BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

K.B. RECYCLING, INC.,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

SP RECYCLING CORP.,
Intervenor-Respondent.

LUBA No. 2001-120

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Mark J. Greenfield, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were R. Roger Reif and Reif, Reif & Thalhofer.

Michael E. Judd, Assistant County Counsel, Oregon City, filed a response brief and argued on behalf of respondent.

Douglas C. MacCourt, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Mark A. Jurva and Ater Wynne LLP.

BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED 11/06/2001

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner challenges county approval of a conditional use permit to operate a recycling facility.

MOTION TO INTERVENE

SP Recycling Corp. (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

FACTS

The subject property consists of several tax lots zoned Light Industrial (I-2) in an unincorporated portion of the county. The I-2 zone allows a "recycling center" as a conditional use. Intervenor proposes to construct a 70,000 square foot structure to house a recycling center that will collect and sort recyclable materials, mostly fiber, from the Portland metropolitan region. The fiber will be trucked south to intervenor's paper mill in the City of Newberg. Other recyclables will be trucked to other recycling facilities, while non-recyclable materials will be transferred to a local garbage hauler. The proposed facility will accept recyclable material only from private hauling companies and will not be open to the public or accept material from the general public.

The subject property is located between SE 120th Avenue and SE Carpenter Drive, approximately one-half mile south of Highway 212/224 and 1.5 miles east of the Interstate-205/Highway 212/224 interchange (205 interchange). Highway 212/224 provides the shortest, most direct route between the site and origins and destinations to the north and west. The 205 interchange and the 82nd Drive/Highway 212/224 interchange are failing during the a.m. and p.m. extended peak hours.[1]

[1]The county's decision explains that "[t]hese intersections are currently operating at failing LOS [level of service] for more than one hour during the AM and PM peak periods. Extended peak hours means the more than one-hour period during which these intersections are operating at a failing LOS during the AM and PM peaks." Record 7 n 1.

Clackamas County Zoning and Development Ordinance (ZDO) 819.02(A)(1)(a) requires that "[t]he road access system to [a recycling] facility shall be adequate to handle traffic generated by the use."[2] Similarly, for conditional uses, ZDO 1203.01(C) requires that "[t]he site and proposed development is timely, considering the adequacy of transportation systems * * * affected by the use."[3] Intervenor submitted a traffic report estimating that the recycling facility would generate 35 trips per day, consisting of 15 employee trips and 20 truck trips. Intervenor later revised the traffic report to estimate that the facility would generate 154 daily vehicle trips, including 30 trip ends during the a.m. peak hour and 22 trip ends during the p.m. peak hour. To minimize impacts on the failing intersections along the Highway 212/224 corridor, intervenor proposed that trucks and vehicles coming to and leaving the site use an alternate route traveling west from the site along SE Jennifer Street and SE Evelyn Street for approximately 1.5 miles, then south along SE 82nd Drive for

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[2]ZDO 819.02 sets standards for approval of recycling centers and transfer stations, and provides in relevant part:

> "A. Mitigation Standards
>
> "1. Traffic
>
> "a. The road access system to the facility shall be adequate to handle traffic generated by the use. The County shall require the necessary traffic measures to insure the facility use is consistent with the County transportation system. The facility shall have access to major roadways and truck routes. The facility shall have an operational plan that assures those traveling to the facility, particularly trucks, travel primarily on truck routes identified by the County."

[3]ZDO 1203.01 sets forth conditional use criteria, and provides in relevant part:

> "The Hearings Officer may allow a conditional use, after a hearing conducted pursuant to [ZDO] 1300, provided that the applicant * * * demonstrates that the proposed use also satisfies the following criteria:
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> "* * * * *
>
> "C. The site and proposed development is timely, considering the adequacy of transportation systems, public facilities and services existing or planned for the area affected by the use."

approximately 1.5 miles, to the Interstate 205/82nd Drive interchange. Under this proposal, trucks and vehicles coming to the site from the north along I-205 would be expected to continue south past the 205 interchange approximately 1.5 miles, exit onto 82nd Drive, and travel north and east approximately three miles to the subject property.

