BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BOB RICE, JANINE RICE, JASON BROWN,
MAJDUDDIN JAFFER, PAT JAFFER,
JACK SLOAN and JEAN ASTRINSKY,
Petitioners,

vs.

CITY OF MONMOUTH,
Respondent,

and

BENSON SAINSBURY,
Intervenor-Respondent.

LUBA No. 2006-137

FINAL OPINION
AND ORDER

Appeal from City of Monmouth.

Bob Rice, Janine Rice, Majduddin Jaffer, Pat Jaffer, Jack Sloan, Jean Astrinsky, Monmouth, and Jason Brown, Dallas, filed the petition for review. Bob Rice and Jason Brown argued on their own behalf.

No appearance by City of Monmouth.

Roger A. Alfred, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Michael C. Robinson and Perkins Coie, LLP.

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

AFFIRMED 12/05/2006

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

Petitioners appeal a city decision that approves comprehensive plan and zoning map amendments for two tax lots.

FACTS

The subject 1.43-acre property is located near a busy intersection in the City of Monmouth and is made up of six tax lots. Four of those tax lots are planned and zoned for commercial use. Two of those tax lots are planned and zoned for residential use. The four commercially designated tax lots occupy approximately 1.04 acres and the two residentially designated tax lots occupy approximately .39-acre. The challenged decision changes the plan and zoning map designations for those two tax lots to allow commercial use. Intervenor proposes to develop a portion of the subject property, including the two tax lots that were formerly planned and zoned for residential use, with a Walgreen's pharmacy. A coffee shop has been developed on a part of the property that was already planned and zoned for commercial use. The remaining portions of the site would be developed with parking and landscaping.

Petitioners appealed an earlier city decision that approved the same comprehensive plan and zoning map amendments to LUBA. *Jaffer v. City of Monmouth*, 51 Or LUBA 633 (2006). We sustained one of petitioners' assignments of error. In sustaining that assignment of error, we held that the city erred by failing to provide petitioner Brown a copy of the applicant's January 21, 2005 transportation impact analysis (TIA). That TIA was submitted to the city on June 7, 2005, the same day the city's final public hearing on intervenor's original application closed. Two days later, on June 9, 2005, petitioner Brown asked the city for all relevant traffic evidence so that he could prepare his final evidentiary submittal, which

was due June 14, 2005. The city failed to provide petitioner Brown a copy of the January 21, 2005 TIA.[1] We held that was error that required remand:

> "* * * Petitioner Brown had a right to expect that the city would give him a copy of that TIA when he asked the custodian of the record for a copy of all of Kittelson's materials on June 9, 2005. The timing of that request makes the city's failure even more significant, since the public hearing had closed and only five days remained for parties to submit the evidence regarding traffic impacts. Because the city failed to provide petitioner a copy of the TIA, [petitioner Brown's] expert Bauer was unable to review and respond to the TIA before the June 14, 2005 deadline expired. We agree with petitioners that that error on the city's part prejudiced petitioner Brown's substantial rights. Remand is required so that petitioner Brown can be given an opportunity to respond to the TIA.
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> "We do not mean to suggest that petitioners other than petitioner Jason Brown may assert the city's failure to provide the TIA to petitioner Jason Brown as a basis for remand. *Cape v. City of Beaverton*, 41 Or LUBA 515, 523 (2002); *Bauer v. City of Portland*, 38 Or LUBA 432, 439 (2000). Indeed petitioners Rice apparently were provided copies of the TIA and offered written testimony critiquing the TIA. However, petitioner Jason Brown is one of the petitioners who signed the petition for review and he may assert the city's failure to provide the requested copy of the TIA as a basis for remand.
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> "Because the city will be required on remand to provide petitioner Brown a copy of the TIA and reopen the evidentiary record to allow him an opportunity to rebut the TIA, we do not reach petitioners' remaining arguments that the TIA and the other Kittelson materials were inadequate to address their Goal 12 (Transportation) concerns." *Jaffer*, 51 Or LUBA at 655-56.

In *Jaffer*, we rejected all of petitioners' remaining assignments of error.

