

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

3  
4                   HAL OIEN, D.M.D. and OPUS NORTHWEST, LLC,  
5                                   *Petitioners,*

6  
7                                   vs.

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9                   CITY OF BEAVERTON,  
10                                  *Respondent.*

11  
12                                  LUBA No. 2002-075

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14                   BEAVERTON SCHOOL DISTRICT  
15                                  NO. 48J  
16                                  *Petitioner,*

17  
18                                  vs.

19  
20                   CITY OF BEAVERTON,  
21                                  *Respondent,*

22  
23                                  and

24  
25                   HENRY KANE  
26                                  *Intervenor-Respondent.*

27  
28                                  LUBA No. 2002-076

29  
30                                  FINAL OPINION  
31                                  AND ORDER

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33                   Appeal from City of Beaverton.

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35                   Hal Oien, Beaverton, filed a petition for review and argued on his own behalf.

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37                   Corinne C. Sherton, Salem, represented petitioner Opus Northwest.

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39                   Dana L. Krawczuk, Portland, filed a petition for review and argued on behalf of  
40 petitioner Beaverton School District No. 48J. With her on the brief was Jack L. Orchard,  
41 Portland and Ball Janik, LLP.

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43                   William J. Scheiderich, Assistant City Attorney, Beaverton, filed a response brief and  
44 argued on behalf of respondent.

1 Henry Kane, Beaverton, filed a response brief and argued on his own behalf.

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

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6 AFFIRMED

12/30/2003

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

**NATURE OF THE DECISION**

In these consolidated appeals, petitioners appeal a city decision denying petitioner Beaverton School District’s design review application for a proposed transit support center.

**MOTIONS TO FILE REPLY BRIEF**

Petitioner Beaverton School District (hereafter, the District) moves to file a reply brief to address alleged new matters in the response briefs of the city and intervenor-respondent. There is no dispute that the proposed reply brief is proper under OAR 661-010-0039, and it is allowed.

Petitioner Oien moves to file a reply brief to address alleged new matters in the city’s response brief. However, the alleged “new matters” appear to be responses to Oien’s assignments of error, and Oien’s proposed reply brief appears to be simply an embellishment of those assignments of error. Oien’s proposed reply brief is not warranted under OAR 661-010-0039, and Oien’s motion is denied. *Sequoia Park Condo Assoc. v. City of Beaverton*, 36 Or LUBA 317, 321, *aff’d* 163 Or App 592, 988 P2d 422 (1999).

**MOTION TO STRIKE**

The District moves to strike statements in intervenor-respondent’s response brief that could be construed as cross-assignments of error. Intervenor-respondent responds that none of the disputed statements are intended to constitute cross-assignments of error. With that understanding, the District’s motion to strike is denied.

**FACTS**

The subject property is a 13.84-acre parcel zoned Light Industrial (LI), the former site of a manufacturing facility. The property is located just west of NW Cornell Road, a county-owned arterial. Primary access to Cornell Road from the property is across a private fire lane to Bethany Court and thence to the intersection of Bethany Court and Cornell Road. Use of the fire lane is controlled by recorded covenants, conditions and restrictions (CC&Rs) of two

1 private subdivision owners' associations. Secondary access is provided by Twin Oaks Drive,  
2 a public road that fronts the subject property to the north, and thence to the intersection of  
3 Twin Oaks Drive and Cornell Road. The Five Oaks Middle School borders the subject  
4 property to the west.

5 The LI zone allows a "Storage Yard—Transit Storage" outright. The District  
6 purchased the subject property with the intent of decentralizing its current school bus  
7 operations and accommodating increased enrollment and demand for busing. The District  
8 applied to the city for design review approval to construct improvements to accommodate the  
9 proposed storage and maintenance of approximately 196 buses (hereafter transit storage  
10 center, or TSC). The proposed improvements include new employee parking areas, a new  
11 paved area north of an existing building, and a remodel of the existing building to  
12 accommodate bus maintenance bays and administrative offices. The District proposed daily  
13 operation of up to 196 buses from the subject property, including employee vehicles entering  
14 and leaving the subject property as well as bus operations, which would generate an  
15 additional 1,610 daily vehicle trips.

16 The District prepared a traffic study concluding that the traffic impacts of the  
17 proposed TSC are consistent with applicable transportation-related design review standards.  
18 The city facilities review committee reviewed the traffic study and recommended approval.  
19 The city board of development review (BDR) conducted a public hearing and approved the  
20 TSC, with conditions.

21 Five appeals of the BDR approval were filed, including four appeals by opponents  
22 and an appeal by the District challenging landscaping conditions. The city council held a  
23 public hearing June 3, 2002, which was continued to June 10, 2002. The city council  
24 announced its tentative oral decision at the conclusion of deliberations on June 10, 2002, in  
25 favor of the opponents' appeal, thereby reversing the BDR approval. On June 17, 2002, the  
26 city council approved a final written decision reversing the BDR approval. The city

1 council’s written decision rejects many of the opponents’ bases for appeal, but agreed with  
2 opponents that the District had failed to carry its burden of proof with respect to compliance  
3 with transportation-related design review criteria. The city council further found that the  
4 District’s appeal issues were rendered moot by the city council’s decision to reverse the BDR  
5 approval. This appeal followed.

