

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

3  
4                   JASON HARRA and JESSICA HARRA,  
5                                   *Petitioners,*

6  
7                                   vs.

01/23/18 PM12:05 LUBA

8  
9                   CITY OF WEST LINN,  
10                                  *Respondent,*

11  
12                                  and

13  
14                   UPPER MIDHILL ESTATES, LLC,  
15                                  *Intervenor-Respondent.*

16  
17                                  LUBA No. 2017-074

18  
19                                  FINAL OPINION  
20                                  AND ORDER

21  
22                   Appeal from City of West Linn.

23  
24                   Jennifer M. Bragar, Portland, filed the petition for review and argued on  
25 behalf of petitioners. With her on the brief was Tomasi Salyer Martin PC.

26  
27                   Timothy V. Ramis, Lake Oswego, filed a joint response brief on behalf  
28 of respondent. With him on the brief was Jordan Ramis PC.

29  
30                   Seth J. King, Portland, filed a joint response brief and argued on behalf  
31 of intervenor-respondent. With him on the brief were Michael Robinson and  
32 Perkins Coie LLP.

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

36  
37                                  AFFIRMED

01/23/2018

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

**NATURE OF THE DECISION**

Petitioners appeal a decision by the city approving a 34-lot subdivision.

**REPLY BRIEF**

Petitioners move for permission to file a reply brief to respond to alleged new matters raised in the response brief. Intervenor-respondent Upper Midhill Estates, LLC (intervenor) objects to the portions of the reply brief at Reply Brief 3-4, arguing that these portions do not respond to “new matters” within the meaning of OAR 661-010-0039. Because resolving the dispute would lengthen an already lengthy opinion, we decline to address the parties’ arguments and we allow the reply brief without further discussion.<sup>1</sup>