FIRST ASSIGNMENT OF ERROR

On remand, the city provided petitioner Brown with a copy of the January 21, 2005 TIA. Petitioner Brown was given an opportunity to submit his written response to the TIA that was submitted at the June 7, 2005 continued hearing. The city refused to allow other

[1] As we noted in our earlier decision, the city apparently provided petitioners Rice a copy of the January 21, 200-5 TIA and Petitioners Rice submitted written comments regarding the TIA on June 14, 2005. *Jaffer*, 51 Or LUBA 656.

petitioners to present additional evidence or argument following our remand in *Jaffer*. Petitioners assign error to that refusal.

A. The City's Proceedings in *Jaffer*

In order to understand the scope and nature of the city's obligation following our remand in *Jaffer*, it is necessary to understand the scope and nature of the error that formed the basis for our remand. The scope and nature of that error is influenced by the stage of the proceeding at which the error occurred. Before adopting the decision that led to our remand in *Jaffer*, the city council held its initial hearing on May 3, 2005. ORS 197.763(6)(a) provides:

> "Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to [ORS 197.763(6)(b)]."

It does not appear that the May 3, 2005 city council's initial hearing is properly viewed as the *city's* "initial evidentiary hearing," within the meaning of ORS 197.763(6)(a), since the planning commission had earlier conducted an evidentiary hearing that presumably was the city's initial evidentiary hearing. Further, it is not clear whether any party requested that the May 3, 2005 city council hearing be continued. However, it does not matter whether the city was *obligated* under ORS 197.763(6)(a) to continue the May 3, 2005 hearing under ORS 197.763(6)(a), because ORS 197.763(4)(b) authorizes the city to continue a hearing in certain circumstances, and the city did so in the proceedings that led to its decision in *Jaffer*.[2]

The city continued the May 3, 2005 hearing to June 7, 2005. Petitioners requested that the June 7, 2005 continued hearing be continued a second time or that the record be held

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[2] ORS 197.763(4)(b) provides, in relevant part:

> "If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond."

open following the June 7, 2005 continued hearing. The city held the record open until June 14, 2005 to allow all parties to respond to new evidence that was submitted during the June 7, 2005 continued hearing, as required by ORS 197.763(6)(b).[3] In addition, while it does not appear to us that the city was required by statute to do so, the city allowed all parties until June 21, 2005 to provide additional rebuttal to the June 14, 2005 responses, before allowing the applicant the opportunity for final written legal arguments that is required by ORS 197.763(6)(e).

The city's error in *Jaffer* came quite late in the city's proceedings. That error was its failure to give petitioner Brown all of the new evidence that was submitted at the June 7, 2005 continued hearing—in particular the January 21, 2005 TIA—thus depriving him of the opportunity to respond to the January 21, 2005 TIA. It was that error that the city was obligated to correct on remand. The city's error came after the June 7, 2005 continued hearing had closed, and five days before all parties were to submit their responses to the new evidence that was submitted at the June 7, 2005 continued hearing.

B. Petitioner Brown's Response on Remand

Citing ORS 197.763(4)(b), *see* n 2, petitioners contend they were entitled to "a reasonable opportunity to respond" to petitioner Brown's response on remand. But it is clear that when petitioners contend they should have been given "a reasonable opportunity to respond" to petitioner Brown's response following our remand in *Jaffer*, they are not contending that they wanted or should have been given an opportunity to rebut petitioner

[3] ORS 197.763(6)(b) provides:

> "If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence."

Brown's written submittal on remand. Instead, petitioners argue that they had a right on remand to an opportunity to enhance and expand petitioner's Brown's response. Petitioners appear to contend that ORS 197.763(4)(b) and *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973) require endless opportunities to "respond" any time new evidence is submitted in a quasi-judicial land use proceeding. We reject the contention.

