

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WAL-MART STORES, INC.,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF GRESHAM,
10 *Respondent,*

11 and

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14 CENTENNIAL NEIGHBORHOOD ASSOCIATION,
15 SOUTHWEST NEIGHBORHOOD ASSOCIATION,
16 HOLLYBROOK NEIGHBORHOOD ASSOCIATION
17 and GRESHAM FIRST,
18 *Intervenors-Respondent.*

19
20 LUBA No. 2006-224

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22 CENTENNIAL NEIGHBORHOOD ASSOCIATION,
23 SOUTHWEST NEIGHBORHOOD ASSOCIATION,
24 HOLLYBROOK NEIGHBORHOOD ASSOCIATION
25 and GRESHAM FIRST,
26 *Petitioners,*

27
28 vs.

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30 CITY OF GRESHAM,
31 *Respondent,*

32 and

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35 WAL-MART STORES, INC.,
36 *Intervenor-Respondent.*

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38 LUBA No. 2006-225

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40 FINAL OPINION
41 AND ORDER

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43 Appeal from City of Gresham.

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45 E. Michael Connors, Portland, filed a petition for review and a response brief and

1 argued on behalf of petitioner/intervenor respondent Wal-Mart Stores, Inc. With him on the
2 brief were Gregory S. Hathaway and Davis Wright Tremaine, LLP.
3

4 David A. Bricklin, Seattle, filed a petition for review and a response brief and argued
5 on behalf of petitioners/intervenors-respondent Centennial Neighborhood Association et al.
6 With him on the brief was Bricklin Newman Dold, LLP.
7

8 David R. Ris, Senior Assistant City Attorney, Gresham, filed a response brief and
9 argued on behalf of respondent.
10

11 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,
12 participated in the decision.
13

14 REMANDED 04/04/2007
15

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

NATURE OF THE DECISION

In these consolidated appeals, petitioners appeal a hearings officer’s decision that denies, based on traffic concerns, a site design review application for a proposed Wal-Mart Supercenter.

MOTION TO FILE OVER-LENGTH BRIEF

Wal-Mart Stores, Inc. (Wal-Mart), the intervenor-respondent in LUBA No. 2006-225, moves to file a response brief with 59 pages, in excess of the 50-page limit imposed by OAR 661-010-0035 and OAR 661-010-0030. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioners in LUBA No. 2006-225 (hereafter, the neighborhoods or the opponents) move to file a 14-page reply brief, pursuant to OAR 661-010-0039.¹ Wal-Mart moves to strike the reply brief, on the grounds that it (1) was untimely filed, (2) exceeds the five-page limit imposed by OAR 661-010-0039, and (3) is not confined to “new matters” raised in the response briefs.

Neither the motion to file the reply brief nor the reply brief itself explicitly identifies any “new matters” raised in Wal-Mart’s respondent’s brief. Generally, responses warranting a reply brief tend to be arguments that assignments of error should fail regardless of their stated merits, based on facts or authority not involved in those assignments. *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1, 4 (2004); *Sequoia Park*

¹ OAR 660-010-0039 provides, in relevant part:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *”

1 *Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317, 321, *aff'd* 163 Or App 592, 988 P2d
2 422 (1999). In other words, “new matters” within the meaning of OAR 661-010-0039
3 generally are something like affirmative defenses, responses that an assignment of error
4 should fail regardless of its stated merits, due to some extrinsic principle (for example,
5 waiver).

6 In a response to the motion to strike the reply brief, the neighborhoods argue that
7 most of the arguments in the reply brief respond to arguments raised in the response briefs
8 that, the neighborhoods contend, “could not have been reasonably anticipated in a petition
9 for review,” and that such arguments therefore warrant a reply brief. Response to Motion to
10 Strike 6, citing *Franklin v. Deschutes County*, 30 Or LUBA 33, 139 Or App 1, 911 P2d 339
11 (1996), and *Caine v. Tillamook County*, 24 Or LUBA 627 (1993). Although LUBA has
12 expressed a preference for the somewhat more precise view of a “new matter” as something
13 akin to an affirmative defense, we agree that a direct response to an assignment of error,
14 which truly could not have reasonably been anticipated, could qualify as a “new matter,”
15 within the meaning of OAR 661-010-0039. However, under either formulation, and with
16 two possible exceptions, the neighborhoods have not demonstrated that any of the issues
17 responded to in the reply brief are “new matters.”²

18 The two exceptions are footnotes 5 and 7 in the reply brief, which respond to
19 arguments in Wal-Mart’s brief that two assignments of error should be denied due to the
20 neighborhoods’ failure to challenge other, allegedly related findings. We will consider

² As an example, petitioners’ petition for review challenges several of the hearings officer’s determinations contrary to petitioners’ positions below as not being supported by substantial evidence, arguing that the hearings officer should have relied on their experts rather than Wal-Mart’s experts. In their response brief, Wal-Mart responds that petitioners misunderstand the substantial evidence standard, and that the challenged determinations are supported by substantial evidence, if that standard is correctly applied. Petitioners contend that Wal-Mart’s response is a “new matter” that warrants a reply brief. While we cannot say that a dispute over the substantial evidence standard would never be a “new matter,” here Wal-Mart’s response is a more or less direct response to the merits of petitioners’ evidentiary challenges, disagreeing with petitioners’ apparent view of the substantial evidence standard expressed in the petition for review, as well as petitioners’ view of the evidence.

1 footnotes 5 and 7 to the reply brief, and allow the reply brief to that extent. That disposition
2 moots Wal-Mart’s objection to the length of the reply brief, and we reject without discussion
3 Wal-Mart’s objection that the reply brief was untimely filed.

4 However, we briefly address and reject an alternative basis the neighborhoods
5 advance for accepting the entire reply brief, if the Board determines that all or part of the
6 reply brief is not authorized by OAR 661-010-0039. Under OAR 661-010-0040(3), multiple
7 petitioners must share 30 minutes of oral argument time, unless the Board orders otherwise.
8 The neighborhoods previously moved, and the Board granted in part, a request for petitioners
9 to have additional time for oral argument, so that the neighborhoods and Wal-Mart—who are
10 both petitioners in these consolidated appeals but have opposing interests and raise different
11 issues—would not have to share and be limited to the 30 minutes allotted to the petitioners in
12 a consolidated appeal. By order, the Board organized oral argument into essentially two
13 consecutive oral arguments, with 25 minutes for Wal-mart in LUBA No. 2006-224, and 25
14 shared minutes for the neighborhoods and the city in that appeal to respond, and 25 minutes
15 for the neighborhoods as petitioners in LUBA No. 2006-225, with 25 shared minutes for
16 Wal-Mart and the City in that appeal to respond, for a total of 100 minutes. At oral
17 argument, Wal-Mart did not use all of its allotted 25 minutes as the petitioner in LUBA No.
18 2006-224. When it came time for oral argument in LUBA No. 2006-225, the neighborhoods
19 requested that Wal-Mart’s unused time be added to their 25 minutes as petitioners. The
20 Board denied the request. In a response to the motion to strike the reply brief, the
21 neighborhoods now argue that the reply brief should be allowed in its entirety because there
22 was inadequate time at oral argument to orally address all of the issues raised in Wal-Mart’s
23 response brief.

24 The time constraints that govern the Board often make it difficult to expand the time
25 allotted for oral arguments under our rules, and in many cases parties must select only the
26 more important issues to address and respond to at oral argument. It is frequently not

1 possible (or necessary) to discuss all issues in an appeal at oral argument. The time that was
2 allotted to the neighborhoods for oral argument in LUBA 2006-225 was only five minutes
3 short of the normal 30 minutes for petitioners in a LUBA appeal. Because these two appeals
4 are based on the same record, the time allotted for oral argument in LUBA 2006-225 was
5 appropriate. In any case, no matter how short the time allotted to oral argument, there is no
6 basis under our rules to allow a reply brief to respond to arguments in the response brief
7 where those arguments are not “new matters.”

8 The reply brief is allowed in part, and denied in part; Wal-Mart’s motion to strike is
9 allowed in part, denied in part.

10 **FACTS**

11 The subject property is an 11.09-acre tract consisting of several developed and
12 undeveloped lots. The western two-thirds of the site is zoned Community Commercial (CC),
13 and the eastern third is zoned Corridor Mixed Use (CMU). Both zones allow “Retail Trade”
14 as a permitted use. However, the CMU zone limits the maximum size of Retail Trade uses to
15 10,000 square feet.

