

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 CITIZENS FOR RESPONSIBLE DEVELOPMENT  
5 IN THE DALLES, LUISE LANGHEINRICH,  
6 JOHN NELSON and MICHAEL LEASH,  
7 *Petitioners,*  
8

9 vs.

10  
11 CITY OF THE DALLES,  
12 *Respondent,*  
13

14 and

15  
16 WAL-MART STORES, INC. and WM3 INC.,  
17 *Intervenors-Respondents.*  
18

19 LUBA No. 2009-048

20  
21 FINAL OPINION  
22 AND ORDER  
23

24 Appeal from City of The Dalles.

25  
26 Kenneth D. Helm, Beaverton, filed the petition for review and argued on behalf of  
27 petitioners.  
28

29 Gene E. Parker, The Dalles, filed a response brief and argued on behalf of  
30 respondent.  
31

32 Gregory S. Hathaway and Jeff N. Evans, Portland, filed a response brief and Jeff N.  
33 Evans argued on behalf of intervenor-respondent Wal-Mart Stores, Inc.  
34

35 James Foster, The Dalles, represented intervenor-respondent WM3, Inc.  
36

37 RYAN, Board Member; BASSHAM, Board Chair, participated in the decision.  
38

39 HOLSTUN, Board Member, did not participate in the decision  
40

41 REMANDED

10/08/2009

42  
43 You are entitled to judicial review of this Order. Judicial review is governed by the  
44 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a decision by the city approving a site plan for a Wal-Mart store.

**MOTION TO CONSOLIDATE**

In *Citizens for Responsible Development v. City of The Dalles*, \_\_ Or LUBA \_\_ (LUBA No. 2009-040, August 11, 2009), we denied petitioners’ motion to consolidate that appeal with the present appeal. For the same reasons set forth in that opinion, we deny the motion here as well.

**REPLY BRIEF**

Petitioners move for permission to file a reply brief. Petitioners maintain that the reply brief is allowable under LUBA’s rules in order to respond to the city’s argument set forth in the response brief that petitioners are precluded from raising the issues raised in the second, fourth, and fifth assignments of error. The city objects to the reply brief, arguing that it does not respond to “new matters” as required by OAR 660-010-0039.

In the final decision, the city council adopted findings in which it purported to adopt “a comprehensive list of the issues considered on appeal.” Record 7. The city argues that none of the issues raised in the second, fourth and fifth assignments of error are included in that “comprehensive list.” Petitioners did not assign error to those findings in their petition for review. Part of the proposed reply brief can be read to argue that the city erred in purporting to limit the issues considered in the local appeal. While the general issue of whether petitioners are precluded from advancing the second, fourth and fifth assignments of error is potentially a “new matter” warranting a reply brief, petitioners cannot use the reply brief as a vehicle to allege that the city erred in limiting the issues it considered on appeal. That allegation would constitute what is essentially a new assignment of error. We therefore do not consider petitioners’ arguments in the reply brief to the extent those arguments

1 challenge the city’s decision to limit the issues it considered on appeal. The reply brief is  
2 otherwise allowed.

3 **FACTS**

4 Intervenor-respondent Wal-Mart Stores, Inc. (Wal-Mart) applied for site plan review  
5 approval to site a 149,000-square foot Wal-Mart store on an approximately 18.08-acre parcel  
6 zoned Commercial Light Industrial (CLI). The property is located on the south side of River  
7 Road generally between Interstate 84 to the west and the Columbia River to the east. Access  
8 to the property is directly from River Road, and River Road is accessed from I-84 by an off-  
9 ramp known as the Chenoweth Interchange.

10 The property contains wetlands, and is located near Chenoweth Creek, which flows  
11 into the Columbia River. The stormwater from the store is proposed to be piped from on-  
12 site locations to a city stormwater system located in River Road. The city’s stormwater  
13 system located in River Road flows into Chenoweth Creek.

14 The planning commission approved the site plan, and petitioners appealed that  
15 approval to the city council. The city council approved the site plan. This appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 **A. Background**

18 OAR 660-012-0060 provides that where a land use regulation amendment would  
19 significantly impact an affected transportation facility, the local government must put  
20 measures in place to ensure that the affected transportation facilities function without  
21 failing.<sup>1</sup> Those measures include as relevant here “transportation system management

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<sup>1</sup> OAR 660-012-0060 provides in relevant part:

“(1) Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to

1 measures, demand management or minor transportation improvements.” OAR 660-012-

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capacity ratio, etc.) of the facility. A plan or land use regulation amendment significantly affects a transportation facility if it would:

“(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);

“(b) Change standards implementing a functional classification system; or

“(c) As measured at the end of the planning period identified in the adopted transportation system plan:

“(A) Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;

“(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or

“(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan.

“(2) Where a local government determines that there would be a significant effect, compliance with section (1) shall be accomplished through one or a combination of the following:

“(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.

“(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.

“(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes.

“(d) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.

“(e) Providing other measures as a condition of development or through a development agreement or similar funding method, including transportation system management measures, demand management or minor transportation improvements. Local governments shall as part of the amendment specify when measures or improvements provided pursuant to this subsection will be provided.”