Petitioner operates a nearby recycling facility just north of Highway 212/224, under a conditional use permit issued in 1997 that prohibits any activities that generate traffic during the p.m. extended peak hours. Petitioner appeared before the hearings officer in opposition to intervenor's application, arguing that intervenor cannot ensure that traffic associated with the proposed use will use the longer alternate route rather than the more direct Highway 212/224 route.

The hearings officer conducted a hearing and, on July 2, 2001, issued a decision approving the conditional use permit, with conditions. Conditions 4 and 5, discussed below, require that traffic associated with the proposed use must use the alternate route during extended peak hours, except for *de minimis* traffic volumes, and that intervenor must devise a monitoring plan to determine whether traffic generated by the facility is using the Highway 212/224 corridor during extended peak hours.

This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

In the first assignment of error, petitioner challenges the hearings officer's interpretation of ZDO 819.02(A)(1)(a) and 1203.01(C), to allow a *de minimis* amount of traffic associated with the proposed facility to pass through the two failing intersections. In the second assignment of error, petitioner argues that the conditions imposed by the hearings officer are inadequate to ensure that traffic associated with the facility will not use the failing intersections. We address these assignments together.

A. Interpretation of ZDO 819.02(A)(1)(a) and 1203.01(C)

As a preface, petitioner explains that this proceeding is not the first time a county

hearings officer has applied ZDO 819.02(A)(1)(a) and 1203.01(C) to a proposed recycling center in the area. Petitioner explains that in 1996 it applied for a conditional use permit for a recycling center located nearby on SE 98th Avenue just north of Highway 212/224. At that time the pertinent interchanges were failing only during the p.m. peak hour. Petitioner argues that the hearings officer in that case, a different one than in the present case, initially denied petitioner's application because the hearings officer interpreted ZDO 819.02(A)(1)(a) and 1203.01(C) as not permitting even minor increases in traffic through already failing intersections. Petitioner ultimately obtained the conditional use permit after introducing additional evidence that, under conditions prohibiting any activities on the site that generate traffic between 3:30 and 6:00 p.m., the proposed use was consistent with ZDO 819.02(A)(1)(a) and 1203.01(C).[4]

Petitioner argues that ZDO 819.02(A)(1)(a) and 1203.01(C) should be interpreted similarly in this case, *i.e.*, a transportation facility cannot be "adequate" to handle new traffic generated by the proposed use if it lacks the capacity to handle even existing traffic. Under that interpretation, petitioner argues, even *de minimis* increases in traffic through the failing

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[4]The hearings officer's decision in that case is part of the record of the present case. It finds compliance with ZDO 819.02(A)(1)(a) based on the following:

> "* * * The access plan now provides for all hauler traffic to completely avoid failing Highway 212 intersections during the extended PM peak traffic hour. This will be required by conditions of approval, and can be easily satisfied, as all hauler traffic can be completed prior to the beginning of the extended PM peak hour.
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> "In addition to hauler traffic, this facility is expected to generate public buy-back trips and public drop-off trips. The substantial evidence in this record establishes that only approximately one vehicle trip per day would travel the affected LOS 'F' intersections during the extended PM peak traffic hour. Because of the necessity to avoid even this low level of traffic, a condition of approval will require the applicant to post highly visible signage that the facility is closed to public buy-back during the extended PM peak traffic hours of 3:30 p.m. to 6:00 p.m., Monday through Friday. The substantial evidence in this record establishes that, given current experience from the applicant's existing similar facility, there will be some public drop-off trips during the extended PM peak traffic hour. To avoid this traffic, the applicant will be required to post highly visible signs that the facility is closed to public drop-off activity between the hours of 3:30 p.m. to 6:00 p.m., Monday through Friday. Although this signage will not prevent all public drop-off activity during the extended PM peak traffic hour, it will assuredly be significantly reduced over time. * * *" Record 124.

intersections are impermissible. Petitioner argues that the hearings officer in the present case

erred in interpreting ZDO 819.02(A)(1)(a) and 1203.01(C) to allow *de minimis* traffic volumes to pass through the failing intersections.