Fasano does stand for the proposition that parties in certain quasi-judicial land use proceedings have a right to present and rebut evidence. 264 Or at 588. But there is no unlimited right to rebut rebuttal evidence, and *Fasano* does not require endless opportunities to rebut rebuttal evidence. ORS 197.763(4)(b) lends even less support to petitioners' argument. ORS 197.763(4)(b) simply authorizes the city to continue a hearing or leave the record open for parties to respond to new evidence. *See* n 2. It is ORS 197.763(6)(b) that governs a seven-day open record period that follows a continued quasi-judicial land use hearing. As relevant, that statute merely provides "[i]f new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence." *See* n 3. By holding the record open from June 7, 2005 to June 14, 2005, the city gave petitioner Brown—and all other parties in the proceedings that led to the city's decision in *Jaffer*—a right to respond to the TIA. In *Jaffer*, only petitioner Brown claimed that the city's error in not providing him with the copy of the TIA he requested had the effect of preventing him from exercising his statutory right under ORS 197.763(6)(b) to respond to that TIA. On remand, the city cured its error and provided petitioner Brown with the opportunity to respond to the TIA that he was entitled to under ORS 197.763(6)(b).

In *Jaffer* the city allowed all parties an additional opportunity to submit rebuttal to the additional argument and evidence that was submitted on June 14, 2005. As we have already noted, it does not appear to us that the city was obligated to do so by ORS 197.763(6)(b).

However, we see no reason why the city may not provide *more* opportunities to present responsive or rebuttal evidence than the minimum opportunity required by ORS 197.763(6)(b). Similarly, on remand, the city allowed intervenor an opportunity to rebut petitioner Brown's submittal on remand. Because the city elected to allow rebuttal of the June 14, 2005 responses and elected to allow intervenor to rebut petitioner Brown's response following our remand in *Jaffer*, we believe the city was also obligated to allow the other petitioners to *rebut* petitioner Brown's response on remand. However, as we have already explained, petitioners did not seek to *rebut* petitioner Brown's response on remand; rather they wished to supplement and enhance petitioner Brown's response. Petitioners had no statutory right to do so under ORS 197.763 or any other authority that we are aware of.

Had the city provided the requested January 21, 2005 TIA in the proceedings that led to our decision in *Jaffer*, there would have been no remand based on the city's failure to do so. In that event, petitioners would not have had any statutory right or any right under local law to supplement or enhance petitioner Brown's June 14, 2004 evidentiary response to the TIA that was submitted at the June 7, 2005 continued hearing. Petitioners also had no such right on remand.

C. Petitioners' Remaining Arguments

Petitioners' arguments under the first assignment of error are actually stated in two unrelated subassignments of error. We have addressed and rejected petitioners' first subassignment of error above. In petitioners' second subassignment of error, petitioners allege the city's decision violates the "Communication Element of Goal 1." Petition for Review 7.[4] Petitioners' argument is based on a condition of approval that limits the approved comprehensive plan map and zoning map amendment "to allow the construction of

[4] Goal 1 (Citizen Involvement) imposes a number of requirements. One of those requirements is that "[m]echanisms shall be established which provide for effective communication between citizens and elected officials."

a maximum 16,087 square foot drugstore/pharmacy with a drive-through, consistent with the related development application for a Walgreens with a drive-through." Record 33.[5] Petitioners' argument under the second subassignment of error is set out below:

> "The City lacks a mechanism to track and effectively communicate this type of zoning designation, and assure that if [a] drugstore/pharmacy with a drive-through was built and later went out of business that no other type of commercial developments would be allowed to be built on the property. Without such a mechanism, the City is in violation of Goal 1 to have 'effective communication between citizens and elected and appointed officials.'" Petition for Review 7.

Even if the city does not have effective mechanisms for monitoring and enforcing zoning conditions of approval, we do not see how that shortcoming could have any bearing on the city's Goal 1 obligation to communicate with its citizens. This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners allege:

> "The City misconstrued or violated applicable law, made inadequate findings, and made findings not supported by substantial evidence in the record in determining that the plan map amendment and zone change comply with Statewide Planning Goal 12 [(Transportation)]" Petition for Review 7.

The applicant submitted the TIA, which was prepared by its transportation expert Kittelson, to demonstrate that the disputed plan and zoning map amendments comply with Goal 12 and the Transportation Planning Rule (TPR), which the Land Conservation and Development Commission adopted to implement Goal 12. Kittelson also submitted a number of additional technical memoranda to supplement the TIA and to respond to transportation issues, as they were raised during the local proceedings.