1 0060(2)(e). In 2006, the city approved an application by the owner of the subject property to  
2 rezone the property to CLI without determining whether the rezoning would significantly  
3 impact a transportation facility under OAR 660-012-0060(1). Rather, Ordinance 2006-1269,  
4 which approved the rezoning, required future development of the property to demonstrate  
5 compliance with OAR 660-012-0060 at the time of submission of a site plan. The Oregon  
6 Department of Transportation (ODOT) appealed Ordinance 2006-1269 to LUBA, and the  
7 city entered into a settlement agreement with the property owner and ODOT, and  
8 subsequently adopted Ordinance 2006-1273 to memorialize the terms of the settlement  
9 agreement. Among other things, Ordinance 2006-1273: (1) required all traffic impact  
10 analyses submitted in accordance with a development proposal on the property to apply a 20-  
11 year planning horizon; (2) adopted a volume to capacity (V/C) ratio performance standard  
12 for the I-84 ramp intersections at River Road (the Chenoweth Interchange) of .75 until  
13 ODOT had adopted an Interchange Area Management Plan (IAMP) for Chenoweth  
14 Interchange; and (3) provided that funding for improvements to the Chenoweth Interchange  
15 would be established after the IAMP was adopted.

16 As part of the site plan application that was submitted in 2008, Wal-Mart submitted a  
17 transportation impact analysis (TIA) that was originally prepared for the owner of the  
18 property in 2007. The TIA concluded that during the planning horizon, the proposed  
19 development would generate significant impacts on various intersections, including the  
20 Chenoweth Interchange. The TIA identified eight mitigation projects that, if implemented,  
21 would mitigate the impact on the affected facilities. The TIA recommended that two of those  
22 mitigation projects be implemented prior to the store opening, and the remaining six  
23 mitigation projects occur at a later date. Mitigation of the impacts to the Chenoweth  
24 Interchange was one of the six projects scheduled for a later date than the store opening.

1           **B.     Traffic Impact Analysis Methodology**

2                   **1.     Planning Horizon**

3           In their first assignment of error, petitioners argue that the city’s decision violates  
4 Ordinance 2006-1269, Ordinance 2006-1273, and the settlement agreement between the city  
5 and ODOT. Petitioners first argue that the TIA submitted by Wal-Mart fails to comply with  
6 Ordinance 2006-0173 because it fails to apply a 20-year planning horizon. Petitioners argue  
7 that the TIA that was submitted with Wal-Mart’s application was completed in December  
8 2007 and included a planning horizon through 2027. However, petitioners argue, the  
9 challenged site plan was approved in January 2009. Thus, petitioners argue, because the  
10 TIA’s planning horizon ended in 2027, the TIA applied an 18-year planning horizon in  
11 violation of the requirement. Petitioners argue that the TIA should have used a planning  
12 horizon beginning in 2009 and ending in 2029.

13           We disagree with petitioners that a TIA that was completed in December 2007 and  
14 that applied a 20-year planning horizon to project traffic in 2027 fails to comply with the  
15 requirement set forth in Ordinance 2006-1273 to apply a 20-year planning horizon.  
16 Ordinance 2006-1273 provided in relevant part that “[a]ll traffic impact analyses shall apply  
17 a 20-year planning horizon.” There is no dispute that the TIA that was submitted in support  
18 of the application applied a 20-year planning horizon at the time it was prepared, and  
19 petitioners’ argument that the TIA planning period should have run from 2009 to 2029 is not  
20 supported by the express language of the requirement.

21           Petitioners also cite The Dalles Land Use and Development Ordinance (LUDO)  
22 10.060(A), but other than merely citing that LUDO section, petitioners do not explain how  
23 the decision violates the section, and we do not see that it does.<sup>2</sup>

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<sup>2</sup> LUDO 10.060(A) provides:

“Traffic Studies. Traffic studies shall be required of all development proposals of 16 or more dwelling units, and any other development proposal that is likely to generate more than 400

1                                   **2.        Estimated Trips from the Proposed Development**

2                    Petitioners next argue that the methodology used by Wal-Mart’s traffic consultants,  
3 DKS Engineering (DKS), in preparing the TIA was flawed because it undercounted  
4 estimated trips generated by the proposed development. Petitioners argue that the TIA  
5 estimated peak trips generated by the proposed use using the Institute of Transportation  
6 Engineers (ITE) land use category for a “shopping center” rather than the category for a  
7 “free-standing discount store.” During the proceedings below, petitioners’ traffic consultants  
8 suggested that the TIA should have used the ITE category for a “free-standing discount  
9 store” rather than a “shopping center.” Petitioners argue that had the correct methodology  
10 been used, the TIA would have shown that the required V/C ratio performance standard of  
11 .75 for the Chenoweth Interchange was not met. As such, the city would have been required  
12 to deny the application unless one of the measures specified in OAR 660-012-0060(2) was  
13 put in place to mitigate the significant effect of the development on the Chenoweth  
14 Interchange.

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average daily motor trips. In addition, a traffic study may be required if the development proposal is near an intersection that is already at or below level of service D. Notwithstanding the previous language, the City may require an initial, limited traffic study to determine the level of service at nearby intersections. If the limited traffic study finds the level of service to be at or below ‘D’, the City may require a full traffic study. The traffic study shall be conducted in accordance with the following:

- “1.        A proposal establishing the scope of the traffic study shall be submitted for review to the Director. The study requirements shall reflect the magnitude of the project in accordance with accepted traffic engineering practices. Large projects should assess all nearby key intersections. Once the scope of the traffic study has been approved, the applicant shall present the results with an overall site development proposal. The study shall be sealed and signed by a Licensed Professional Engineer specializing in traffic.
  
