because they require “subjective, value-laden analyses” to determine what
17 exactly is “necessary” and what is “consisten[t].” We agree. Terms such as
18 “necessary” and “consisten[t]” are designed to balance or mitigate impacts from
19 development and, therefore, are not “objective.” *Rogue Valley*, 35 Or LUBA at
20 158. TDMC 10.10.060(A)(5)(a) is not clear and objective and, thus, the city erred
21 in applying it to deny petitioner’s application for housing.

22 The first and second subassignments of error are sustained.

1 **C. TDMC 10.10.060(A)(5)(b)**

2 TDMC 10.10.060(A)(5)(b) provides:

3 “Construction of off-site improvements may be required to mitigate
4 impacts resulting from development that relate to capacity
5 deficiencies and public safety; and/or to upgrade or construct public
6 facilities to City standards.”

7 The city council’s findings regarding this provision are largely dependent on its
8 findings regarding TDMC 10.10.060(A)(3)(a) and provide:

9 “As mentioned in Finding #1, [petitioner’s] TIS failed to provide a
10 full analysis of the US 197/Fremont Street/Columbia View Drive
11 intersection; therefore, there is not sufficient information in the
12 record to determine the effect of the proposed development on the
13 LOS and the Critical Crash Rate at the intersection. Without
14 undertaking a full analysis of the US 197/Fremont Street/Columbia
15 View Drive intersection, [petitioner’s] TIS does not demonstrate if
16 the City’s LOS standards will be met, or what impact the
17 development may have on the Critical Crash Rate of the
18 intersection. As a result, the City Council cannot determine whether
19 the intersection can safely accommodate the additional traffic from
20 the proposed development or whether and to what extent additional
21 mitigation measures may be triggered.” Record 16.

22 In its third subassignment of error, petitioner argues that the city may not apply
23 TDMC 10.10.060(A)(5)(b) to its application because the phrase “may be required
24 to mitigate impacts resulting from development that relate to capacity
25 deficiencies and public safety” is both ambiguous and subjective. Petitioner
26 argues that the phrases “capacity deficiencies” and “public safety” are general
27 concepts, not defined in the TDMC, and that subjective analyses are required to
28 determine whether and how to apply them. Again, we agree. *Rogue Valley*, 35 Or
29 LUBA at 159-60 (holding that a standard requiring an applicant to “mitigate any

1 potential negative impact caused by the development” is not “clear and
2 objective”); *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or
3 LUBA 37, 50 (2014); *see also Home Builders Assoc. v. City of Eugene*, 41 Or
4 LUBA 370, 398-400, 399 n 23 (2002) (holding that a standard requiring that “on-
5 site vehicular and pedestrian circulation shall be designed to minimize
6 vehicular/pedestrian conflicts at driveway crossings within parking lots and at
7 vehicle ingress/egress points” is not “clear and objective”).

8 The third subassignment of error is sustained.

9 **D. TDMC 10.10.040(E)**

10 TDMC 10.10.040 sets out “Pedestrian Requirements” for new
11 development and provides, as relevant here:

12 “E. Off-Site Improvements. To ensure improved access between
13 a development site and an existing developed facility such as
14 a commercial center, school, park, or trail system, the
15 approving authority may require off-site pedestrian facility
16 improvements concurrent with development.”

17 The city council found:

18 “Since the application for this development was first submitted,
19 there has been continued testimony from the neighborhood that
20 pedestrian travel along surrounding streets are unsafe with no
21 sidewalks, narrow shoulders, steep drainage ditches, speeding cars
22 and farm equipment during harvest season. Staff had provided in
23 past findings that the proposed development is approximately 2,800’
24 from the existing sidewalk system on Thompson Street. The
25 Appellants argued that a sidewalk or the widening of the street along
26 E. 10th and 12th Streets from the development to Thompson Street
27 could help solve pedestrian safety issues, but a full understanding of
28 the needs would need to be studied further. The City Council found

1 this evidence and testimony to be persuasive and determined the
2 need for additional pedestrian improvements (i.e. sidewalks)
3 between the development site and nearby areas with existing
4 developed pedestrian improvements. Because [petitioner] does not
5 propose improvements to connect the site to existing developed
6 sidewalks, the application does not comply with this criterion.”
7 Record 16.

8 In its fourth subassignment of error, petitioner argues that the city may not apply
9 TDMC 10.10.040(E) to its application because the provision is not clear and
10 objective.

11 Intervenor's first response that “TDMC 10.10.040(E) is required by the state
12 Transportation Planning Rule” at OAR 660-012-0045(3). Response Brief 21.
13 According to intervenors, TDMC 10.10.040(E) “implements this state imposed
14 requirement.” *Id.*

15 OAR 660-012-0045(3) applies to new development and explains that the
16 purpose of the rule is, in relevant part,

17 “to ensure that new development provides on-site streets and
18 accessways that provide reasonably direct routes for pedestrian and
19 bicycle travel in areas where pedestrian and bicycle travel is likely
20 if connections are provided, and which avoids wherever possible
21 levels of automobile traffic which might interfere with or discourage
22 pedestrian or bicycle travel.”

23 The rule then proceeds to identify the types of local land use regulations required
24 for new development. OAR 660-012-0045(3)(b) requires local governments to
25 adopt land use regulations for new development that provide for “[o]n-site
26 facilities * * * which accommodate safe and convenient pedestrian and bicycle
27 access from within new subdivisions, multi-family developments, planned

1 developments, shopping centers, and commercial districts to adjacent residential
2 areas and transit stops, and to neighborhood activity centers within one-half mile
3 of the development.”

