

1.2.4 Administrative Law – Denials – Evidence to Support. LUBA will affirm a local government’s denial of a proposed dwelling with a turret that exceeds the 28-foot height restriction applicable in the zone, notwithstanding the applicant’s contention that the turret is merely a “projection” that is allowed to exceed the height limit, where the local government plausibly interprets its code to limit projections to non-habitable structures, and concludes that the proposed turret, accessible to human occupation via ladder, is not a projection. *Najimi v. City of Cannon Beach*, LUBA No 2020-118 (June 21, 2021).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the evidence is extremely one-sided in favor of a permit applicant challenging a county decision denying its application for permit approval for a natural gas pipeline on the basis that other uses allowed in the zone would be limited, it is possible to conclude that the permit applicant challenging the denial on evidentiary grounds carried its burden as a matter of law, as it must when challenging a permit denial on evidentiary grounds. But where that evidence is somewhat equivocal about whether some uses would be limited and does not address whether other uses would be limited, the evidentiary record is insufficient to demonstrate that the permit applicant carried its burden as a matter of law. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

1.2.4 Administrative Law – Denials – Evidence to Support. A high pressure natural gas pipeline applicant challenging a board of commissioners’ denial of its request for permit approval on evidentiary grounds does not carry its burden as a matter of law, as it must when challenging a permit denial on evidentiary grounds, where the applicant’s own evidence show there is some danger of habitat damage from hydraulic fracturing and other evidence from permit opponents that hydraulic fracturing has caused habitat damage in other pipeline projects. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

1.2.4 Administrative Law – Denials – Evidence to Support. ORS 215.296(1) requires some description of farm practices on surrounding farm lands, in order to evaluate whether the proposed conditional use will significantly change or increase the costs of such practices. Where the record and planning commission decision includes no such description, on local appeal the governing body could conclude that the planning commission decision approving the conditional use is not supported by substantial evidence. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

1.2.4 Administrative Law – Denials – Evidence to Support. When a local ordinance requires that no additional vehicle trips enter an intersection during peak hours, an applicant cannot overcome a denial by merely encouraging visitors to use other routes to the site. Without an enforcement mechanism or evidence that such encouragement would be completely effective without an enforcement mechanism, the applicant has not demonstrated as a matter of law that no additional vehicle trips would enter the intersection during peak hours. *Vista Construction, LLC v. City of Grants Pass*, 59 Or LUBA 195 (2009).

1.2.4 Administrative Law – Denials – Evidence to Support. A reasonable decision maker could conclude that the applicant for a proposed motorcycle race track failed to demonstrate compliance with an approval standard requiring that the property act as a buffer between urban and agricultural uses, which the county interpreted to require evidence that the race track, as mitigated, would

externalize less dust than would agricultural use of the property, where the applicant failed to present any evidence quantifying dust impacts, comparing dust impacts of farm uses and the race track, or estimating the effectiveness of mitigation. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

1.2.4 Administrative Law – Denials – Evidence to Support. Where a hearings officer’s evaluation of the evidence is based in part on a considered assessment that one set of witnesses is more credible or reliable than others with respect to a disputed factual issue, it will be a rare circumstance where LUBA has a basis to overturn that credibility judgment. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

1.2.4 Administrative Law – Denials – Evidence to Support. In an evidentiary challenge to a hearings officer’s denial of proposed development, the applicant can prevail only if the applicant demonstrates that no reasonable person could reach the conclusion the hearings officer did, considering the evidence in the whole record. *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

1.2.4 Administrative Law – Denials – Evidence to Support. A fire district letter opining that conducting large concert events of up to 5,500 people on a forest-zoned parcel would not significantly increase the risk of wildfires is not substantial evidence to support a finding to that effect, where the letter is expressly contingent on the applicant maintaining a prohibition on burning of any kind, and the evidence regarding the effectiveness of banning burning of any kind during large concert events is extremely limited and conclusory. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

1.2.4 Administrative Law – Denials – Evidence to Support. Assuming, without deciding, that an applicant’s misrepresentation of a material fact in a discretionary permit proceeding would allow a local government to deny subsequent administrative permits necessary to carry out the earlier permit approval, the record supporting denial must establish that the applicant indeed misrepresented a material fact. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004).