- “2.        If the traffic study identifies level-of-service conditions less than the minimum standard established in The Dalles Transportation Master Plan, improvements and funding strategies mitigating the problem shall be considered concurrent with a development proposal.
  
- “3.        Location of new arterial streets shall conform to The Dalles Transportation Master Plan, and traffic signals should generally not be spaced closer than 1500 feet for reasonable traffic progression.”

1 Wal-Mart responds that in replying to petitioners' traffic consultants' suggestions,  
2 DKS explained that because the proposed store includes a full-service grocery department,  
3 the "free standing discount store" is not an appropriate ITE category. Wal-Mart explains that  
4 although DKS acknowledged that the proposed use could also fall under the ITE category for  
5 a "free standing discount *superstore*," which is a category of discount stores that includes  
6 groceries, DKS pointed out that the trip generation rate for the free-standing discount  
7 superstore land use category is 3.87 trips per 1,000 square feet, while the trip generation rate  
8 for the shopping center land use category is 4.67 trips per 1,000 square feet. Thus, Wal-Mart  
9 explains, the TIA used a trip generation rate that estimated higher traffic counts than the  
10 superstore trip generation rate it could have used.

11 We disagree with petitioners that Wal-Mart erred in using the ITE land use category  
12 of "shopping center." In using that category, the TIA properly estimated potential trips  
13 generated by the development. Moreover, as pointed out by the city and Wal-Mart, if the  
14 TIA had used the category for a "free standing discount superstore," that category would  
15 produce a lower estimate of trips than the category the TIA actually used. Therefore, the  
16 argument provides no basis for reversal or remand of the decision.

### 17 **3. TIA Study Hours**

18 Petitioners also maintain that the TIA is flawed because it measured traffic at the  
19 Chenoweth Interchange on a Tuesday evening, and using a Tuesday evening as the  
20 measurement period results in both lower trip generation rates for the proposed use and lower  
21 traffic volumes measured at the Chenoweth Interchange. Petitioners first argue that the TIA  
22 is flawed because it does not include a Saturday PM peak hour trip generation rate for the  
23 proposed development, and instead uses only a weekday PM peak hour rate for calculating  
24 trips generated by the proposed development, which petitioners contend is contrary to ODOT  
25 procedures. Petitioners contend that by using only a weekday PM peak hour rate, the TIA  
26 ignores evidence that shopping centers generate more traffic on weekends than on weekdays.

1           Petitioners also contend that the TIA is flawed because the study hour used to  
2 measure traffic volumes at the Chenoweth Interchange resulted in a significant  
3 underestimation of the traffic at that interchange. We understand petitioners to argue that the  
4 city’s decision that the proposed development will not significantly impact the Chenoweth  
5 Interchange is not supported by substantial evidence due to the flaws in the TIA. ORS  
6 197.835(9)(a)(C). Petitioners argue that if ODOT’s procedures for preparing traffic impact  
7 analyses had been followed, both background and development-generated traffic volumes at  
8 that intersection would have been higher and the TIA would have determined that the  
9 proposed development significantly affects the interchange under OAR 660-012-0060(1). At  
10 that point, unless mitigation was put in place to remedy the impacts of the development on  
11 the interchange, the project would not have been found to comply with OAR 660-012-  
12 0060(1).

13           The parties’ arguments under this assignment of error are not particularly clear. As  
14 we understand it, ODOT’s procedures for preparing traffic impact analyses require the  
15 analyses to develop “design hour volumes [DHVs].” As explained in ODOT’s procedures  
16 manual:

17           “DHVs are used for ODOT planning and project level analyses. The DHV is  
18 defined as the future year 30 HV. The following procedure outlines the  
19 development of the DHV for a single intersection based on the application of  
20 seasonal factors and growth rates to manual counts.

21           “Daily traffic count volumes cannot be used alone for design or operational  
22 analysis of transportation projects. \* \* \*” *ODOT Analysis Procedures*  
23 *Manual*, Chapter 4, Developing Design Hour Volumes, April 2006. Record  
24 212-213.

25           As we understand it, one type of Design Hour Volume is known as the “30<sup>th</sup> Highest Hour  
26 Volume” (30<sup>th</sup> HHV). As we understand it, the 30<sup>th</sup> HHV requires a traffic impact analysis to  
27 use the 30<sup>th</sup> highest hour of manual traffic counts generated from a specific point on a  
28 roadway in order to determine the appropriate date and time to measure traffic at an existing  
29 point located on that roadway. We presume that in developing that guideline, ODOT was

1 attempting to ensure that analyses measure traffic at an affected interchange reasonably close  
2 to the time when traffic is typically the busiest, and that in specifying use of the “30<sup>th</sup> highest  
3 hour,” ODOT has determined that the hours prior to the 30<sup>th</sup> hour might contain anomalies  
4 that make those counts less reliable, and that the hours after the 30<sup>th</sup> hour are also less  
5 indicative of the busiest traffic flows.