16 West Powell Boulevard borders the entire northern boundary of the property. SW
17 Highland Drive runs north/south a short distance from the western boundary of the property,
18 intersecting with West Powell Boulevard. SW Highland Drive continues north of its
19 intersection with West Powell Boulevard intersection as SW 182nd Avenue. The SW
20 Highland Drive/SW 182nd Avenue/West Powell Boulevard intersection (hereafter, the
21 Highland/Powell intersection) is a central issue in these appeals.

22 The property’s eastern boundary is bordered by West Powell Loop, which comes in
23 from the east and swings north to intersect with West Powell Boulevard. A city-owned right-
24 of-way alignment crosses the north-east corner of the subject parcel.

25 Wal-Mart previously proposed a 210,000-square foot Supercenter on the property
26 (the 2005 proposal). The city hearings officer denied site plan approval for the 2005

1 proposal on the grounds that the proposal did not adequately mitigate traffic impacts on
2 nearby intersections. Wal-Mart elected not to appeal that denial to LUBA.

3 Instead, Wal-Mart reduced the size of the proposed store to 121,877-square feet, and
4 submitted new applications (2006 proposal). The 2006 applications proposed constructing
5 the smaller Supercenter on top of an underground parking lot on the CC-zoned western half
6 of the property, and using the eastern CMU-zoned portion for a surface parking lot. To
7 address traffic issues, Wal-Mart submitted the original traffic impact analysis (TIA) from the
8 2005 proposal, supplemented by three memoranda or updates of the TIA that address the
9 traffic impacts of the modified proposal. As proposed, the property has four access points.
10 On the east, a driveway accesses West Powell Loop, which runs north a short distance to
11 intersect with West Powell Boulevard, where Wal-Mart proposes a new traffic signal. On
12 the west, a driveway connects over a short street (SW 11th Avenue) to intersect with SW
13 Highland Drive, several hundred feet south of the signalized Highland/Powell intersection.
14 There are also two unsignalized right-turn only entrance/exits to the north that connect
15 directly to West Powell Boulevard. A key assumption under the TIA and its supplements is
16 that the majority of the westbound traffic leaving the property will use the eastern West
17 Powell Loop connection rather than the western SW Highland Drive connection.

18 The city planning manager approved the site plan application and related
19 applications. The neighborhoods appealed that approval to the city hearings officer, on a
20 number of transportation-related grounds. After conducting a hearing, on November 16,
21 2006, the hearings officer issued a decision concluding that Wal-Mart failed to sustain its
22 burden of proof with respect to one transportation-related issue, and accordingly denied the
23 applications. The hearings officer rejected the neighborhoods' other grounds for appeal and
24 affirmed the planning manager's decision on all other issues. Wal-Mart and the
25 neighborhoods filed separate appeals of the hearings officer's decision, which were
26 consolidated for LUBA's review.

1 **ASSIGNMENT OF ERROR (WAL-MART)**

2 Wal-Mart’s traffic experts made several key trip distribution assumptions to support
3 their conclusion that the proposed store would not cause nearby intersections to fail the city’s
4 “capacity criteria” and related transportation standards, particularly with respect to the
5 Highland/Powell intersection, which operates near capacity under current weekday p.m. peak
6 hour conditions. In particular, the TIA and its supplements assumed that 70 percent of the
7 westbound trips leaving the store would exit the property via the “eastern route” (the
8 connection to West Powell Loop, and then north to West Powell Boulevard, and finally west
9 on West Powell Boulevard to the Highland/Powell intersection). The TIA and its
10 supplements assumed that only 30 percent of westbound trips would exit the property via the
11 “western route” (connecting to SW Highland Drive and thence north to the Highland/Powell
12 intersection). In addition, the TIA assumed that 60 percent of northbound trips through the
13 Highland/Powell intersection would exit the property via the eastern route, while only 40
14 percent of northbound trips would exit the property via the western route.

15 Those 70/30 and 60/40 estimates were apparently justified on the grounds that most
16 Wal-Mart customers will choose to park in the surface parking lot on the eastern portion of
17 the property rather than the underground parking lot on the western portion, and that most
18 customers leaving the eastern surface lot would tend to use the closest exit to the east rather
19 than the western exit, even if their ultimate destination lay to the west or north through the
20 Highland/Powell intersection. As explained further below, the northbound and left-turn
21 movements of the Highland/Powell intersection are particularly constrained, and the more
22 traffic that Wal-Mart sends through those movements the less likely it is that Wal-Mart can
23 satisfy the city transportation standards.

24 In response, the opponents submitted to the planning manager an analysis by their
25 traffic expert questioning the TIA’s assumption of a 70/30 and 60/40 split in favor of the
26 eastern route. The opponents’ traffic expert presented evidence, apparently drawn from

1 information in one of the three traffic simulation models that Wal-Mart's experts developed
2 to support the TIA, showing that travel times through the Highland/Powell intersection are
3 faster if customers parking in the surface lot use the western route via SW Highland Drive
4 rather than the eastern route via West Powell Loop. The opponents' expert opined that
5 drivers will naturally use the route with the shorter travel times, and if they do that would
6 exacerbate existing and predicted queuing problems on SW Highland Drive and degrade the
7 operation of the northbound approaches to the Highland/Powell intersection.

8 Wal-Mart's experts responded in a memorandum dated July 21, 2006, arguing that
9 the opponents' travel time analysis was based on one of Wal-Mart's traffic models that did
10 not take into account Wal-Mart's proposal to coordinate signal timing to improve traffic flow
11 through the affected intersections. According to Wal-Mart, the only traffic model that takes
12 coordinated signal timing into account is the "Synchro6" model. Because the opponents'
13 travel time analysis was based on a model that did not take signal coordination into account,
14 Wal-Mart argued, the opponents' travel time analysis is not reliable for purposes of
15 calculating delays and driving times. The city traffic engineer agreed with Wal-Mart's
16 response. The planning manager adopted the position of Wal-Mart and the city traffic
17 engineer with respect to the travel time issue, and rejected the opponents' challenge to the
18 trip distribution assumptions.

19 On appeal to the hearings officer, the opponents renewed their challenge to the trip
20 distribution figures, among many other issues. Neither side presented any new evidence or
21 testimony on the issue, however, and apparently there was little discussion of trip distribution
22 at the hearing. In the final decision, as noted, the hearings officer denied the site review
23 application based solely on the trip distribution issue. The hearings officer rejected Wal-
24 Mart's argument, which was supported by the city engineer, that the opponents' travel time
25 analysis was based on a model that did not take into account coordinated signal timing:

26 "The appellants argue that vehicle trips exiting the site via West Powell Loop
27 will experience more delay than vehicle trips exiting the site onto Highland

1 Drive when the drivers intend to travel north on 182nd or west on Powell. The
2 appellants based their delay analysis on the travel time analysis in Table 4 of
3 the May 25, 2006 letter from Greenlight Engineering. The shorter travel
4 times provided by the western (Highland) route will encourage more drivers
5 to exit the site via Highland Drive, which will exacerbate predicted queuing
6 issues on Highland and degrade the operation of the Powell/182nd/Highland
7 intersection.

8 “The City argued that the appellants’ analysis did not consider the coordinated
9 signal timing the applicant proposed to implement. The hearings officer finds
10 that this is an incorrect statement. *The appellants’ travel time analysis clearly*
11 *states that intersection delays were based on the applicant’s estimates.* See p
12 13 of the May 25, 2006 letter from Greenlight Engineering.” Record 39
13 (emphasis added, citations omitted).

14 The hearings officer then examined the evidence supporting Wal-Mart’s trip distribution
15 assumptions in light of the travel time analysis, and concluded that Wal-Mart’s trip
16 distribution figures were not supported by substantial evidence.³

³ The hearings officer’s findings state, in relevant part:

- “d. The City further argued that the appellants’ travel time estimates are no more reliable than the applicant’s. However, the hearings officer is unable to find any travel time estimates that the applicant performed for this movement—from the eastern parking lot to westbound Powell west of Highland/182nd or northbound 182nd north of Powell. The only travel time data from the applicant in the record is a comparison of trips to and from the south of the site, comparing travel times on Highland Drive and Pleasant View Drive.
- “e. The applicant does not cite to any other evidence in support of its trip assignments. The applicant’s final argument merely cites to the [planning] manager’s decision that ‘the trip assignment assumptions of the April 2006 TIA are reasonable and accepted.’ The applicant further argues that ‘substantial evidence in the record supports staff’s conclusion.’ However, the applicant fails to point to any evidence in the record in support of this statement. As discussed above, the hearings officer is unable to find any evidence in the record that the applicant conducted travel time analyses to confirm its trip distribution assumptions and refute the appellants’ travel time analysis. The largely unsupported findings in the manager’s decision and the Staff Report are not substantial evidence sufficient to overcome the travel time evidence submitted by the appellants.
- “f. The appellants’ analysis appears to undercut the trip distribution assumptions used in the applicant’s analysis. The appellants’ travel time estimates demonstrate that drivers leaving the eastern parking lot via the [western route] will reach the section of 182nd Avenue north of Powell faster than drivers leaving the eastern parking lot [via the eastern route].

