BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAL-MART STORES, INC.,
Petitioner,

vs.

CITY OF BEND,
Respondent,

and

OUR COMMUNITY FIRST, JOHN OVERBAY,
and ANN WHEELER,
Intervenor-Respondents.

LUBA No. 2006-040

FINAL OPINION
AND ORDER

Appeal from City of Bend.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were Gregory S. Hathaway and Davis Wright Tremaine, LLP.

Peter M. Schannauer, Bend, filed a response brief and argued on behalf of respondent. With him on the brief was Forbes & Schannauer, LLP.

Christine M. Cook, Portland, filed a response brief and argued on behalf of intervenor-respondents.

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

AFFIRMED 07/19/2006

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city hearings officer decision that denies its request for land use approvals for a commercial subdivision and Wal-Mart Supercenter.

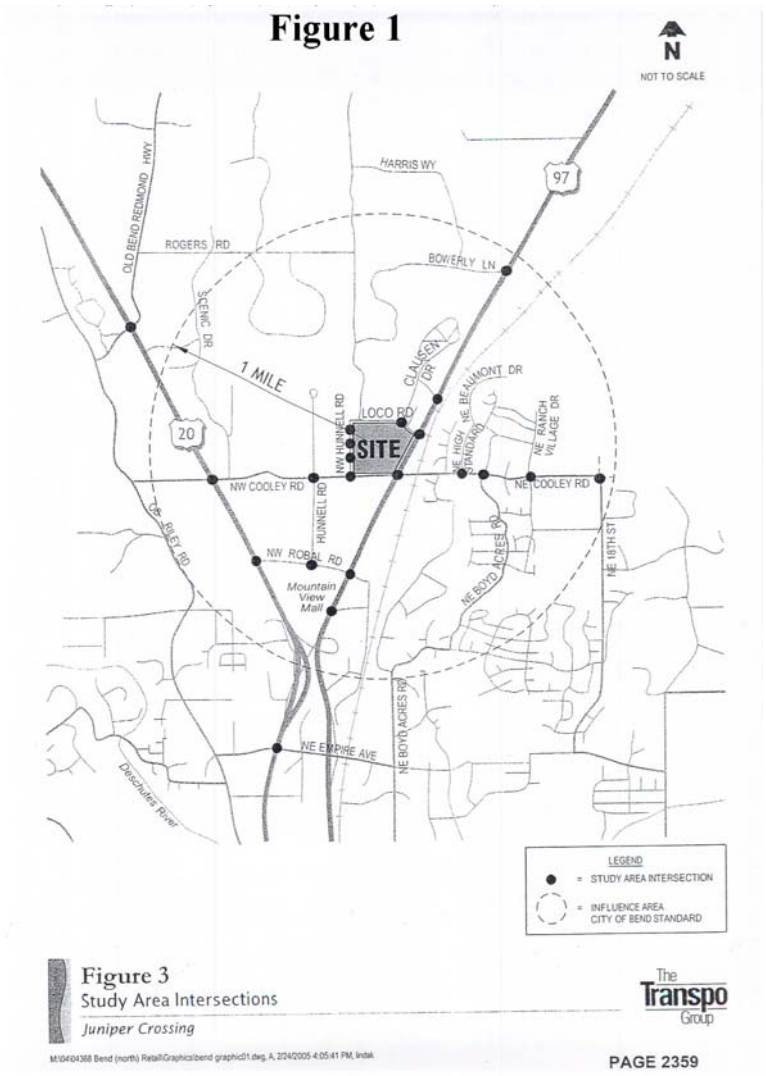
MOTION TO INTERVENE

Our Community First, John Overbay and Ann Wheeler move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Petitioner sought three land use approvals from the city: (1) tentative subdivision plan approval to replat an existing commercial subdivision into a new eight-lot commercial subdivision (Juniper Crossing), (2) site plan and design review approval for the proposed development and (3) conditional use approval to operate a "department store" within the proposed Wal-Mart Supercenter. The subject 30+ acre property is zoned Highway Commercial (CH) and is located within the City of Bend Urban Growth Boundary (UGB). Lot number 1 of Juniper Crossing occupies approximately 22 acres of the 30+ acres. The proposed Wal-Mart Supercenter would occupy lot number 1.

At the north end of the City of Bend, Highways 20 and 97 diverge as they travel north, with Highway 20 traveling northwest toward the City of Sisters and Highway 97 traveling northeast toward the City of Redmond. The commercial area between these diverging highways is an inverted triangle, which is sometimes referred to as the Golden Triangle. Mountain View Mall occupies the lower part of the inverted triangle. The subject 30+ acre property is located further north, along the northeastern leg of the inverted triangle. A map showing the site vicinity and highway intersections that were studied for traffic impacts is included at Record 2359 and is reproduced on the next page.



Anticipated traffic impacts are at the heart of the parties' dispute in this appeal. Petitioner consulted with city and Oregon Department of Transportation (ODOT) traffic engineers before preparing the initial Traffic Impact Analysis (TIA) that it submitted in February 2005. Record 2350-2563. The city, county and ODOT commented on the initial TIA and raised issues concerning proposals in the initial TIA to mitigate traffic impacts. Record 2083-2098 (city), 2099 (county) 2100-2105 (ODOT). In September 2005, petitioner submitted a Supplemental TIA. Record 1559-1822. ODOT and the city commented on the Supplemental TIA. Record 1362-66 (ODOT), 1367-77 (city). The record includes two

memoranda from petitioner's traffic engineers to ODOT and the city. Record 1304-1310 (November 22, 2005 memorandum), 1005-1014 (December 12, 2005 memorandum). According to the December 12, 2005 memorandum, it sets out the "final understanding" that the city, ODOT and petitioner reached concerning the steps that need to be taken to mitigate expected traffic impacts of the proposal so that the surrounding road system will be able to accommodate the additional traffic that Juniper Crossing is expected to generate. Record 1005.