6           Petitioners argue that the TIA is flawed because it did not use either the 30<sup>th</sup> HHV  
7 traffic counts as measured at the nearest ODOT automatic trip recorder (ATR) at the I-84  
8 Rowena Interchange approximately 6 miles west of The Dalles, or traffic counts remotely  
9 close to the 30<sup>th</sup> HHV. As petitioners explain it, the 30<sup>th</sup> highest hour at that ATR occurred  
10 on Sunday afternoon, July 29, 2007. However, the traffic counts that DKS used to project  
11 the development’s effect on the Chenoweth Interchange were generated on Tuesday, July 10,  
12 2007 from 4:00 pm to 6:00 pm, which petitioners argue are closer to the 1171<sup>st</sup> and 1123<sup>rd</sup>  
13 highest hours at the Rowena ATR.

14           The TIA includes the following analysis:

15           “30<sup>th</sup> HIGHEST HOUR DESIGN VOLUMES

16           “Based on recommended guidelines set forth by ODOT for developing design  
17 hour volumes, the 30<sup>th</sup> highest hour for the study area was determined from  
18 the Automatic Traffic Recorder (ATR) located 6.3 miles west of The Dalles  
19 on I-84 (Rowena ATR). The location should be a good representation of what  
20 traffic patterns are within the study area since I-84 is adjacent to the proposed  
21 site. Detailed seasonal traffic volume data for the Rowena ATR determined  
22 that the peak month occurred during July \* \* \*.

23           “Traffic counts were conducted on Tuesday July 10, 2007 from 4:00 pm to  
24 6:00 pm. This count date is consistent with ODOT guidelines since they  
25 represent traffic volumes within the peak month. The count date and time  
26 period were approved by ODOT staff. \* \* \*” Oversized Exhibit B, DKS  
27 Associates Transportation Impact Study, September 2007, page 6 (footnotes  
28 omitted).

29 We understand the TIA to have used manual traffic volume counts taken at the I-84  
30 Chenoweth Interchange on and off ramps on Tuesday, July 10, 2007, rather than traffic  
31 counts taken at the Rowena ATR.

1 In challenging the TIA during the proceedings below, petitioners' traffic consultant  
2 argued:

3 "Upon review of the 2007 ATR data, the hours of 4 PM – 5 PM and 5 PM – 6  
4 PM (the count hours used in the analysis of the [TIA]) on July 10, 2007 were  
5 the 1171<sup>st</sup> and the 1223<sup>rd</sup> highest hours with volumes quite noticeably less  
6 than that of the actual 30<sup>th</sup> highest hour. \* \* \*

7 " \* \* \* \* \*

8 "It should be noted that the [TIA] is based upon counts of I-84 when the  
9 hourly volume is roughly 60% of the actual 30<sup>th</sup> highest hour volume, or 40%  
10 less than the actual 30<sup>th</sup> highest hour. This, by far, stretches well beyond the  
11 10% threshold required by ODOT's *Analysis Procedures Manual* Figure 4-1  
12 shown below, which at minimum, would require the turning movement counts  
13 to be adjusted to the 30<sup>th</sup> highest hour. The use of unadjusted raw traffic  
14 counts, as was done in the [TIA], is completely inappropriate and do not  
15 follow the procedures of the *APM* as purported.

16 "The reason the selection of the 1171<sup>st</sup> and 1223<sup>rd</sup> highest hours being passed  
17 off as the 30<sup>th</sup> highest hour is critical for one key reason. The traffic flows  
18 within the area are lower during the 1171<sup>st</sup> and 1223<sup>rd</sup> highest hour than they  
19 are in the 30<sup>th</sup> highest hour. The [TIA], based upon an analysis far from the  
20 30<sup>th</sup> highest hour, indicates that the I-84 EB off ramp/River Road intersection  
21 will operate at a v/c ratio of 0.72, just 0.03 under ODOT's 0.75 v/c mobility  
22 standard. It is highly likely, if not a foregone conclusion, that this intersection  
23 will operate beyond the required v/c ratio of 0.75 if the [TIA] was based upon  
24 the required analysis procedures.

25 "Because of this error, the results that indicate the need for mitigation based  
26 upon the City's level of service and ODOT's v/c do not match the required  
27 analysis parameters. Not only do they not match the required parameters, but  
28 they do not even remotely match them. For this reason alone, the application  
29 cannot be approved because the traffic study's traffic counts so far  
30 underestimate the volume of traffic that will be present during the actual 30<sup>th</sup>  
31 highest hour that the [TIA] is vastly flawed and unreliable." Supplemental  
32 Record 22-24.

33 In response to petitioners' arguments below, DKS explained:

34 "Because traffic volumes vary widely throughout the year, the typical practice  
35 is to analyze transportation facilities under their 30<sup>th</sup> Highest Hourly Volumes  
36 (30<sup>th</sup> HV). When estimating 30<sup>th</sup> HV, many factors come into play, including:  
37 local traffic patterns, surrounding land uses, and regional traffic trends.  
38 Because all of these factors must be considered, coordination with City,  
39 County, and ODOT regional traffic engineers is essential due to their local

1 knowledge of traffic patterns and their understanding of transportation  
2 policies and procedures. The 30<sup>th</sup> HV time period for the WM3 [TIA] study  
3 intersections was determined in close coordination with the City of The  
4 Dalles, Wasco County, and ODOT Region 4. The selection of the [TIA]  
5 analysis count period was reviewed and found satisfactory before analysis was  
6 performed.