6 **FIRST ASSIGNMENT OF ERROR (THE DISTRICT)**

7 The District argues that the city erred in finding that petitioner failed to carry its  
8 burden of proof with respect to compliance with transportation-related design review criteria  
9 at Beaverton Development Code (BDC) 40.10.15.3.C.1(b), (c) and (d), and that the city’s  
10 finding to that effect is not supported by substantial evidence.<sup>1</sup> The District contends that the  
11 traffic study it submitted amply demonstrates that the proposed facility complies with  
12 applicable criteria, and the city erred in relying on two types of evidence to reject the

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<sup>1</sup> In relevant part, BDC 40.10.15.3.C(1) requires the following findings to approve design review:

- “b. That, based on anticipated vehicular and pedestrian traffic generation and the standards and policies of the Comprehensive Plan, adequate right of-way and improvements to streets, pedestrian ways, bikeways, transitways and other ways are provided by the development in order to promote safety, reduce congestion, conserve energy and resources, and encourage transit use, bicycling and walking. \* \* \*;
- “c. That adequate dedication or reservation of real property for public use, as well as easements and right of entry for construction, maintenance and future expansion of public facilities and services, shall be required to protect the public from any potentially deleterious effects resulting from the proposed use, to fulfill the need for additional, improved services, whether on or off site, created by the proposed use, and to effect the implementation of the standards and policies of the Comprehensive Plan;
- “d. That there is a safe and efficient circulation pattern within the boundaries of the site. Consideration shall include the layout of the site with respect to the location, number, design and dimensions of vehicular, transit, and pedestrian access, exits, drives, walkways, bikeways, transit stops and facilities, building location and entrances, emergency equipment ways and other related onsite or off-site facilities. That there are adequate off-street parking and loading-unloading facilities provided in a safe, well designed and efficient manner. Consideration shall include the layout of parking, storage of all types of vehicles and trailers, shared parking lots and common driveways, garbage collection and storage points, as well as the surfacing, lighting, screening, landscaping, concealing and other treatment of the same[.]”

1 conclusions in the traffic study: (1) unsubstantiated non-expert testimony by opponents and  
2 (2) a two-page critique of the District’s traffic study by the opponents’ traffic engineer.

3 The District argues that the evidence the city relied upon is either insubstantial or  
4 does not undermine the conclusions in the traffic study, that the proposed facility complies  
5 with all transportation-related design review standards. According to the District, if the  
6 evidence in the record is viewed as a whole, no reasonable person could conclude, as the city  
7 did, that the proposed facility fails to comply with applicable transportation-related criteria.

8 The burden of overturning a permit denial on evidentiary grounds is a daunting one.  
9 In challenging a denial on evidentiary grounds, it is not sufficient to demonstrate that the  
10 evidence would also support approval of the application. Rather, the petitioner must  
11 demonstrate that the evidence is such that he “sustained his burden of proof as a matter of  
12 law.” *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979);  
13 *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, *aff’d* 134 Or App 414, 894  
14 P2d 1267 (1995); *Consolidated Rock Products v. Clackamas County*, 17 Or LUBA 609, 619  
15 (1989). That burden becomes even more daunting when the applicable approval criteria are  
16 highly subjective in nature. *Dundas v. Lincoln County*, 43 Or LUBA 407, 425 (2002).  
17 BDC 40.10.15.3.C.1(b), (c) and (d) are highly subjective, for example requiring findings that  
18 the proposed development provide “adequate” transportation improvements to “promote  
19 safety” and “reduce congestion,” among other things. *See* n 1. We turn to the District’s  
20 challenges to the city’s findings under these criteria.

21 **A. BDC 40.10.15.3.C.1(b)**

22 The city council first concluded that the District’s evidence was insufficient to answer  
23 the question posed by BDC 40.10.15.3.C.1(b) in the affirmative. That conclusion was based  
24 primarily on a critique of the District’s evidence by the opponents’ traffic engineer, Ahrend.<sup>2</sup>

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<sup>2</sup> The Ahrend letter states, in relevant part:

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“The Revised Traffic Impact Analysis (February 2002), similar to the original September application, does not appear to include approximately half of the supporting calculations for intersection operations. Of those included, we believe that the existing percentage of heavy trucks and buses were unaccounted for and the proposed increase in buses was inaccurately accounted. In our professional opinion, we believe that one bus to two passenger cars is not equivalent with the roadway grades of Bethany Boulevard and the Highway 26 ramps. Without accurate portrayal of the intersection operation and capacity, the proposed mitigation may not be sufficient for the impact of the subject site.

“Oregon Department of Transportation (ODOT) recommended approval in their February 22, 2002 letter with two conditions. ODOT required that traffic simulation models for both the A.M. and P.M. peak hours of Bethany Boulevard from Cornell Road and Bronson Road be prepared to confirm the appropriate mitigation. ODOT indicated that the models should be reviewed by both the County and ODOT. They also required ODOT permits for work in the highway right-of-way. Please consider incorporating that these mitigation measures be completed before the project is given final approval. The currently proposed City of Beaverton condition only requires the school district comply with ODOT’s requirements if the cost of improvements is roughly proportional to their impact. This condition would leave any improvement in doubt if the costs were high. The modeling and final ODOT conditions should be completed and incorporated into the conditions of approval prior to a decision on this project.

“DKS & Associates prepared a memorandum dated March 1, 2002 which summarized potential future mitigation. It states that the site can generate 100 additional buses during the P.M. peak hour before a level of service ‘E’ is experienced at the intersections of Cornell Road/167th Avenue and Cornell Road/Bethany Boulevard. In our professional opinion, we believe that this memorandum does not adequately address the potential future growth and impact of the site for the following reasons:

“The memorandum only addresses impacts at the two intersections on Cornell Road. While these intersections will be significantly impacted, the interchange is operating at a lower level of service and even with the proposed mitigation will be impacted more severely. All of the study area intersections should be analyzed for impact by potential growth of the site. (It should be noted that ODOT’s conditioned recommendation of approval is based on the proposed development in the application, not the potential growth the site may have.)