4 TDMC 10.10.040(E) allows the city to require “*off-site* pedestrian facility
5 improvements” and, accordingly, is not the city’s implementation of OAR 660-
6 012-0045(3)(b), which requires local governments to provide for *on-site*
7 *facilities*. We reject intervenors’ argument.¹²

8 Petitioner argues that the phrase “off-site pedestrian facility
9 improvements” is ambiguous because it could mean sidewalks, intersection
10 crosswalks, trails, or all of those. Petitioner argues that determining the meaning
11 of this phrase requires subjective value judgments. Relatedly, petitioner points
12 out that the city’s findings focus significant attention on safety concerns raised
13 by opponents of the application, but the provision itself does not use the word
14 “safety” at all. Accordingly, petitioner argues, the city council’s interpretation of
15 the provision to address safety issues evidences a subjective analysis. We agree.

16 The fourth subassignment of error is sustained.

¹² Petitioner responds that LCDC’s rules must be consistent with state statute and, accordingly, we understand petitioner to argue, any LCDC rule that the city applies to an application for housing must also be clear and objective or the city may not apply it. Although we tend to agree with petitioner, because we reject intervenors’ argument that TDMC 10.10.040(E) implements OAR 660-012-0045(3), we need not address petitioner’s argument that a local government may apply only clear and objective administrative rules to an application for housing.

1 **E. TDMC 10.10.040(B)**

2 TDMC 10.10.040(B) provides:

3 “Connectivity. Safe and convenient pedestrian facilities that strive
4 to minimize travel distance to the greatest extent practicable shall be
5 provided in conjunction with new development within and between
6 new subdivisions, planned developments, commercial
7 developments, industrial areas, residential areas, and neighborhood
8 activity centers such as schools and parks, as follows:

9 “1. For the purposes of this Chapter, ‘safe and convenient’ means
10 pedestrian facilities that are reasonably free from hazards
11 which would interfere with or discourage pedestrian travel for
12 short trips, that provide a direct route of travel between
13 destinations, and that meet the travel needs of pedestrians
14 considering destination and length of trip.”

15 The city council found:

16 “[Petitioner’s] proposal failed to address which improvements
17 would be needed to provide a safe pedestrian pathway between the
18 proposed development and activity centers such as bus stops,
19 schools and commercial areas. In addition, [petitioner] did not
20 suggest any solutions or provide any detailed study or analysis of
21 the acknowledged pedestrian safety issues. As a result, the
22 application does not demonstrate compliance with this criterion.”
23 Record 16.

24 In its fifth subassignment of error, petitioner argues that TDMC 10.10.040(B) is
25 not clear and objective. We agree. It is hard to imagine a local government
26 standard that uses the phrases “strive to minimize,” “to the greatest extent
27 practicable,” “reasonably free from,” or “interfere with or discourage” that does
28 not require a subjective, value-laden analysis to determine whether the standard
29 is met. The definition of “safe and convenient” does not save TDMC

1 10.10.040(B) from that fatal flaw, since it is itself an unclear and subjective
2 standard.

3 The fifth subassignment of error is sustained.

4 The first assignment of error is sustained.

5 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

6 In its second assignment of error, petitioner argues that the city council
7 committed a procedural error that prejudiced its substantial rights when it denied
8 the application based on the insufficiency of the TIS after deeming the application
9 complete. In its third assignment of error, petitioner argues that the city council's
10 decision to deny its application violated the Fifth Amendment to the United States
11 Constitution. Because we sustain petitioner's first assignment of error and reverse
12 the city's decision, we need not and do not decide whether the city committed a
13 procedural error or violated petitioner's constitutional rights. We do not reach the
14 second and third assignments of error.

15 **DISPOSITION**

16 We have sustained petitioner's challenges to all of the city council's bases
17 for denial of the application. Petitioner asks LUBA to reverse the city's decision
18 and order the city to approve the application. Petition for Review 32.

19 ORS 197.835(10)(a) provides, in part:

20 "The board shall reverse a local government decision and order the
21 local government to grant approval of an application for
22 development denied by the local government if the board finds:

1 “(A) Based on the evidence in the record, that the local government
2 decision is outside the range of discretion allowed the local
3 government under its comprehensive plan and implementing
4 ordinances[.]”

5 The city council denied petitioner’s application on bases that are barred by ORS
6 197.307(4) because the application is for approval of “housing” and the standards
7 that the city council found were not met are not “clear and objective.” The city
8 council’s decision was therefore “outside the range of discretion allowed the local
9 government under its comprehensive plan and implementing ordinances.”
10 *Parkview Terrace*, 70 Or LUBA at 57.

11 In *Parkview Terrace*, we reversed a city council decision denying site plan
12 approval and a variance for a needed housing development. We concluded that
13 all 10 of the reasons that the city council gave for denying the petitioner’s
14 applications were “outside the range of discretion allowed the local government
15 under its comprehensive plan and implementing ordinances.” *Id.* at 57-58.
16 Accordingly, we reversed the city council’s decision and ordered the city to
17 approve the petitioner’s applications. We instructed that the city council’s
18 decision to approve the applications could include conditions of approval
19 imposed by the urban area planning commission to which the petitioner had
20 agreed. *Id.* at 58 (citing *Stewart v. City of Salem*, 58 Or LUBA 605, 622, *aff’d*,
21 231 Or App 356, 219 P3d 46 (2009), *rev den*, 348 Or 415 (2010)). Accordingly,
22 here, the city council’s decision to approve the application may include
23 conditions of approval imposed by the planning department to which petitioner
24 has agreed.

1 The city council's decision is reversed, and the city is ordered to approve
2 petitioner's application.