1 On appeal to LUBA, Wal-Mart argues that the hearings officer failed to appreciate
2 the difference between “intersection delays,” which all three traffic models measured, and
3 “signal coordination,” which only the Synchro6 model took into account. Had the hearings
4 officer not confused the two, Wal-Mart argues, he would have evaluated the evidentiary
5 question very differently.

6 The city and the neighborhoods respond that even if the hearings officer
7 misunderstood Wal-Mart’s argument regarding travel time analysis and signal coordination,
8 that argument was simply a critique of the opponents’ travel time evidence, which was itself
9 a critique of Wal-Mart’s trip distribution figures. According to respondents, the hearings
10 officer went on to examine the evidence Wal-Mart submitted justifying the trip distribution
11 figures, and found no substantial evidence supporting the assumption of a 70/30 and 60/40

“i. The appellants’ travel time analysis demonstrates that the Western Route is ten seconds shorter than the Eastern Route during the weekday a.m. peak and 14 seconds shorter during the Saturday peak. The hearings officer notes that the [Highland/Powell] intersection is operating well below capacity during these peak periods. Therefore any changes in the trip distribution assumptions caused by the faster [times] are less likely to have a significant impact on the applicant’s analysis.

“ii. The appellants’ travel time analysis demonstrates that the Western Route is only two seconds shorter than the Eastern Route during the weekday p.m. peak hour. This minor difference in travel times may have little impact on drivers’ choice of routes. However the applicant’s travel model assumes that 60 percent of drivers will utilize the Eastern Route. There is simply no support in the record for the assumption that more drivers will choose the Eastern Route when the Western Route provides an equal or faster course. The hearings officer cannot find that the applicant sustained its burden of proof that the vehicle distribution assumptions in its traffic models are reasonable and supported by substantial evidence.

“iii. An even (50/50) split of vehicle trips between the Eastern and Western Routes may have a significant impact on applicant’s transportation analysis. The number of northbound through trips on Highland/182nd would increase and the number of eastbound right turns from eastbound Powell to northbound 182nd would diminish. However this intersection is operating very near capacity during the p.m. peak hour. Therefore even a minor change in the trip distribution may have a significant impact on the applicant’s analysis. The hearings officer cannot find that the applicant’s traffic analysis is accurate based on these unsupported trip distribution assumptions.” Record 39-40 (citations omitted).

1 trip distribution split. The hearings officer ultimately concluded that Wal-Mart failed to
2 sustain its burden of proof regarding impacts on the Highland/Powell intersection.
3 Respondents contend that that conclusion is independent of the travel time analysis, and any
4 possible misunderstanding with respect to the travel time analysis or Wal-Mart's arguments
5 is not a basis to reverse or remand the hearings officer's denial.

6 Wal-Mart appears to be correct that the hearings officer misunderstood Wal-Mart's
7 (and the city engineer's) argument that the opponent's travel time analysis did not take signal
8 coordination into account. It is difficult to tell how important the travel time analysis was in
9 the hearings officer's subsequent evaluation of the evidence supporting Wal-Mart's trip
10 distribution figures, but from the findings quoted at n 3 it appears the travel time analysis
11 played a significant, if not paramount, role in that evaluation. Given the hearings officer's
12 reliance on the opponents' travel time analysis, we cannot agree with the city and the
13 neighborhoods that the hearings officer's conclusion regarding the trip distribution figures
14 can be affirmed notwithstanding the apparent misunderstanding the hearings officer had with
15 respect to the travel time analysis and signal coordination.

16 That said, it is not clear to us that the failure to take signal coordination into account
17 necessarily represents a "flaw" in the opponents' travel time analysis. Wal-Mart's argument
18 presumes that if signal coordination is taken into account, a travel time analysis would
19 support or at least would not undermine Wal-Mart's trip distribution figures, *i.e.*, that the
20 most of the westbound and northbound traffic leaving the eastern parking lot will use the
21 eastern rather than western exit. However, unless signal coordination affects different traffic
22 movements at different rates, it would seem logical to expect that signal coordination of all
23 nearby signalized intersections would equally improve all intersection movements. In other
24 words, if without signal coordination the western route is faster than the eastern route, and
25 signal coordination equally improves related intersection movements, after signal
26 coordination the western route might still be faster than the eastern route. If so, that would

1 tend to undermine Wal-Mart's trip distribution assumptions, for the reasons the hearings
2 officer stated. Wal-Mart does not explain why the failure to take signal coordination into
3 account necessarily makes any difference, with respect to the validity of the trip distribution
4 figures.⁴

5 The neighborhoods attach to their brief data that, they claim, are derived from the
6 Synchro6 traffic model. According to the neighborhoods, the Synchro6 data shows that the
7 western route is still faster than the eastern route, even with signal coordination. The
8 neighborhoods may be correct on that point, and if so that would certainly seem to undercut
9 Wal-Mart's arguments. However, the data is presented in a table that the neighborhoods
10 created for this appeal, and that table is apparently not found in the record. The
11 neighborhoods claim that the Synchro6 analysis is found in electronic format in the record, in
12 the form of a compact disc located at Record 1065. The neighborhoods do not identify
13 which of the many electronic files on that disc includes the data they list in the table attached
14 to the petition for review, so we cannot confirm the accuracy of the data listed in the table.⁵

15 Given the state of the findings and pleadings on this point, and the highly technical
16 nature of the issue, we believe the best resolution is to remand the decision to the hearings
17 officer to evaluate the trip distribution figures and related transportation impact issues based
18 on a correct understanding of Wal-Mart's argument, *i.e.*, that the opponents' travel time
19 analysis that the hearings officer apparently relied upon does not take signal coordination
20 into account. That re-evaluation would not necessarily require an additional evidentiary
21 hearing or even additional opportunity for argument from the parties. The hearings officer

⁴ Wal-Mart's (unexplained) point may be that signal coordination would generally improve intersection performance, which might make the validity and accuracy of the 70/30 and 60/40 trip distribution figures less critical.

⁵ In addition, LUBA lacks the software to open up the electronic files on the disc. Petitioners do not identify what computer program is used to access the information on the compact disc, or explain how LUBA can review that information absent that program.

1 may conclude that no such proceedings are necessary, and simply adopt additional findings
2 on remand that re-evaluate the issue based on a correct understanding of Wal-Mart's
3 arguments, as discussed above.

4 Wal-Mart's assignment of error is sustained.

5 **FIRST ASSIGNMENT OF ERROR (THE NEIGHBORHOODS)**

6 As noted, the TIA was supported by three computer traffic models, called Traffix,
7 Synchro and SimTraffic, which were each used for somewhat different purposes.
8 Apparently, SimTraffic is a "microsimulation" model that was used to model queuing and
9 progression issues on SW Highland between 11th Avenue and the Highland/Powell
10 intersection, which includes the left-turn movement from Highland onto Powell.

11 The neighborhoods explain that the usual approach with computer traffic models is to
12 "calibrate" each model, by checking its predictions of *existing* conditions against real-world
13 observations. If the model's prediction of existing conditions turns out to be inaccurate, the
14 model parameters can be adjusted or "calibrated" so that the output accurately reflects
15 existing conditions, which in turn gives greater confidence that the model's prediction of
16 *future* conditions (including the impact of the proposed development) will be accurate. The
17 neighborhoods quote several passages from a Federal Highways Administration (FHWA)
18 document entitled "Traffic Analysis Toolbox Volume III: Guidelines for Applying Traffic
19 Microsimulation Modeling Software," to the effect that calibration is essential to determine if
20 a computer traffic model is accurate. However, the neighborhoods argue, in the present case
21 it is undisputed that Wal-Mart's traffic experts never calibrated the SimTraffic model.
22 According to the neighborhoods, the hearings officer accepted Wal-Mart's argument that it
23 was not feasible to calibrate the SimTraffic model, because at the time the model was
24 developed West Powell Boulevard was undergoing a large construction project, which meant
25 that "existing conditions" were in a state of constant flux, and any attempt to compare the
26 model's predictions for pre-construction "existing conditions" with conditions during

1 construction would have demonstrated nothing about the accuracy of the model. The
2 hearings officer characterized the issue as a “close call,” but ultimately agreed with Wal-
3 Mart and city engineering staff that the SimTraffic model was reliable notwithstanding the
4 absence of calibration, because of the “conservative nature of the model[.]”⁶

⁶ The hearings officer’s decision states, in relevant part:

“a. The FHWA and ODOT publications cited by the appellants in Exhibit 31 clearly state that calibration is a critical step in preparing a transportation model. The FHWA publication states, ‘it is critical that the analyst calibrate any microsimulation model to local conditions.’ Calibration is defined as ‘selecting model parameters that cause the model to best reproduce field-measured local traffic operations conditions.’ ‘Without calibration, the analyst has no assurance that the model will correctly predict traffic performance for the project.’