According to the Supplemental TIA, Juniper Crossing will generate 12,764 average daily vehicle trips and 1,188 of those daily vehicle trips would occur during afternoon peak hour. The Supplemental TIA predicts how that traffic will be distributed over the 17 intersections that were studied in the Supplemental TIA. Petitioner took the position before the hearings officer that based on the Supplemental TIA and the supplemental memoranda the city, ODOT and petitioner agreed that the proposed mitigation measures would allow the intersections impacted by Juniper Crossing to operate at a level that is not worse than the existing level of performance at those intersections.

The evidentiary hearing before the city hearings officer was held on December 12, 2005. The evidentiary record closed on December 27, 2005. In her January 30, 2006 decision, the city hearings officer found that despite the Supplemental TIA and subsequent agreements among the city, ODOT and petitioner, petitioner failed to demonstrate that the proposed mitigation measures would be adequate to mitigate the impacts of the traffic that Juniper Crossing will generate. Citing this failure on petitioner's part, the hearings officer denied the requested land use approvals. After the Bend City Council declined to review the hearings officer's decision, this appeal followed.

FIRST ASSIGNMENT OF ERROR

A. The Hearings Officer's Decision Concerning Traffic Impacts

City of Bend Zoning Ordinance (BZO) 10-10.23(8)(a) through (g) set out seven mandatory approval criteria for site plan review. One of those seven criteria, BZO 10-10.23(8)(g), provides:

> "Public Facilities. The proposed use shall not be an undue burden on public facilities, such as the street, sewer or water systems."

In addressing BZO 10-10.23(8)(g) the city hearings officer adopted ten single-spaced pages of findings. Those findings include the following explanation of city and ODOT highway intersection performance standards:

> The [S]upplemental [TIA] noted Highways 20 and 97 are maintained by ODOT and therefore are subject to ODOT's standards, while the remaining intersections fall within the city's jurisdiction. The traffic study stated both ODOT's acceptable level of service for signalized intersections on Highways 20 and 97 ('mobility standard') and the city's acceptable levels of service for the other intersections are based on the ability of the affected intersection to handle traffic. For signalized intersections, both ODOT's and the city's performance standards are based on the ratio of traffic volume to intersection capacity (v/c ratio). The city's acceptable v/c ratio is 1.0 or less, with vehicle delay not exceeding 80 seconds, and 95 percent of the vehicle queuing length not exceeding the available storage length. The [S]upplemental [TIA] stated that ODOT's acceptable v/c ratio is 0.8, with the following exception set forth at page 27:
>
> > "'*Per the requirements of the OHP* [Oregon Highway Plan]*, at intersections where the mobility standard is not currently met, the project is not permitted to make conditions any worse. If a zone change were being sought as part of the application, the applicant would be required to mitigate conditions such that the mobility standard is met based on a 20 year horizon. Since the proposed use is consistent with the current zoning, the project is responsible for mitigating its impacts at the year of opening only.*'
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> "In other words, if a signalized intersection for which ODOT is responsible does not currently function at a v/c ratio of 0.8 or better, this ODOT standard – described as the 'don't make it worse' standard – requires only that the developer provide improvements to the intersection that will allow it to

function *at the same substandard v/c ratio as of the date the development commences operation*." Record 113-14 (italics in original).

The hearings officer's decision goes on to discuss the many mitigation measures proposed by petitioner. The hearings officer's decision also discusses concerns that were discussed following the December 12, 2005 public hearing regarding proposed improvements to the Cooley Road/Burlington Northern Santa Fe (BNSF) railroad crossing a short distance east of Highway 97 and the proposed Juniper Crossing.[1] The hearings officer then goes on to discuss five issues that were raised by the opponents' traffic engineers (Robert Bernstein and Scott Ferguson).[2] Those five issues appear in three numbered paragraphs in the hearings officer's decision at Record 118-19, and we summarize those issues below:

1. The ODOT Highway Capacity Manual requires that intersections with oversaturated existing conditions must be evaluated using "demand traffic volumes." The TIA and Supplemental TIA do not use demand traffic volumes.[3]

2. Expected queue lengths have not been adequately estimated for the Highway 99/Cooley Road intersection.

3. Even if petitioner did not err by failing to use "demand traffic volumes," "segments of the Highway 97 intersections with Cooley Road and Robal Road will experience increased v/c ratios with the addition of traffic generated by the proposed 'Juniper Crossing'

[1] Cooley Road is a two-lane facility east of Highway 97, and it includes an at-grade intersection with the BNSF railroad a short distance east of the Cooley Road/Highway 97 intersection. Petitioner proposes to widen this section of a Cooley Road to a four-lane facility with bicycle lanes on both sides of the road. The Cooley Road/BNSF railroad crossing would remain an at-grade crossing under petitioner's proposal. The hearings officer's findings concerning the ODOT Rail Division permit that will be needed to expand the existing Cooley Road/BNSF railroad crossing to four lanes are the subject of petitioner's third assignment of error.

[2] Mr. Bernstein's testimony appears at Record 689-95. Those seven pages of testimony are followed by 14 pages that set out Mr. Bernstein's professional qualifications and experience. Mr. Ferguson's testimony appears at Record 1941-50.

[3] Although we do not pretend to fully understand the difference that using "demand traffic volumes" would make, "demand traffic volumes" "takes into account traffic that wants to use the affected intersection but cannot because of congestion." Record 118-19.

development, therefore violating ODOT's 'don't make it worse' standard."

4. Widening of Cooley Road at the BNSF crossing from a two-lane to a four-lane facility "would be contrary to long-standing rail safety standards that focus on reducing – and not increasing or enlarging – at-grade rail crossings."