“DKS estimated the number of buses which could be accommodated at the intersections assuming one school bus is equivalent to two passenger cars. This assumption does not appear to be reasonably sufficient considering the steep roadway grades approaching the interchange.

“The project is recommended for approval based on the anticipated noise and pollution levels of 30 buses during the A.M. peak hour and 131 buses during the P.M. peak hour. If approval of this project will allow development up to 130 A.M. buses and 231 P.M. buses, then these other issues should be re-evaluated as well.

“Typically, applications are prepared for a specific size of development with a corresponding trip generation. Approval or denial should be recommended for that application only. Growth of a site beyond the application submitted necessitates reanalysis of the impact. We believe that approval of this site should limit buses to the number presented in the original application.

1           The District criticizes the evidence relied upon by the city and argues that that  
2 evidence does not undermine the conclusions of its traffic experts, that transportation  
3 facilities are adequate to accommodate the proposed TSC. The District first notes that the  
4 opponents' expert, Ahrend, merely recommends further studies and additional conditions, but  
5 does not recommend denial. Second, the District argues that Ahrend's first set of criticisms  
6 regarding the lack of supporting calculations, failure to account for existing heavy truck and  
7 bus volume, and the equation of one school bus to two passenger vehicles, are not well-  
8 founded. The District notes that its traffic study was peer-reviewed and approved by another  
9 traffic engineering firm, as well as by staff at the Oregon Department of Transportation  
10 (ODOT), Washington County, and the city's own traffic department, none of whom was  
11 bothered by the lack of supporting calculations. The District argues that Ahrend fails to  
12 explain how the traffic study improperly accounts for existing heavy truck and bus volumes.  
13 Further, the District argues that the equation of one school bus to two passenger vehicles for  
14 purposes of estimating traffic impacts is a generally accepted professional standard  
15 authorized by the Highway Capacity Manual.

16           The District also takes issue with Ahrend's second set of criticisms that the District  
17 may be able to avoid conditions imposed by ODOT by challenging those conditions as not  
18 "roughly proportional" to the impacts of the proposed facility. The District contends that it  
19 accepted all conditions imposed by ODOT, and therefore the city had no basis to speculate  
20 that at some point in the future that the District would or could attempt to avoid those  
21 conditions.

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"In conclusion, we request that all of ODOT's and Washington County's conditions of approval be incorporated into the text of the Staff Report, and that ODOT's improvements be defined prior to a decision on this application. In addition, we request that the bus facility be limited to the number of buses anticipated in the traffic study (30 during the AM. peak hour and 131 during the P.M. peak hour). We recommend that an additional traffic study be required in order to exceed those limits." Record 720-21.

1 Finally, the District argues that Ahrend and the city misunderstood the traffic study's  
2 opinion that the proposed TSC could generate 100 more bus trips than expected before  
3 impacted intersections would fail applicable performance standards. According to the  
4 District, the traffic study is simply pointing out that there is excess capacity in affected  
5 transportation facilities, not that the District plans to operate an additional 100 buses over the  
6 number of buses proposed, as Ahrend and the city appear to understand.

7 The city responds that the Ahrend critique is a sufficient basis for the city to conclude  
8 that the District failed to provide evidence establishing compliance with  
9 BDC 40.10.15.3.C.1(b).<sup>3</sup> According to the city, that Ahrend recommended additional

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<sup>3</sup> The city council adopted the following findings under BDC 40.10.15.3.C.1.b.

“BDC 40.10.15.3.C.1.b-- This provision requires, among other things, that, in the light of an analysis of ‘anticipated vehicular and pedestrian traffic generation’ and Plan policies, the Council can find that ‘adequate right of way and improvements to streets, pedestrian ways, bikeways, transitways, and other ways are provided by the development’ to produce certain beneficial results. The issue for the Council under this criterion is whether it was given an adequate analysis of ‘anticipated vehicular and pedestrian traffic generation’ to be able to evaluate the proposed use. The Council answers this question in the negative.

“The applicant placed a revised traffic study prepared by DKS Associates and dated February 7, 2002, in the record at the Council record pages 483-580. This revised study was the result of criticism of a previous DKS study by a letter dated January 11, 2002 by one of the opponents, Opus Northwest, LLC, a commercial landowner in the area who was concerned over the traffic impacts of the proposed transportation facility. \* \* \*

“\* \* \* \* \*

“Mr. Ahrend presented a letter found at Council record pages 150-151 and dated March 14, 2002. That letter made three principal points:

“1. The revised traffic impact analysis of February 7, 2002 shared many of the same flaws as the previous analysis because it did not include approximately half of the supporting calculations for intersection operations, that for the calculations included, existing percentages of heavy trucks and buses were unaccounted for, and proposed increases in buses was inaccurately accounted. Mr. Ahrend concluded: ‘Without accurate portrayal of the intersection operation and capacity, the proposed mitigation may not be sufficient for the impact of the subject site.’

