

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 TEEN CHALLENGE INTERNATIONAL  
5 PACIFIC NORTHWEST CENTERS,

6 *Petitioner,*

7  
8 vs.

9  
10 LANE COUNTY,

11 *Respondent,*

12  
13 and

14  
15 AL PHILLIPS and PAT PHILLIPS,

16 *Intervenors-Respondents.*

17  
18 LUBA No. 2012-088

19  
20 FINAL OPINION

21 AND ORDER

22  
23 Appeal from Lane County.

24  
25 Micheal M. Reeder, Eugene, filed the petition for review on behalf of petitioner.  
26 With him on the brief was Arnold Gallagher PC.

27  
28 No appearance by Lane County.

29  
30 Gregory S. Hathaway, Portland, filed a response brief and argued on behalf of  
31 intervenors-respondents. With him on the brief were E. Michael Connors and Hathaway  
32 Koback and Connors LLP.

33  
34 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,  
35 participated in the decision.

36  
37 AFFIRMED

05/07/2013

38  
39 You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a county hearings official’s decision denying its application for a special use permit to operate a group care home.

**FACTS**

County hearings official’s decisions approving special use permits for petitioner’s proposed group home were appealed to LUBA twice before and remanded. *Freedman v. Lane County*, 64 Or LUBA 309 (2011); *Phillips v. Lane County*, 62 Or LUBA 92 (2010). We described the nature of petitioner’s proposal in *Freedman*:

“[Petitioner] operates residential facilities to assist young people recovering from various addictions, including drug and alcohol addictions. The proposed facility at issue in this appeal is called Hanna[h’s] House. \* \* \* Under the proposal, as many as 20 individuals (women and dependent children) would be housed in an expanded existing single family residence on the property. In addition there would be as many as seven staff, three of which would remain on-site over night. Hanna[h’s] House conducts on-site special events from time to time, and those events draw other visitors.” 64 Or LUBA at 311.

The central issue that remains in dispute in this third appeal is whether petitioner has established that the proposal complies with Lane Code (LC) 16.290(5)(c), a county standard that requires that the site must be adequate for on-site sewage disposal.<sup>1</sup>

Hannah’s House does not propose to seek a Water Pollution Control System (WPCS) permit from the Oregon Department of Environmental Quality (DEQ). A WPCS permit from DEQ is required if the waste water produced by Hannah’s House exceeds residential

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<sup>1</sup> LC 16.290(5)(c) provides:

“The proposed use and development shall not exceed the carrying capacity of the soil or of the existing water supply resources and sewer service. To address this requirement, factual information shall be provided about any existing or proposed sewer or water systems for the site and the site’s ability to provide on-site sewage disposal and water supply if a community water or sewer system is not available[.]”

1 strength.<sup>2</sup> If Hannah’s House’s waste water does not exceed residential strength, a DEQ  
2 WPCS permit is not required, and the county sanitarian is authorized to approve an on-site  
3 septic system and drain field for waste water disposal.

4 Whether Hannah’s House will produce residential strength waste water also has a  
5 bearing on a related question. The 5.3 acre site where Hannah’s House is located has limited  
6 area available that is suitable for the drain field and replacement drain field that is required  
7 under DEQ rules for individual sewer systems. In the event Hannah’s House is required to  
8 use its replacement drain field, it will need to convert its conventional septic tank system to a  
9 pressurized sand filtration system, because the area available for a replacement drain field is  
10 too small for a conventional septic system.

11 Following our decision in *Freedman*, the hearings official concluded that petitioner  
12 had not carried its burden of proof to establish that Hannah’s House will produce residential  
13 strength waste water so that the proposed on-site septic system may be installed without  
14 exceeding the LC 16.290(5)(c) carrying capacity standard. In reaching that conclusion, the  
15 hearings official first noted that while petitioner’s expert testified that Hannah’s House would  
16 produce residential strength wastewater he also conceded that no one can know for sure  
17 whether that is the case until the facility is expanded and in operation. The hearings official  
18 took the position that the most reliable way to establish that Hannah’s House would produce  
19 residential strength waste water would be obtain samples from a facility of similar size and  
20 operating characteristics. The hearings official noted that opponent’s expert testified that the  
21 facility’s waste water would be greater than residential strength, based on experience at a