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[5] The record in this appeal includes the record that was compiled in *Jaffer* and the record that was compiled on remand. We cite the record that was compiled following our remand in *Jaffer* as the "Record." We cite the record and supplemental record that was compiled in *Jaffer* as "Prior Record," and "Prior Supplemental Record."

Petitioners' approach under the second assignment of error is to: (1) cite a number of alleged flaws in the TIA and supporting memoranda that petitioners identified during the local proceedings; (2) fault the city for inadequately responding to those claimed flaws; and (3) generally assert that "thus the TPR is not met." Our review of this assignment of error is complicated by petitioners' failure in many instances to identify (1) the particular finding or findings that petitioners are challenging, (2) the particular legal criterion in Goal 12 or the TPR that the challenged findings were adopted to address, and (3) precisely why petitioners believe those findings are inadequate. In some cases, petitioners at least make it clear that they are relying on the TPR requirement that particular mitigation or other measures be implemented when a plan or zoning map amendment will "significantly affect a transportation facility," within the meaning of the TPR. OAR 660-012-0060. However, in other instances where petitioners claim "the TPR is not met," their argument actually appears to be based on the much more general standard in Goal 12 that requires the city "[t]o provide and encourage a safe, convenient and economic transportation system." We now turn to the perceived flaws that petitioners identify and intervenor's response to petitioners' arguments.

A. Inadequate Response to Identified Flaws in the TIA

1. Intersection of Highways 99W and 51

Petitioners fault the January 21, 2005 TIA for failing to acknowledge that the intersection of Highways 99W and 51 ranks in the top ten percent of crash sites on the Oregon Department of Transportation's (ODOT's) Safety Priority Index System (SPIS). Prior Record 157.[6] It is unclear to us whether ODOT ranks intersections, as petitioners claim, or ranks .1-mile segments, as Kittelson claims in a June 2, 2006 technical

[6] Prior Record 157 is a June 7, 2005 letter from ODOT, which concludes "[t]he intersection of OR 99W and OR 51 was on the top 10% SPIS list for 2004 (our most recent listing)."

memorandum. Record 93. The ODOT letter that petitioners rely on is ambiguous.[7] Whatever the case, the ODOT letter states there were 39 accidents over the five years. Kittelson's June 2, 2006 memorandum explains:

> "The segment of ORE 99W that intersects ORE 51 is identified as a SPIS location for ODOT's Region 2. * * * A total of 23 crashes were reported on this segment for the years 2001 through 2003." Record 93.

The specified numbers of crashes for three-year and five-year periods appear to be consistent. Both numbers support a conclusion that there have been numerous crashes in the vicinity of the intersection. More to the point, assuming the significant number of crashes in the vicinity demonstrate that something needs to be done to improve safety at that intersection in approving the disputed plan and zoning map amendments, in order to comply with the general Goal 12 requirement for a safe transportation system, the city found:

> "The City Council adopts and incorporates by reference the evidence and conclusions in the Kittelson memoranda dated June 2, 2006, June 14, 2005 and June 21, 2005. The Kittelson materials explain the nature of the ODOT Safety Priority Index System (SPIS), and explain that the applicant is being required to construct improvements to the intersection that will enhance operations and improve safety, including the provision of additional right-of-way in order to increase the turn radius, and also the addition of a center turn lane on OR 99W. The City Council finds that these improvements will increase safety at the OR 99W/OR 51 intersection above existing conditions, and that the map amendments are consistent with any and all applicable criteria related to safety." Record 28-29.

Petitioners neither acknowledge nor challenge those findings. Based on those unchallenged findings, we conclude that the city's decision adequately addresses any general Goal 12 safety issues that the proposed amendments may pose for the Highway 99W/Highway 51 intersection.

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[7] The conclusion quoted at n 6 suggests intersections are ranked, but another part of the letter states there were 39 reported crashes over the five year period beginning on January 1, 2000 and ending on December 31, 2004 "near the subject intersection." That language suggests highway segments are ranked.

2. Store Square Footage Limitation

Petitioners contend the TIA is erroneously premised on an assumption that a 14,820-square foot drugstore/pharmacy with a drive-through on the subject property is the worst case scenario regarding the potential for generation of new vehicle trips in the vicinity. As conditioned, a drugstore/pharmacy of 16,087 square feet is permitted. Petitioners argue that larger structure would generate more traffic than the assumed 14,820-square foot structure worst case scenario. Petitioners suggest this mistaken assumption invalidates the city's Goal 12 findings and might also have implications for other unspecified statewide planning goals.