“2. ODOT had recommended approval of the application with two conditions, to be realized before final approval was given, viz 1) use of traffic simulation models for both the AM and PM peak hours of Bethany Boulevard from Cornell Road and Bronson Road be prepared to confirm the appropriate mitigation and that these models be reviewed both by ODOT and Washington County; and 2) secure ODOT permits for highway work. The first of these

1 conditions rather than denial does not foreclose the city from concluding, based on the  
2 Ahrend critique of the District's evidence, that the District failed to establish compliance  
3 with applicable criteria. The city argues that there is no dispute that the traffic study lacks  
4 supporting data for half of the intersections studied, an omission that casts into doubt the  
5 study's baseline estimate of existing traffic conditions. Further, the city argues that it could  
6 reasonably rely on Ahrend's professional opinion that the traffic study fails to account  
7 accurately for existing heavy truck and bus volume. The city also argues that the District  
8 offers no response to Ahrend's professional opinion that the equation of one bus to two cars  
9 is inappropriate when calculating performance on steep road approaches.

10 With respect to the ODOT conditions, the city argues those conditions essentially  
11 require the District to further model traffic conditions in order to determine appropriate

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requirements, and the subject of Mr. Ahrend's concern, is found at condition C(6) at Council record page 331, incorporated by Condition 11 of the BDR order at Council record page 53.

"Mr. Ahrend contended that the necessary traffic mitigation improvements could be avoided by the applicant, if the cost were too high, concluding that the project should be denied if the necessary improvements were not installed. Mr. Ahrend concluded that proper modeling be done, as set forth in item I, above, and that the necessary improvements from ODOT review of that modeling be incorporated into the final order, if the TSC should be approved.

"3. Mr. Ahrend's letter of March 14 was also critical of a DKS memorandum dated March 1, 2002, in which it opined that the site could generate 100 more buses than currently expected in the PM peak hour before a level of service 'E' would be experienced at the intersection of Cornell Road and 167th Ave and Cornell Road and Bethany Boulevard. Mr. Ahrend disagreed for four listed reasons, including a failure to review operations at the intersection of Cornell Road and U.S. Highway 26, which would be operating at an even lower level of service and would be more seriously impacted, suggesting that it was necessary, in his professional opinion, to study all intersections in the area and noting that ODOT's recommendation was based solely on the level of trips found in the application, and not any additional trips. He also commented that one school bus was not necessarily equivalent to two passenger cars, especially with respect to steep roadway grades approaching the Highway 26 and Cornell Rd. intersection. He indicated that adding another 100 buses in the AM and PM peak hours required further evaluation of these additional trips.

"The Council has reviewed these materials and considered the presentations of the traffic engineers who presented oral and written testimony to the BDR and the Council and concludes that it believes the Ahrend critique of the DKS presentation as not constituting an adequate analysis of 'anticipated vehicular and pedestrian traffic generation' to be able to evaluate the proposal under this subsection. The Council concludes that the Ahrend critique constitutes substantial evidence on which it can, and does, predicate denial of this application." Record 15-17.

1 mitigation. The point of Ahrend's criticism, the city argues, is that the required modeling  
2 should be performed, and all appropriate mitigation identified, prior to final approval. Given  
3 the uncertainty over what level of improvements ODOT can require, the city contends, the  
4 city council agreed with Ahrend that design review approval is not warranted until the  
5 requested traffic modeling is performed and appropriate mitigation confirmed.

6 Finally, with respect to the potential for more daily bus trips than are currently  
7 proposed, the city argues that in response to staff concerns regarding future growth of the  
8 facility, the District relied upon the alleged excess capacity in two nearby intersections, but  
9 did not deny the potential for future growth or additional bus trips beyond those currently  
10 contemplated. The District proposed as a condition of approval that if future growth or  
11 schedule changes result in more than 100 additional bus trips through the two identified  
12 intersections, then the District will conduct further traffic studies and, if warranted, submit  
13 plans to mitigate traffic impacts to return the intersections to the condition existing prior to  
14 the growth or schedule change. According to the city, the city council agreed with the  
15 Ahrend critique that the District's evidence failed to adequately address potential future  
16 growth, given that the traffic study and proposed condition addressed only two intersections  
17 and in any case failed to demonstrate excess capacity in those intersections.

18 We agree with the city that the Ahrend testimony is a sufficient basis for the city to  
19 conclude that the District's evidence failed to establish compliance with  
20 BDC 40.10.15.3.C.1(b). The District as well as the city approached the question of  
21 compliance with BDC 40.10.15.3.C.1(b) as a matter of determining whether nearby  
22 transportation facilities could accommodate the traffic impacts of the proposed facility. That  
23 determination appears to involve an estimate of traffic impacts and a calculation of the  
24 capacity of the impacted facilities, under current and future conditions, and as mitigated by  
25 proposed improvements. A reasonable person could, based on the Ahrend critique, question  
26 the accuracy and sufficiency of the District's calculation of traffic impacts as well as the

1 calculation of capacity. Certainly the District’s evidence is not such that the District can be  
2 said to have established compliance with the subjective standards of BDC 40.10.15.3.C.1(b)  
3 as a matter of law.

4 **B. BDC 40.10.15.3.C.1(c)**

5 BDC 40.10.15.3.C.1(c) requires adequate dedication of property to protect the public  
6 from potentially deleterious effects resulting from the proposed use, among other things. The  
7 city council found that the District’s evidence failed to demonstrate compliance with this  
8 standard for several reasons, with particular focus on the adequacy of the right of way on  
9 Bethany Court, which provides primary access to the subject property.<sup>4</sup> The city council

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<sup>4</sup> The city council’s findings state, in relevant part:

“BDC 40.10.15.3. C.1.c - This subsection requires, among other things, adequate dedication or reservation of real property for public use and easements and rights of entry for public facilities and services ‘to protect the public from any potentially deleterious effects resulting from the proposed use, to fulfill the need for additional improved services,’ whether on or off-site, created by the proposed use. Council interprets this criterion as focusing on construction, maintenance and expansion of public utility facilities and services, as well as right of way for vehicular and pedestrian traffic, based on the proposed use.