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<sup>2</sup> OAR 340-071-0100 sets out 178 definitions for use in DEQ’s onsite wastewater treatment systems rules. One of those definitions is “Residential Strength Wastewater:”

“(126) ‘Residential Strength Wastewater’ means septic tank effluent that does not typically exceed five-day biochemical oxygen demand (BOD5) of 300 mg/L; total suspended solids (TSS) of 150 mg/L; total Kjeldahl nitrogen (TKN) of 150 mg/L; oil & grease of 25 mg/L; or concentrations or quantities of other contaminants normally found in residential sewage.”

1 similar facility. But the hearings official took the position that it would be “dangerous” to  
2 rely on that testimony, because the opponents’ expert would not identify the similar facility  
3 so that its similarity to Hannah’s House could be verified. Record 20.

4 The hearings official took the position that the “most relevant evidence” in the record  
5 concerning the likely strength of Hannah’s House’s wastewater was “three grab samples  
6 taken from Hannah’s House effluent over a period of 45 days.” Record 20. The hearings  
7 official expressed some uncertainty about the reliability of those samples as a predictor of the  
8 quality of the effluent at the proposed expansion of Hannah’s House, because DEQ sample  
9 protocols may not have been followed and at the time the samples were collected only a few  
10 persons resided at Hannah’s House. The hearings official also noted that one of the three  
11 samples exceeded the 25 mg/L residential strength standard for oil and grease. *See* n 2.

12 The hearings official acknowledged that evidence in the record shows that it is  
13 standard county practice for the county sanitarian to approve subsurface on-site wastewater  
14 disposal systems, based on an assumption that the effluent would be of residential strength.  
15 Then, if that assumption later turns out to be mistaken and the system fails, a WPCS permit is  
16 later required and “DEQ staff would work with the applicant to correct the situation.”  
17 Record 20. However, the hearings official concluded that county sanitarian’s practice did not  
18 excuse his obligation to apply the LC 16.290(5)(c) carrying capacity standard in this case:  
19 “To say that a subsurface sewage system can be corrected once it violates a standard is  
20 different than saying that the system will not exceed that standard.” Record 21.

21 The hearings official ultimately concluded that petitioner failed to carry its burden to  
22 establish that the effluent from the proposed expanded Hannah’s House would be of  
23 residential strength:

24 “To a large extent, the residential strength of effluent is determined by the  
25 daily activities and habits of the people who create the effluent as much as it is  
26 by their number. In the present case, the latter is known but not the former.  
27 Absent effluent samples from a facility that is truly similar in number and  
28 activity to Hanna[h’s] House at build out, it is impossible to confidently

1 predict whether the three grab samples are indicative of the eventual effluent  
2 strength of the latter facility. The burden of proof lies with the applicant and a  
3 conclusion that the effluent from Hanna[h's] House, at build-out, will  
4 typically be of residential strength is not supported by a preponderance of the  
5 evidence in this record.” Record 21.

6 Finally, the hearings official acknowledged opponents’ argument “that it is  
7 unreasonable for the applicant to rely on the Orenco AdvanTex pretreatment system to treat  
8 non-residential strength effluent and reduce the size of the replacement drainfield.”<sup>3</sup> The  
9 hearings official explained:

10 “[T]he grab sample results from Hanna[s] House wastewater effluent  
11 exceeded Orenco daily average guidelines for successful operation of an  
12 AdvanTex system in regard to two factors. First, Orenco suggests that the  
13 average BOD not be greater than 150 mg/l and the three grab samples  
14 exceeded this parameter. \* \* \* Second, Orenco suggests that the average oil  
15 and grease level not exceed 20 mg/l and the three samples exceeded this  
16 parameter. \* \* \*”

17 “\* \* \*

18 “Based upon the record in this ma[tt]er, I must conclude that at this stage of  
19 the proceedings it is not possible to conclude that DEQ will approve a permit  
20 application for an alternative pretreatment system as proposed by the  
21 applicant.” Record 21-22.