5. The wrong Institute of Transportation Engineer's (ITE) Trip Generation Manual category was used. Whereas petitioner used the shopping center category (3.4 trips per 1,000 square feet of floor space), petitioner should have used "discount club," "free-standing discount store," and "discount supermarket," all of which assume a higher number of trips per 1,000 square feet of floor space.

The hearings officer then provided the following explanation for why she concluded that petitioner failed to demonstrate that the proposal complies with BZO 10-10.23(8)(g).

> "As noted above, the proposed 'Juniper Crossing' development will generate 12,764 ADT's and 1,188 p.m. peak hour trips per day. Although the applicants have proposed to construct, or contribute to the cost of constructing, a number of improvements to the Highway 97/Cooley Road intersection and other affected streets and intersections, the Hearings Officer finds they have failed to demonstrate these improvements will be sufficient to mitigate the impacts of this enormous amount of new traffic. Two experienced traffic engineers – Robert Bernstein and Scott Ferguson – have raised serious and legitimate questions about the methodology and calculations, and the predictions based thereon, in the applicants' supplemental traffic study. These questions have gone largely unrefuted by the applicants. I have no reason to doubt Mr. Bernstein's or Mr. Ferguson's qualifications or credibility. Both included in their written testimony evidence of extensive transportation planning and/or engineering experience." Record 120 (footnote omitted).[4]

[4] The hearings officer also relied on her findings concerning the BZO 10-10.23(8)(g) public facilities criterion to support her subsequent conclusions that petitioner failed to demonstrate that the proposal complies with a "minimal adverse impact" conditional use permit criterion and an "orderly development" subdivision approval criterion. Record 149, 167-68. We set out the "orderly development" criterion later in this opinion. The "minimal adverse impact" conditional use permit criterion is set out at BZO 10-10(29)(3)(a), which requires the following finding:

> "That the location, size, design and operating characteristics of the proposed use are such that it will have a minimal adverse impact on the property value, livability and permissible development of the surrounding area. Consideration shall be given to compatibility in terms of scale, coverage, and density, to the alteration of traffic patterns and the capacity of surrounding streets, and to any other relevant impact of the proposed use."

B. Petitioner's Assignment of Error

Petitioner's first assignment of error is both a substantial evidence challenge and a findings challenge. We turn first to petitioner's substantial evidence challenge.[5]

1. Substantial Evidence Challenge

Petitioner argues:

> "Although the Hearings Officer is entitled to some deference in choosing among conflicting expert evidence, the choice among conflicting expert evidence must be reasonable based on a review of all the evidence in the record. *Younger v. City of Portland*, 305 Or 346. 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992); *Mollala River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251, 268 (2002). The substantial evidence standard is not satisfied when '*the credible evidence apparently weighs overwhelmingly in favor of one finding and the [decision maker] finds the other without giving a persuasive explanation*.' *Garcia v. Boise Cascade Corp*., 309 Or 292, 295, 787 P2d 884 (1990)." Petition for Review 8 (emphasis added).

The first sentence quoted above is an accurate description of how a land use decision maker's choice between conflicting evidence is reviewed on appeal to LUBA, under the substantial evidence standard of review. The quotation that petitioner attributes to *Garcia* in the second sentence quoted above does not appear in that decision. However, the quotation is an accurate quotation from the Court of Appeals' decision in *Armstrong v. Asten-Hill Co*., 90 Or App 200, 752 P2d 312 (1988), which is cited in *Garcia*. We discuss *Armstrong* in more detail below.

a. *Jurgenson v. Union County Court,* 42 Or App 505, 600 P2d 1241 (1979).

When reviewing substantial evidence challenges to land use decisions that deny applications for land use permits, LUBA generally applies the standard of review described

[5] As we note later in this opinion, we normally consider findings challenges before considering arguments that there is not substantial evidence in the record to support any critical findings. We are not departing from that normal order in this case because we now think it is generally appropriate to analyze substantial evidence challenges before considering findings challenges. We do so because doing so in this case facilitates our analysis of the authority that petitioner relies on in making its substantial evidence challenge.

in *Jurgenson v. Union County Court*. As we explained in *Chemeketa Industries Corp. v City of Salem*, 14 Or LUBA 159, 163-64 (1979).

> "A related point about the burden assumed by one who challenges a denial for lack of substantial evidence is made in *Jurgenson v. Union County Court* * * *. Former Chief Judge Schwab stated:
>
> > "'When a local government has denied a requested land-use change, the concept of reviewing for substantial evidence to sustain the denial presents difficulties. In a local land-use proceeding the proponent of change has the burden of proof. Could not a local government deny a land-use change on the sole basis that the proponent did not sustain his burden of proof because his evidence was not credible? If so, in what sense would we be expected to say that the denial was supported by substantial evidence?
> >
> > "'To draw an analogy, in a personal injury case the plaintiff, who has the burden of proof, might present evidence of the defendant's negligence. The defendant could rest without presenting any evidence. The jury could return a verdict for the defendant. It would be passing strange for an appellate court to reverse such a verdict as not supported by substantial evidence on the ground that the party who did not have the burden of proof presented no evidence. Instead, the normal appellate approach in such a situation would be to affirm a verdict adverse to the party with the burden of proof unless the court could say that party sustained his burden as a matter of law.
> >
> > "'We perceive no reason why a local decision denying a requested land-use change should be treated differently. In other words, a denial is supported by substantial evidence within the meaning of ORS 34.040(3) unless the reviewing. court can say that the proponent of change sustained his burden of proof as a matter of law." 42 Or App at 510 (citations omitted) (emphasis added).'"

If petitioner's substantial evidence challenge in this case must be rejected unless LUBA can say that petitioner "sustained its burden of proof as a matter of law," the first assignment of error must be denied. As we explain later in this opinion, there is conflicting expert testimony and, among other things, the hearings officer identified unanswered questions

about certain assumptions that petitioners' experts relied on. Petitioner clearly did not carry its burden regarding traffic impacts "as a matter of law."

