

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 ELIZABETH BACKER, BRIANNA KAMPSTRA,
5 and JACQUELENE HILFIKER,
6 *Petitioners,*
7

8 vs.
9

10 CITY OF SALEM,
11 *Respondent,*
12

13 and
14

15 KEHOE NORTHWEST PROPERTIES, LLC,
16 *Intervenor-Respondent.*
17

18 LUBA No. 2022-053
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from City of Salem.
24

25 Charles W. Woodward, IV filed the petition for review and reply brief and
26 argued on behalf of petitioners.
27

28 No appearance by City of Salem.
29

30 Garrett H. Stephenson filed the intervenor-respondent's brief and argued
31 on behalf of intervenor-respondent. Also on the brief were Bailey M. Oswald and
32 Schwabe, Williamson & Wyatt, P.C.
33

34 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
35 Member, participated in the decision.
36

37 AFFIRMED 12/01/2022
38

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

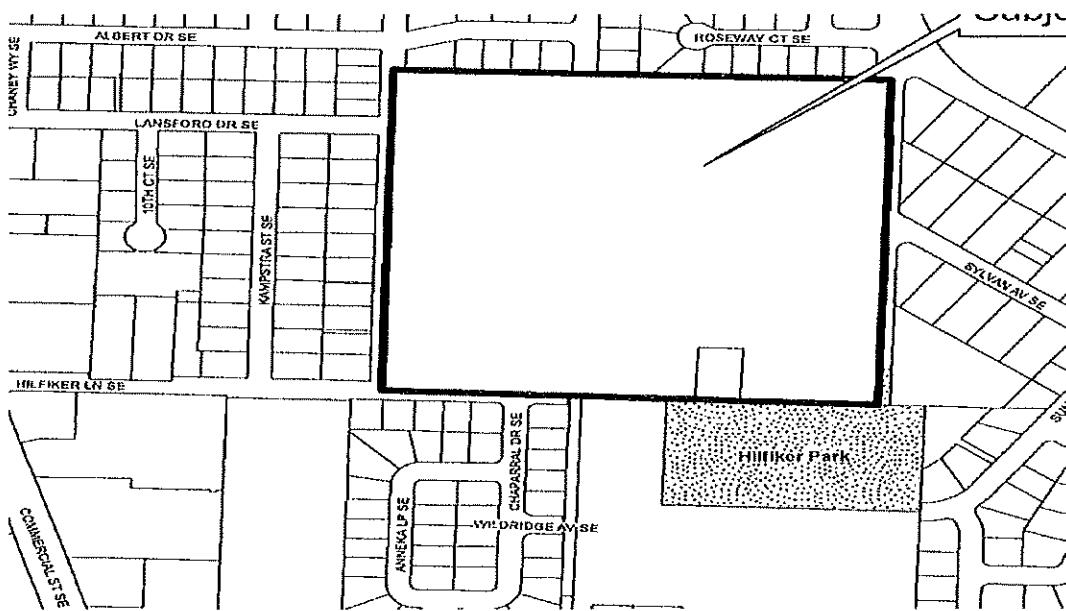
Opinion by Ryan.

2 NATURE OF THE DECISION

3 Petitioners appeal a city council decision approving a tentative plan for a
4 phased subdivision.

5 FACTS

The subject property is approximately 30 acres and zoned Residential Agriculture. The property is located generally between Commercial Street to the west and Pringle Road/Battle Road to the east, and between Hilfiker Lane to the south and Albert Drive to the north. The property slopes from south to north.



Record 6.

On July 14, 2021, intervenor-respondent (intervenor) applied for approval of a tentative plan to subdivide the property into 138 lots, in two phases. The application proposed to extend Hilfiker Lane diagonally through the subject

1 property from the southwest corner to the northeast corner to connect to Pringle
2 Road. The application proposed to remove 17 of the 28 “significant trees” located
3 on the property.¹

4 On November 3, 2021, the planning administrator approved the
5 application. On November 8, 2021, the city council voted to review the planning
6 administrator’s decision. On January 10, 2022, the city council held a public
7 hearing on the application. On February 28, 2022, the city council voted to
8 tentatively deny the application. On March 9, 2022, intervenor submitted revised
9 application materials, which proposed to reduce the number of lots from 138 to
10 125 lots and to remove six “significant trees” rather than 17 trees.² On March 14,
11 2022, the city council voted to reconsider its February 28, 2022 oral decision and
12 to reopen the record for public comment on the revised application materials. On
13 March 28, 2022, the city council voted to approve the revised application. This
14 appeal followed.