The hearings officer in this case found that the proposed use can be approved only if it will not generate more than a *de minimis* increase in traffic through the failing intersections.[5] The hearings officer then found that it was feasible for intervenor to ensure that traffic associated with the use would not violate that standard.[6] Finally, the hearings

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[5]The hearings officer's decision states, in relevant part:

> "The hearings officer finds that the applicant must ensure that the proposed facility will not generate more than a *de minimis* increase in traffic through the failing intersections within the Highway 212/224 corridor.
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> "a. Highway 212/224 provides the shortest, most direct access between the site and origins/destinations to the north and west. Absent some contrary incentive, reasonable drivers will choose the shortest, most direct route to the site.
>
> "* * * * *
>
> "b. As noted above, the I-205/Highway 212/224 and 82nd Drive/Highway 212/224 intersections are failing during the AM and PM peak hours. Therefore the hearings officer finds that:
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> "i. The Highway 212/224 corridor is not adequate to handle traffic generated by the use. ZDO 819.02(A)(1)(a);
>
> "ii. A facility that generates additional traffic through the failing intersections is not timely. ZDO 1203.01(C)[.]"Record 9 (footnote omitted).

[6]The hearings officer found, in pertinent part:

> "The hearings officer further finds that it is feasible for the applicant to ensure that vehicles associated with the site use the [alternate] truck route, or other routes which do not impact the failing intersections within the Highway 212/224 corridor, during extended peak hours.
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> "a. The applicant clearly has sufficient authority over its employees to require that they use the truck route, or other routes which do not impact the failing intersections, to access the site during extended peak hours. The applicant can discipline employees for failure to do so.
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> "b. The hearings officer further finds that the applicant has sufficient influence over drivers patronizing the facility to ensure that they use the truck route, or other routes which do not impact the failing intersections, through the use of incentives or disincentives. For example, the applicant could require use of the truck route in its contracts with hauling companies. In cases where the applicant does not have a contract, the applicant could refuse to accept loads from drivers who fail to use the truck route during extended peak hours, among other options." Record 10.

officer imposed conditions, discussed below, to ensure compliance with ZDO 819.02(A)(1)(a) and 1203.01(C).

Petitioner contends that, even without the example of the earlier hearings officer's interpretation, the interpretation of the hearings officer in the present case is incorrect. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994) (standard of review of hearings officer's interpretation is whether the interpretation is reasonable and correct); *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988) (same). According to petitioner, nothing in ZDO 819.02(A)(1)(a) and 1203.01(C) expresses or implies a *de minimis* exception to the adequacy requirement. Petitioner argues that if the county intended to provide for such an exception, it would have written its code to so provide. It is inconsistent with the plain text of ZDO 819.02(A)(1)(a) and 1203.01(C), petitioner contends, to conclude that a facility that lacks capacity to handle existing traffic is nonetheless "adequate" to handle additional traffic, even if the additional traffic volume is minor or *de minimis*.

Intervenor responds that the hearings officer's interpretation is consistent with the text and context of ZDO 819.02(A)(1)(a) and 1203.01(C). According to intervenor, ZDO 819.02(A)(1)(a) and 1203.01(C) do not expressly prohibit conditional uses that may have a *de minimis* impact on failing intersections, and it would be improper to read such a prohibition into the code. Intervenor argues that LUBA rejected a similar zero-impact interpretation of a similar code provision in *Anderson v. City of Medford*, 38 Or LUBA 792 (2000), and should do so here.[7] Further, intervenor argues that the first hearings officer's

[7]In *Anderson*, the city's code allowed property to be rezoned only if transportation facilities "adequately serve the property." The city council interpreted the code such that no street "served" the property unless the uses allowed by the rezone would generate more than 250 daily vehicle trips. We rejected that interpretation as inconsistent with the text, purpose and policy of the code provision, and remanded. In doing so, however, we agreed with the city that the code could be interpreted to allow zone changes notwithstanding *de minimis* impacts on street facilities that only tangentially "serve" the subject property. 38 Or LUBA at 805. We remanded to the city to adopt a sustainable interpretation of the code that identified the geographic and quantitative limits necessary to determine which facilities "serve" the property.

interpretation of ZDO 819.02(A)(1)(a) and 1203.01(C) is not entitled to any particular weight in evaluating the hearings officer's interpretation in this case.[8]