“\* \* \* \* \*

“Council notes a concern over the safety of pedestrians, especially children along Bethany Ct., which, as proposed, would have passenger vehicles parked along both sides, effectively reducing the width available for bus movement and maneuvering. This concern would indicate inadequate right of way or street improvements or both.

“While the applicant presented evidence to indicate there would be few occasions in which two-way bus traffic conflicts would occur along the fire lane or Bethany Ct., the possibility of such occurrence cannot be ruled out. The likely consequences of same were graphically illustrated in the video tape.

“Council has concluded above that the applicant did not bear its burden of providing an adequate transportation study to evaluate the transportation impacts of the proposed use. For the same reasons, the Council finds that the DKS analysis is inadequate to evaluate the ‘potentially deleterious effects’ from the proposed use. \* \* \*

“Finally, the Council viewed the narrative and videotape of the ‘live bus demonstration,’ presented by opponents that illustrated the inadequacy of certain roads and intersections in the vicinity of the site to accommodate anticipated bus trips combined with existing trips. The Council accepts this testimony in that it supports the conclusion that the applicant did not bear its burden of demonstrating that it is able ‘to protect the public from any potentially deleterious effects resulting from the proposed use, to fulfill the need for additional improved

1 relied in part on a video produced by opponents that attempts in relevant part to illustrate  
2 traffic conflicts between buses, cars and pedestrians along Bethany Court. Using 30 buses  
3 hired for the occasion, the video depicts buses traveling in two directions on Bethany Court,  
4 which has a 22-foot wide travel lane.

5 The District argues that the video is flawed for a number of reasons and does not  
6 undermine the District's evidence of compliance with BDC 40.10.15.3.C.1(c). The District  
7 argues that the video was not produced by traffic experts, and inaccurately assumes two-way  
8 bus traffic on Bethany Court. According to the District, bus circulation will be one way in or  
9 out of the facility, depending on the time of day, and two-way bus traffic along Bethany  
10 Court at any given time will be a rare occurrence. The District argues that if the city council  
11 is truly concerned with rare occurrences of two-way bus traffic, it could have considered  
12 imposing conditions regulating such occurrences.

13 The city disputes the District's view that two-way bus traffic on Bethany Court will  
14 be a rare occurrence. The city notes that the District's circulation plan depicts two-way bus  
15 traffic on Bethany Court, and that its traffic impact tables project bus trips both in and out  
16 during the AM and PM peak hours. According to the city, the bus video and other testimony  
17 relied upon by the city council are a sufficient basis to conclude, as the city did, that the  
18 District failed to demonstrate compliance with BDC 40.10.15.3.C.1(c).

19 In any case, the city points out that the city council also found noncompliance with  
20 BDC 40.10.15.3.C.1(c) for the same reasons it found noncompliance with  
21 BDC 40.10.15.3.C.1(b), *i.e.*, the identified inadequacies in the District's traffic study. The  
22 District challenges that alternative finding, but simply incorporates its evidentiary challenge  
23 to the city's findings under BDC 40.10.15.3.C.1(b). We rejected that evidentiary challenge  
24 above. The District offers no reason why the deficiencies in the traffic study that the city

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services,' whether on or off-site, created by the proposed use. Based on the above discussion as pertaining to adequacy of right of way, Council sustains the opponent appeal on this issue." Record 17-18.

1 identified in discussing BDC 40.10.15.3.C.1(b) should not also constitute a sufficient basis to  
2 conclude that the District failed to establish compliance with BDC 40.10.15.3.C.1(c). In any  
3 case, we have reviewed the bus video and other evidence relied upon by the city, as well as  
4 the evidence cited by the District. Although the bus video and testimony the city relied upon  
5 are not particularly compelling evidence that the right-of-way along Bethany Court is  
6 inadequate, we cannot say that that evidence is unsubstantial, or that the District’s evidence  
7 establishes compliance with BDC 40.10.15.3.C.1(c) as a matter of law.

8 **C. BDC 40.10.15.3.C.1(d)**

9 BDC 40.10.15.3.C.1(d) requires that the site have a safe and efficient circulation  
10 pattern. The District proposed using a private fire lane with a pavement width of 24 feet for  
11 primary access. The city council found that proposed use of the fire lane was inconsistent  
12 with BDC 40.10.15.3.C.1(d), because illegal parking in the lane effectively reduced the  
13 width available for bus movement and maneuvering.<sup>5</sup>

14 The District cites to evidence that buses can maneuver adequately onto the fire lane  
15 from Bethany Court, although the District admits that the turning radius is tight. To the  
16 extent the city council is concerned with parking on the fire lane, which is apparently  
17 prohibited by private covenants governing the fire lane, the District argues that the city  
18 should have considered ways in which the city could enforce the parking prohibition.

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<sup>5</sup> The city council’s findings state, in relevant part:

“The applicant proposed using the fire lane as its principal means of ingress and egress from the bus storage area. Returning buses would travel Bethany Ct. from Cornell Rd. and turn onto the fire lane and from there enter the site. Evidence was presented to show that passenger vehicles of customers of area businesses frequently park alongside Bethany Ct. and the fire lane. While the fire lane is posted to prohibit parking, it is nonetheless a relatively common occurrence. Such parking effectively reduces the width available for bus movement and maneuvering, especially at the corner where Bethany Ct. intersects with the bus lane, which is a difficult turning movement even without nearby parked cars. The Council believes this evidence and concludes that it constitutes substantial evidence that the applicant did not bear its burden of demonstrating there is a safe and efficient circulation pattern within the boundaries of the site.” Record 18-19.