“b. The applicant argued that it is not feasible to calibrate the SimTraffic model to existing conditions on Powell Boulevard, because the ‘existing conditions’ are changing on a daily basis as construction progresses on the Powell Improvement Project. There is no existing ‘steady state’ condition on Powell Boulevard. Any model developed to reflect existing conditions over the past ten months, when construction was occurring, would be inapplicable to the assessment of future conditions or the validity of the future model.

“* * * * *

“d. The hearings officer accepts that it was not feasible to develop a model that reflects existing conditions on Powell Boulevard because ongoing construction activities related to the Powell Boulevard Improvement [Project]. Construction associated with the Project significantly altered the input data required for the model. It is well known that road construction activities slow traffic, disrupt normal vehicle flows, close vehicle lanes and otherwise alter normal driving conditions. Drivers may seek alternate travel routes and otherwise modify their normal driving habits to avoid construction areas. In addition, recent construction on Powell modified the existing traffic controls: eliminating signal demand loops and changing the timing and progression of traffic signals on this roadway segment. Any model calibrated to conditions occurring during construction activity would not reflect ‘normal’ operating conditions when no construction is occurring. * * * Therefore it was not feasible for the applicant to calibrate its Synchro [sic] model after the City began construction of the Powell Boulevard Improvement Project.

“e. The applicant argues that it developed its SimTraffic model consistent with the FHWA guidelines cited by the appellant ‘*where applicable and appropriate*. In some instances, unique circumstances did not allow for complete adherence. It should also be noted that the *general* FHWA guidelines do not account for the unique circumstances such as those experienced in this case.’ * * * ‘Therefore, to preserve the conservative nature of the model, saturation flow rates well below those observed were assumed.’ The applicant further testified that ‘Global capacity parameters were purposely not adjusted to match observed saturation flow rates to

1 The neighborhoods contend that Wal-Mart’s “excuse” for not calibrating is
2 inadequate, and the hearings officer erred in accepting that excuse. According to the
3 neighborhoods, Wal-Mart could have gathered the data necessary for calibration at the same
4 time it obtained the traffic counts for the initial TIA, at a time prior to the Powell
5 construction project. Alternatively, the neighborhoods argue that the Powell construction
6 project lasted less than a year and was substantially completed in late 2006, and there is no
7 reason why Wal-Mart could not have gathered calibration data after completion of the
8 project.

9 Wal-Mart responds that calibration is not required by the city’s code and the FHWA
10 documents the neighborhoods cite are merely “guidelines” that do not *mandate* calibration in
11 all circumstances. Wal-Mart also argues that the real question is not the adequacy of its
12 “excuse” for not calibrating or whether the hearings officer erred in accepting Wal-Mart’s
13 contention that it was not feasible to calibrate the model, but rather whether the hearings
14 officer erred in concluding that the reliability of the model can be reasonably assured by
15 means other than calibration. To the extent Wal-Mart’s “excuse” or the feasibility of

ensure the model remained conservative. This ensures a high level of confidence in the results.’

“f. City engineering staff opined that:

“‘[Wal-Mart’s] model, using an ideal saturated flow rate of 1,900 vehicles per hour per lane [vphpl] was conservative relative to the 2,100+ vphpl measured saturation flow rate. The several reduction factors that are missing from the Synchro model are insignificant in comparison to the approximately 12% difference between these rates.’

“g. This is a very difficult issue and a very close call. The Highland/182nd/Powell intersection is operating very close to capacity. Therefore minor changes or errors in the analysis may have a significant impact on the outcome. The FHWA and ODOT publications are quite clear that calibration is a necessary step in developing a microsimulation model. However it was not feasible to calibrate the models in this case due to the ongoing construction activities on Powell Boulevard. The applicant and the City argue that reliance on highly conservative inputs is sufficient to overcome the lack of complete calibration in this case. The hearings officer relies on the independent expertise of City engineering staff to find that the applicant’s conservative model is adequate to compensate for the lack of calibration.” Record 22-24 (citations omitted, emphasis in original).

1 calibrating is relevant, Wal-Mart disputes the suggestion that it could have obtained
2 calibration data at the same time it conducted traffic counts prior to the construction project.
3 Wal-Mart cites to FHWA guidelines indicating that traffic counts are step 2 of the process,
4 modeling is step 3, and calibration does not occur until step 5, which does not suggest that
5 traffic counts and calibration data be gathered at the same time. Similarly, Wal-Mart
6 disputes that calibration data could have been gathered after the construction project ceased
7 on Powell Boulevard, citing to evidence that the construction project was still ongoing in
8 November and December 2006, and noting that the hearings officer's decision was issued
9 November 16, 2006.

10 We generally agree with Wal-Mart that the real question is not the adequacy of Wal-
11 Mart's "excuse" for not obtaining calibration data, or the support for the hearings officer's
12 finding that it was not "feasible" to obtain calibration data, but rather whether the SimTraffic
13 model can reasonably be relied on, in the absence of calibration, to predict future traffic
14 conditions. For whatever reason, Wal-Mart's experts chose not to gather calibration data in
15 conducting the initial traffic counts or in updating the TIA prior to the Powell construction
16 project, and that failure could not be rectified during the proceedings before the hearings
17 officer, because those pre-construction conditions no longer exist. The neighborhoods do not
18 contend that a comparison of predictions for pre-construction conditions with data on post-
19 construction conditions would yield useful information regarding the reliability of the model.
20 The neighborhoods' argument is that an uncalibrated model cannot be relied upon at all to
21 predict current and future traffic conditions, and therefore the hearings officer should have
22 denied the site review application on that basis. However, the hearings officer found to the
23 contrary, relying on Wal-Mart's expert and city engineering staff to conclude essentially that
24 the SimTraffic model is sufficiently accurate, notwithstanding the lack of calibration, due to
25 other factors that allow confidence in the model's predictive capability.

1 On that point, the opponents’ traffic expert testified that calibration is necessary to
2 ensure reliability. Wal-Mart traffic experts and city engineer staff disagreed, testifying that
3 the SimTraffic model is reliable notwithstanding the lack of calibration, due to its
4 “conservative” inputs.⁷ That dispute between experts over how to determine the reliability
5 of the model, and whether the model is sufficiently accurate to make it reasonable to rely on
6 the model to predict present and future traffic conditions, is a highly technical issue. As far
7 as we can tell, that issue is not controlled by any city code provision or other authority,
8 including the FHWA Traffic Analysis Toolbox Guidelines. While the FHWA guidelines
9 certainly stress the importance of calibrating the model to verify its accuracy in predicting
10 future conditions, the guidelines do not state that calibration is the *only* way to ensure that the
11 model is sufficiently accurate, if for some reason calibration data cannot be obtained. The
12 hearings officer chose to resolve this difference of expert opinion by relying on the testimony
13 of Wal-Mart’s expert and the city staff.

14 In the petition for review, the neighborhoods critique that testimony, and argue that
15 reliance on analysis of “saturation flow” and “lane utilization” is not sufficient to ensure the
16 reliability of the SimTraffic model, in the absence of calibration. However, as Wal-Mart
17 points out, the neighborhoods do not cite to any expert testimony or other evidence in the
18 record to support that critique, and it apparently consists only of the arguments of the

⁷ Wal-Mart’s traffic experts stated in an October 18, 2006 submittal:

“Recognizing the circumstances and cognizant that standard model development procedures did not apply in this case, [Wal-Mart’s experts] developed a conservative model by using the best available data to forecast an accurate baseline for future conditions. As evidenced in the record, saturation flow rate and lane utilization data during the critical weekday p.m. peak hour were collected prior to construction at the intersection of West Powell Boulevard/SE 182nd Avenue/SW Highland Drive. This intersection is the critical node of the local transportation system, and has a great deal of influence on the overall operation of the transportation network in the vicinity of the site. Again, as shown in Table 2, of all the input parameters that affect a model’s output, only the saturation flow rate and lane utilization are likely to remain constant in this case due to the significant changes to the existing transportation system. Using a saturation flow rate significantly less than that observed in the field and accounting for field-collected lane utilization data, the model is an accurate and purposefully conservative predictor of future conditions.” Record 1260-61.

1 neighborhoods’ attorney.⁸ Nothing cited to us in the record directly contradicts the
2 testimony quoted in n 7, that using the identified conservative inputs is sufficient to ensure
3 that the model “is an accurate * * * predictor of future conditions.” Record 1261.