7 “A review of the process that was followed for the selection of the [TIA]  
8 analysis count period will clarify why WM3 Development [TIA] does provide  
9 the appropriate design hour volumes and why the 30<sup>th</sup> highest hour  
10 methodology suggested by Greenlight Engineering is inappropriate.

11 “First, it must be understood how local traffic patterns differ from the  
12 interstate freeway traffic patterns provided by the ODOT Automatic Traffic  
13 Recorder (ATR) located on I-84 west of The Dalles. *The City of The Dalles*  
14 *Traffic Impact Study Guidelines* specify that a weekday PM peak hour  
15 analysis is typically appropriate. The Dalles City Engineer selected the  
16 weekday PM peak hour as the critical peak period within the City of The  
17 Dalles because of his knowledge that it is during the weekday PM peak hour  
18 that traffic volumes at City intersections consistently reach their peak levels.  
19 This assumption was confirmed with the City Engineer during the [TIA]  
20 scoping.

21 “A second consideration for the analysis period is the surrounding land uses,  
22 which are principally industrial uses and generate little to no traffic during the  
23 weekend. The third consideration is the yearly traffic fluctuation, which is  
24 typically most impacted by regional traffic patterns due to the fact that local  
25 employment-related traffic patterns stay relatively consistent throughout the  
26 year. Therefore, while the critical peak period during the week is the  
27 weekday PM peak hour, the critical time (or peak month) of the year is best  
28 determined by considering regional trends.

29 “In the WM3 [TIA], the 30<sup>th</sup> Highest Hourly Volumes (30<sup>th</sup> HV) were  
30 collected during the weekday PM peak hour during the month of July (which  
31 is the peak month). The study reports, ‘Detailed seasonal traffic volume data  
32 for the Rowena ATR determined that the peak month occurred during July.’  
33 The Rowena ATR referred to is located on I-84 and provides a good  
34 representation of overall regional traffic patterns. However, a detailed  
35 analysis of hour-by-hour traffic patterns at the Rowena ATR is inappropriate  
36 for determining 30<sup>th</sup> HV at the [TIA] study intersections because the main  
37 contributors to intersection volumes are the local traffic generators (not I-84).  
38 If the study intersections are actually located on the mainline interstate, then  
39 the hour-by-hour analysis methodology outlined by Greenlight Engineering  
40 would be applicable. However, none of the study intersections are located on  
41 mainline I-84; therefore, study intersection volumes do not correlate directly  
42 with the Rowena ATR volumes. Instead the Rowena ATR is only helpful for

1 determining the peak month of the year. This assumption was confirmed by  
2 ODOT staff.

3 “It should be noted that the 30<sup>th</sup> highest hour provided by the Rowena ATR  
4 and recommended by Greenlight correlates to a Sunday in July from 3:00 to  
5 4:00 p.m. Having grown up in Hood River and The Dalles and observing  
6 numerous hours of traffic the past few years during the weekday and  
7 weekends, it is clear that the Sunday traffic volumes from 3:00 to 4:00 p.m. at  
8 the study area intersections would be significantly lower than the traffic  
9 volumes analyzed in the WM3 Transportation Impact Study. This assumption  
10 was also verified by the City Engineer who has a clear understanding of the  
11 traffic volumes in the City of The Dalles.” Record 190-91 (footnote omitted).

12 DKS also explained that ODOT concluded that:

13 “The DKS response accurately describes the roles that local and regional  
14 traffic play in the determination of the appropriate selection of the 30<sup>th</sup> HV.  
15 While it is true that highways often experience their 30<sup>th</sup> HV on weekends  
16 (e.g. Sunday afternoons) this fact is not applicable to the \* \* \* [TIA].” Record  
17 198.

18 As we understand DKS’ explanation, the TIA made reference to and used Rowena ATR  
19 traffic counts only to establish the peak month for purposes of design hour volumes, and not  
20 to establish the peak day or peak hours for performing traffic counts.

21 The city responds that the city concluded based on the TIA and DKS’ explanation  
22 that more accurate counts would occur on a weekday in July, the peak month, due to the  
23 industrial zoning of the surrounding lands and the fact that traffic generated by those  
24 industrial uses would occur mainly during the week in the evening hours. The city and Wal-  
25 Mart also respond that the 30<sup>th</sup> HHV would only be appropriate if any of the study  
26 intersections were located on “mainline” I-84. Finally, the city and Wal-Mart assert that use  
27 of the actual 30<sup>th</sup> HHV for the Rowena ATR would generate low background traffic counts  
28 because most background traffic will occur during the weekday evening hours and the 30<sup>th</sup>  
29 HHV occurred on a Sunday.