Intervenor responds that petitioners are mistaken. While the drugstore/pharmacy that intervenor proposes to build in the site will include 14,820 square feet, intervenor contends that the TIA was premised on the worst case scenario under the requested rezoning, which would permit a larger 16,087-square foot structure. Intervenor appears to be correct. Prior Record 446-47 (showing 16,087-square foot store as the reasonable maximum development scenario); Prior Record 370 ("[p]roject is a proposed 14,820 SF Walgreens drug store").

Petitioners' arguments under this portion of the second assignment of error provide no basis for reversal or remand.

3. V/C Ratio Rounding Error

As we noted earlier, if a comprehensive plan or zoning map amendment will significantly affect a transportation facility, certain steps must be taken to mitigate or otherwise accommodate the additional traffic under the TPR. OAR 660-012-0060. A plan or zoning map amendment will significantly affect a transportation facility if, among other things, the amendments will (1) cause a transportation facility to operate below applicable standards (*i.e.* to fail) or (2) worsen the performance of a transportation facility that is

projected to fail regardless of the proposed plan or zoning map amendment.[8] Under the Oregon Highway Plan, the operating standard for Highway 99W where it intersects with Highway 51 is a volume to capacity (v/c) ratio of not to exceed 0.80. Without the disputed plan and zoning map amendments, that intersection is projected to operate at a v/c ratio of 0.87 during the evening peak hour in 2020. Therefore OAR 660-012-0060(1)(c)(C) applies, *see* n 8, and the disputed amendments will significantly affect that intersection if they will cause that 0.87 ratio to increase.

Based on the assumptions in the TIA, the disputed plan and zoning map amendments would result in 30 more trips through that intersection in 2020 during the evening peak hour than would be anticipated without the plan and zoning map amendments. Utilizing the OAR 660-012-0060(1)(c)(C) non-degradation or "don't make it worse" standard for intersections that are already projected to fail, the TIA concluded that because the projected 0.87 v/c ratio would not be increased by those 30 additional trips, the proposed amendment would not significantly affect the Highway 99W/Highway 51 intersection.

Under the methodology applied by Kittelson, it apparently is undisputed that if the v/c ratio for that intersection is taken out to three decimal places, without the disputed

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[8] As relevant, OAR 660-012-0060(1) provides:

> "A plan or land use regulation amendment significantly affects a transportation facility if it would:
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> "* * * * *
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> "(c) As measured at the end of the planning period identified in the adopted transportation system plan:
>
> "* * * * *
>
> "(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or
>
> "(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan."

amendments, the expected v/c ratio at the end of the planning period is 0.868. Under Kittelson's methodology, it is also undisputed that with the approved amendments the projected v/c ratio is 0.871. The city rounded those numbers to the nearest two decimal place number, which in both cases is 0.87. Petitioners assign error to that computation and contend that if the v/c ratio is measured in thousandths, it is undisputed that the amendments will increase (worsen) the v/c ratio for the Highway 99W/Highway 51 intersection.

Among the findings that the city adopted to respond to this issue are the following:

> "The City Council concludes that the map amendments are consistent with the TPR because: (1) the applicable v/c ratio will remain at 0.87 with or without the amendments, a conclusion that has been reviewed and approved by ODOT; and/or (2) to the extent there is a measurable increase in the v/c ratio for purposes of the TPR, such an insignificant increase will be adequately mitigated by the required improvements, and therefore will not 'significantly affect' the OR 99W/OR 51 intersection. As explained in the Kittelson memorandum, a variance of three one-thousandths is so small that it 'would be expected to occur due to daily fluctuation in traffic levels. Said another way, this microscopic level of change could not be measured in the field in a meaningful way.' Based on this statistically insignificant increase and the substantial roadway system improvements being required of the applicant in conditions attached to this approval, Kittelson concludes that 'the intersection improvements being constructed as part of this project will improve operations at the intersection and provide mitigation that will more than offset the microscopic change claimed in Mr. Brown's letter.'" Record 29.