4 The neighborhoods further challenge the hearings officer’s reliance on the
5 “independent expertise” of city engineer staff, citing staff statements that staff are “not that
6 sophisticated” about traffic simulations. However, the cited statements certainly fall short of
7 establishing that city engineering staff are not competent to testify on the reliability of the
8 SimTraffic model absent calibration. The hearings officer did not err in relying in part on the
9 testimony of city engineering staff, or in giving weight to staff’s “independent” testimony.
10 *See Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 277 (2006) (a local decision
11 maker may assign additional significance to the testimony of city or state engineers based on
12 their neutrality regarding the development proposal).

13 Finally, the neighborhoods argue that there is evidence that the uncalibrated model
14 for the 2005 proposal was significantly inaccurate with respect to one intersection which was
15 not impacted by the Powell construction project and for which there happens to be data that
16 can be used for calibration. The neighborhoods explain that Wal-Mart’s initial TIA had
17 gathered traffic counts regarding the Powell Boulevard/174th Avenue intersection, located
18 one-half mile west of the subject property in the City of Portland. Under the revised
19 proposal that intersection fell outside the required study area and the revised TIA did not
20 update that data. However, the neighborhoods’ traffic expert apparently collected field data
21 on that intersection in June 2005, in opposition to the 2005 proposal. During the proceedings
22 on the 2006 proposal, the neighborhoods’ traffic expert compared that data with the

⁸ Although the petition for review does not cite it, we note that petitioners’ traffic expert did address Wal-Mart’s reliance on “saturation flow” and “lane utilization” data, arguing that analysis of such data “falls far short of a full calibration.” Record 1194. However, petitioners’ expert did not state, at least explicitly, that such data cannot be relied upon to ensure that the SimTraffic model is sufficiently accurate, only that an analysis of such data “does not constitute calibration.” Record 1195.

1 SimTraffic predictions for existing conditions at that intersection and noted significant
2 differences, from which the expert surmised (correctly, it turned out) that neither of the
3 SimTraffic models used for the proposals had been calibrated. The neighborhoods cite to
4 that testimony as compelling evidence that the updated SimTraffic model used to predict
5 future conditions for *other* intersections is unreliable and inaccurate, in the absence of
6 calibration.

7 Wal-Mart responds that the neighborhoods fail to challenge findings that reject that
8 same contention. The neighborhoods argued to the hearings officer that the data regarding
9 the Powell/174th intersection “demonstrates the unreliability of the queuing analysis for the
10 remainder of the intersections,” citing to the same evidence cited on appeal. Record 27. The
11 hearings officer disagreed, stating:

12 “* * * The applicant noted that its 2006 transportation models did not include
13 this intersection. Therefore the applicant did not update the queuing model
14 for this intersection. In addition, the appellants’ observations fail to account
15 for improvements in traffic flow resulting from planned improvements to this
16 intersection, the Powell improvement project and coordinated signal timing on
17 the section of Powell east of this intersection. ‘Therefore, the results at this
18 intersection are not indicative of the Applicant’s ability to estimate queue
19 lengths, and has no bearing on the reliability of the analyses for the remainder
20 of the intersections.’

21 “* * * The hearings officer finds that the applicant’s predictions of future
22 queuing at this intersection cannot be relied upon, based on the applicant’s
23 testimony that the queuing model for this intersection was not updated.
24 *Therefore comparison of the existing and predicted vehicle queues at this*
25 *intersection is not sufficient to negate use of the model at other intersections*
26 *reviewed in the 2006 traffic analysis with an updated traffic model. * * **”
27 Record 28 (emphasis added; citation omitted).

28 The neighborhoods argue that that finding is “incongruous” but do not explain why
29 that finding is error. The hearings officer concluded that the cited evidence regarding the
30 “existing conditions” at the Powell/174th intersection was not based on the *updated*
31 SimTraffic model for the 2006 proposal, and therefore the comparison of existing and
32 predicted conditions at that intersection was not indicative of the reliability of the *updated*

1 model's predictions with respect to other intersections within the study area for the 2006
2 proposal. In other words, the apparent inaccuracy of the SimTraffic model developed for the
3 2005 proposal with respect to one intersection is not necessarily an indication that the
4 updated SimTraffic model developed for the 2006 proposal is also inaccurate. That
5 reasoning may not be bulletproof, but Wal-Mart is correct that the petition for review does
6 not challenge that finding. Instead, the neighborhoods merely cite to the evidence the
7 hearings officer rejected, and argue that it undermines the hearings officer's ultimate
8 evidentiary choice with respect to the calibration issue. We agree with Wal-Mart that in this
9 circumstance the neighborhoods must do more than cite to the evidence the hearings officer
10 found to be unreliable; the neighborhoods must challenge that finding, and explain why the
11 hearings officer erred in concluding that the cited evidence is unreliable. Absent a challenge
12 to that effect, the cited evidence does little to assist the neighborhoods in challenging the
13 hearings officer's ultimate evidentiary choice with respect to the calibration issue.

14 As a review body, we are authorized to reverse or remand the challenged decision if it
15 is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C).
16 Substantial evidence is evidence a reasonable person would rely on in reaching a decision.
17 *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v.*
18 *State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes*
19 *County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the
20 evidence, however, we may not substitute our judgment for that of the local decision maker.
21 Rather, we must consider all the evidence in the record to which we are directed, and
22 determine whether, based on that evidence, the local decision maker's conclusion is
23 supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752
24 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d
25 441 (1992). Based on the evidence cited to us, the neighborhoods have not demonstrated

1 that no reasonable person would rely on the testimony of Wal-Mart’s expert and city
2 engineering staff with respect to the reliability of the uncalibrated model.

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR (THE NEIGHBORHOODS)**

5 The neighborhoods contend that the TIA and its supplements omit mandatory
6 analyses with respect to street sections, required peak hour factors, and signal timing.

7 **A. Street Sections**

8 City of Gresham Public Works Standards (PWS) 6.01.04(3) defines the “study area”
9 that must be analyzed for transportation impacts, and requires in relevant part that the study
10 area include “streets, ramps or intersections” for which site traffic comprises at least five
11 percent of existing capacity, or “street sections or intersections impacted by site traffic” that
12 currently exceed prescribed volume to capacity ratios or level of service (LOS) standards.
13 The neighborhoods argue that the TIA addresses impacted intersections, but fails to address
14 any discrete “street sections.”

15 Wal-Mart responds that PWS 6.01.04(3) simply defines the study area, but does not
16 provide the requirements for the traffic analysis itself. According to Wal-Mart,
17 PWS 6.01.04(5) sets out the requirements for the traffic analysis, and clearly requires an
18 analysis of intersections and access points, but does not require an analysis of “street
19 sections” between intersections. Further, Wal-Mart notes that the hearings officer adopted a
20 finding addressing and rejecting this contention, and that the neighborhoods do not challenge
21 that finding.⁹ Wal-Mart is correct that the neighborhoods do not challenge that finding or

⁹ The hearings officer’s findings state:

“The hearings officer finds that the applicant is not required to analyze the LOS of street segments between intersections. PWS 6.01.04.3 defines the required study area for traffic analyses. PWS 6.01.04.5 sets out the required analyses within the defined study area. This section clearly limits the required analyses to intersections and access points. It does not require analysis of street segments.” Record 32.

1 explain why it is erroneous. To the extent the petition for review can be understood to
2 challenge that finding, the hearings officer's interpretation of PWS 6.01.04(3) and
3 PWS 6.01.04(5) is consistent with the text of those provisions, and we affirm it.

4 **B. Peak Hour**

5 PWS 6.01.04(5) requires the traffic study to analyze the "existing daily, p.m. peak
6 hour, and site peak hour counts by traffic movement at intersections* * *." The
7 neighborhoods contend that instead of identifying the peak hour of each individual
8 intersection, the TIA identified the overall peak hour of the intersections in the area, and
9 analyzed traffic impacts based on that "system" peak hour. The neighborhoods' traffic
10 expert testified that a particular intersection's peak hour may differ significantly from the
11 "system" peak hour, and that using the system peak hour may skew the analysis. The traffic
12 expert also explained that according to the Highway Capacity Manual, an intersection's peak
13 hour capacity is calculated by determining the peak 15 minutes and then applying that 15
14 minutes to the entire hour. The expert criticized the traffic counts conducted by Wal-Mart,
15 arguing that the counters rounded the data in five minute increments to the nearest 15
16 minutes, which according to the neighborhoods' expert skewed the peak hour analysis with
17 respect to several identified intersections. The hearings officer rejected those arguments,
18 relying on city engineering staff testimony to find that it was reasonable to use the system
19 peak hour, and concluding that the neighborhoods had not demonstrated that using the
20 system peak hour skewed the analysis.¹⁰

¹⁰ The hearings officer's findings state, in relevant part:

"d. City engineering staff concluded that use of a system peak hour is reasonable. It 'provides a snapshot of the worst conditions experienced by the system.' Use of individual intersection peak hours would produce an unrealistic snapshot of the network as a whole, as the worst 15-minute conditions would be experienced at every intersection simultaneously. Such 'worst case' conditions '[w]ould never occur in the real world.'