¹ Various provisions of Salem Revised Code (SRC) chapter 808 were amended effective March 16, 2022. Because intervenor submitted its application on July 14, 2021, we refer to the prior version of those provisions.

² SRC 808.005 (May 14, 2014) defines “significant trees” as “rare, threatened, or endangered trees of any size, as defined or designated under state or federal law and included in the tree and vegetation technical manual, and Oregon white oaks (*Quercus garryana*) with a dbh of 24 inches or greater.”

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners' first assignment of error implicates Salem Revised Code
3 (SRC) 808.015, which provides, in part, "No person shall remove a significant
4 tree, unless the removal is * * * undertaken pursuant to a tree conservation plan
5 approved under SRC 808.035[.]" SRC 808.035(d) (May 14, 2014), in turn,
6 provides, in part:

7 "An application for a tree conservation plan shall be granted if the
8 following criteria are met:

9 *** * * *

10 "(2) No significant trees are designated for removal, *unless there*
11 *[are] no reasonable design alternatives that would enable*
12 *preservation of such trees[.]*"(Emphasis added.)

13 As noted, the original application included a tree conservation plan that
14 proposed to remove 17 of 28 significant trees. During the proceedings before the
15 city council, opponents testified that the extension of Hilfiker Lane through the
16 property could be realigned to the west to avoid removing some of the significant
17 trees that the original application materials proposed to remove. In response,
18 intervenor's consultant submitted a memorandum explaining how opponents'
19 proposed design alternative either would not comply with city street design
20 standards or would make complying with city street design standards more

1 difficult.³ Record 4208. The February 28, 2022 staff report to the city council
2 provided additional reasons why opponents' proposed design alternative would
3 not comply with city standards, including that shifting Hilfiker Lane would
4 require sharper curves that would reduce speeds below the designated speed for
5 a collector street. Record 1012-13. After the city council's March 14, 2022
6 hearing at which it tentatively voted to approve intervenor's revised application,
7 during the open record period an opponent submitted a letter arguing that
8 opponents' proposed design alternative would comply with city standards and
9 was therefore reasonable. Record 551-52.

10 Based on intervenor's consultant's memorandum and the staff report, the
11 city council found that opponents' proposed design alternative for Hilfiker Lane
12 was not a "reasonable design alternative":

13 "The Council finds that, at least in this case, the phrase 'reasonable
14 design alternatives' means that a significant tree may be removed
15 under this exception only if there is no alternative design for the
16 proposed development that would not otherwise require adjustments
17 or exceptions to the applicable standards or required public or
18 private infrastructure improvements required to serve the
19 development, such as those concerning streets and public utilities.
20 The Council finds that design alternatives are not reasonable if they
21 would create a street system or public utility design that would not

³ These include: not meeting the intersection angle, conflicts with existing driveways, create "double frontage lots," potentially adversely affect significant trees, create dangerous driving conditions for users, impact on proposed water quality facilities, and require the shifting of other streets to meet spacing requirements. Record 4208.

1 meet City standards without exception to those standards. The
2 Council also finds that ‘reasonable design alternatives’ must be
3 practically feasible; that is, they would not require excessive grading
4 or topographical alterations to prevent removal of a significant tree.”
5 Record 65.

6 The city council concluded that, even considering the March 21, 2022 letter,
7 opponents’ proposed design alternative did not provide enough detail and the
8 detail that it did provide indicated that it would not comply with city standards.

9 In the first assignment of error, we understand petitioners to argue that the
10 city council misconstrued SRC 808.035(d)(2) in approving intervenor’s revised
11 application; that the decision is not supported by substantial evidence in the
12 record; and that the city’s findings are inadequate. ORS 197.828(2)(a), (b); ORS
13 197.195(4).⁴ Petitioners argue that the city council improperly construed SRC

⁴ ORS 197.828(2) provides that LUBA shall reverse or remand a limited land use decision if:

- “(a) [t]he decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision;
- “(b) The decision does not comply with applicable provisions of the land use regulations[.]”