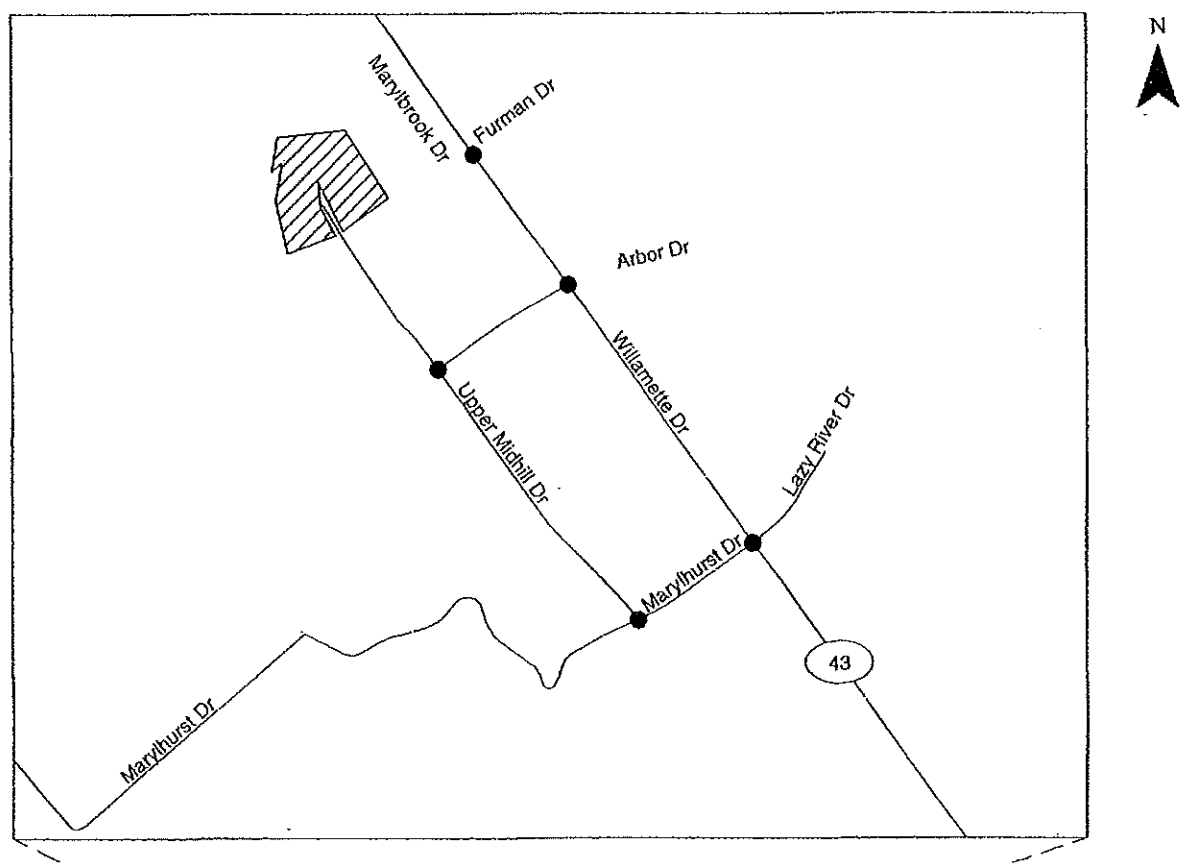
**FACTS**

Intervenor applied to subdivide an approximately 6.1-acre parcel into 34 lots. Upper Midhill Drive is a local street that currently dead ends at the property. Upper Midhill Drive intersects with other local streets that eventually connect to Oregon Highway 43, known as Willamette Drive. Record 2206-07.

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<sup>1</sup> In their third assignment of error, petitioners allege that the city committed a procedural error. The petition for review, however, does not explain how that procedural error prejudiced petitioners’ substantial rights, and the response brief points that out. In their Reply Brief, petitioners take the position that the alleged procedural error prejudiced their substantial rights “to meaningful participation in the local government’s land use proceedings, including the right to respond to material evidence submitted after the close of the evidentiary record.” Reply Brief 3.

1 As part of its application, intervenor submitted a Transportation Impact  
2 Analysis (TIA) prepared by intervenor's consultant Kittleson & Associates  
3 (Kittleson) in January 2016 (January 2016 TIA). A figure from the January  
4 2016 TIA at Record 1436 showing the location of the subject property and  
5 affected transportation facilities is set out here:



6  
7 The January 2016 TIA explains the street layout adjacent to and nearby the  
8 subject property:

9 “Willamette Drive is the major north-south arterial within the City  
10 of West Linn providing access to the cities of Lake Oswego and  
11 Portland to the north, and Oregon City to the south. Marylhurst  
12 Drive is an east-west collector, which provides access to  
13 Willamette Drive via a signalized intersection. Arbor Drive is an  
14 east-west local street that provides access to Willamette Drive via

1 a two-way stop-control intersection. Upper Midhill Drive is a  
2 north-south local street that connects the proposed development to  
3 Arbor Drive and Marylhurst Drive. The segment of Upper Midhill  
4 Drive located south of Arbor Drive is relatively narrow; however,  
5 two vehicles can pass each other on the roadway. \* \* \*” Record  
6 2210.

7 Upper Midhill Drive between Arbor Drive and Marylhurst Drive is constructed  
8 with two travel lanes that meet the width standard for local streets, except for  
9 an approximately 200-foot section adjacent to Upper Midhill Park. When the  
10 city developed Upper Midhill Park, the planning commission granted a  
11 variance to the requirement to complete half-street improvements along the  
12 park frontage. Record 614. In that section, the paved width of the road narrows  
13 to approximately 16 to 20 feet with one to four-foot gravel shoulders on each  
14 side. Record 867.

15 The January 2016 TIA concluded that with the traffic from the proposed  
16 subdivision, all affected intersections would operate within the applicable level  
17 of service or volume to capacity ratios, except the Arbor Drive approach to the  
18 Willamette Drive/Arbor Drive intersection.<sup>2</sup> That intersection currently

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<sup>2</sup> The March 2017 TIA explains:

“A Traffic Impact Analysis (TIA) was prepared for the proposed Chene Blanc Estates development in January 2016. The TIA provides an evaluation of traffic operations at several study intersections under year 2016 existing traffic conditions, year 2018 background traffic conditions (without the proposed development), and year 2018 total traffic conditions (with full build-out and occupancy of the proposed development) during the weekday a.m. and p.m. peak hours.” Record 663.

1 operates at a level of service “F,” and above capacity during the weekday p.m.  
2 peak hour.<sup>3</sup> Record 2213. In October 2016, Kittleson conducted supplemental  
3 traffic counts at the affected intersections to account for traffic generated  
4 during the school year, and in March 2017, intervenor submitted a  
5 supplemental TIA (March 2017 TIA) that found again that all affected  
6 intersections would operate within acceptable levels except the Willamette  
7 Drive/Arbor Drive intersection. Record 663-70.

8 The city and ODOT have planned long-term improvements to the  
9 Willamette Drive/Arbor Drive intersection, proposed to be constructed in 2020.  
10 Intervenor proposed interim mitigation to that intersection between the time the  
11 subdivision is developed and the time the long-term improvements are  
12 completed, and the city imposed a condition of approval (condition 3) that  
13 requires intervenor to restripe Willamette Drive with a northbound left turn  
14 pocket on the south leg of the intersection, and a left turn/refuge storage area  
15 on the north leg of the intersection, to allow for two-stage left turns. Record 12,  
16 20. The interim mitigation is referred to by the parties as the “Interim  
17 Improvement.”