1 The neighborhoods challenge the hearings officer's conclusion that the opponents
2 failed to demonstrate that using the system peak hour skewed the traffic impact analysis,
3 arguing that that conclusion impermissibly shifts the burden of proof to the neighborhoods.

4 The neighborhoods argue:

5 “* * * Wal-Mart had the burden to demonstrate that it had met all of the
6 applicable Gresham requirements. [The neighborhoods] undisputedly met
7 that burden by demonstrating that Wal-Mart's TIA did not comply with
8 [PWS] 6.01.04(5). The Hearings Officer failed to rule on this basis. Instead
9 the Hearings Officer wrongly placed on the petitioner the additional burden of
10 demonstrating what the results would have been if Wal-Mart had done its
11 analysis correctly.” Petition for Review 24.

12 Wal-Mart responds that PWS 6.01.04(5) does not, as the neighborhoods' argument
13 presumes, require that individual peak hours for each intersection be evaluated, or prohibit
14 using a “system” peak hour. According to Wal-Mart, the neighborhoods ignore the hearings
15 officer's ultimate conclusion that “use of the system peak hour is reasonable under the
16 circumstances,” and instead challenge only the alternative finding that the neighborhoods
17 failed to demonstrate that any skewing effect “actually impacted intersections that are

“e. The hearings officer notes * * * that the applicant's traffic counting personnel chose to round the data collected in five minute increments into the nearest 15 minute increment. This undercuts the applicant's assertion that the system peak and individual intersection peak hours were the same at all signalized intersections. However, based on the appellants' own calculations, there is no substantial evidence that the resulting skewing effect actually impacted intersections that are operating near capacity. The appellants did not analyze the intersection of Powell/182nd/Highland, which is projected to operate at the highest v/c ratio. [T]he intersections where the appellants provided revised peak hour factors all operate well below capacity. Therefore changes in the analysis that might result from use of individual peak hour factors and un-rounded data [are] unlikely to cause those intersections to exceed the City's LOS and v/c standards.

“* * * * *

“f. This is a highly technical issue. The appellants provided expert testimony that the applicant's use of the system peak hour factor ‘may’ skew the results. The applicant provided expert testimony that use of the system peak hour factor allows for logical analysis of the interaction between intersections within the system. The hearings officer relies on the independent expert testimony of the City engineering staff to find that use of the system peak hour is reasonable under the circumstances of this case.” Record 37.

1 operating near capacity.” Wal-Mart notes that the neighborhoods do not challenge the
2 *correctness* of that finding, but instead the neighborhoods argue only that the hearings officer
3 shifted the burden of proof to the neighborhoods. In any case, Wal-Mart argues, the hearings
4 officer simply rejected the neighborhoods’ effort to challenge Wal-Mart’s evidence of
5 compliance with PWS 6.01.04(5), and accepted that evidence as demonstrating compliance
6 with that criterion.

7 We agree with Wal-Mart that PWS 6.01.04(5) does not specify that the individual
8 peak hour for each intersection must be identified, or preclude use of an overall or “system”
9 peak hour. The merits of those two approaches were disputed by experts on both sides, and
10 the hearings officer ultimately chose to rely on the approach favored by Wal-Mart’s expert
11 and by city engineering staff. We also agree that the hearings officer did not “shift the
12 burden of proof” to the neighborhoods to demonstrate that any skewing effect actually
13 impacted intersections that are operating near capacity. Instead, the hearings officer merely
14 rejected the neighborhoods’ effort to undermine or cast doubt on Wal-Mart’s evidence, and
15 chose to rely on that evidence instead of the neighborhoods’ evidence.

16 **C. Existing Signal Timing**

17 PWS 6.01.04(5)(d) requires that the TIA include:

18 “A determination of the existing levels of service, background levels of
19 service, and total traffic levels of service at each intersection and access point
20 studied. For signalized intersections, levels of service shall be reported using
21 existing timing plans and lane configurations.”

22 The neighborhoods argue that Wal-Mart’s traffic models did not determine levels of
23 service based on existing signal timing, and the hearings officer approved that omission,
24 finding that it would be “useless” to consider existing signal timing given the ongoing
25 construction on Powell Boulevard.¹¹ However, the neighborhoods argue that there are two

¹¹ The hearings officer found:

1 intersections included in the model that are not on Powell Boulevard and not subject to the
2 Powell construction project. The neighborhoods contend there is no reason why the signal
3 timing for those intersections could not have been used in determining the level of service for
4 those intersections.

5 Wal-Mart responds that PWS 1.01 provides that the PWS standards “cannot provide
6 for all situations” and that they “are intended to assist but not substitute for competent work
7 by design professionals.” According to Wal-Mart, PWS 1.01 recognizes that unusual
8 circumstances will arise that will require PWS standards to be applied differently, based on
9 the expertise of professional engineers, and that is precisely what the hearings officer did in
10 the present case. Wal-Mart argues that both its experts and the city engineering staff
11 concluded that using the existing signal timing of affected intersections, including the two
12 intersections that were not subject to the Powell construction project, would not be reflective
13 of the actual conditions that will apply once the construction project is complete and Wal-
14 Mart implements the coordinated signal timing as a condition of development approval.

15 We agree with Wal-Mart that PWS 1.01 contemplates that the city may vary from the
16 strict letter of PWS standards to address unusual situations, based on expert
17 recommendations. While the neighborhoods challenge the hearings officer’s rationale for
18 varying from the letter of PWS 6.01.04(5)(d) with respect to the Powell construction project,
19 the neighborhoods do not challenge the hearings officer’s other rationale that analyzing
20 existing signal timing would be “irrelevant” because Wal-Mart proposes “signal coordination
21 and optimization planned for this area.” That finding presumably applies to the two
22 intersections cited by the neighborhoods, and the neighborhoods do not explain what purpose

“As discussed above, existing signal timing is relevant to proper calibration of the simulation models. However, because the ongoing construction activities on Powell disrupted the existing signal timing, analysis of existing signal timing would be useless. The applicant’s traffic models are based on signal coordination and optimization planned for this area. Therefore, the applicant’s failure to include analysis of existing signal timing is irrelevant.”
Record 33.

1 would be served by taking into account the current signal timing of intersections that will
2 likely either change or be impacted by the condition of approval requiring coordination and
3 optimization of signals in the area. The neighborhoods do not argue that such information
4 would have any utility whatsoever, for purposes of satisfying the PWS standards. The
5 hearings officer reasonably relied on expert testimony that such information would be
6 “irrelevant” and accordingly did not err in failing to require that the TIA report the level of
7 service of the two intersections using the “existing timing plans[.]”

8 The second assignment of error is denied.

9 **THIRD ASSIGNMENT OF ERROR (THE NEIGHBORHOODS)**

10 Wal-Mart proposed, and the city accepted, constructing a northbound left-turn lane
11 from SW Highland to West Powell Boulevard with a storage length of 300 feet to
12 accommodate the anticipated left-turn queues generated by the proposed development. The
13 neighborhoods note, however, that Wal-Mart’s Synchro macrosimulation traffic model
14 predicted that the weekday p.m. peak hour queues of cars making a northbound left turn onto
15 Powell from Highland will be 365 feet long. The neighborhoods argued to the hearings
16 officer that these queues will exceed the storage capacity of the new turn lane, and will thus
17 create dangerous conditions, with vehicles stopped in the high speed through lane or vehicles
18 decelerating rapidly while still in the through lane in order to enter the turn lane.

19 The hearings officer rejected that argument, explaining that the SimTraffic
20 microsimulation model predicted a weekday p.m. peak hour queue length of 285 feet, less
21 than the storage capacity, and that the SimTraffic model is a more specific and accurate
22 model with respect to queuing effects than the Synchro model. Record 25-26.¹² On appeal,

¹² The hearings officer found, as relevant:

“a. The hearings officer finds that the applicant’s revised SimTraffic analysis demonstrates that adequate queue storage is available to accommodate left turn queues at the intersections of Highland and Powell, and Highland and 11th Avenue.