Petitioners offer no focused challenge to the above findings. The Kittelson memorandum points out that petitioners cite nothing that requires v/c ratios to be computed to three decimal places and that the OHP only states v/c ratios to two decimal places. Given the number of assumptions and the nature of the assumptions that are commonly applied to estimate v/c ratios, and the effect the proposed plan and land use regulation amendments will have on v/c ratios, any absolute requirement that v/c ratios be computed to three decimal places would seem hard to justify. In fact, the level of service (LOS) measure that ODOT used prior to its decision to use v/c ratios is a far less precise measure of traffic facility

performance.[9] Many local governments continue to use the six LOS ratings to measure local transportation facility performance. We reject petitioners' argument that the city erred by rounding the existing v/c ratio up to 0.87 and rounding the projected v/c ratio down to 0.87 and concluding that the disputed plan and zoning map amendments therefore would not "worsen" the Highway 99W/Highway 51 intersection's v/c ratio, within the meaning of OAR 660-012-0060(1)(c)(C).

4. Data Collection When Western Oregon University Was Not in Session

Petitioners point out that the locally collected data that was used by Kittelson in the TIA was collected at a time when Western Oregon University was not in session. Petitioners contend that the data is invalid because the traffic associated with the 5,000 students that attend the university was not reflected in the data the TIA relies on.

We agree with petitioners that collecting traffic data in the City of Monmouth, a city of 8,000 people, at a time when the 5,000 students that attend Western Oregon University are not in school, certainly could render that data an unreliable basis for estimating current traffic and projecting future traffic during times of the year when the university is in session. In petitioners' words, failing to account for normal university generated traffic could "significantly bias[] the validity of the TIA." Petition for Review 13. However, the only specific argument that petitioners advance in conjunction with their point regarding the timing of the TIA data collection is as follows:

> "Had the TIA been conducted when [Western Oregon University] was in session it would undisputedly show that the intersection is 'significantly impacted' and thus the TPR is not met." *Id*.

[9] Under the LOS system of measuring the performance of transportation facilities, one of six letter scores—LOS A through F—is assigned to transportation facilities, depending on the amount of delay experienced at those facilities.

The intersection petitioners are referring to is the Highway 99W/Highway 51 intersection. As we have already noted, that intersection is already failing. Under OAR 660-012-0060(1)(c)(C), the proposed plan and zoning map amendments will significantly affect that intersection only if the projected 30 additional morning peak hour trips will worsen the projected level of failure. The city found that the proposed plan and zoning map amendments would not worsen the 0.87 v/c ratio that is projected without the plan and zoning map amendments, and we have rejected petitioners' challenge to that finding. Adding university related traffic to that intersection might make the intersection fail sooner or increase the v/c ratio at the end of the planning period. However, it is not obvious to us why adding university-related traffic would have any bearing on whether the 30 additional trips generated by the disputed plan and zoning map amendments would worsen that increased v/c ratio, and that is the issue under the TPR with regard to that intersection. If anything, it would seem that adding traffic from the university to the equation would further dilute the impact of the expected 30 additional trips on the already failing intersection.

Petitioners have not established that the timing of the collection of the data used in the TIA was error.

5. Dutch Bros. Coffee Shop Actual Trip Generation and the Institute of Transportation Engineers (ITE) Trip Generation Manual

a. Dutch Bros. Coffee Shop Actual Trips

Following our remand in *Jaffer*, petitioners counted actual trips entering and departing the Dutch Bros. Coffee shop that is located on the portion of the subject property that was already planned and zoned for commercial use. The data collected by petitioners, if accurate, shows that there are significantly more customer stops at Dutch Bros. than was assumed in the TIA. Petitioners also interpret that data to show that approximately 20 percent of those stops should be considered Dutch Bros. generated trips, rather than pass by

trips that are unrelated to Dutch Bros. The TIA assumes all Dutch Bros. trips are pass by trips.