22 **FIRST ASSIGNMENT OF ERROR**

23 In its first assignment of error, petitioner contends “[t]he [hearings official] erred by  
24 rejecting Teen Challenge’s evidence that Hannah’s House complied with wastewater strength  
25 requirements and by requiring Teen Challenge to obtain data from a similar facility.”  
26 Petition for Review 9. We understand petitioner to argue that it was established in the prior  
27 two LUBA appeals that petitioner could establish that Hannah’s House will produce  
28 residential strength wastewater by providing (1) effluent data from Hannah’s House itself or  
29 (2) effluent data from a similar facility elsewhere. Petitioner contends the hearings official’s

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<sup>3</sup> We understand the Orenco AdvanTex pretreatment system to be petitioner’s proposal for the pressurized sand filter system that will be required to allow use of a smaller replacement drain field.

1 insistence on data from a similar facility is inconsistent with the law of the case doctrine.  
2 Petitioner also contends that intervenors “are judicially estopped from taking the position that  
3 it is insufficient to test the wastewater from Hannah’s House to show compliance with the  
4 wastewater requirements and that testing must occur at a similar facility in order to show  
5 compliance.” Petition for Review 10.

6 Petitioner’s arguments under the first assignment of error fail at the threshold. While  
7 the hearings official found that the only way to confidently predict the effluent characteristics  
8 of an expanded Hannah’s House would be to obtain data from a similar facility, the hearings  
9 official did not require that petitioner must obtain such “similar facility” data. The hearings  
10 official simply found that the evidence that petitioner submitted was not sufficient to carry its  
11 burden of proof that expanded Hannah’s House’s effluent will be residential strength. In  
12 doing so, the hearings official pointed out that the data petitioner collected from the existing  
13 Hannah’s House was the “most relevant” and that that data showed that one of the DEQ  
14 residential strength standards was exceeded.

15 Beyond the threshold problem, petitioner’s law of the case and judicial estoppel  
16 arguments are without merit for other reasons. As potentially relevant here, we have  
17 described the law of the case principle as follows:

18 “Based on the court’s holding in *Beck* [*v. City of Tillamook*, 313 Or 148, 831  
19 P2d 678 (1992)] \* \* \* we conclude the permissible scope of local proceedings  
20 following a LUBA remand of a local government’s decision, is framed by  
21 LUBA’s resolution of the assignments of error in the first appeal. Resolved  
22 issues, which may not be considered in the local government proceedings on  
23 remand, include (1) issues presented in the first appeal and rejected by LUBA;  
24 and (2) issues which could have been, but were not, raised in the first appeal.  
25 \* \* \*.” *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32, 35 (1994).

26 One of the issues that was resolved in *Freedman* was whether the record included *any*  
27 evidence that Hannah’s House’s effluent would be residential strength. We concluded that it  
28 did not. 64 Or LUBA at 314-15. The issue of how petitioner must go about collecting

1 evidence to establish that it will be residential strength was neither an issue nor resolved in  
2 *Freedman*. We reject petitioner’s law of the case argument.

3 Under the equitable doctrine of judicial estoppel, a party may be precluded from  
4 taking a position in one judicial proceeding that is inconsistent with the position that the same  
5 party successfully asserted in a different judicial proceeding. *Hampton Tree Farms, Inc. v.*  
6 *Jewett*, 320 Or 599, 609, 892 P2d 683 (1995). Assuming that equitable principle might apply  
7 in appropriate circumstances in a LUBA appeal, it does not apply here. In *Freedman*  
8 intervenors took the position that petitioner “never gathered any data from the existing  
9 [Hannah’s House] or from any other system.” Record 351. Petitioner contends intervenors’  
10 position before the hearings official on remand was that “[t]he only reliable method to  
11 evaluate the character of the wastewater is to collect a series of grab samples from an  
12 operating similar facility, serving similar numbers of clients and to the extent possible  
13 discharging about the same volume of wastewater.” Petition for Review 11.<sup>4</sup> The short  
14 answer to petitioner’s judicial estoppels argument is that the cited positions, while  
15 overlapping somewhat, are not inconsistent. We reject petitioner’s judicial estoppel  
16 argument.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 Article III, section 1 of the Oregon Constitution provides:

20 “The powers of the Government shall be divided into three separate branches,  
21 the Legislative, the Executive, including the administrative, and the Judicial;  
22 and no person charged with official duties under one of these branches, shall  
23 exercise any of the functions of another, except as in this Constitution  
24 expressly provided.”