To the extent it is relevant, we do not see that the two hearings officers' views of ZDO 819.02(A)(1)(a) and 1203.01(C) are inconsistent. The first hearings officer apparently viewed ZDO 819.02(A)(1)(a) and 1203.01(C) as requiring the facility to operate in a manner that would not impact the affected intersections during the relevant time period, and accordingly prohibited activities at the facility that would generate either incoming or outgoing traffic during the relevant hours. Nonetheless, the hearings officer recognized that the imposed conditions could not prevent "all public drop-off activity during the extended PM peak traffic hour" while the facility was closed, although such incidental traffic could be "significantly reduced over time." *See* n 4. The hearings officer approved the facility, notwithstanding that the imposed conditions could not eliminate the possibility of such incidental traffic. Although the hearings officer did not describe that traffic as *de minimis*, that is clearly what he meant.

In the present case, the hearings officer similarly found that the failing intersections are not adequate to handle traffic generated by the proposed facility, and that the county cannot approve the application "without assurance that traffic generated by the proposed use will not impact the failing intersections" during extended peak hours. Record 11. The hearings officer then attempted to craft conditions to provide such assurance, and concluded that those conditions were sufficient to prevent the facility from impacting the failing

[8]Intervenor cites *Holland v. City of Cannon Beach*, 154 Or App 450, 458, 962 P2d 701, *rev den* 328 Or 115 (1998), *Alexanderson v. Clackamas County*, 126 Or App 549, 552, 869 P2d 873, *rev den* 319 Or 150 (1994) and *Friends of Bryant Woods Park v. City of Lake Oswego*, 126 Or App 205, 207, 868 P2d 24 (1994) for the general proposition that inconsistent interpretations do not constitute reversible error unless those different interpretations are the product of a design to act arbitrarily or inconsistently from case to case. Because we conclude, below, that the two hearings officers' interpretations at issue in this case are not inconsistent, we need not address or resolve questions of how our review function is affected by inconsistent interpretations, or what bearing or weight a prior hearings officer's interpretation has in our review of a subsequent hearings officer's interpretation.

intersections. In short, both hearings officers' decisions appear to interpret and apply ZDO 819.02(A)(1)(a) and 1203.01(C) to allow a recycling facility notwithstanding the inability to guarantee *zero* impacts from the facility on the failing intersections. Both decisions reflect the understanding that the code provisions allow a recycling facility notwithstanding *some* impacts on failing intersections, as long as imposed conditions are sufficient to ensure that those impacts are, for lack of a more precise phrase, *de minimis*. That understanding of the pertinent code language is reasonable and correct, and we affirm it.

The critical questions, in our view, are what is meant by *de minimis* and whether the conditions imposed in this case are sufficient to ensure that the traffic impact on the failing intersections will be *de minimis*. The hearings officer in the present case provides no explanation of what he means by "a *de minimis* amount of traffic." Record 11. Without such an explanation, the term *de minimis* by itself is not a clear description of what is and is not permitted. This is demonstrated by the parties' different understandings of what is permitted under the challenged decision, discussed below. This lack of a shared understanding about what the hearings officer meant by "a *de minimis* amount of traffic" underlies much of the difficulties we describe below, in resolving petitioner's challenges to the conditions imposed by the hearings officer.

Black's Law Dictionary, 443 (7th ed 1999) defines *de minimis* to mean "[t]rifling, minimal" or of a fact or thing "so insignificant that a court may overlook it in deciding an issue or case." As applied here to traffic impacts on failing intersections, that term would seem to require that conditions on the facility's operation be imposed that minimize impacts to the point where any irreducible or unavoidable impacts during pertinent times are accurately characterized as "trifling."

The hearings officer and applicant did not attempt quantify how many trips might pass through the failing intersections during the extended peak hour without violating the *de minimis* exception. Neither did the hearings officer and applicant attempt to quantify how

many trips they expect to pass through those intersections during extended peak hours, despite the applicant's best efforts to require that the alternate route be used. Had that approach been taken, the county might have been in a position to say that adding X trips to an intersection during peak hours qualifies as *de minimis*, *i.e.*, a number that can be overlooked because it is too small to have a measurable effect. Rather, the hearings officer simply (1) required that the proposed facility generate no more than a *de minimis* number of trips that pass through the failing intersections during the extended peak hours without defining the standard that must be met, and (2) imposed conditions to achieve that result. While that approach is not necessarily fatally defective, the conditions he imposed must be adequate to ensure that trips generated by the proposal that pass through the failing intersections during the extended peak hours will be few and rare.