The TIA estimate for the trips that should be attributed to Dutch Bros. is based on an ODOT study for "Portable Espresso Stand" land uses. Prior Supplemental Record 488-97. Intervenor contends that the ODOT study is substantial evidence of the number of trips that can be expected from the Dutch Bros. coffee stand, even if petitioners' data suggest otherwise. If it were shown that the trips that are properly attributable to the Dutch Bros. coffee stand have some bearing on a relevant criterion under the TPR, the difference in the projections under the ODOT study and the petitioners data is so dramatic that we might agree with petitioners that more of an explanation from the city is warranted to justify relying on the general study rather than the actual data collected by petitioners.[10] However the city explained why any trips attributable to Dutch Bros. are legally irrelevant under the TPR:

> "To the extent it could be found that Mr. Brown is implicitly alleging that the data collected by the opponents indicates that the application somehow violates the TPR, such an argument can also be rejected based on the fact that the Dutch Bros. site was already in a commercial zone, and was not the subject of review under the TPR. As explained in the June 2, 2006 Kittelson memorandum and the June 2, 2006 correspondence from Perkins Coie, the TPR applies only to the plan and zoning map amendments; that is, the two tax lots comprising the 0.39 acres in the southeastern portion of the subject property, and not to the Dutch Bros. location." Record 31.

Although it may be that the expected traffic from the Dutch Bros. coffee shop is legally relevant when other legal standards are applied, the inquiry under OAR 660-012-0060 is whether the disputed plan and zoning map amendment will significantly affect the Highway 99W/Highway 51 intersection. The trips attributable to the Dutch Bros. Coffee shop on the tax lots that were already planned and zoned for commercial use have no direct bearing on that inquiry. The part of the TIA that considers whether the disputed plan and

[10] The city found that it could not assume that petitioners' traffic counts are accurate, in part, because the counts were made by individual petitioners who are not traffic professionals and are opponents of the proposal. We need not resolve the parties' dispute regarding the reliability of petitioners' traffic counts.

zoning map amendments will significantly affect nearby transportation facilities uses "Reasonable Maximum Development Scenarios." Prior Supplemental Record 447. The TIA compares the traffic that could be expected from the existing residentially zoned tax lots with the traffic that could be expected from a 16,087-square foot drug store with a drive through. *Id*. The Dutch Bros. Coffee shop on the tax lots that were already planned and zoned for commercial use plays no part in that analysis.

b. Institute of Transportation Engineers (ITE) Trip Generation Manual

The TIA uses the Seventh Edition of the ITE Trip Generation Handbook to estimate the number of trips that can be expected from a 16,087-square foot "Pharmacy/Drugstore with Drive-Through Window (ITE Code 881)." Record 90. Citing a letter prepared by PTV America, Inc., petitioner Brown's traffic consultant, and a traffic study that analyzes a proposed Walgreens in Austin, Texas, petitioners contend it was unreasonable for the city to allow the applicant to project Walgreen-related trips based on ITE Code 881. The letter and the study suggest the ITE Trip Generation Handbook may underestimate the traffic that will actually be generated by the disputed Walgreens. Petitioners argue the city should have required that the applicant prepare a local trip generation study that specifically addresses the proposed Walgreens.

The PTV America, Inc. letter includes the following:

> "The question [that needs to be] answered is the following: Does the *Trip Generation, 7th Edition* accurately estimate the trip generation characteristics of a Walgreen's? PTV does not know of any credible engineering studies that can provide a 'yes' or 'no' answer to this question. Given the small sample size (3) of the data used to develop the trip generation rates for Land Use 881, however, it seems prudent to conduct further analysis regarding the trip generation characteristics of Walgreen's. One credible approach to answer the above question would be to conduct independent studies of similar Walgreen's sites in Oregon to develop specific trip generation rates. A sensitivity analysis using the range of trip generation rates for Land Use 881 is another possible approach." Prior Record 149.

The city adopted the following findings in response to petitioners' criticism of the ITE Trip Generation Handbook:

> "Mr. Brown asserts that the TIA's use of the ITE trip rates for 'Pharmacy-Drugstore with Drive-Through Window' is not appropriate, due to allegedly small sample sizes and his belief that a drugstore is really a convenience store. These issues are addressed in the June 2, 2006 Kittelson memorandum, which is adopted and incorporated by reference by the City Council. The City Council finds that the TIA applies the appropriate land use designation under the ITE manual for the proposed use." Record 30.