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<sup>4</sup> Petitioner does not identify where the record shows that intervenors took this position.

1 “Article II, section 1 prevents an officer in one branch of government from exercising power  
2 constitutionally assigned to a different branch. \* \* \*” *State ex rel Frohnmayer v. Oregon*  
3 *State Bar*, 307 Or 304, 310, 767 P2d 893 (1989).

4 DEQ is an agency of the Executive branch. Petitioner contends that the county  
5 sanitarian acts on behalf of DEQ and on November 30, 2010 authorized petitioner’s proposed  
6 septic system expansion. Petitioner contends that because the challenged decision is quasi-  
7 judicial, the hearings official is “a member of the judicial branch.” Petition for Review 13.  
8 We understand petitioner to contend that because the hearings official found that petitioner  
9 failed to carry its burden of proof that Hannah’s House will produce residential strength  
10 wastewater, and the county sanitarian believes that the facility will produce residential  
11 strength wastewater, the hearings official’s decision violates Article III, section 1 of the  
12 Oregon Constitution.

13 Petitioner’s contention that the action of the county sanitarian is an act of the Oregon  
14 Executive branch and that the hearings official’s action in this matter is an attempt to exercise  
15 the county sanitarian’s power is questionable. Be that as it may, petitioner’s contention that  
16 the county hearings official’s action in this matter is an action of the Judicial Branch is not  
17 merely questionable; it is entirely without merit. While the challenged decision may be  
18 *quasi*-judicial, that characterization of the decision as quasi-judicial does not make the action  
19 of the Lane County hearings official, an employee or contractor of Lane County, an action of  
20 the Judicial branch of Oregon state government. Petitioner’s Article III, section 1 argument  
21 is without merit.

22 The second assignment of error is denied.

23 **THIRD ASSIGNMENT OF ERROR**

24 In its third assignment of error, petitioner argues the hearings official “impermissibly  
25 required Teen Challenge to prove with absolute certainty that Hannah’s House would in fact  
26 produce Residential Strength Wastewater at full occupancy.” Petition for Review 15.

1           The hearings official ultimately found that petitioner’s position that Hannah’s House  
2 will produce residential strength wastewater at full build out “is not supported by a  
3 preponderance of the evidence in this record.” Record 21. Petitioner agrees that  
4 “preponderance of the evidence in the record” is the correct standard of proof, but petitioner  
5 contends that elsewhere in the hearings official’s decision it is clear that he held petitioner to  
6 a much higher standard of proof—absolute certainty.

7           The hearings official heard conflicting expert testimony regarding the residential  
8 strength issue. We do not agree that the hearings official’s expressions of misgivings  
9 regarding the quality of the evidence submitted by petitioner and others necessarily means the  
10 hearings official held petitioner to an impermissibly high standard of proof. Neither do the  
11 hearings official’s suggestions about the kinds of evidence that might more reliably predict  
12 the quality of Hannah’s House wastewater at full build out mean the hearings official  
13 imposed an impermissible standard of proof.

14           The third assignment of error is denied.

15           **FOURTH ASSIGNMENT OF ERROR**

16           In its fourth assignment of error, petitioner contends that the hearings official’s  
17 finding that petitioner failed to carry its burden of proof that Hannah’s House’s effluent will  
18 be residential strength is not supported by substantial evidence. We note at the outset that  
19 petitioner faces a difficult burden in challenging the hearings official’s finding on evidentiary  
20 grounds. Petitioner must establish that the evidentiary record establishes that petitioner  
21 carried its burden as a matter of law. *Jurgenson v. Union County Court*, 42 Or App 505, 510,  
22 600 P2d 1241 (1979); *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680, 699,  
23 *aff’d* 194 Or App 211, 95 P3d 269 (2004).