1 the neighborhoods cite and discuss the 365-foot figure from the Synchro model; however, the
2 neighborhoods do not challenge the hearings officer’s findings that expressly rely on the
3 SimTraffic model instead of the Synchro model with respect to queuing issues, or explain
4 why that finding is erroneous.

5 The neighborhoods also argued, based on testimony from their traffic expert, that the
6 left-turn design is unsafe even assuming that predicted queues will not exceed the storage
7 capacity. The traffic expert opined that with little excess storage capacity in the turn lane
8 during peak hours, vehicles will have to use the through lane for much of their deceleration
9 from the 40 mile per hour posted speed limit, possibly exceeding design standards that
10 recommend no more than ten miles per hour deceleration in a through lane before entering an
11 auxiliary lane.

12 The hearings officer rejected that argument, finding that the left-turn lane design was
13 consistent with design standards because of the slow speeds of cars traveling on the through
14 lanes during the peak p.m. hour.¹³ The neighborhoods challenge that finding, arguing that

The SimTraffic model demonstrates that the maximum northbound left turn queue will extend 282 feet south of Powell during the weekday [p.m] peak hour. * * *

“i. The appellants noted that the applicant’s Synchro analysis predicted a 365foot northbound left turn queue on Highland at Powell during the weekday p.m. peak hour. The predicted queue clearly exceeds the available storage area. However the hearings officer finds that the queue length predictions of the Synchro analysis are not sufficient to overcome the more specific analysis provided by the SimTraffic model. The Synchro model expressly provides that the SimTraffic microsimulation model provides a more accurate analysis of queuing effects.” Record 25-26 (citations omitted).

¹³ The hearings officer found, as follows:

“iii. The appellants argued that vehicles must slow down significantly within the northbound through lane in order to avoid hitting vehicles already stopped in the left turn queue. AASHTO [American Association of State Highway and Transportation Officials] standards limit such through lane deceleration to a maximum 10 mph below the speed of the through lanes. This section of Highland Drive is posted at 40 mph. Therefore vehicles may slow to a maximum 30 mph while still in the through lane without violating AASHTO standards. However drivers must slow to 15 to 20 mph in the through lane in order to avoid vehicles already stopped in the [longer] left-turn queues that form during peak hours.

1 there is no evidence either that the ten miles per hour speed differential will not be exceeded
2 during non-peak hours, or that longer left turn queues are only present during peak hours.
3 Wal-Mart responds that the hearings officer's findings on this point are supported by the
4 testimony of its traffic experts. Record 1208, 1244. The neighborhoods cite to no
5 countervailing evidence. We agree with Wal-Mart that the neighborhoods have not
6 established that the challenged findings quoted are not supported by substantial evidence.¹⁴

7 The third assignment of error is denied.

“iv. The hearings officer finds that the proposed median design is consistent with AASHTO guidelines. AASHTO expressly provides that:

““Short tapers are preferred for deceleration lanes at urban intersections because of slow speeds during peak periods. The total length of taper and deceleration length should be the same as if a longer taper was used. This results in a longer length of full-width pavement for the auxiliary lane. This type of design of design may reduce the likelihood that entry into the auxiliary lane may spill back into the through lane.”

“The design of the median allows drivers to decelerate within the 300-foot left-turn pocket during periods of light traffic, when through movements speeds are higher but fewer vehicles are waiting in the left-turn queue. Longer left-turn queues only occur during peak hours. However congestion during peak periods will reduce traffic speeds in the through lane, allowing drivers to decelerate within the through lane without exceeding the 10 mph speed differential allowed by AASHTO.” Record 26-27 (citations omitted).

¹⁴ In a footnote, petitioners argue that even if the hearings officer is correct on this point with respect to peak hour congestion and the *northbound* left-turn lane, the same may not be true in the *southbound* left turn lane from Highland onto 11th Avenue. Petition for Review 30, n 13. Petitioners cite to evidence that the southbound through lanes will be “coordinated” and argue that southbound traffic will therefore likely have high speeds approaching 11th Avenue, potentially creating the same through-lane deceleration problem discussed in the text with respect to the northbound left-turn lane. Wal-Mart does not respond specifically to this footnote, but we decline to remand the decision based on the argument in footnote 13. For one thing, petitioners do not allege and it does not appear to be the case that only the southbound movement on Highland will be “coordinated.” As far as we can tell, the northbound through lane will also be “coordinated,” in which case the hearings officer’s reasoning would seem equally applicable to the southbound through lane. That is, if there are slow speeds in the northbound through lane at peak hours notwithstanding coordination of signals, it seems likely that there will also be slow speeds in the southbound lane at peak hours notwithstanding coordination. For another, there are no findings directed at this issue with respect to the southbound lanes, and petitioners do not argue the issue was raised below. Wal-Mart argues that the general issue of non-peak deceleration problems was not adequately raised below and was waived. While that argument is directed at the dispute over the northbound lanes, and we chose to resolve that dispute without addressing the waiver issue, it seems even more appropriate to apply that waiver challenge to the issue raised, apparently for the first time, in footnote 13.

1 **FOURTH ASSIGNMENT OF ERROR (THE NEIGHBORHOODS)**

2 Duniway Avenue is a residential street that intersects West Powell Boulevard on the
3 opposite side of Powell from the subject property. Currently, there is no median on Powell
4 to control left turns from Duniway Avenue onto the eastbound Powell lanes. Wal-Mart
5 proposed, and the city accepted, a condition requiring a new raised median along Powell that
6 would channel left-turns from Duniway onto Powell into a “two-step gap acceptance” lane,
7 where the vehicle would first cross the westbound lanes into a middle lane partially separated
8 by the median from eastbound traffic, wait for a gap in eastbound traffic and then use that
9 lane to accelerate and merge into the eastbound lanes.

10 In this assignment of error, the neighborhoods cite to testimony from their traffic
11 expert that the design of this particular “two-step gap acceptance” lane is unsafe, because it
12 encourages drivers to treat the middle lane as an immediate acceleration lane rather than as a
13 place to stop and wait for a gap in eastbound traffic. The expert argued that drivers may be
14 accelerating and looking backward for a gap to slide into at the same time that the vehicle
15 ahead of them may be slowing to merge into a gap, creating a risk of rear-end collisions. The
16 expert also argued that the acceleration lane is too short to operate as an acceleration lane.

17 The hearings officer rejected these concerns, adopting the following findings:

18 “* * * The appellants agree that two stage gap acceptance is widely
19 recognized in Oregon and drivers are accustomed to this maneuver. However
20 the design of this turn lane does not provide any visual clues to drivers that it
21 is intended to operate as a two-stage left turn rather than as an acceleration
22 lane.

23 “* * * The hearings officer finds, based on the expert testimony of City
24 engineering staff, that it is feasible to incorporate features into the design of
25 this turn lane to ‘make it evident that it is not intended to be a high-speed
26 merge lane.’ The hearings officer assumes such measures will include signs,
27 striping and other visual [clues]. It is unnecessary to comply with AASHTO
28 requirements for acceleration lanes if the facility will not operate as an
29 acceleration lane. The hearings officer finds, based on the expert testimony of
30 the engineers of the applicant and City that the facility will operate safely as a
31 two-stage left turn.” Record 30 (citation omitted).

1 The neighborhoods do not challenge that finding directly, but argue that the hearings officer
2 failed to impose any condition of approval requiring any “features” such as signs, striping
3 and other visual clues to “make it evident that the middle lane is not a high speed merge
4 lane.”

5 Wal-Mart responds by citing to a statement by its experts that “the final design of the
6 center refuge will make it evident that it is not intended to be a high speed merge lane.
7 Record 1207, 1246. According to Wal-Mart that statement supports the hearings officer’s
8 finding that it is feasible to incorporate into the “final design” any features necessary to
9 ensure the middle lane is not used as a high speed merge lane. Wal-Mart argues that the
10 above-quoted finding is sufficient in itself to ensure that the final design includes such
11 features, and that no express condition of approval is necessary.

12 The hearings officer apparently believed that additional design measures were
13 necessary to ensure that the proposed median design is safe. To the extent the neighborhoods
14 challenge the finding that such measures are “feasible,” we agree with Wal-Mart that that
15 finding is supported by substantial evidence. Whether the hearings officer erred by not
16 imposing a condition of approval to require such measures is more problematic. Generally,
17 where there is conflicting evidence regarding whether compliance with an approval criterion
18 is feasible, the local government may determine that compliance is feasible and impose
19 conditions of approval as necessary to ensure compliance. *Rhyne v. Multnomah County*, 23
20 Or LUBA 442, 447-48 (1992). We are cited to no authority that suggests that in such
21 circumstance the finding of feasibility by itself is sufficient to ensure compliance. Here, the
22 hearings officer apparently believed that the proposed design must be changed to some
23 extent to ensure safety. We disagree with Wal-Mart that it is unnecessary in this
24 circumstance to impose a condition of approval to that effect.