1.2.4 Administrative Law – Denials – Evidence to Support. The burden of overturning a permit denial on evidentiary grounds is even more difficult when the applicable approval criteria are highly subjective in nature, such as standards requiring “adequate” transportation improvements to “promote safety” and “reduce congestion.” *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

1.2.4 Administrative Law – Denials – Evidence to Support. A traffic engineer’s critique of the applicant’s traffic study that questions the accuracy and sufficiency of the study’s calculation of traffic impacts and facility capacity is sufficient to support denial of proposed development under standards requiring the applicant to demonstrate that nearby transportation facilities can accommodate traffic impacts of the development. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

1.2.4 Administrative Law – Denials – Evidence to Support. Denial of a proposed school bus storage yard is supported by evidence that access to the yard relies on a private fire lane that the applicant cannot improve and that limits bus movement, under design standards requiring a “safe

and efficient” circulation pattern. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

1.2.4 Administrative Law – Denials – Evidence to Support. Given the subjectivity of criteria requiring that (1) the subject property be of adequate size to allow for “aesthetic design treatment,” (2) the proposed building be “compatible” in scale and mass with adjoining structures, and (3) the site plan provide for “adequate” buffers, the testimony of residential neighbors that a proposed church on a 3.85-acre parcel fails to comply with these criteria is adequate to support the city’s finding of noncompliance. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

1.2.4 Administrative Law – Denials – Evidence to Support. Conclusory testimony by an acoustic engineer that a proposed church will not violate “maximum allowable noise levels” is insufficient to show compliance as a matter of law with code standards that require a demonstration that proposed uses will not exceed specific decibel levels within a specified distance from adjoining residential uses. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

1.2.4 Administrative Law – Denials – Evidence to Support. A city is entitled to rely on expert testimony that a specific model of the flood depth and velocity over the subject property is necessary to demonstrate compliance with a standard requiring no significant hazard to life or property, and the city may decline to extrapolate that information from other expert testimony that models an adjacent area. *Starks Landing, Inc. v. City of Rivergrove*, 43 Or LUBA 237 (2002).

1.2.4 Administrative Law – Denials – Evidence to Support. LUBA will remand a decision denying an application to place and remove fill in a riparian zone, where the findings do not independently address the relevant standards and it is not clear what evidence the hearings officer relied on to apply the standards. *Griffin v. Jackson County*, 41 Or LUBA 159 (2001).

1.2.4 Administrative Law – Denials – Evidence to Support. A city’s denial of a permit to construct a house proposed to be cantilevered out over the face of a sand bluff is supported by substantial evidence, where there is conflicting expert testimony regarding adverse impacts from structural supports sunk into the face of the bluff, and the city reasonably chose to believe an expert opinion that under no circumstances should the face of the bluff be compromised. *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999).

1.2.4 Administrative Law – Denials – Evidence to Support. Neighbors’ testimony regarding adverse impacts of vibration from construction on the integrity of a sand bluff underlying adjacent properties is substantial evidence supporting the city’s denial of a house proposed to be built on the bluff, notwithstanding a contrary conclusion inferred from geotechnical reports supporting the application. *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999).

1.2.4 Administrative Law – Denials – Evidence to Support. In determining whether a denial is supported by substantial evidence, LUBA considers all relevant evidence, including that which supports and that which detracts from the county’s decision. *Evenson v. Jackson County*, 36 Or LUBA 251 (1999).

1.2.4 Administrative Law – Denials – Evidence to Support. To successfully challenge the evidentiary basis for denial, it is not sufficient for petitioner to show there is evidence in the record to support his position; petitioner must show the evidence is such that a reasonable trier of fact could only decide in his favor. Where the record contains credible, conflicting evidence, petitioner has not sustained his burden to show, as a matter of law, that the trier of fact should only have believed petitioner’s evidence. *Evenson v. Jackson County*, 36 Or LUBA 251 (1999).