1 The city responds, and we agree, that the city council could find, based on the record,  
2 that given the illegal parking and tight turning radii on the fire lane that that right-of-way is  
3 not “safe and efficient” for purposes of BDC 40.10.15.3.C.1(d). Certainly we cannot say that  
4 the evidence cited by the District demonstrates compliance with that criterion as a matter of  
5 law. The District offers no reasonable means for either the District or the city to enforce  
6 private parking restrictions that neither controls, even assuming the city would be required to  
7 consider such measures as an alternative to denial, a topic we take up in the District’s second  
8 assignment of error.

9 The District’s first assignment of error is denied.

10 **SECOND ASSIGNMENT OF ERROR (THE DISTRICT)**

11 The District argues that the city failed to consider its obligations under ORS 197.522  
12 in denying the design review application outright under BDC 40.10.15.3.C.1(b), (c) and (d),  
13 without considering whether the application may be approved with “reasonable conditions”  
14 that bring the proposed use into compliance with those criteria.

15 ORS 197.522 provides:

16 “A local government shall approve an application for a permit, authorization  
17 or other approval necessary for the subdivision or partitioning of, or  
18 construction on, any land that is consistent with the comprehensive plan and  
19 applicable land use regulations or shall impose reasonable conditions on the  
20 application to make the proposed activity consistent with the plan and  
21 applicable regulations. A local government may deny an application that is  
22 inconsistent with the comprehensive plan and applicable land use regulations  
23 and that cannot be made consistent through the imposition of reasonable  
24 conditions of approval.”

25 The District explains that, historically, local governments have been under no  
26 affirmative obligation to develop conditions of approval that might permit approval of  
27 proposed development, as an alternative to denial of development that the local government  
28 finds does not comply with applicable criteria. *Simonson v. Marion County*, 21 Or LUBA  
29 313, 325 (1991). However, the District argues that ORS 197.522 plainly alters that  
30 traditional rule. Under ORS 197.522, the District argues, prior to denial the local

1 government *must* consider whether the application can be approved with “reasonable  
2 conditions” that “make the proposed activity consistent with the plan and applicable  
3 regulations.” According to the District, only if the local government concludes that the  
4 application cannot be made consistent with applicable criteria through the imposition of  
5 reasonable conditions of approval may the local government deny the application. The  
6 District argues that the city council in the present case failed to undertake that inquiry, and  
7 denied the design review application without considering whether it may be made consistent  
8 with BDC 40.10.15.3.C.1(b), (c) and (d) by imposing reasonable conditions. As an example  
9 of such “reasonable conditions,” the District argues that if the city felt that the transportation  
10 system could not support the proposed operation with 196 buses, it should have imposed  
11 conditions limiting the operation to fewer buses.

12         The city responds that, while it does not concede that ORS 197.522 is applicable in  
13 the present case or obligates the city to consider “reasonable conditions” as an alternative to  
14 denial, the predicate for any such obligation is that the *applicant* come forward with any  
15 proposed conditions for the city to consider during the evidentiary proceedings below,  
16 together with any evidence necessary to demonstrate that the proposed development as  
17 conditioned will be consistent with applicable standards. The city disputes the District’s  
18 premise that local governments have the obligation to develop on their own initiative and  
19 without assistance from applicants conditions or other modifications that will render a  
20 noncompliant development consistent with applicable standards. According to the city, the  
21 District failed to come forward during the evidentiary proceedings with proposed conditions  
22 or other modifications that would have made the proposed facility consistent with  
23 BDC 40.10.15.3.C.1(b), (c) and (d).

1           We assume for purposes of our analysis that ORS 197.522 is potentially applicable to  
2 the present decision.<sup>6</sup> Like the city, we disagree with the District’s premise that any  
3 obligation under the statute to identify and propose “reasonable conditions” belongs to the  
4 city. The statute is silent as to the party with the burden of identifying and proposing such  
5 conditions. Placing that initial burden on the local government poses a number of pragmatic  
6 difficulties that are avoided if that initial burden belongs to the applicant. The applicant is  
7 more likely to have the resources and motivation to develop conditions of approval or  
8 modifications to the proposal to make it consistent with applicable criteria. Conditions  
9 developed and proposed by the applicant are likely to be acceptable to the applicant, and thus  
10 probably, if not presumptively, reasonable. Further, requiring the applicant to develop such  
11 conditions along with any necessary supporting evidence as to their efficacy, and present  
12 them during the evidentiary proceeding, allows other interested parties to object to such  
13 conditions and present opposing evidence. Under the District’s view, a local government  
14 contemplating denial during its deliberations would either have to develop conditions on its  
15 own after the evidentiary proceedings are closed or re-open the proceedings to allow  
16 evidence from the applicant or opponents.

17           We understand the District to argue that, notwithstanding that the initial burden under  
18 ORS 197.522 may belong to the applicant, the city must nonetheless afford the applicant  
19 some warning that denial is forthcoming and offer some opportunity for the applicant to  
20 propose reasonable conditions to address the decision-makers’ concerns. The District argues  
21 in the present case that there was no hint prior to the close of evidentiary proceedings before  
22 the city council that the city council might deny the application, and therefore no reasonable

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<sup>6</sup> ORS 197.522 is codified among the provisions governing moratoria on construction or land development at ORS 197.505 through 197.540. Arguably, based on that context or the relating clause of its enacting legislation, ORS 197.522 is not intended to apply or cannot apply outside the context of a declared or de facto moratorium. As the parties do not raise such arguments, and they need not be resolved in the present case, we assume without deciding that ORS 197.522 is applicable outside the context of a declared or de facto moratorium.