We turn to petitioner's challenges to the conditions imposed in this case.

B. Conditions of Approval

The hearings officer imposed conditions 4 and 5 to assure compliance with ZDO 819.02(A)(1)(a) and 1203.01(C).[9] In a footnote, the hearings officer commented that

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[9]Condition 4 requires that:

> "Traffic associated with the use shall use a route that follows Jennifer Street, Evelyn Street and 82nd Drive to access I-205 at the Gladstone interchange * * * or the reverse route during extended peak hours (*i.e.*, when one or more intersections in the Highway 212/224 corridor operate at a failing level of service) except for *de minimis* traffic volume or emergencies." Record 12-13.

Condition 5 requires that:

> "The applicant shall devise a monitoring plan, subject to County approval, to determine whether traffic generated by the facility is using the failing intersections in the Highway 212/224 corridor during extended peak hours. Monitoring shall occur at random, non-scheduled, times, and the applicant shall not give any notice to drivers, in substance or kind, when monitoring will occur.
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> "a. The plan shall provide for monitoring on at least the following schedule: * * * Two months after the start of the operation of the temporary facility [and s]ix months after the start of operation of the permanent facility and every six months for 18 months thereafter.

absent these conditions, the application must be denied because there is no substantial evidence that the application complies with ZDO 819.02(A)(1)(a) and 1203.01(C). Record 10 n 4. Under those conditions, the hearings officer concluded, it will be "feasible for the applicant to ensure that vehicles associated [with] the site use the [alternate] route, or other routes which do not impact the failing intersections within the Highway 212/224 corridor, during extended peak hours." Record 10.

Petitioner argues that, while the county may adopt a finding that it is feasible to satisfy an approval standard and impose conditions necessary to ensure that the standard will be satisfied, the finding of feasibility must be supported by substantial evidence that solutions to problems posed by the project are "possible, likely, and reasonably certain to succeed." *Just v. Linn County*, 32 Or LUBA 325, 330 (1997) (*quoting Meyer v. City of Portland*, 67 Or App 274, 280 n 5, 678 P2d 741 (1984)). Far from being "likely" and "reasonably certain to succeed," petitioner contends, conditions 4 and 5 are unrealistic, unenforceable and ineffective to ensure compliance with ZDO 819.02(A)(1)(a) and 1203.01(C).

Petitioner notes first that, according to the revised traffic report, 52 peak hour trip-ends, more than one-third of the daily vehicle trips to and from the facility, are projected to occur during the a.m. and p.m. peak hours. Petitioner argues that it is not clear what number

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"b. The applicant shall submit reports to the County after each monitoring session.

"c. If the initial monitoring sessions detect more than a *de minimis* use of the failing intersections during extended peak hours, the applicant shall:

"i. Conduct additional monitoring; and

"ii. Undertake additional measures to ensure that traffic generated by the facility does not impact the failing intersections in the Highway 212/224 corridor.

"d. If the applicant fails to conduct monitoring as required herein or the applicant's additional measures to prevent more than a *de minimis* amount of trips from using the Highway 212/224 corridor during extended peak hours are unsuccessful, the County shall begin a process to revoke the conditional use permit." Record 13.

of vehicle trips will occur during the "extended" peak hours and, more importantly, what those "extended" peak hours are. Nothing in the challenged decision defines the "extended" peak hours, petitioner argues, which makes it impossible for the applicant to determine, or the county to verify, that the facility is in compliance with the requirement to avoid impacts on the failing intersections during the extended peak hours.[10]