30 When faced with competing evidence, the city is entitled to choose between that  
31 conflicting evidence, and as long as the city’s reliance on that evidence is reasonable, we will  
32 not substitute our judgment for the decision maker’s. Rather, we must consider and weigh all

1 the evidence in the record to which we are directed, and determine whether, based on that  
2 evidence, the local decision maker's conclusion is supported by substantial evidence.  
3 *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of*  
4 *Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

5 We tend to agree with petitioners that the city's findings fail to adequately explain  
6 why traffic counts taken on a weekday satisfy the requirement to measure 30<sup>th</sup> highest hour  
7 volumes for traffic, when the 30<sup>th</sup> HHV for traffic as measured at the Rowena ATR occurred  
8 on a Sunday afternoon in July. First, the city's assertion that because the subject property is  
9 not located directly adjacent to I-84, the 30<sup>th</sup> HHV Rowena ATR traffic volumes are not  
10 relevant seems to miss the point that the studied intersection, the Chenoweth Interchange, is  
11 located directly on I-84. Although the city may be correct that traffic at the other affected  
12 intersections that are located entirely within the city is busiest during the week, that does not  
13 necessarily mean that traffic at the Chenoweth Interchange, located directly on I-84, is  
14 busiest during the week, when ODOT's ATR counts at Rowena appear to at least call that  
15 conclusion into question.

16 Further, testimony and evidence introduced by petitioners regarding 30<sup>th</sup> HHV traffic  
17 counts at Rowena called into question evidence introduced by the applicant that traffic at the  
18 Chenoweth Interchange is busiest on weekdays. As far as we can tell, DKS has not  
19 adequately responded to petitioners' traffic experts' assertion that the TIA's measurement of  
20 traffic at the Chenoweth Interchange on a Tuesday afternoon did not result in an appropriate  
21 design hour volume for that intersection. As noted above, the TIA states that it was prepared  
22 "[b]ased on recommended guidelines set forth by ODOT for developing design hour  
23 volumes," and that "the 30<sup>th</sup> highest hour for the study area was determined from the  
24 Automatic Traffic Recorder (ATR) located 6.3 miles west of The Dalles on I-84 (Rowena  
25 ATR)" because "[t]he location should be a good representation of what traffic patterns are  
26 within the study area since I-84 is adjacent to the proposed site." Moreover, ODOT's

1 procedure manual appears to require use of the 30<sup>th</sup> HHV traffic counts from the Rowena  
2 ATR when an automatic trip recorder is either on site or “close by.” Record 215.<sup>3</sup> All of  
3 that seems to indicate that traffic counts taken at the Chenoweth Interchange on a weekend  
4 day may be necessary in order to reach an accurate conclusion about whether the proposed  
5 development will significantly affect that interchange, and thus require mitigation earlier  
6 than that proposed by DKS and conditioned by the city. Absent a meaningful response to  
7 petitioners’ challenges to the TIA from Wal-Mart’s experts, we do not think it was  
8 reasonable for the city to rely on Wal-Mart’s experts’ evidence. *See Wal-Mart Stores, Inc. v.*  
9 *City of Bend*, 52 Or LUBA 261, 276 (2006) (“the critical issue for the local decision maker  
10 will generally be whether any expert or lay testimony offered by \* \* \* opponents raises  
11 questions or issues that undermine or call into question the conclusions and supporting  
12 documentation that are presented by the applicant’s experts and, if so, whether any such  
13 questions or issues are adequately rebutted by the applicant’s experts”).

14 The first assignment of error is sustained, in part.

## 15 **SECOND ASSIGNMENT OF ERROR**

16 The TIA identified needed improvements to various intersections that will be affected  
17 by the proposed development in order to mitigate the effects of the store. The city imposed a  
18 condition of approval requiring that two of the projects to be completed prior to store  
19 opening; the remaining projects are required to be completed according to the terms of a  
20 future development agreement to be entered into between the city and Wal-Mart.<sup>4</sup> In the

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<sup>3</sup> In addition, ODOT’s procedure manual includes a note indicating that “the 30<sup>th</sup> HHV will likely occur during the peak month on a weekday in large urban areas and on weekends in recreational areas.” Record 215.

<sup>4</sup> The city imposed Condition 11, which provides:

“The recommended traffic mitigation elements as set forth in the Traffic Impact Study (TIS) prepared by DKS Associates, dated September 2007, shall be completed according to the schedule in the TIS listing the elements to be accomplished by the day of opening and those to be completed by the year 2027 or earlier. Prior to issuance of any building permits for the proposed development, the City and Applicant shall enter into a development agreement,

1 second assignment of error, petitioners argue that the decision violates OAR 660-012-0060,  
2 the Transportation Planning Rule (TPR), because it does not identify a schedule for  
3 completion or require funding of the remaining six identified mitigation measures.  
4 Petitioners further argue that the city erred in deferring the schedule for the remaining six  
5 projects to a time specified in a future development agreement between the city and Wal-  
6 Mart because there is no right of public participation in the development agreement process.

7 The city responds initially that petitioners are precluded from raising the issues set  
8 forth in the second assignment of error because petitioners failed to raise the issues in their  
9 notice of local appeal as required by LUDO 3.020.080(D)(3).<sup>5</sup> In the findings, the city

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which will include detailed provisions for implementing construction of the traffic mitigation element in accordance with the schedule outlined in the TIS.