24           **A.     Mischaracterization of Testimony**

25           Petitioner first contends the hearings official mischaracterized the testimony of its  
26 expert Boeger as uncertain, simply because Mr. Boeger honestly stated that no one can be

1 certain of the strength of the effluent until the expanded facility is in operation and producing  
2 effluent that can be tested. Petitioner contends:

3 “The import of the [hearings official’s] (and the Opponents’)  
4 mischaracterization of Mr. Boeger’s expert testimony cannot be overstated. It  
5 is clear that the [hearings official’s] deciding factor in denying the [special use  
6 permit] application was what he perceived as uncertainty in the position taken  
7 by Mr. Boeger. \* \* \*” Petition for Review 19-20.

8 We do not agree that the hearings official mischaracterized Mr. Boeger’s testimony  
9 and we do not agree that Mr. Boeger’s honesty regarding the difficulty of accurately  
10 predicting what the strength of Hannah’s House’s effluent will be in the future was the  
11 deciding factor in the hearings official’s finding that petitioner failed to carry its burden. The  
12 hearings official expressly recognized that Mr. Boeger, as an expert, believed the expanded  
13 Hannah’s House’s wastewater would be residential strength. The hearings official did note  
14 that the opponents’ expert was more dismissive of the difficulty in predicting future effluent  
15 strength in stating that “he ‘absolutely’ believe[d] that an expanded Hanna[h’s] House will  
16 discharge greater than residential strength wastewater.” Record 19-20. But the hearings  
17 official also stated that relying on the opponents’ expert’s testimony would be “dangerous,”  
18 because he would not identify the allegedly similar facility he relied on in reaching his  
19 opinion concerning the strength of the wastewater. As far as we can tell, the hearings official  
20 carefully considered all the expert testimony and found none of it to be conclusive regarding  
21 the future wastewater strength at an expanded Hannah’s House.

22 **B. Failure to Consider County Sanitarian’s Testimony**

23 Petitioner next contends the hearings official’s decision is not supported by  
24 substantial evidence because he ignored evidence submitted by the county sanitarian in this  
25 matter.

26 While the hearings official did not explicitly mention the two documents prepared by  
27 the county sanitarian that petitioner identifies, it is not accurate to say the hearings official  
28 ignored the county sanitarian. As noted earlier, the hearings official expressly noted that

1 according to standard county practice, the county sanitarian would assume that the  
2 wastewater would be of residential strength and issue a building permit for an on-site septic  
3 system, but the hearings official explained that an assumption that effluent will be residential  
4 strength is not sufficient in applying the LC 16.290(5)(c) carrying capacity standard, as the  
5 hearings official must do in this case. Record 20-21.

6 Petitioner identifies two documents that it believes the hearings official should have  
7 addressed in his decision. The first document is a November 30, 2010 letter in which the  
8 county sanitarian authorized use of an expanded septic system for the Hannah's House  
9 expansion. Record 44-45. But that letter does not expressly address the residential strength  
10 question and was included in the record in *Freedman* that we concluded had no evidence to  
11 support the contention that the expanded Hannah's House's wastewater would be residential  
12 strength. We assign no evidentiary significance to the hearings official's failure to expressly  
13 mention that November 30, 2010 letter.

14 The second letter that petitioner cites is a May 7, 2012 letter signed by the county  
15 sanitarian that responds to a May 2, 2012 letter from petitioner's attorney. Record 228-32. In  
16 the May 7, 2012 letter, the county sanitarian takes the position that the expanded Hannah's  
17 House's wastewater would be residential strength. Record 232.<sup>5</sup> The hearings official  
18 explained that he did not consider that letter because it was not submitted before the  
19 evidentiary record closed and the hearings official rendered his April 25, 2012 decision.  
20 Record 195.<sup>6</sup> Petitioner does not dispute that the letter was submitted after the evidentiary

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<sup>5</sup> As far as we can tell the county sanitarian's position regarding the residential strength of the proposed Hannah's House expansion is based on his assumption that the activities in the expanded facility are residential in nature and therefore will produce residential strength wastewater.