Petitioner next argues that the imposed conditions are insufficient to ensure compliance with ZDO 819.02(A)(1)(a) and 1203.01(C). The hearings officer found that "absent some contrary incentive, reasonable drivers will choose the shortest, most direct route to the site." Record 9. The hearings officer suggested two possible incentives, but left it up to the applicant to determine how it will comply with the requirement that traffic use the alternate route during the relevant time periods. With regard to employees, the hearings officer found that the applicant has sufficient authority to require employees to comply with the requirement. With respect to private haulers, the hearings officer suggested that the applicant can require use of the alternate route in its contracts with hauling companies or, where no such contracts exist, refuse to accept loads from drivers who fail to use the alternate route. Petitioner argues that both of the suggested incentives regarding private haulers are unrealistic. According to petitioner, a contract provision requiring haulers to use the alternate route is unlikely to include any significant penalty because, if it did, haulers would likely choose to deliver their recyclable materials instead to one of the other numerous recycling centers in the metropolitan area, including several along the Interstate 205 corridor. Similarly, petitioner questions whether the applicant has sufficient incentive to penalize haulers who violate the contract, since such penalties run counter to the applicant's business interests. For the same reason, petitioner argues, turning away trucks that fail to use the

[10]Petitioner notes that the "extended" p.m. peak hour for purposes of its recycling facility was 3:30 to 6:00 p.m. Petitioner suggests that it is reasonable to assume that the hearings officer intended a similar definition for the present facility. However, petitioner argues, the hearings officer did not provide such a definition, nor a corresponding definition for the extended a.m. peak hour.

alternate route only penalizes the applicant. According to petitioner, the drivers can take their loads elsewhere, whereas the applicant cannot recover the lost revenue. For these reasons, petitioner argues, condition 5 is not reasonably certain to succeed.

Similarly, petitioner questions the efficacy of the monitoring program required by condition 5:

> "[U]nannounced, random monitoring followed by reporting can only harm the applicant, as it can result in the loss of hauler business or revocation of its permit. *A company that has invested millions of dollars to construct a recycling facility will not jeopardize its investment (and its stockholder's funds) through actions that could cause it to lose business or shut down.* To assume otherwise is folly, no matter how well intentioned the company. To protect its investments and its existence, the company either will find a discreet way to warn haulers in advance that monitoring will occur, or it will fudge numbers, or it will manipulate monitoring in some other way. But it will not monitor and report itself out of existence." Petition for Review 22 (emphasis in original).

With respect to the requirement that the applicant devise a monitoring plan, petitioner points out that, even assuming monitoring under the plan occurs, the only remedy imposed by the decision is further monitoring, plus unspecified "additional measures." Finally, petitioner argues that the monitoring obligation imposed by condition 5 is only once per six-month interval and in any case extends only for two years after construction of the permanent facility. After two years, petitioner argues, there is no longer any means to ensure that hauler and employee traffic does not revert to using the shortest, most direct route through the Highway 212/224 corridor during extended peak hours.

Intervenor responds that the record contains substantial evidence that conditions 4 and 5 are "reasonably certain to succeed." *Just*, 32 Or LUBA at 330. Intervenor argues that condition 5 was proposed by intervenor "as good faith assurance that vehicles traveling to the facility, particularly trucks, would travel primarily on the [alternate] truck route." Intervenor-Respondent's Brief 33. According to intervenor, the monitoring mechanism in condition 5 is simple, straightforward, easy to verify, and there is no reason to believe that the monitoring process is insufficient to ensure compliance with ZDO 819.02(A)(1)(a) and

1203.01(C).

Intervenor apparently understands that the purpose of condition 5 is to assure that traffic to and from the facility travels "primarily" on the alternate route. That understanding is apparently based on the last sentence of ZDO 819.02(A)(1)(a), which states that "[t]he facility shall have an operational plan that assures those traveling to the facility, particularly trucks, travel primarily on truck routes identified by the County." *See* n 2. However, that sentence is directed at assuring that truck traffic travels on county-identified *truck* routes, and is not related to the "adequacy" requirement in the first sentence of ZDO 819.02(A)(1)(a). In our view, intervenor's misconception of the purpose and intent of conditions 4 and 5 underscores several flaws in those conditions.