“The development agreement will identify the mitigation elements to be constructed at the Applicant’s expense by the date of opening of the proposed retail store. For those mitigation elements to be completed by the year 2027, or earlier as warranted, including those at West 6<sup>th</sup> Street/River Road, I-84 Eastbound Ramp Terminal/River Road, I-84 Westbound Ramp/River Road, Webber Street/West 6<sup>th</sup> Street, and West 6<sup>th</sup> Street (Highway 30) River Road, the development agreement will include a provision that the full cost of installing these improvements will be at the Applicant’s expense, and the Applicant will be provided with two options: First, to construct the improvements at the time the City gives notice to the Applicant to proceed with construction of the improvements; or Second, the Applicant will provide a financial guaranty for future construction of the improvements, which guaranty could take the form of payment into a City fund, or a letter of credit, or other form of guaranty approved by the City. Installation of the traffic signals at the two I-84 Interchange off ramps will occur upon confirmation that warrants for the traffic signals exist, and approval for the installation by ODOT has been obtained. The mitigation elements for Webber and 6th Streets listed in the schedule shall be installed upon the giving of notice from the city to the Applicant, in the manner to be set forth in the development agreement.

“For the mitigation element for the I-84 Westbound Ramp Terminal/Highway 197, the development agreement shall include provisions consistent with the recommended proportionate share mitigation on page 5 of the Memorandum from DKS Associates to ODOT Region 4, dated September 5, 2007. The development agreement will include provisions giving the Applicant a choice between two options, similar to those provided for the other mitigation elements to be constructed by 2027 or earlier; i.e., to pay for the actual proportionate share of the costs of the mitigation element at the time of construction, or to provide some form of financial guaranty approved by the City assuring the Applicant will pay their proportionate share of the cost of constructing the improvement in the future.” Record 3-4.

<sup>5</sup> LUDO 3.020.080(D)(3) requires that in an appeal of a planning commission decision, the notice of appeal must state “[t]he specific grounds why the decision should be reversed or modified, based on the applicable criteria or procedural error.” Petitioners’ notice of appeal contained the following identification of the grounds for appeal under LUDO 3.020.080(D)(3):

1 council specifically identified the four issues it considered to have been preserved for appeal,  
2 the first of which is:

3 “The Planning Commission’s findings and conditions of approval related to  
4 traffic are legally insufficient to ensure compliance *with the LUDO.*” Record 7  
5 (emphasis added).

6 The city maintains that petitioners’ argument that the decision fails to comply *with the TPR*  
7 is not an issue that the city council determined was preserved.

8 We tend to agree with the city that petitioners’ argument set forth in the second  
9 assignment of error does not fall within any of the four issues that the city council found  
10 were preserved in the appeal of the planning commission decision. Petitioners’ argument set  
11 forth in the second assignment of error challenges the application’s compliance with the  
12 TPR. The issue that the city found was preserved regarding traffic was the application’s  
13 compliance with the LUDO. Petitioners do not assign error to the above-quoted finding, or  
14 otherwise argue that any of the city’s actions constitute a procedural error that prejudiced  
15 their substantial rights. Because petitioners do not assign error to the above-quoted finding,  
16 that unchallenged finding means that any assignments of error presented in the petition for  
17 review that are outside of the scope of issues that the city found were properly raised or that  
18 the city found were waived provide no basis for reversal or remand of the decision.

19 However, even if the issues presented in the second assignment of error were  
20 adequately preserved, we agree with the city and Wal-Mart that the decision complies with  
21 the TPR mitigation requirements. Condition 11 requires compliance with the mitigation  
22 identified in the TIA and requires Wal-Mart to pay for installation of all of the improvements  
23 either through a financial guaranty or through deposit of funds with the city. Condition 11

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“The decision should be reversed for failure to comply with the city’s land use development ordinance Sections 3, 6, 7, 8, and 10. The Planning Commission’s decision is not based on substantial evidence to demonstrate compliance with the above-noted provisions of the LUDO. The Planning Commission’s findings and conditions of approval related to traffic, stormwater management and wetlands are legally insufficient to ensure compliance with the LUDO.” Record 325.

1 also provides a timeframe and event triggers for when the remaining improvements will be  
2 required to be constructed. The event triggers are based on notice from the city that the  
3 projects are warranted and, in some cases, approval for installation by ODOT. Condition 11  
4 requires the city and Wal-mart to enter into a development agreement, as allowed under OAR  
5 660-012-0060(2)(e), that provides a funding mechanism and timing of the improvements.

6 Petitioners cite *Jaqua v. City of Springfield*, 193 Or App 573, 91 P3d 817 (2004), in  
7 support of their argument. In *Jaqua*, the Court of Appeals held that the city erred in  
8 approving a zone change that required mitigation of significant impacts to the transportation  
9 facility to generally occur by the end of the planning period, without specifying when the  
10 mitigation would occur in order to avoid temporary failures of the transportation facility.  
11 However, in the present appeal, condition 11 specifies triggers for determining when six of  
12 the mitigation projects will occur, consistent with OAR 660-012-0060(2)(e).<sup>6</sup>

13 We also disagree with petitioners that whether the future development agreement  
14 described in Condition 11 is subject to a public process is relevant to whether the decision  
15 complies with the TPR. It is the condition itself that binds Wal-Mart to fund the  
16 improvements and sets forth the schedule for when the improvements will be completed.  
17 That a future development agreement may further refine the terms of Condition 11 is not a  
18 basis for remand of the decision, because the future development agreement could not  
19 modify the requirements of Condition 11 in a way that is inconsistent with that condition.