<sup>6</sup> The hearings official reopened the record to give petitioner an opportunity to collect effluent samples at a similar facility to bolster its case that expanded Hannah's House would produce residential strength wastewater. Record 195-97. That effort ultimately was unsuccessful and the April 25, 2012 decision stood as the county's final decision in this matter. The May 7, 2012 and May 2, 2012 letters were attached to the petitioner's request that the hearings official reopen the evidentiary record. Record 223-32.

1 record closed and neither acknowledges nor challenges the hearings official’s explanation  
2 that the letter should not be considered because it was submitted too late.

3 **C. Extrapolation Based on Grab Samples Taken at the Existing Hannah’s**  
4 **House**

5 Petitioner’s final complaint is that the hearings official assigned some significance to  
6 the unavoidable uncertainty in relying on samples taken at the existing Hannah’s House to  
7 predict whether the expanded Hannah’s House will generate residential strength wastewater.

8 The hearings official’s ultimate conclusion that petitioner failed to carry its burden of  
9 proof on the residential strength issue is set out a page 21 of the Record and was quoted  
10 earlier in this opinion. Additional findings in support of that conclusion are set out below:

11 “If I understood the testimony from the sanitation experts, which on occasion I  
12 did not, there isn’t a one-to-one relationship between the number of people  
13 and the amount of BOD and other residential strength characteristics of  
14 effluent. Rather, the more the people, the greater the likelihood of an  
15 increased use of detergents, soaps and other chemicals associated with  
16 additional meal preparation, clothes washing, and showering. The more  
17 women present also can be correlated to the number of guests who might visit  
18 on a weekly basis. The January 4, 2012 ‘grab’ sample taken from Hanna[h’s]  
19 House exceeded DEQ standards for [fats, oil and grease] and the sample taken  
20 on January 26, 2012 showed a BOD that was slightly over 76 percent of its  
21 DEQ standard. While the cause of these readings can be debated, their  
22 evidentiary import must be enhanced by the fact that all of the samples were  
23 taken at a time when only a few women and staff were present.” Record 20.

24 **1. Petitioner’s Failure to Challenge the Hearings Official’s Questions**  
25 **about DEQ Protocols**

26 Before turning to petitioner’s challenges to the above-quoted findings, interveners’  
27 first point to findings the hearings official adopted that seem to suggest some uncertainty that  
28 the samples taken at the existing Hannah’s House may not have been taken in accordance  
29 with DEQ guidelines.<sup>7</sup> Intervenors argue petitioner’s failure to assign error to those findings

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<sup>7</sup> Those findings are as follows:

“\* \* \* These samples were taken in the late afternoon and around noon-time. Apparently,  
DEQ grab sample guidelines require that samples be taken between 50-90 days after pumping

1 “is a fatal flaw to its evidentiary challenge.” Intervenors-Respondents’ Brief 20. We reject  
2 intervenors’ argument. It is far from clear in the hearings official’s findings that the hearings  
3 official believed any failure to follow DEQ guidelines may have rendered the samples  
4 unreliable. Although we reject petitioner’s evidentiary challenge for other reasons below,  
5 petitioner’s failure to assign error to the hearings official’s findings regarding DEQ sample  
6 guidelines has no effect on our consideration of petitioner’s evidentiary challenge.

7 **2. The Effect of Expanding Hannah’s House to Include More**  
8 **Residents.**

9 As we have already explained, petitioner took samples at the existing Hannah’s House  
10 (where there are a handful of current residents) to predict whether effluent can be expected to  
11 be residential strength after Hannah’s House is expanded to house as many as 20 residents  
12 and as many as seven staff (three full time). It is fair to say that the hearings official appears  
13 to have assigned some significance to that fact and assumed there is at least some chance the  
14 additional persons may make it more likely that effluent strength may increase, as compared  
15 to the strength shown in the samples from the current Hannah’s House level of operation.  
16 Petitioner faults the hearings official in that regard and points out that their expert testified  
17 that the additional persons would not change the nature of the activities at Hannah’s House,  
18 and while volume of effluent will increase with additional residents, petitioner’s expert  
19 contended the strength of that effluent would not increase.