The Court of Appeals' decision in *Jurgenson* concerned a land use decision that was challenged in circuit court via a writ of review before LUBA was created. Although LUBA has cited and followed *Jurgenson* many times, in reviewing LUBA decisions the Court of Appeals has never cited *Jurgenson* for the principle that we described in *Chemeketa Industries Corp*.[6] In fact, the Court of Appeal has cited *Jurgenson* for that principle only twice. *Messer v. Polk Co. Dist. Boundary Bd*., 58 Or App 46, 646 P2d 1369 (1982) and *Clinkscales v. City of Lake Oswego*, 47 Or App 1117, 615 P2d 1164 (1980). In *Messer* the Court of Appeals was reviewing a boundary board's decision for substantial evidence under the Oregon Administrative Procedures Act. 58 Or App at 49. *Clinkscales* was judicial review of a circuit court decision in a writ of review proceeding, like *Jurgenson*. 47 Or App at 1119.

Although intervenor-respondents cite *Jurgenson* and argue that it accurately states the test that LUBA should apply to the city's decision in resolving petitioner's substantial evidence challenge, petitioner does not acknowledge *Jurgenson* or argue that the city's decision should be reversed if its first assignment of error is analyzed in the way *Jurgenson* describes. Instead, we understand petitioner to argue that its experts presented overwhelming evidence that Juniper Crossing will satisfy ODOT's "don't make it worse" standard and that the hearings officer's contrary finding is not supported by an adequate explanation. *Armstrong*, the case that describes the analysis that we understand petitioner to ask us to

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[6] Of course the Court of Appeals would have limited reasons to cite *Jurgenson* in reviewing a LUBA decision. Although LUBA has jurisdiction to review local government decisions that deny land use approval, LUBA does not itself deny applications for land use approval. Moreover, under ORS 197.850(9) the Court of Appeals generally reviews LUBA decisions for errors of law, not substantial evidence. The limited substantial evidence review provided for under ORS 197.850(9)(c) applies to LUBA's findings in those rare circumstances when LUBA makes findings of fact when it accepts evidence outside the record filed by the local government, for the purposes specified in ORS 197.835(2).

apply in this case, is a workers compensation case, as are all of the cases that we have located that cite it for the principle that petitioner asks us to apply in this case. We seriously question whether the Court of Appeals would require that LUBA apply that analysis in reviewing a land use decision under ORS 197.835(9)(a)(C).[7] However, for purpose of our discussion of *Armstrong* below, we assume without deciding that the Court of Appeals would do so.

b. *Armstrong v. Asten-Hill Co*.

We have already noted the Court of Appeals' admonition in *Armstrong* that the substantial evidence standard is not satisfied when "the credible evidence apparently weighs overwhelmingly in favor of one finding and the [decision maker] finds the other without giving a persuasive explanation.'" The context in which that admonition appears is useful in understanding the significance of that admonition. The quoted language appears in a paragraph in the court's opinion where the court is discussing "de novo" review," "substantial evidence" review, and "any evidence" review:

> "ORS 183.482(8)(c) states: 'Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.' We have never decided the meaning of that language. However, in *Brown v. AFSD*, 75 Or App 98, 705 P2d 236 (1985), *rev den* 300 Or 477 (1986), where the issue was whether the 'any evidence rule' applied under an earlier version of ORS 183.482(8)(c), which did not contain that definition, *dicta* in all of the opinions recognized that the statute as now written incorporates what has been referred to as the 'federal' substantial evidence test. That test, enunciated in *Universal Camera Corp. v. NLRB*, 340 US 474, 487, 71 S Ct 456, 95 L Ed 456 (1951), requires us to look at the whole record with respect to the issue being decided, rather than at one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence. That is not what has been referred to as the 'any evidence' rule, *see* 75 Or App at 105 (Warren, J., concurring), but it is also *not de novo* review. For instance, and in a context which is likely frequently to occur in workers' compensation cases, if there are doctors on both sides of

[7] ORS 197.835(9)(a)(C) requires that LUBA reverse or remand a decision if LUBA finds that the local government "[m]ade a decision that is not supported by substantial evidence."

> a medical issue, whichever way the Board finds the facts will probably have substantial evidentiary support. We would not need to choose sides. *The difference between the 'any evidence' rule and the substantial evidence test in ORS 183.482(8)(c) will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the Board finds the other without giving a persuasive explanation*." 90 Or App at 206 (emphasis added).

The italicized language from *Armstrong* is not announcing a separately cognizable analytical approach in applying substantial evidence review. Instead, it simply describes a situation where a finding might survive "any evidence" review but would not survive "substantial evidence" review.

Applying *Armstrong* in this case, we have expert testimony from petitioner's engineers and the opponents' engineers. That testimony is conflicting. If petitioner is arguing that the evidentiary record in this case is the kind of evidentiary record the Court of Appeals was describing in *Armstrong*, there are two relevant questions. First, do the TIA, the Supplemental TIA and additional supporting memoranda "overwhelmingly" favor a finding that Juniper Crossing will comply with the "don't make it worse standard?" Second, if they do, did the hearings officer fail to give "a persuasive explanation" for finding otherwise? In this case our answer to the second question requires that we affirm the hearings officer's decision, but we generally discuss our answer to the first question, before considering the second question.

Petitioners point to the length of the TIA and Supplemental TIA, the consultation process that preceded preparation of those documents, and the modifications that petitioner incorporated to address the city's and ODOT's concerns with the TIA and Supplemental TIA that led to the December 12, 2005 memorandum that reflected an agreement among the city engineer, ODOT's engineers and petitioner's engineers. Petitioner describes that lengthy effort as collaborative. If that effort is viewed along side the opponent's engineers' testimony that does not rely significantly on any original data collection or analysis and is largely a critique of petitioners' study and analysis, we understand petitioner to contend that

it follows that the evidence presented by petitioner's expert "overwhelmingly" favors a finding that Juniper Crossing will comply with ODOT's "don't make it worse" standard.