ORS 197.195(4) provides:

“Approval or denial of a limited land use decision shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.”

1 808.035(d)(2) because, according to petitioners, intervenor failed to satisfy the
2 requirement petitioners allege is included in SRC 808.035(d)(2) to provide
3 multiple design alternatives, with an explanation as to the infeasibility of each, in
4 order to demonstrate that no reasonable design alternative exists.

5 Intervenor responds that the city did not impermissibly shift the burden of
6 proof to opponents when it rejected opponents proposed design. Intervenor also
7 responds by pointing out that it submitted one design alternative. As explained
8 above, the original application materials proposed removing 17 significant trees
9 to create 138 lots. To address the city council's concerns regarding SRC
10 808.035(d)(2), intervenor submitted revised application materials that proposed
11 to remove six significant trees and to create fewer lots than originally proposed—
12 125 lots instead of 138 lots.

13 Intervenor argues, and we agree, that nothing in the express language of
14 SRC 808.035(d)(2) requires an applicant to propose multiple design alternatives
15 to prove that no reasonable design alternative exists.⁵ The city's interpretation of
16 SRC 808.035(d)(2), which petitioners do not challenge, is also entitled to
17 deference. ORS 197.829(1)(a); *Siporen v. City of Medford*, 349 Or 247, 243 P3d
18 776 (2010); *Kaplowitz v. Lane County*, 285 Or App 764, 775, 398 P3d 478

⁵ Petitioners do not address or challenge the city council's interpretation of SRC 808.035(d)(2), quoted above.

1 (2017). We conclude that it is not inconsistent with the express language of the
2 provision and we affirm it.

3 The city has some latitude in finding that “there are no reasonable design
4 alternatives.” SRC 808.035(d)(2). We addressed similar language interpreted by
5 the city planning commission in *Anderson v. City of Salem*, ___ Or LUBA ___
6 (LUBA No 2021-087, Apr 21, 2022). SRC 808.035(d)(3) requires that trees and
7 native vegetation located in a riparian corridor not be removed, unless there are
8 no reasonable design alternatives that will enable preservation of trees or native
9 vegetation. The petitioners argued that there was not evidence in the record that
10 reasonable designs that avoid construction in the riparian corridor do not exist.
11 The planning commission explained that the proposed subdivision layout was
12 redesigned on multiple occasions to minimize impacts on the riparian corridor.
13 The modified design included large lots and modified streets and accesses. Those
14 modifications resulted in development less dense than allowed in the zone. The
15 planning commission concluded that the limited removal of native vegetation and
16 trees within the riparian corridor was allowable and reasonable alternative
17 designs allowing development of the property as zoned do not exist. The
18 petitioners did not challenge those findings or explain why the referenced
19 redesigns of the subdivision were insufficient to address the issue of reasonable
20 design alternatives. We denied the substantial evidence assignment of error.
21 *Anderson*, ___ Or LUBA at ___ (slip op at 50-51).

1 Here, intervenor modified the subdivision design so that the development
2 will not remove any significant trees for the purpose of creating a building
3 envelope. That change resulted in eliminating 13 lots, resulting in a development
4 less dense than allowed in the zone. Record 642. The city council concluded that
5 there are:

6 “six significant trees proposed for removal * * * in three areas: three
7 within the street section of 12th Street, two within proposed
8 alignment of Hilfler Road, and one within the public utility
9 easement fronting Lot 57. There are no reasonable design
10 alternatives that would enable preservation of all six significant trees
11 for three reasons. First, it would be impossible for [intervenor] to
12 develop the required boundary street improvements, as required by
13 SRC 803.040, without removal of the significant trees on 12th
14 Street. Second, [intervenor] has shown, and City Staff agree, that
15 there are no reasonable design alternatives to the proposed
16 alignment of Hilfler Lane because such a realignment, as proposed
17 by project opponents, would not meet City engineering design
18 standards. *See* February 28, 2022 Appeal Hearing Staff Report. In
19 so findings, the Council also relies on oral testimony to this effect
20 by City Staff during the Council’s March 28 deliberations. Third,
21 the other trees proposed to be removed are within the required
22 location of the public utility easement along proposed Hilfiker Lane.
23 [Intervenor] proposed additional conditions of approval, and
24 reduced the number of developed lots in order to preserve all the
25 significant trees it reasonably could, while still meeting street and
26 utility design requirements. Exhibit 3. Therefore, Council finds that
27 there are no reasonable design alternatives that could preserve the
28 six significant trees proposed for removal and finds that the
29 Application satisfies SRC 808.035(d)[(2)].” Record 65 (emphasis in
30 original, boldface omitted).