The referenced June 2, 2006 Kittelson memorandum includes the following analysis:

> "Mr. Brown claims that the use of the * * * (ITE code 881) land use is not appropriate in development of the trip generation estimate for the proposed Walgreens. He points out that the source of the trip generation estimate, the *Trip Generation* manual by the Institute of Transportation Engineers, urges caution due to the small sample size for this land use. This statement is misleading. The manual makes the caution in the report of weekday daily trips, which is not relevant to any of the analysis provided in the TIA. The critical time period for the zone change analysis is the weekday p.m. peak hour. This is also the critical hour for which ODOT has established mobility standards. The *Trip Generation* manual has trip data from 12 studies for this land use during the weekday p.m. peak hour.
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> "In addition, the manual includes nine separate studies for *Pharmacy/Drugstore Without a Drive-Through Window* (ITE code 880), a very similar land use. These studies show trip generation rates that are virtually identical, for a total of 21 supporting trip generation studies. These data are summarized below:
>
> **"WEEKDAY PM PEAK HOUR TRIP GENERATION RATES**
>
> **"TRIPS PER THOUSAND SQUARE FEET**

Land Use	ITE Land Use Code	Number of Studies	Average Size (Square Feet)	Average Trip Rate
Pharmacy Without Drive-Through	880	9	10,000	8.42
Pharmacy With Drive Through	881	12	14,000	8.62

> "Mr. Brown further claims that 90% to 95% of the Walgreens store will operate more like a Convenience Store than like a pharmacy. However, his assessment of the commercial operation character is not relevant in the trip

generation estimate; instead the sources of the trip generation data are relevant. The *Trip Generation* manual describes this land use as follows:

> "'*Pharmacies/drugstores are retail facilities that primarily sell prescription and non-prescription drugs. These facilities may also sell cosmetics, toiletries, medications, stationery, personal care products, limited food products, and general merchandise*.'
>
> "As shown in the table above, the average size of stores represented in the stud[ies] was 14,000 square feet, which is virtually the same as the proposed Walgreens. The *Trip Generation* manual provides data for 24-hour convenience market[s] based on studies of sites with an average size of 3,000 square feet. Clearly the *Pharmacy/Drugstore with Drive-Through Window* is the appropriate land use designation for this project." Record 90-91 (emphases in original).

Given the above competing arguments for and against using the ITE Trip Generation Manual and the 881 code to estimate the expected trips that will be generated by the proposed Walgreens, it may be that the city *could have* accepted petitioners' criticisms of relying on the ITE Trip Generation Manual and required a more tailored local study of the proposal. But given the applicant's response to petitioners' criticism, it was certainly also reasonable for the city to decline to do so. Petitioners' arguments concerning the Institute of Transportation Engineers (ITE) Trip Generation Manual provide no basis for reversal or remand.

B. Provision of Inaccurate Information to ODOT

Finally, under the second assignment of error, petitioners allege that intervenor may have provided ODOT inaccurate information. Petitioners speculate that ODOT may have relied on this inaccurate information in deciding which measures to recommend to mitigate any significant impacts of the amendment that might be required by OAR 661-012-0060.

We have already rejected petitioners' challenges to the city's findings that the proposed comprehensive plan and zoning map amendments will significantly affect a transportation facility. Therefore mitigation is not necessary under OAR 660-012-0060. Moreover, it is the *city's* obligation to ensure that any mitigation that might be required

under OAR 660-012-0060 is required. Petitioners do not explain how any inaccurate information ODOT may have been relying on could provide a basis for reversing or remanding the city's decision in this matter.

For the reasons explained above, petitioners' second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under the city's zoning ordinance, the city was required to find that the proposed comprehensive plan and zoning map amendments are warranted based on changed conditions in the surrounding neighborhood. In *Jaffer*, we rejected petitioners' challenges to the city's findings that the changed conditions criteria are satisfied. In their third assignment of error in this appeal, petitioners contend the new information submitted by petitioner Brown on remand warrants reconsideration of the same arguments they presented in *Jaffer* regarding the changed conditions criteria. We do not agree.

The third assignment of error is denied.

The city's decision is affirmed.