Given the nature of most significant land use permit applications, and the nature of this application in particular, if the opponents of a permit application must match the number of hours an applicant spends formulating a study method to assess traffic impacts, collecting data, analyzing data and presenting that analysis in a form that is usable by a land use decision maker, applicants would nearly always prevail. Because the land use permit applicant has the burden of proof, the applicant will almost always be required to put forth the larger and more technically sophisticated and documented effort. Petitioner clearly put forth a much larger effort in this case to predict the traffic Juniper Crossing can be expected to generate and how that traffic will affect the nearby highway system. However, the party putting forth the larger effort is not entitled to prevail under a substantial evidence review, solely by virtue of that larger more technically sophisticated and documented effort.

Neither do we agree with petitioner's suggestion that the opponents' experts' testimony should be discounted significantly because it is largely a critical review of the work that petitioner's experts have done rather than an original effort by those experts to predict how the expected traffic will affect transportation facilities. As we have already noted, that difference in approaches is largely a function of, and dictated by, the fact that the applicant has the burden of proof and the opponents do not. The critical issue for the local decision maker will generally be whether any expert or lay testimony offered by permit opponents raises questions or issues that undermine or call into question the conclusions or supporting documentation that are presented by the applicant's experts and, if so, whether any such questions or issues are adequately rebutted by the applicant's experts. LUBA's role on review is to determine if a reasonable person would have answered those questions as the local decision maker did, in view of all of the evidence in the record.

Finally, petitioner argues that the city's and ODOT's conclusions should be given more weight "because they are objective and unbiased agency representatives that are responsible for ensuring compliance with the transportation standards." Petition for Review 11. While we tend to agree with petitioner that the city engineer and ODOT's engineers do not have the same kind of personal stake that the permit applicant and permit opponents have, we do not agree that their presumed focus on the functionality of the impacted transportation system generally rather than the value of the proposed development itself requires that the hearings officer give their position a great deal of extra weight and that such extra weight must be "an important factor" when LUBA reviews the hearings officer's decision for substantial evidence. Petition for Review 12. We do not mean to say the local decision maker could not assign some additional significance to the testimony of the city engineer or ODOT engineers regarding transportation system impacts based on their neutrality regarding the merits of the development proposal itself. But that process of assigning any extra weight necessarily calls for a case by case determination by the hearings officer, with LUBA deferring to any such assignments of extra weight that are reasonable, based on the evidence in the whole record.

We agree with petitioner that the evidence it presented to the hearings officer covers a great deal more ground and is weightier than the evidence that was submitted by the opponent's expert. However, LUBA's role on review is not to determine which side's evidence it finds to be the weightier. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 587, 842 P2d 441 (1992). Our role is far more limited. We are limited to determining whether the hearings officer's decision to rely on the opponents' experts' testimony in the way that she did is reasonable, in view of all of the evidence. Our conclusion on that point is influenced significantly by our resolution of petitioner's findings challenge below, and we conclude that the hearings officer's decision is supported by substantial evidence.

2. Findings Challenge

LUBA frequently analyzes findings challenges and evidentiary challenges separately. In fact, we generally analyze findings challenges first, because our resolution of the findings challenge frequently affects our resolution of the evidentiary challenge or makes it unnecessary to decide the evidentiary challenge. *Friends of Linn County v. Linn County*, 37 Or LUBA 844, 856 (2000); *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474, 476 (1994); *Holliday Family Ranches v. Grant County*, 10 Or LUBA 199, 205 (1984). We have departed from that general approach here because the findings and evidentiary challenge are integrally related under the analysis that petitioner argues we should apply under *Armstrong*. As the Court of Appeals' discussion in *Armstrong* suggests, the record supporting a critical finding may appear so at odds with that finding that the decision has to be reversed or remanded because the reviewing tribunal concludes a reasonable person would not adopt the challenged finding in the face of that evidence, without explaining the apparent contradiction between the finding and the evidence.

In this case, with the presence of the opponent's engineer's December 12, 2005 memorandum, we question whether the TIA, Supplemental TIA and the subsequent November 22, 2005 and December 12, 2005 memoranda are sufficient to result in a record where, using the Court of Appeals' phrasing in *Armstrong*, "the credible evidence apparently weighs overwhelmingly in favor of [a] finding" that Juniper Crossing will comply with ODOT's "don't make it worse" standard. We do not mean to denigrate the significant effort petitioner put forth to study the affected transportation facilities, estimate the impacts of Juniper Crossing and propose mitigation measures to meet ODOT's "don't make it worse" standard. However, we also appreciate what a technically challenging burden of proof petitioner assumed in seeking the challenged land use approvals in this case. Even if we assume that petitioner presented "overwhelming" evidence concerning traffic impacts and that LUBA would be required to reverse or remand the hearings officer's decision without "a

persuasive explanation to the contrary," the hearings officer provided such a persuasive explanation to the contrary.

As we discuss above, the hearings officer identified five issues that were raised by the opponent's engineers, issues that the hearings officer reasonably concluded call into question whether Juniper Crossing will violate ODOT's "don't make it worse" standard. Although petitioner argues the hearings officer's findings are inadequate to explain why the hearings officer declined to rely on petitioner's experts' testimony, we do not agree. There may well be satisfactory responses to all five of those issues that would render them non-issues. However, we agree with respondent and intervenors that without a more specific response to those issues, it was not unreasonable for the hearings officer to cite those issues and to rely on the opponents' experts' testimony to find that petitioner failed to carry its burden of proof with regard to BZO 10-10.23(8)(g).