31 The city has some latitude in finding that “there are no reasonable design
32 alternatives.” We also agree with intervenor that in rejecting opponents’ proposed

1 design alternative, the city did not shift the burden of proof to petitioners, but
2 rather, reached the conclusion that opponents' proposed alternative was not a
3 reasonable design alternative because it would require excessive grading or
4 topographical alterations.

5 Also in the first assignment of error, petitioners argue that the city
6 council's conclusion that opponents' proposed design alternative was not
7 reasonable is not supported by substantial evidence. Petitioners argue that the
8 March 21, 2022 letter is substantial evidence that refutes each of the city's
9 bases—as expressed in intervenor's consultant's February 1, 2022 memorandum
10 and the February 28, 2022 staff report, and the city council's findings—for
11 concluding that opponents' proposed design alternative was not reasonable.

12 ORS 197.828(2)(a) provides that LUBA shall "reverse or remand a limited
13 land use decision if: * * * [t]he decision is not supported by substantial evidence
14 in the record. *The existence of evidence in the record supporting a different*
15 *decision shall not be grounds for reversal or remand if there is evidence in the*
16 *record to support the final decision[.]*" (Emphasis added.) LUBA's standard of
17 review of evidentiary challenges to a limited land use decision is different from,
18 and likely less rigorous than, the standard of review of challenges to land use
19 decisions. *Truth In Site Coalition v. City of Bend*, 71 Or LUBA 348, 363-64,
20 *aff'd*, 273 Or App 820, 362 P3d 1215, *rev den*, 358 Or 527, 366 P3d 1168 (2015).
21 Under ORS 197.828(2)(a), in determining whether the decision is "supported by
22 substantial evidence in the record," LUBA may not remand a decision on the

1 basis that there exists evidence in the record supporting a different decision. *Id.*
2 at 364.

3 Substantial evidence is evidence a reasonable person would rely on in
4 making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608
5 (1993) (citing *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262
6 (1988)). In reviewing a substantial evidence challenge, LUBA's role is not to
7 reweigh the evidence but, rather, to determine if a reasonable person, viewing the
8 whole record, could reach the conclusion that the decision-maker reached. *1000*
9 *Friends of Oregon v. Marion County*, 116 Or App 584, 587-88, 842 P2d 441
10 (1992). LUBA is not authorized to second-guess the judgments made by local
11 decision-makers with respect to the credibility of evidence presented at local land
12 use hearings. *Sanders v. Clackamas County*, 10 Or LUBA 231, 237 (1984). We
13 have no trouble concluding that the city council could reach the conclusion it
14 reached based on the evidence in the record.

15 Finally in the first assignment of error, petitioners argue that the city
16 council's findings are inadequate because the adopted findings do not address
17 intervenor's arguments below that took the position that SRC 808.035(d)(2) does
18 not apply to the application, while other findings conclude that SRC
19 808.035(d)(2) is met. Record 31-32, 48-50. Intervenor argued below that the city
20 council could not apply SRC 808.035(d)(2) to the application because (1) the
21 SRC did not indicate that it was an approval criterion; and (2) even if the SRC
22 did indicate that it was an approval criterion, it was not "clear and objective," as

1 required by ORS 197.307(4).⁶ Exhibit 2 to the city council's decision includes
2 the following findings acknowledging intervenor's position:

3 “[Intervenor] argued that SRC 808.035(d)[(2)] is not applicable to
4 the Application for two reasons. First, it is not a subdivision
5 tentative plan approval criterion nor embraced in the approval
6 criteria. [Intervenor] argued that its tree conservation plan was not
7 called up for review, but rather the subdivision tentative plan was,
8 and therefore the only applicable criteria are those that relate to
9 subdivision tentative plans. Second, [Intervenor] argued SRC
10 808.035(d)[(2)] is not ‘clear and objective’ as required by ORS
11 197.307(4) (the ‘needed housing statute’). [Intervenor] argued that
12 it is not clear and objective because the term ‘reasonable design
13 alternatives’ is not defined in the SRC. Further, even if it were,
14 application of such a standard necessarily requires discretion and it
15 is not ‘clear and objective’ on its face as required by the needed
16 housing statute. ORS 227.173(2). Project opponents did not explain
17 how SRC 808.035(d)[(2)] applies to a subdivision tentative plan, but
18 maintain that it is both clear and objective and that there are
19 reasonable design alternatives that would allow for preservation of
20 significant trees that are proposed to be removed.