25 That said, the failure to impose a condition of approval to that effect would be
26 harmless error, if the hearings officer’s denial on other grounds is sustained. For the reasons

1 set out above remand is necessary for the hearings officer to re-evaluate the single basis for
2 denial. If on remand the hearings officer approves the application, then the hearings officer
3 should consider whether a condition of approval is warranted with respect to the median
4 design at issue in this assignment of error. If the hearings officer again denies the
5 application, then this issue becomes moot, although it might be prudent to contingently
6 impose such a condition, in case a denial on remand is overturned on appeal.

7 The fourth assignment of error is sustained.

8 **FIFTH ASSIGNMENT OF ERROR (THE NEIGHBORHOODS)**

9 As noted, the western two-thirds of the site is zoned CC, while the eastern third is
10 zoned CMU. Both commercial zones allow “Retail Trade” as a permitted use. GDC Table
11 4.0420 lists the uses allowed in both zones. However, footnote 5 to the table imposes the
12 following limitation on “Retail Trade” uses in the CMU zone:

13 “The maximum building footprint size permitted for any building occupied
14 entirely by a commercial use or uses shall be 10,000 square feet.”

15 Wal-Mart does not propose to construct any building in the CMU zoned portion of the site,
16 only a surface parking lot and related driveways and landscaping. However, the
17 neighborhoods argue that GDC Table 4.0420 does not provide for “parking lots” as an
18 independent use, and parking lots are allowed only as accessory uses. The accessory use
19 here, the neighborhoods argue, is the Supercenter on the CC-zoned portion of the site, which
20 exceeds the exceeds the 10,000-square foot limitation in footnote 5. The neighborhoods
21 contend that a parking lot is permitted on the CMU-zoned portion of the site only if the use
22 to which that lot is accessory is also allowed in the CMU zone.

23 The hearings officer rejected that argument, concluding that nothing in the city’s code
24 requires that accessory parking for a use be located in the same zone as the proposed use.¹⁵

¹⁵ The hearings officer found, as follows:

1 The neighborhoods disagree with that conclusion, arguing that accessory uses cannot be
2 permitted independently from the primary use and that the city code implicitly prohibits
3 allowing an accessory parking lot in a zone that does not permit the primary use. The
4 neighborhoods argue that the case the hearings officer cites, *Welch v. City of Portland*,
5 actually supports their position, because in that case the site proposed for a parking lot was
6 rezoned in the challenged decision from a zone that allows the primary residential use as a
7 conditional use to a zone that allows that primary use outright.

8 The hearings officer correctly found that nothing in the city code expressly prohibits
9 locating an accessory parking lot in a different zone as the primary use, or requires that the
10 primary use, as proposed, comply with all regulations that would apply to that use, if it were
11 located in the same zone as the parking lot. Because the relevant code provisions are silent
12 on this point, the hearings officer probably could have reached a sustainable conclusion
13 either way. Although the neighborhoods argue that the purpose statement of the CMU zone
14 provides context that supports their preferred interpretation, we are not persuaded that that
15 context undermines the hearings officer’s interpretation or compels a different interpretation.
16 While the circumstances in *Welch* are not identical, that case stands for the general

“* * *City staff and the applicant argue that Footnote 5 of CDC 4.0420 is only a dimensional standard restricting the size of the building footprint, not a use limitation. No building is proposed in the CMU zone. Therefore this provision is inapplicable. Commercial parking related to a Retail Trade use is permitted as an accessory use in the CMU zone. Nothing in the Code requires that accessory uses must be located on the same site or in the same zone as the primary use. * * *

“* * * The appellants made a very strong argument. However the hearings officer finds that the position of the applicant and the City is clearly supported by case law. The Code requires that vehicle parking must be located on the same lot as the proposed use, an adjacent lot or, if approved by the manager, ‘any lot’ in close proximity to the site. CDC 9.0820. The Code is silent with regard to the zoning of the adjacent or nearby parcel. Nothing in the Code requires that the parking be located in the same zone as the proposed use. This is nearly identical to the fact situation in *Welch v. City of Portland*, 28 Or LUBA 439 (1994). As in *Welch*, the Code requires that the applicant provide a certain number of parking spaces on the same lot as the proposed development or on an adjacent lot. However nothing in the Code requires that the parking spaces be located in the same zone as the primary use. Therefore the hearings officer finds that the proposed parking lot and access driveways are permitted in the CMU zoned portions of the site.” Record 51.

1 proposition that, absent a code provision that requires otherwise, it is permissible to locate an
2 accessory parking use on land that is zoned differently than the land on which is located the
3 primary use the parking serves. *Welch* does not provide any particular support for the
4 neighborhoods’ preferred interpretation, that locating accessory and primary uses in different
5 zones is permissible *only* if the primary use, as proposed, complies with the applicable
6 regulations in both zones.

7 The fifth assignment of error is denied.

8 **SIXTH ASSIGNMENT OF ERROR (THE NEIGHBORHOODS)**

9 West Powell Court is an undeveloped public right of way that crosses the
10 northeastern corner of the subject property, apparently the leftover result of a realignment of
11 nearby roads. Wal-Mart proposed to place a driveway, a pedestrian plaza and landscaping
12 across a portion of the West Powell Court right of way. The hearings officer noted that that
13 proposal would require a city right of way permit, but found that it is feasible to obtain such
14 a permit and that the city could impose a condition of approval to that effect.¹⁶ On appeal,
15 the neighborhoods argue that there is no substantial evidence supporting that finding of
16 feasibility, and that the proposed development within the right of way does not appear to fit
17 within one of the four types of right of way permits listed at GMC 6.35.040(4). The

¹⁶ The hearings officer’s findings state, in relevant part:

“The appellants argued that section 6.35.030(3) of the Gresham Municipal Code (‘GMC’) prohibits the proposed driveways, landscaping and pedestrian improvements within the public right of way of West Powell Court. The applicant must obtain approval of a street vacation prior to constructing the proposed development.

“a. The hearings officer finds that the proposed improvements are permitted within the public right of way, subject to the permit requirements of GMC 6.35.040. Pedestrian facilities, landscaping and driveways are commonly allowed within public rights of way. The proposed driveway must cross the West Powell Court right of way in order to connect the driveway to the developed public street within the Powell Boulevard right of way to the north. If this application is approved the applicant should be required to obtain a right of way permit prior to construction of these improvements. The hearings officer finds that it is feasible to submit an application for a right of way permit. Therefore the City may impose a condition of approval to that effect.” Record 53 (citation omitted).

1 neighborhoods also contend the right of way permit will require discretion, in which case the
2 condition of approval requiring a right of way permit “requires a discretionary land use
3 decision to be made with no notice or opportunity to appeal which is a procedural error that
4 prejudices the appellants’ rights.” Petition for Review 40.

5 Wal-Mart makes a number of responses, including an argument that the issue raised
6 in this appeal was waived because the neighborhoods failed to list that issue in the local
7 notice of appeal, and because the neighborhoods failed to challenge the hearings officer’s
8 conclusion that this issue is waived. Wal-Mart may be correct on that point, but the question
9 of waiver under the applicable city code provisions and the caselaw the parties cite is a
10 particularly complicated question to resolve. The merits of the issue, by contrast, are
11 relatively straightforward. The petition for review itself cites to evidence that supports the
12 hearings officer’s feasibility finding, a dialogue between the hearings officer and planning
13 staff wherein staff stated that the driveway, landscaping and pedestrian developments within
14 the right of way are types of development that are permitted under a right of way permit.
15 Record 70-71. The neighborhoods do not explain why that testimony is not substantial
16 evidence supporting the hearings officer’s finding that it is feasible to obtain a right of way
17 permit. That testimony also seems sufficient, at least for present purposes, to reject the
18 neighborhoods’ claim that as a matter of law the proposed development is not permitted
19 under any of the four types of right of way permits listed in GMC 6.35.040(4). Finally, while
20 the hearings officer imposed a condition requiring that Wal-Mart obtain a right of way
21 permit, that condition does not specify what procedure the city must follow in addressing that
22 permit application. The neighborhoods do not argue that the hearings officer deferred
23 consideration of any approval criterion applicable to the present site design review
24 application to the right of way permit process. Whatever discretion staff may exercise under
25 the procedures and standards that apply to a right of way permit, the neighborhoods have not
26 established that the hearings officer erred in requiring Wal-Mart to obtain a right of way

1 permit or in failing to require that the city process the right of way permit under procedures
2 requiring notice and a hearing.

3 The sixth assignment of error is denied.

4 The city's decision is remanded.