Petitioner finally argues that the five issues raised by the opponent's traffic engineers were "implicitly and explicitly refuted by Petitioner, the City and ODOT." Petition for Review 14. If the evidentiary record shows that the five issues the hearings officer relied on to conclude petitioner failed to carry its burden of proof were in fact refuted, contrary to the hearings officer's apparent belief, the hearings officer's decision might well have to be remanded. We turn to petitioner's arguments that the five issues were implicitly and explicitly refuted.

a. Implicitly Refuted

Petitioner's argument that the issues were implicitly refuted is set out below:

> "* * * Mr. Bernstein's comments were implicitly refuted by the City and ODOT's traffic engineers given that they continued to concur with Petitioner's traffic impact study even after reviewing Mr. Bernstein's comments. Mr. Bernstein first submitted his written comments on the traffic impact study to the City on November 28, 2005. Despite the issues raised by Mr. Bernstein, the City and ODOT traffic engineers continued to agree with Petitioner's traffic impact study." Petition for Review 14 (record citation omitted).

It is not entirely clear to us that the city and ODOT remained in agreement with petitioner that Juniper Crossing will comply with ODOT's "don't make it worse" standard in all respects. Both ODOT and the city clearly had concerns with the proposal to expand Cooley Road from a two-lane to a four-lane facility extending east with an at-grade crossing of the BNSF railroad right of way. In any event, we reject petitioner's theory that in the face of the opponents' engineers' specific criticism of the TIA and Supplemental TIA assumptions, silence or continued support of the Supplemental TIA can be viewed as implicitly refuting those issues. Ignoring those issues is not the same thing as implicitly refuting those issues.

b. Explicitly Refuted

In support of its argument that the issues raised by the opponents' traffic engineers were explicitly refuted, petitioner attaches a partial transcript of the December 12, 2005 hearing. Petition for Review Appendix 115-29, 130-39.

With regard to issues 2 (inadequate estimate of queue length), 3 (increased v/c ratios on "segments of the Highway 97 intersections with Cooley Road and Robal Road), and 5 (use of wrong ITE Trip Generation Manual Category) we do not see a response to those issues in the testimony cited by petitioner, much less testimony that refutes those issues. Both the city engineer's representative and petitioner's representative testified that the study method and assumptions in the TIA and Supplemental TIA were designed to comply with city and ODOT requirements. That general response does not appear responsive to issues 2 and 3 and is an inadequate response to issue 5. There is a difference between ODOT allowing petitioner to use the ITE Trip Generation Manual Category that it used and ODOT requiring petitioner to use the ITE Trip Generation Manual Category that it used. Even if ODOT required that petitioner to use the ITE Trip Generation Manual Category that it used, a more specific response to the opponents' traffic engineer's assertion that a different one should have been used is necessary.

Regarding issues 1 (failure to use demand traffic volume) and 4 (widening Cooley Road at the BNSF crossing) there is testimony in the cited transcript that responds to those issues. Turning first to issue 1, there was no representative from ODOT present at the hearing. The representative from the city engineer's office stated that she "hesitate[d] to speak for ODOT" and suggested it might be appropriate to defer for a later response on that issue. Petition for Review Appendix 115. However, she nevertheless proceeded to attempt to explain generally how the city and ODOT require that transportation impact studies be performed. Her attempt to address issue 1 appears at Petition for Review Appendix 123-29. While we agree that that testimony is an attempt to respond to issue 1, we do not agree that that testimony necessarily refutes the claim that petitioner should have used demand traffic volume in the TIA and Supplemental TIA. The representative from the city engineer's office does not appear to challenge the claim that ODOT's Highway Capacity Manual requires use of demand traffic volume for oversaturated intersections or that there are some oversaturated intersections. Rather she appears to contend that ODOT in fact does not require use of demand traffic volume when applying the "don't make it worse" standard, based on a "white paper that they provide their consultants on how to apply analysis procedures." Petition for Review Appendix 124.

The representative from the city engineer's office may have done everything she reasonably could have done to respond to issue 1. But the Highway Capacity Manual requirement to use demand traffic volume is ODOT's, and the hearings officer could easily have remained uncertain about whether it should have been used here.

Finally, with regard to the widened, at-grade Cooley Road/BNSF railroad crossing, a brief response appears at Petition for Review Appendix 139. Additional comments regarding that aspect of the project's mitigation were submitted later. Record 330. We do not agree that either the brief testimony or the subsequent comments were sufficient to refute the position asserted in issue 4.

In summary, the hearings officer's findings clearly identified five issues that the opponents' engineers raised about the TIA and Supplemental TIA. The hearings officer's findings characterized the questions raised in those issues as "serious and legitimate" and "largely unrefuted by the applicants." Petitioner presents no sufficient reason to question the hearings officer's characterizations. Those findings are a persuasive explanation for why the hearings officer found the TIA and Supplemental TIA do not adequately establish that Juniper Crossing will comply with ODOT's "don't make it worse" standard.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Our resolution of the first assignment of error requires that we affirm the city's decision. *See Gionet v. City of Tualatin*, 30 Or LUBA 96, 98 (1995) (denial of an application for land use approval need only be supported by one adequate basis for denial); *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 635 (1995) (same). It is therefore not necessary that we decide the second and third assignments of error. However, those assignments of error could become important if our decision is appealed and reversed. In addition, the issues presented in those assignments of error would likely remain if the applicant makes another attempt to secure city approval for Juniper Crossing. We therefore decide those assignments of error.

As noted earlier, the hearings officer relied in part on her findings regarding the BZO 10-10.23(8)(g) public facilities site plan review criterion in finding that the applicable criteria for conditional use and tentative subdivision plan approval were not satisfied. See n 4. As relevant, Bend Land Division Ordinance (BLDO) 3.060(1) imposes the following requirements for subdivision approval:

> "No application for subdivision or partition shall be approved unless the following requirements are met:
>
> "A. The land division contributes to *orderly development* and land use patterns in the area, and provides for the preservation of natural

features and resources such as streams, lakes, natural vegetation, special terrain features, and other natural resources to the maximum degree practicable as determined by the City of Bend.