21 “The Council does not resolve the issue of whether SRC
22 808.035(d)[(2)] is applicable to the Application. Regardless of
23 whether SRC 808.035(d)[(2)] applies to a subdivision tentative plan,
24 the Council finds that the Application, with [intervenor’s] proposed
25 conditions, meets the standard * * *. Record 64.

26 In its response brief, intervenor argues, initially, that the city council could
27 not apply SRC 808.035(d)(2) to the application because it is not “clear and

⁶ ORS 197.307(4) provides, in relevant part, “[A] local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing[.]”

1 objective” as required by ORS 197.307(4). For that reason, intervenor argues
2 that, even if we agree with petitioners that the city council misconstrued SRC
3 808.035(d)(2) or that its conclusion that the application complies with that
4 provision is not supported by substantial evidence, we should nevertheless affirm
5 the city council’s decision because the city erred in applying SRC 808.035(d)(2)
6 to the application.

7 Because we deny the first assignment of error, we need not address
8 intervenor’s alternative argument. However, we note that intervenor’s argument
9 is essentially a contingent cross assignment of error, which our rule at OAR 661-
10 010-0030(7) requires be included in a cross petition for review.⁷ Intervenor did

⁷ OAR 661-010-0030(7) provides:

“Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party.”

1 not file a cross petition for review and therefore we do not consider its argument
2 included in the response brief that we should affirm the city's decision.

3 Intervenor also responds, and we agree, that the findings the city adopted
4 satisfy ORS 197.195(4) and are adequate. The findings that the city adopted
5 affirmatively decline to determine whether the city may apply SRC 808.035(d)(2)
6 to the application, and instead assume it applies, and conclude that it is satisfied.
7 The findings "explain[] the criteria and standards considered relevant to the
8 decision * * *." ORS 197.195(4). Petitioners have not established that any
9 discrepancy exists, or that any discrepancy renders the findings inadequate. The
10 findings include alternative bases for approval, and are more than adequate to
11 explain why the provision is met.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 Intervenor's application materials include a traffic impact analysis (TIA).
15 Petitioners' second assignment of error raises two issues related to intervenor's
16 TIA.

17 **A. Objective 2**

18 In the second assignment of error of the petition for review, petitioners
19 argue that the extension of Hilfiker Lane is not being designed in a manner that
20 is appropriate to its functional role as a collector, as required by Objective 2 of
21 the Street System Element of the city's Transportation System Plan (TSP),
22 because the evidence in the record is that Hilfiker Lane will accommodate cut

1 through traffic.⁸ Petition for Review 23. Intervenor responds that the issue of
2 Hilfiker Lane's consistency with Objective 2 was not raised below and is
3 therefore waived under ORS 195.195(3)(c)(B) and ORS 197.835(3).⁹

4 In their reply brief, petitioners reply that their argument regarding
5 Objective 2 is not alleged as a basis to reverse or remand the decision, which we
6 understand to mean that it is not an assignment of error or subassignment of error.
7 Petitioners state that the argument in their petition for review provides "context
8 for and supports" their argument that the city council's conclusion that the
9 application complies with SRC 205.010(d)(7) is not supported by substantial
10 evidence, a subassignment of error that we address below. Given that reply and
11 clarification, we need not address intervenor's waiver argument, because even if
12 the issue was not waived, petitioners' argument that the extension of Hilfiker
13 Lane is not designed in a manner consistent with Objective 2 provides no basis
14 for reversal or remand of the decision.

15 **B. SRC 205.010(d)(7)**

16 SRC 205.010(d)(7) provides that the applicant must establish that "[t]he
17 tentative subdivision plan mitigates impacts to the transportation system

⁸ TSP Objective 2 is to "[d]esign City streets in a manner that maximizes the utility of public rights-of way, is appropriate to their functional role, and provides for multiple travel modes, while minimizing their impact on the character and livability of surrounding neighborhoods and business districts."