1 opportunity for the District to come forward with conditions of approval that might make the  
2 proposed facility consistent with BDC 40.10.15.3.C.1(b), (c) and (d).

3 While we generally agree with the District that the local government must provide  
4 some opportunity for the applicant to propose reasonable conditions under ORS 197.522, we  
5 disagree that the city failed to provide such an opportunity in the present case. Local  
6 governments' discretion in fashioning local procedures to allow all parties a reasonable  
7 chance to anticipate the local government's final decision and propose conditions of approval  
8 that an applicant would prefer to denial and that an opponent would prefer to approval  
9 without conditions is somewhat limited. ORS 197.763 sets out fairly detailed procedural  
10 requirements for conducting quasi-judicial land use proceedings and ORS 215.427 and  
11 227.179 impose time limits for a final decision. Here, the District had an opportunity during  
12 the local evidentiary proceedings before the city council to identify conditions of approval to  
13 respond to concerns raised during those proceedings regarding compliance with BDC  
14 40.10.15.3.C.1(b), (c) and (d). Those conditions could have been proposed as an alternative  
15 to denial of the application, in the event the city ultimately concluded the development as  
16 requested did not satisfy those criteria. The District also could have suggested conditions of  
17 approval to satisfy concerns during its final legal arguments under ORS 197.763(6)(e).

18 Requiring the District to propose conditions that might address expressed concerns  
19 without rendering the proposal infeasible admittedly places the District an awkward position.  
20 The District must propose conditions of approval that might increase expense or reduce  
21 developmental or operational flexibility in situations where the local decision maker might  
22 otherwise have approved the application without the conditions. However, that is no more  
23 awkward than requiring that the city effectively modify or revise the District's proposed  
24 development through conditions of approval with no indication from the District or the other  
25 parties concerning the feasibility or efficacy of particular conditions. Such conditions could  
26 easily have dramatic unanticipated consequences that would render the proposal

1 economically infeasible. If, as would frequently be the case, the tentative decision that the  
2 proposal does not comply with applicable approval criteria is reached after the close of the  
3 evidentiary phase of the local proceedings, it could be difficult or impossible for the city to  
4 determine the efficacy of any possible conditions of approval, or allow an additional  
5 evidentiary presentation to consider that question, within statutory deadlines for reaching a  
6 final decision. Absent a clearer indication in the statute that the legislature intended to  
7 impose such a problematic burden on local governments, we decline to read ORS 197.522 to  
8 do so.

9 The District's second assignment of error is denied.

10 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR (OIEN)**

11 Petitioner Oien cites several comprehensive plan policies and argues that the city  
12 erred in failing to apply them as approval criteria to the District's design review application.  
13 Petitioner also argues that the city committed procedural and constitutional errors by failing  
14 to provide notice of applicable comprehensive plan policies. Instead, petitioner argues, the  
15 city misled the public by announcing that the challenged design review decision is a limited  
16 land use decision, and that comprehensive plan policies are therefore applicable only if  
17 specifically incorporated into the code.<sup>7</sup> Petitioner argues that there is no authority for  
18 limiting the applicability of comprehensive plan policies in that manner.

19 The city responds that ORS 197.195(1) prohibits the city from applying  
20 comprehensive plan policies to a limited land use decision, other than policies incorporated  
21 into the city code.<sup>8</sup> The city argues, and we agree, that petitioner has not demonstrated that

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<sup>7</sup> Petitioner cites to the following announcement made during the city council proceedings:

“Since the application involves a limited land use decision, generally the provisions of the Beaverton Comprehensive Plan are not approval criteria. Only those [plan] provisions that are specifically incorporated in the [BDC] would be considered approval criteria.” Record 146.

<sup>8</sup> ORS 197.195(1) provides, in relevant part:

1 the cited comprehensive plan policies have been incorporated into the BDC as approval  
2 criteria or that the city committed procedural or constitutional error.

3 Petitioner Oien’s first, second and third assignments of error are denied.

4 **FOURTH AND SEVENTH ASSIGNMENTS OF ERROR (OIEN)**

5 Petitioner Oien contends that the city erred in determining that two BDC provisions  
6 are not approval standards.

7 **A. BDC 20.15.80.2**

8 BDC 20.15.80.2 states that “[t]he emission of odorous gasses or matter as to be  
9 readily detectable at any point beyond the property line is prohibited.” Opponents argued  
10 below that under BDC 20.15.80.2 the proposed transit facility must be denied because diesel  
11 fumes from the buses will be readily discernible and detectable beyond the property line.  
12 The city council agreed with staff that BDC 20.15.80.2 is a “performance standard” rather  
13 than a design review approval standard.<sup>9</sup> Petitioner Oien disputes that conclusion, arguing  
14 that BDC 20.15.80.2 is an approval standard.

15 The city responds, and we agree, that the city council’s interpretation of BDC  
16 20.15.80.2 is not reversible under the deferential standard of review that we must apply to a

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“A ‘limited land use decision’ shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. \* \* \* Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision.”

<sup>9</sup> The city council’s findings state, in relevant part:

“Opponents argued that odors from the [TSC] would be readily discernible or detectable beyond the property line. Therefore, they believe the application is fatally flawed without any possibility of Code compliance.

“The Council agrees with staff and BDR that these Code provisions [BDC 20.15.80] have never been interpreted (and should not be now) as being land use approval standards. By their explicit terms, they are, instead, ‘Performance Standards.’” Record 12.