20 As intervenors correctly note, while petitioner’s expert’s testimony may have been  
21 confident that the effluent at the expanded facility would be residential strength, he candidly  
22 conceded that no one can be certain about the strength of the effluent at the expanded  
23 Hannah’s House until samples can be taken. Record 418-32. More importantly, the  
24 opponents’ expert testified that the effluent quality at the expanded facility would exceed

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of the septic tank and that the sampling should be taken at peak usage time of the system. It is unclear how significant it is to follow this procedure but it can be presumed that it is required for DEQ permit-related testing.” Record 20.

1 residential strength. Record 263-65. In this case the hearings official was presented with  
2 conflicting, believable expert testimony regarding whether increasing the residents at  
3 Hannah's House may increase the strength of the wastewater, as compared to the waste water  
4 produced currently at Hannah's House. In such cases, the hearings official who actually  
5 heard the conflicting testimony is entitled to choose which expert to believe. *Gould v.*  
6 *Deschutes County*, 59 Or LUBA 435, 460 (2009), *aff'd* 233 Or App 623, 227 P3d 758  
7 (2010); *Walker v. Deschutes County*, 59 Or LUBA 488, 498 (2009); *Westside Rock v.*  
8 *Clackamas County*, 51 Or LUBA 264, 294, *aff'd* 207 Or App 320, 141 P3d 600 (2006);  
9 *Cadwell v. Union County*, 48 Or LUBA 500, 507-08 (2005). We conclude that a reasonable  
10 decision maker could have concluded, based on this conflicting expert testimony, that the  
11 grab samples taken at the existing Hannah's House may understate the strength of the  
12 wastewater that will actually be produced at the expanded Hannah's House.

### 13 **3. The Grab Samples**

14 A fact that petitioner does not directly confront is that for one of the DEQ residential  
15 strength parameters (fats, oil and grease) the grab sample taken on January 4, 2012 was 29.6  
16 mg/l, which exceeds the DEQ residential strength standard of 25 mg/l. Record 238; *see n 2.*  
17 The hearings official cited this exceedance of the DEQ standard as one of his reasons in  
18 finding that petitioner failed to carry its burden of proof. If this finding is viewed in context  
19 with the hearings official's finding that the strength of the wastewater at the expanded  
20 Hannah's House may increase to some degree as the number of residents increases, we  
21 believe the hearings official could reasonably conclude that petitioner failed to carry its  
22 burden to show that the effluent from the expanded Hannah's House will not exceed  
23 residential strength.

### 24 **4. The Orenco AdvanTex Pretreatment System**

25 As we explained in our discussion of the facts, an advanced sand filter treatment  
26 system will be required if Hannah's House is required to utilize its back up drain field area.

1 Due to the limited drain field area, that in turn will require that Hannah’s House convert to an  
2 advanced sand filter treatment system. We understand that the Orenco AdvanTex  
3 pretreatment system is the system that petitioner plans to employ. The hearing official found  
4 that the grab samples showed that the wastewater from the existing Hannah’s House exceeds  
5 two of the guidelines for successful operation of the AdvanTex system and concluded “it is  
6 not possible to conclude that DEQ will approve a permit application for an alternative  
7 pretreatment system as proposed by the applicant.” Record 22. That may have been an  
8 alternative basis for the hearing official’s finding that petitioner failed to carry its burden  
9 concerning the LC 16.290(5)(c) carrying capacity standard. However, it is not clear that it  
10 was, intervenor does not argue that it was, and petitioner apparently does not view it as such  
11 since petitioner does not assign error to those findings.

12 **5. Conclusion**

13 For the reasons set out in subsections 2 and 3 above, we reject petitioner’s evidentiary  
14 challenge under the fourth assignment of error.

15 The fourth assignment of error is denied.

16 The county’s decision is affirmed.