Those flaws result from a combination of several considerations. The first is, as discussed above, uncertainty over what the hearings officer meant in allowing *de minimis* amounts of traffic through the failing intersections during the pertinent hours. The second is uncertainty over the pertinent hours. Intervenor does not respond to petitioner's argument that the decision does not determine the scope of "extended" peak hours. We agree with petitioner that without such a determination, the requirement that the applicant not impact the failing intersections during those hours, and the applicant's monitoring efforts, lack a critical foundation. The third and related consideration is the insufficiency of evidence demonstrating that the applicant's operation can avoid impacts on the failing intersections to the requisite (albeit undefined) degree.

The hearings officer's decision requires that the applicant offer sufficient incentives to private haulers to avoid the failing intersections, but leaves the nature of those incentives to the applicant. Petitioner cites to testimony that time is of the essence in solid waste hauling, and that no likely incentives, including the two suggested by the hearings officer, can alter private haulers' preference for short, direct routes to a degree sufficient to ensure compliance with ZDO 819.02(A)(1)(a) and 1203.01(C). Intervenor cites to no substantial

evidence in the record supporting a different conclusion, and we agree with petitioner that it seems unlikely that the suggested incentives will succeed.[11]

A contract requirement that private haulers use the alternate route does little to ensure compliance with ZDO 819.02(A)(1)(a) and 1203.01(C) absent effective, enforceable and enforced penalty provisions. The decision does not require such penalty provisions, or their enforcement, and for the reasons petitioner states it seems unlikely that intervenor would enforce any such provisions against haulers.

The suggestion that intervenor refuse to accept loads from noncontract haulers who do not use the alternate route at least has the virtue that it is nominally a limitation on intervenor's operation rather than on third parties. That or a similar limitation might well suffice to ensure compliance with ZDO 819.02(A)(1)(a) and 1203.01(C), if made a part of intervenor's operation plan and daily operations. However, the decision does not impose such requirements. Further, given the uncertainties discussed above, the wide latitude granted intervenor under conditions 4 and 5, and the lack of financial incentive to do so, there is no assurance that intervenor will interpret or apply conditions 4 and 5 to impose such requirements. It seems more probable that intervenor would contemplate the option of refusing loads, if at all, only as a much-belated response to noncontract haulers whose noncompliance might be discovered during biannual monitoring checks.

In resolving an evidentiary challenge, LUBA will not independently review that evidence, but instead will examine the record only to determine if a reasonable person could have reached the decision the local government made, in view of all of the evidence in the record. *Tigard Sand and Gravel, Inc. v. Clackamas County*, 33 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d 1106, *adhered to* 151 Or App 16, 949 P2d 1225 (1997). Here, the

[11]Intervenor does cite to testimony from intervenor's regional manager that the alternate route is faster than the Highway 212/224 corridor and private haulers will naturally use the faster route, even without incentives. Record 301. However, the hearings officer implicitly rejected that testimony, and intervenor does not cite to any other evidence in the record supporting it.

question is the evidentiary sufficiency for the hearings officer's conclusion that conditions 4 and 5 are sufficient to ensure that the proposed facility will comply with ZDO 819.02(A)(1)(a) and 1203.01(C), *i.e.*, avoid impermissible impacts on the failing intersections. Individually considered, the deficiencies discussed above might not undermine that conclusion. However, considered together, we do not believe that a reasonable person could conclude, as the hearings officer did, that the conditions are sufficient to ensure compliance with applicable approval criteria.

The first assignment of error is sustained in part; the second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

The hearings officer found that the proposed facility will generate 154 daily vehicle trips, based on the traffic report submitted by intervenor's consultant. Petitioner challenges that finding, arguing that the record does not show what the estimate is based on or how it was generated. Petitioner cites to evidence suggesting that the proposed facility will generate considerably more than 154 daily trips. Given that evidence and that lack of explanation for the estimates in the traffic report, petitioner argues, the hearings officer's finding that the facility will generate 154 daily vehicle trips is not supported by substantial evidence.

Intervenor cites to an addendum attached to the traffic report that explains how the estimates in the report were generated. Record 201-256. The cited portions of the record support the estimates in the traffic report. We agree that the contrary evidence cited by petitioner does not undermine the evidence relied upon by the hearings officer, and the hearings officer's finding that the proposal will generate 154 daily vehicle trips is supported by substantial evidence. *Tigard Sand and Gravel, Inc.*, 33 Or LUBA at 138.

The third assignment of error is denied.

The county's decision is remanded.