⁹ Intervenor also responds that Objective 2 is not an approval criterion and accordingly, any lack of compliance with it is not a basis for reversal or remand.

1 consistent with the approved [TIA], where applicable.” The city council adopted
2 five pages of findings and four conditions of approval addressing opponent
3 testimony regarding traffic, and concluding that intervenor’s tentative
4 subdivision plan will mitigate impacts to the transportation system consistent
5 with the approved TIA. Record 20-21, 55-56, 66-71.

6 In the second assignment of error, petitioners argue that the city council’s
7 conclusion that the application complies with SRC 205.010(d)(7) is not supported
8 by substantial evidence because, according to petitioners, intervenor’s TIA does
9 not include traffic volumes from other approved developments. In support of their
10 argument, petitioners point to Salem Administrative Rules chapter 109, which
11 includes rules that govern the format for TIAs, and rules for projecting
12 background traffic and traffic volumes from other proposed and approved
13 developments. Petitioners then argue that intervenor’s TIA does not include
14 projected traffic volumes from other developments in various stages of the
15 approval process in their projections of background traffic.¹⁰

16 We agree with intervenor that the city council’s conclusion that the
17 application complies with SRC 205.010(d)(7) is supported by substantial
18 evidence. ORS 197.828(2)(a). Intervenor’s TIA states that, “[a]t the direction of
19 City staff, a 1.5-percent annual growth rate was applied to the existing conditions

¹⁰ Petitioners reference a Costco store, a Walgreen’s store, a Trader Joes store, and “several large subdivisions.” Petition for Review 23-24.

1 volumes for all movements at the study intersections.” Record 3479. Intervenor’s
2 consultant’s February 14, 2022 memorandum states:

3 “In-process traffic volumes for developments that have been
4 approved and planned to be constructed and occupied by the TIA
5 study year 2023 were requested from City of Salem traffic
6 engineering staff during the scoping process. *City staff concluded no*
7 *approved developments would contribute 50 trips or more to the*
8 *study intersections and thus identified no in-process studies for*
9 *inclusion in the July 2021 TIA. In lieu of tracking individual*
10 *development in-process trips, City staff required that a regional*
11 *growth rate of two percent (consistent with the long range traffic*
12 *planning in the [TSP]) be applied to all study intersections.*” Record
13 1409 (emphases added).

14 In addition, on February 10, 2022, a city engineer sent intervenor’s attorney an
15 email stating:

16 “The Costco development was approved by City Council and the
17 improvements that have been constructed adequately mitigate their
18 traffic. The traffic generated by Costco that will be traveling along
19 this corridor is considered background traffic. This development
20 cannot [be] responsible to mitigate background growth and to
21 account for every potential development that may be contemplated
22 in the vicinity. *The background growth and the COVID adjustments*
23 *used in the [TIA] more than accommodate general traffic growth in*
24 *the area.*” Record 1417 (emphasis added).

25 Based, in part, on the foregoing evidence, the city council adopted five
26 pages of findings and four conditions of approval addressing opponent testimony
27 regarding traffic and concluding that intervenor’s tentative subdivision plan will
28 mitigate impacts to the transportation system, as required by SRC 205.010(d)(7).
29 Record 20-21, 55-56, 66-71.

1 Petitioners do not address or challenge any of the foregoing evidence or
2 findings. While petitioners do challenge intervenor’s TIA, they do not explain
3 why the TIA’s reliance on a city-determined regional growth rate in lieu of
4 tracking or estimating traffic volumes from individual approved or proposed
5 developments is not evidence to support the city council’s conclusion that
6 intervenor’s tentative subdivision plan will mitigate impacts to the transportation
7 system, as required by SRC 205.010(d)(7). We conclude that the city council
8 could reach the conclusion it reached based on the record before it.¹¹

9 The second assignment of error is denied.

10 The city’s decision is affirmed.

¹¹ In the response brief, intervenor argues that even if we agree with petitioners that the city council’s decision is not supported by substantial evidence and that remand is required, we should nevertheless affirm the city council’s decision because the city may not apply SRC 205.010(d)(7) to the application because it is not “clear and objective,” as required by ORS 197.307(4). As explained above, we do not address intervenor’s argument. *See* n 7.