1.2.4 Administrative Law – Denials – Evidence to Support. In challenging a decision denying a permit on evidentiary grounds, it is not sufficient to show the evidence would also have supported approval of the permit. The evidence must show that petitioner sustained his burden of proof as a matter of law. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the evidence is such that a reasonable person could conclude that a permit applicant failed to carry his burden of proof, the hearings officer’s decision denying the permit is supported by substantial evidence. A hearings officer is not obligated to defer to an unopposed affidavit submitted by a permit applicant as establishing the facts alleged in the affidavit. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

1.2.4 Administrative Law – Denials – Evidence to Support. An applicant does not carry his burden to demonstrate compliance with transportation-related criteria, where the findings supporting denial identify a flaw in the applicant’s evidence resulting from conducting a traffic study in the summer when school trips would not be reflected in the study. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.2.4 Administrative Law – Denials – Evidence to Support. Where petitioner cites no evidence that partition plat contains words of road dedication and there is un rebutted testimony that a partition plat lacks terms of dedication, the local decision maker’s finding that petitioner failed to prove road dedication on the basis of the partition plat is supported by substantial evidence. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

1.2.4 Administrative Law – Denials – Evidence to Support. Where an applicable criterion requires that a dwelling have the “least impact” on adjoining lands and the applicant does not show the dwelling could not be located on alternative sites on the property that would have fewer impacts, the applicant fails to demonstrate compliance with the criterion as a matter of law. *Evans v. Multnomah County*, 33 Or LUBA 555 (1997).

1.2.4 Administrative Law – Denials – Evidence to Support. A decision denying a requested nonconforming use determination is supported by substantial evidence, where the applicant’s evidence had gaps and inconsistencies and the opponent’s evidence was uniform. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

1.2.4 Administrative Law – Denials – Evidence to Support. To obtain reversal at LUBA of a city’s variance denial, a petitioner must show that it proved its compliance with the criteria as a matter of law and that only its evidence should be believed. *Main Auto Body v. City of Salem*, 30 Or LUBA 194 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the challenged decision denies an application, the local government need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. To challenge a denial on evidentiary grounds, petitioner must demonstrate compliance with all applicable criteria as a matter of law. *Gionet v. City of Tualatin*, 30 Or LUBA 96 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. LUBA does not substitute its judgment regarding conflicting evidence in the record for that of the local government. If a reasonable person could reach the decision made by the local government, LUBA will defer to the local government's choice between conflicting evidence. *Gionet v. City of Tualatin*, 30 Or LUBA 96 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. In order to justify reversal or remand of a city's denial of a discretionary application, petitioner must establish, as a matter of law, that all approval criteria are satisfied. Where there is substantial evidence in the record, upon which the city relied, to determine that the application fails to comply with several comprehensive plan provisions, petitioner fails to sustain his burden of proof regardless of whether the application could satisfy some, or even all, of the applicable subdivision approval criteria. *Holland v. City of Cannon Beach*, 30 Or LUBA 85 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. To overturn the county's determination that an applicable approval criterion is not met on evidentiary grounds, it is not sufficient for petitioners to show there is substantial evidence in the record to support their position. Rather, the evidence must show that only petitioners' evidence should be believed. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. In challenging a local government's determination of noncompliance with an applicable approval standard on evidentiary grounds, petitioners must demonstrate they sustained their burden of proof of compliance with the applicable standard as a matter of law. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. Applicants for approval to divide a 110-acre EFU-zoned parcel into 50- and 60-acre farm parcels fail to carry their burden of proof regarding a code standard requiring that the newly created parcels be of sufficient size to continue existing commercial agricultural enterprises in the area, where the applicants submit evidence concerning agricultural activity only on the property proposed to be divided. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