20 The second assignment of error is denied.

### 21 **THIRD ASSIGNMENT OF ERROR**

22 LUDO 3.030.040(C)(2) requires the “elements of the site plan are arranged to: \* \* \*  
23 [p]reserve and maintain public amenities and significant natural features.” In the third  
24 assignment of error, petitioners argue that wetlands located on the site are “significant

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<sup>6</sup> OAR 660-012-0060(2)(e) was adopted after the Court’s decision in *Jaqua*.

1 natural features” under that code section, and that the site plan fails to show all wetlands  
2 located on the property and thus fails to preserve all “significant natural features” as required  
3 by LUDO 3.030.040(C)(2). The phrase “significant natural features” is not defined in the  
4 LUDO.

5 The city interpreted the phrase “significant natural features” to include those  
6 contained in the “natural resource inventories in either the 1982 Comprehensive Plan or the  
7 1989 Riverfront Plan.” Record 21. Because the wetlands located on the subject property are  
8 not shown on either the comprehensive plan or the Riverfront Plan, the city reasoned, they  
9 are not “significant natural features” and the site plan need not demonstrate how it preserves  
10 and maintains the wetlands.

11 The city and Wal-Mart argue that petitioners do not challenge the city’s interpretation  
12 of the phrase “significant natural features” or otherwise explain why the city’s interpretation  
13 is incorrect. We agree with the city and Wal-Mart. Absent any challenge to the city’s  
14 interpretation of its code language, the city’s interpretation of the phrase “significant natural  
15 features” as not including the wetlands located on the subject property means that the  
16 arguments contained in the third assignment of error provide no basis for reversal or remand  
17 of the decision.

18 The third assignment of error is denied.

19 **FOURTH ASSIGNMENT OF ERROR**

20 In the fourth assignment of error, petitioners argue that the city’s decision fails to  
21 demonstrate compliance with LUDO 3.030.040(B), which requires the city to determine that  
22 adequate public facilities for water, sanitary sewer, storm sewer and streets and sidewalks  
23 will be provided to the property. Petitioners argue that there are a number of approved but  
24 undeveloped subdivisions in the city that, when developed, will increase demand on the  
25 city’s water and sewer facilities, and that the city’s analysis failed to consider whether the

1 city's public facilities will be sufficient to serve all of the undeveloped parcels when  
2 developed as well as the proposed development.

3 The city adopted the following findings regarding adequacy of sewer and water  
4 facilities:

5 "The City Engineer provided verbal testimony at the February 23, 2009  
6 hearing that, based on the City's master plans for water and sanitary sewer  
7 there was adequate capacity to serve the proposed development as well as all  
8 approved, but as yet undeveloped commercial and residential projects in the  
9 City. Although this issue was technically not properly preserved on  
10 appeal \* \* \* , this testimony was provided as a direct response to suggestions  
11 from [petitioners] that certain undeveloped projects had not been taken into  
12 account in determining whether there was adequate capacity to serve the Wal-  
13 Mart project. The City Engineer further explained that an evaluation had been  
14 conducted prior to the pre-application conference with the Applicant in order  
15 to ensure that adequate capacity existed, and determine what improvements, if  
16 any, would need to be included as part of the Application. The City Engineer  
17 noted that the improvements to the sewer and water systems proposed by the  
18 Applicant were consistent with the master plan and would not only  
19 accommodate the Wal-Mart development, but would add capacity to the  
20 remainder of the system." Record 20.

21 Petitioners argue that because the evaluation referenced in the city engineer's testimony is  
22 not included in the record, that finding is not supported by substantial evidence.

23 The city and Wal-Mart respond that the evidence in the record supports the city's  
24 conclusion, based on testimony from the city engineer, that the city's water and sewer  
25 facilities will be adequate to serve all existing and planned development in the city. We  
26 agree.

27 The fourth assignment of error is denied.<sup>7</sup>

## 28 **FIFTH ASSIGNMENT OF ERROR**

29 LUDO 8.050.020(B) requires that any development that increases runoff must collect  
30 and direct that runoff to a city street, storm drain, or natural water course. The development

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<sup>7</sup> Because we deny the assignment of error, we need not address the city's argument that petitioners are precluded under ORS 197.763(1) from raising the issue.

1 proposes to direct stormwater to the public storm sewer located in River Road, which  
2 discharges into Chenoweth Creek. The city imposed a condition of approval that requires  
3 Wal-Mart to obtain approval of its stormwater disposal plan from all agencies with  
4 jurisdiction over storm water disposal. Record 3. In the fifth assignment of error, petitioners  
5 argue that the city erred in determining that the proposed development satisfies LUDO  
6 8.050.020(B) because, according to petitioners, the permits that Wal-Mart must obtain in  
7 order to comply with that condition are prohibited as a matter of law.

8 As the city and Wal-Mart point out, petitioners' arguments in support of the fifth  
9 assignment of error are virtually identical to the arguments in support of the first assignment  
10 of error in *Citizens for Responsible Development v. City of The Dalles*, \_\_ Or LUBA \_\_  
11 (LUBA No. 2009-040, August 11, 2009). We denied the first assignment of error in LUBA  
12 No. 2009-040, finding that obtaining the necessary permits was not precluded as a matter of  
13 law. *Id.* at slip op 9-10. For the same reasons, we deny petitioners' fifth assignment of error.

14 The fifth assignment of error is denied.

15 The city's decision is remanded.