"B. The land division will not create excessive demand on public facilities and services required to serve the development.

"C. The land division contributes to the *orderly development* of the Bend area transportation network of roads, bikeways, and pedestrian facilities, and does not conflict with existing public access easements within or adjacent to the land division."

"* * * * *." (Emphases added.)

We will use the short-hand term "orderly development criteria" to refer to the above criteria. In finding that the proposed Juniper Crossing subdivision would violate the orderly development criteria, the hearings officer adopted the following finding, in addition to her findings addressing BZO 10-10.23(8)(g):

"In *Paterson v. City of Bend,* [49 Or LUBA 160, 170 n 5 (2005)], LUBA cited with approval the following definition of "orderly development" articulated by another Bend hearings officer in applying this approval criterion:

> "'* * * *the term 'orderly' as applied to the above criteria has been found to mean a system or order that is a logical extension of the transportation system, that does not overtax the system, provides for the maintenance thereof, that recognizes the limitations that the shape of the parcel and the topography have on the development, does not have internal conflicts with the very development being proposed, meets the code layout and design requirements, and does not foreclose future development.*'

"For the reasons set forth in the site plan and conditional use findings above concerning the impacts of traffic generated by the proposed subdivision and Wal-Mart Supercenter, incorporated by reference herein, the Hearings Officer finds the applicants' proposal will not contribute to the orderly development of the Bend transportation network. Specifically, I find the applicants have failed to demonstrate that traffic generated by the proposed subdivision and Wal-Mart Supercenter will not exceed the capacity of affected streets and intersections. As discussed in the above findings, I found the applicants failed to demonstrate their proposed mitigation plan is feasible and will bring the performance of affected intersections within ODOT's and the city's standards.

> "Moreover, even if the Hearings Officer could conclude this record supports a finding that the mitigation plan would assure the Highway 97/Cooley Road intersection would meet ODOT's 'don't make it worse' performance standard, I cannot find it would 'contribute to the orderly development of the Bend area transportation network.' That is because ODOT's 'don't make it worse' standard is lower than the city's 'orderly development' standards as I have previously interpreted and applied them. For example, in *Clabaugh* (99-118), I held the applicant's proposed zone change did not promote an "orderly sequence of growth" where the evidence in the record showed it would add large volumes of traffic to an already failing intersection with no proposed mitigation. I cannot find 'orderly development' is promoted by the circumstances presented by the applicants' proposed subdivision and Wal-Mart Supercenter. Enormous amounts of traffic would be added to *already failing intersections* while proposed mitigation measures would only bring intersection function up to *a slightly less dire state of failure*." Record 167-68.

Petitioner advances a number of challenges to the interpretation of the orderly development criteria in the last of the above-quoted paragraphs. We do not address each of those arguments, but we generally agree with petitioner that the hearings officer's expansive interpretation of the land division "orderly development criteria" in the last of the above-quoted paragraph is not adequately explained.

As a general proposition, we see no particular reason why the city could not interpret the subjective orderly development criteria to impose a more stringent transportation system impact standard than ODOT's "don't make it worse" standard. We reject petitioner's contention that such an interpretation is somehow inherently erroneous. However, we tend to agree with petitioner that the orderly development criteria govern land divisions, not the ultimate development of the lots that will be created by the land division. The hearings officer did not interpret the similarly subjective BZO 10-10.23(8)(g) "undue burden" on public facilities criterion or the BZO 10-10.29(3)(a) "minimal adverse impacts" conditional use permit criteria to impose a more stringent standard than the ODOT "don't make it worse"

standard.[8] To the contrary, she interpreted those criteria to be coextensive with the ODOT "don't make it worse" standard when considering transportation impacts. It seems anomalous to interpret and apply those criteria in that way to the site plan, design review and conditional use decisions in this case that actually would allow the development that would generate the traffic that the city is concerned about, while interpreting the orderly development criteria to apply a more stringent standard to the subdivision that does not directly generate any additional traffic. That approach seems doubly anomalous because, as a portion of the hearings officer's decision quoted under the first assignment of error explains, the city's v/c standard for intersections over which it has jurisdiction is 1.0, which is *less* stringent than ODOT's 0.8 standard, not *more* stringent. We owe no particular deference to the hearings officer's interpretation of the orderly development criteria. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). Without a better explanation for why the city interpreted the BLDO 3.060(1)(A) through (C) orderly development criteria as it did, we reject that interpretation as incorrect. *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988).

THIRD ASSIGNMENT OF ERROR

In response to expressed concerns that petitioner might not be able to widen Cooley Road to four lanes and make the other improvements proposed to mitigate traffic impacts on the Cooley Road/Highway 97 intersection and on Cooley Road as it travels east across the BNSF railroad right of way, petitioner advised the hearings officer in its final argument to the hearings officer:

> "Notwithstanding that concern, the city and ODOT have agreed to a condition of approval of these applications to require the Applicant to be entirely responsible for all of the work and fees necessary to complete the application

[8] We set out the text of the BZO 10-10.23(8)(g) "undue burden" on public facilities criterion at the beginning of our discussion of the first assignment of error. The text of the BZO 10-10.29(3)(a) "minimal adverse impacts" conditional use permit criterion is set out at n 4.

> process with ODOT, and to acquire the necessary approvals to proceed. In that regard, the Applicant has already contacted ODOT Rail Division and is in the process of initiating the approval process that will not only benefit this project but other future projects in the area." Record 330.

After quoting the above response, the hearings officer adopted the following findings:

> "The Hearings Officer finds both of these responses miss the point. In order to impose a condition of approval requiring the applicants to make improvements to Cooley Road that include the BNSF rail crossing, the Hearings Officer must find it is *feasible* for the applicants to comply with that condition. *Paterson v. City of Bend* (LUBA No. 2004-155 (2005). Where, as here, there is reliable, credible evidence in the record in the form of testimony from the city's Engineering Manager that the applicants may not be able to obtain approval from ODOT Rail and BNSF to add lanes to the segment of Cooley Road that crosses the railroad tracks – *mitigation the applicants' traffic own engineers identified as required* – the record simply does not support a finding of feasibility." Record 121 (italics in original).