1.2.4 Administrative Law – Denials – Evidence to Support. Where petitioners were the applicants below, and challenge on evidentiary grounds a local government determination that an applicable approval standard is not met, petitioners must demonstrate, as a matter of law, that they sustained their burden of proof of compliance with the standard. *Kangas v. City of Oregon City*, 26 Or LUBA 177 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. To overturn a denial decision on evidentiary grounds, an applicant must establish that the proposal satisfies each applicable approval standard as a matter of law. *Decuman v. Clackamas County*, 25 Or LUBA 152 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the local code includes a broad definition of the term “wetland,” and the local government denies a permit application because it determines evidence in the record establishes that petitioner’s grading activities on the subject property created a “wetland” within the meaning of the local code, LUBA cannot say that the local government’s determination is wrong as a matter of law. *Annett v. Clackamas County*, 25 Or LUBA 111 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. In order to overturn, on evidentiary grounds, a local government determination that an applicable approval criterion is not met, it is not sufficient for petitioners to show there is substantial evidence in the record to support their position. Rather, petitioners must demonstrate they sustained their burden of proof of compliance with applicable criteria, as a matter of law. *Thomas v. City of Rockaway Beach*, 24 Or LUBA 532 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. Where a local government denies a setback variance to allow a deck on the side of a dwelling, and petitioners cite no evidence in the record establishing that having such a deck on the dwelling is more than a personal preference or amenity, petitioners fail to show the evidence in the record establishes, as a matter of law, that enforcement of the setback requirement will cause “practical difficulty or unnecessary hardship.” *Thomas v. City of Rockaway Beach*, 24 Or LUBA 532 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. To overturn on evidentiary grounds a local government’s determination that an applicable approval standard is not met, a petitioner may not simply show that there is substantial evidence in the record to support his position. Rather, petitioner must demonstrate that he sustained his burden of proof of compliance with all applicable standards, as a matter of law. *Baker v. Marion County*, 24 Or LUBA 519 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the local government relies upon evidence that there are several hundred acres within an urban growth boundary (UGB) available for residential development to support its determination that the applicant failed to establish a need for more residential land under Goal 14, factor 1, evidence that some of those acres of land may be unavailable for residential development does not establish the existence of a need for residential land within the existing UGB as a matter of law. *Baker v. Marion County*, 24 Or LUBA 519 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. In order to overturn on evidentiary grounds a local government’s determination that an applicable approval criterion is not met, it is not sufficient for petitioner to show there is substantial evidence in the record to support its position. Rather, the evidence must be such that a reasonable trier of fact could only say petitioner’s evidence should be believed. *Roozenboom v. Clackamas County*, 24 Or LUBA 433 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. There is substantial evidence to

support a local government determination that a code standard requiring a proposed use not to be detrimental to the area or to adjacent properties is not satisfied where the record includes evidence that the subject business operation is noisy, operates on evenings and weekends, and generates a significant amount of sawdust. *Stockwell v. Clackamas County*, 24 Or LUBA 358 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the challenged decision denies a proposed development, the local government need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. Further, in challenging a denial decision on evidentiary grounds, petitioners have the burden of establishing compliance with each and every criterion as a matter of law. *Woosley v. Marion County*, 24 Or LUBA 231 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. In the absence of evidence in the record establishing the quantity of products delivered or dollar amount of sales by petitioners' business to farm uses within the local agricultural community, petitioners cannot demonstrate as a matter of law that their proposed use is a commercial activity in conjunction with farm use. *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. In order to overturn, on evidentiary grounds, a local government determination that an approval standard is not met, petitioners must establish that the approval standard is satisfied as a matter of law. *Schoppert v. Clackamas County*, 23 Or LUBA 138 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. Where there is conflicting believable evidence in the record, LUBA cannot say a reasonable decision maker could only believe the evidence relied upon by petitioner, and will reject a challenge to the evidentiary support for a decision denying development approval. *Joyce v. Multnomah County*, 23 Or LUBA 116 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. To overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, it is not sufficient for petitioners to show that there is substantial evidence in the record to support their position. Rather, the "evidence must be such that a reasonable trier of fact could only say petitioners' evidence should be believed." *Barber v. Marion County*, 23 Or LUBA 71 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. Where evidence in the record establishes that with adequate drainage a parcel could be put to farm use, petitioner has not established as a matter of law that the proposed nonfarm use is located on land "generally unsuitable" for farm use. *Barber v. Marion County*, 23 Or LUBA 71 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. In order to overturn, on evidentiary grounds, a local government's determination that an applicable approval standard is not met, the evidence must be such that a reasonable trier of fact could only say petitioners' evidence should be believed. *Goffic v. Jackson County*, 23 Or LUBA 1 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the local code requires that

additional dwellings in a forest zone “will not interfere with forest management or harvesting practices,” and the parties cite no evidence in the record concerning the impacts of such additional dwellings on the use of the access road for forest management and harvesting, petitioners fail to demonstrate compliance with the approval standard as a matter of law. *Goffic v. Jackson County*, 23 Or LUBA 1 (1992).