1 governing body’s interpretation of local regulations, pursuant to ORS 197.829(1) and *Church*  
2 *v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). BDC 20.15.80 is a separate section of  
3 a larger code section, at BDC 20.15, governing the siting of industrial development in  
4 industrial zones. BDC 20.15.80 is titled “performance standards,” and generally prohibits  
5 vibrations, odors, and other emissions detectable at the property line. It is not inconsistent  
6 with the text, purpose or policy of BDC 20.15.80.2 to view it as a performance standard  
7 rather than an approval criterion applicable to design review of the proposed industrial use.

8 **B. BDC 40.10.15.3.B.11**

9 The opponents argued below that BDC 40.10.15.3.B.11 is an applicable design  
10 review approval standard. The city council disagreed, finding that BDC 40.10.15.3.B.11 is  
11 part of the application requirements for design review and declining to interpret it to be an  
12 approval criterion.<sup>10</sup>

13 Petitioner Oien argues that the city council erred in refusing to apply  
14 BDC 40.10.15.3.B.11, but does not directly challenge the city council’s interpretation quoted  
15 at n 10 or explain why that interpretation is reversible under ORS 197.829(1). Absent a more  
16 developed challenge to the city council’s interpretation, petitioner fails to provide a basis for  
17 reversal or remand.

18 Petitioner Oien’s fourth and seventh assignments of error are denied.

19 **FIFTH AND SIXTH ASSIGNMENTS OF ERROR (OIEN)**

20 Petitioner Oien argues that the city’s findings regarding air quality are not supported  
21 by substantial evidence. Specifically, petitioner contends that the city council gave too much  
22 weight and credibility to the testimony of the District’s air quality expert, and faults the city

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<sup>10</sup> The city council’s decision states, in relevant part:

“As stated in the staff reports and as incorporated in the BDR Findings, this code section is not an approval standard but is listed under ‘Application Requirements’ in the code. The Council agrees with this position and has consistently so interpreted and administered this code section.” Record 14.

1 for dismissing the opponents' evidence regarding air quality as lacking scientific credibility.  
2 Petitioner argues that the District's air quality consultant is not in fact an expert in air quality,  
3 and that the evidence submitted by the opponents regarding diesel pollution and air quality is  
4 scientific and credible.

5 We note, at the outset, that petitioner Oien never indicates what approval criteria  
6 require findings regarding air quality. The specific findings petitioner challenges relate to  
7 what appear to be the city's alternative findings under BDC 20.15.80.2.<sup>11</sup> We affirmed,  
8 above, the city council's primary finding that BDC 20.15.80.2 is not an approval criterion.  
9 For that reason alone, petitioner fails to demonstrate reversible error. *See Hard Rock*  
10 *Enterprises v. Washington County*, 36 Or LUBA 106, 119, *aff'd* 161 Or App 198, 984 P2d  
11 958 (1999) (where a local government's approval rests on independent alternative grounds,  
12 petitioner must successfully challenge each of those alternative grounds in order to obtain  
13 reversal or remand of the decision).

14 In any case, petitioner's evidentiary challenge to the city's alternative findings  
15 addressing BDC 20.15.80.2 is not well-taken. As a review body, we are authorized to  
16 reverse or remand the challenged decision if it is "not supported by substantial evidence in

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<sup>11</sup> The city council findings state, in relevant part:

"Much discussion about odor occurred before the Council. The applicant's air quality expert, Mr. Bloom, identified in his report and testimony why odors will not be readily detectable beyond the property in light of the applicant's stated mode of operations for the TSC. While the opponents questioned Mr. Bloom's analyses, the Council cannot find credible, scientific or demonstrable evidence to the contrary. Because [BDC 20.15.80.2] is a performance, not an approval, standard, the applicant will, like all industrially-zoned owners, be required to meet applicable performance standards once operations commence.

"Unquestionably, the use of the property for bus storage and maintenance generates no readily detectable odors beyond the property line when buses are not running. Opponents do not argue otherwise. Their sole objection is limited to the running of bus engines on the property shortly prior to and during the departure from, and return to, bus storage. As to this issue, these bus operations are of very limited duration and effect. The Council finds that such operations will not be readily detectable to those conducting their normal and reasonable daily activities in adjoining businesses and neighborhoods. The standard only addresses circumstances where residents or businesses are involuntarily subjected in a meaningful way to off-site odors for a duration exhibiting some obvious intensity." Record 12-13.

1 the whole record.” ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable  
2 person would rely on in reaching a decision. *Carsey v. Deschutes County*, 21 Or LUBA 118,  
3 *aff'd* 108 Or App 339, 815 P2d 233 (1991). The record includes the resume of the District’s  
4 air quality consultant, indicating 14 years of experience in air quality assessment and  
5 monitoring. Record 282-83. Petitioner’s critique of that resume and the consultant’s  
6 testimony falls well short of demonstrating that the consultant is unqualified to render an  
7 expert opinion regarding air quality. As petitioner indicates, the opponents submitted  
8 voluminous testimony and evidence, some of it in the form of articles in various scientific or  
9 medical journals, pointing to the adverse impacts of diesel fumes on humans, particularly  
10 children. However, even assuming BDC 20.15.80.2 is an approval standard, it is directed at  
11 detectable odors at property boundaries. Viewing the record as a whole, a reasonable person  
12 could conclude, as the city council did, that the proposed facility will not produce detectible  
13 odors at the property line.

14 Oien’s fifth and sixth assignments of error are denied.

15 The city’s decision is affirmed.