Petitioner assigns error to the above-quoted findings and other similar findings to elsewhere in the decision. Petition for Review 25. Petitioner cites *Wetherell v. Douglas County*, 44 Or LUBA 745, 764 (2003) and *Bouman v. Jackson County*, 23 Or LUBA 626 (1992) for the proposition that the hearings officer erred in believing she was required to find it is feasible for petitioner to secure the ODOT Rail Division permit that will be required to construct the planned improvements across the BNSF railroad right of way. Instead, petitioner contends, it was only required to demonstrate that it is "not precluded from obtaining such state agency permits as a matter of law." *Bouman*, 23 Or LUBA at 647.

As we explained in *Bouman*, where a local government finds that a local approval standard will be met by imposing conditions of approval that the local government itself will ultimately enforce, the record must demonstrate that it is feasible for the proposed use to satisfy that condition. *Id*. at 646. However, in *Bouman* we distinguished the situation where a condition of approval requires that an applicant secure a state agency permit:

> "However, where a local government finds that approval criteria will be met if certain conditions are imposed, and those conditions are requirements to obtain state agency permits, we think a decision approving the subject application simply requires that there be substantial evidence in the record that the applicant is not precluded from obtaining such state agency permits as

> a matter of law. There does not have to be substantial evidence in the record that it is feasible to comply with all discretionary state agency permit approval standards because the state agency, which has expertise and established standards and procedures, will ultimately determine whether those standards are met." Id. at 646-47.

Based on our decision in *Bouman*, the hearings officer's finding that she could not impose a condition of approval that required petitioner to seek and obtain the ODOT Rail Division permit necessary to make the needed improvements to Cooley Road, without finding that it was feasible for petitioner to do so, was error. *See also Skerpetos v. Jackson County*, 29 Or LUBA 193, 210 n 14 (1995) (citing and applying the holding in *Bouman*).

While we agree with petitioner that the hearings officer's finding that she was legally required to find that it is feasible for petitioner to secure the ODOT Rail Division permit is erroneous, we do not mean to suggest that the hearings officer had no option but to uncritically accept and apply the condition of approval that petitioner suggested. It appears that at least ODOT, the city engineer and petitioner are satisfied that the proposed improvements to the Cooley Road/Highway 97 intersection and the proposal to widen and improve Cooley Road as it travels east at-grade across the BNSF railroad right of way will be sufficient to mitigate the traffic impact of the Juniper Crossing proposal so that the ODOT "don't make it worse" standard will be met on that portion of Cooley Road. But apparently all parties agree that those improvements will require an ODOT Rail Division permit. If BNSF must agree for the permit to be granted, that agreement has not been obtained.[9] The record shows that there may be obstacles to securing approval to widen the existing two-lane crossing to a wider four-lane crossing. The pending refinement plan that is considering changes to Highways 97 and 20 in this area adds uncertainty to whether the proposed widened Cooley Road at-grade crossing of the BNSF right of way will be approved. The

[9] At oral argument, petitioner contended that the ODOT Rail Division Permit does not require BNSF approval.

hearings officer noted that the city engineer took the position that if that permit is not approved, it would not be acceptable to simply leave the existing two-lane Cooley Road crossing of the BNSF right of way.[10] Record 117-18. Given these uncertainties and the necessity for the proposed improvements to Cooley Road in this area, we see no reason why the hearings officer could not have conditioned her approval on the petitioner securing the required ODOT Rail Division permit *before* any building permits for commercial development at Juniper Crossing are issued, as the city engineering manager suggested. *See* n 10.

With the caveat that we see no reason why the hearings officer could not have imposed additional conditions to ensure that the needed ODOT Rail Division permit is actually secured before construction of Juniper Crossing is allowed to commence, we sustain

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[10] The city's engineering manager offer the following comments on December 21, 2005:

> "ODOT Rail is very concerned about the potential improvements to the at grade intersection with the rail. Prior to [a December 2005] meeting, ODOT Rail was under the impression that this was only temporary, and that the ultimate solution was a grade separated roadway for Cooley Road. When the four US 97/20 Refinement Plan alternatives were discussed, it was clear that only two of the options facilitate a raised intersection in the future. And of course those two alternatives are not getting much support, primarily due to the impacts to the businesses and the BANA neighborhood.
>
> "There was some discussion about safety of crossings and how adding lanes is a major concern of ODOT rail, at this and any other location. He could not speak for the entire Division, but was clear that in his experience the adding of lanes at Cooley would be a major uphill battle.\\
>
> With this info, it is imperative that the burden of mitigating the Walmart traffic impacts be borne by the developer and that it is shown those impacts extend across the railroad tracks. It should be a condition of approval that the applicant, with assistance from the City, be required to obtain all necessary permits and make the needed improvements, including those across the BNSF Railroad ROW to the satisfaction of the City, ODOT Rail, BNSF Railroad, and any other party that may have jurisdiction over the subject area. The Developer should be required to obtain these approvals, and construct the needed improvements prior to plat approval and prior to issuance of any building permit.
>
> "Given the uncertainty of success in obtaining ODOT Rail or BNSF approval to modify the crossing, it is imperative that this issue be resolved on the front end and not be deferred through some phased development plan. Similarly, cash in lieu of the needed improvements creates a problem because the solution may not be feasible without ODOT Rail and BNSF cooperation." Record 218.

petitioner's challenge to the hearings officer's finding that she was required to find that it is feasible for petitioner to secure the ODOT Rail Division permit.

The third assignment of error is sustained.

In accordance with our resolution of the first assignment of error, the city's decision is affirmed.