18 The planning commission considered intervenor’s application at a March  
19 22, 2017 hearing, and at the conclusion of the hearing, a majority of the

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<sup>3</sup> Oregon Department of Transportation (ODOT) performance standards require all signalized and unsignalized intersections with state highways to maintain a volume to capacity ratio of .99 or less. City performance standards require a level of service “D” or better for all intersections. Record 2213.

1 planning commission voted to approve the application with conditions,  
2 including condition 3. Petitioners appealed the decision to the city council.  
3 Record 493. The city council held an on-the-record hearing on the appeal and  
4 at the conclusion voted to approve the application with additional conditions to  
5 address construction-related traffic and pedestrian safety on Upper Midhill  
6 Drive. This appeal followed.

7 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

8 West Linn Community Development Code (CDC) 85.200 provides the  
9 following criterion for land divisions:

10 “No tentative subdivision or partition plan shall be approved  
11 unless adequate public facilities will be available to provide  
12 service to the partition or subdivision area prior to final plat  
13 approval and the Planning Commission or Planning Director, as  
14 applicable, finds that the following standards have been satisfied,  
15 or can be satisfied by condition of approval.”<sup>4</sup>

16 CDC 2.030 defines “adequate public facilities” as:

17 “Public facilities that must be adequate for an application for new  
18 construction, remodeling, or replacement of an existing structure  
19 to be approved are *transportation*, water, sewer, and storm sewer  
20 facilities. To be adequate, on-site and adjacent facilities must meet  
21 City standards, *and off-site facilities must have sufficient capacity*  
22 *to (1) meet all existing demands, (2) satisfy the projected demands*  
23 *from projects with existing land use approvals, plus the additional*  
24 *demand created by the application, and (3) remain compliant with*  
25 *all applicable standards.*

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<sup>4</sup> Various subsections of CDC 85.200 further require an applicant to satisfy standards such as requirements for streets, the length of blocks and lots, pedestrian and bicycle trails, grading, water, sewers, and storm detention.

1 “For purposes of evaluating discretionary permits in situations  
2 where the level-of-service or volume-to-capacity performance  
3 standard for an affected City or State roadway is currently failing  
4 or projected to fail to meet the standard, and an improvement  
5 project is not programmed, the approval criteria shall be that the  
6 development avoids further degradation of the affected  
7 transportation facility. Mitigation must be provided to bring the  
8 facility performance standard to existing conditions at the time of  
9 occupancy.” (Emphases added).

10 Thus, CDC 85.200 and the definition of “adequate public facilities” together  
11 require the city to find (1) that “on-site facilities” meet city standards, and (2)  
12 that “off-site facilities” have sufficient capacity to meet existing demand plus  
13 demand from projects with existing approvals and the demand created by the  
14 land division. For off-site facilities that are failing or projected to fail, and for  
15 which an improvement to the failing facility is not programmed, the city must  
16 find that the land division “avoids further degradation of the affected  
17 transportation facility.” The definition requires mitigation to bring the facility  
18 into compliance with performance standards. Against that backdrop, we  
19 address petitioners’ first and second assignments of error together.

20 **A. Intervenor’s TIAs**

21 As explained above, intervenor submitted into the record the January  
22 2016 TIA and the March 2017 TIA (the TIAs), both conducted by Kittleson.  
23 Intervenor also submitted into the record a memorandum from ODOT stating  
24 that ODOT had reviewed the January 2016 TIA and recommended that  
25 intervenor be required to (1) construct the Interim Improvement and (2)  
26 contribute a proportionate share of funding for the long-term improvements to



1 Willamette Drive and the intersection that ODOT and the city have planned to  
2 fund. Record 718-19. Based on that evidence, the planning commission  
3 concluded that CDC 85.200 was satisfied. Record 285-87, 319-25.

4 The city council's decision incorporates as findings: (1) the planning  
5 commission's decision, which incorporated as findings a March 22, 2017 staff  
6 report; (2) all of intervenor's submittals, including the January 2016 TIA and  
7 the supplemental March 2017 TIA; (3) the May 8, 2017 city council meeting  
8 staff report; and (4) intervenor's March 1, 2017 supplemental narrative; and (5)  
9 March 22, April 19 and May 11, 2017 letters from intervenor's counsel. The  
10 city council's decision also adopted additional findings in support of its  
11 decision, which we discuss below.

12 **a. CDC 85.170(B)(2)(e)(1)(C)(1)-(5)**

13 In portions of their first and second assignments of error, petitioners  
14 argue that intervenor's proposal fails to meet the requirements of CDC  
15 85.170(B)(2)(e)(1)(C)(1)-(5). Petition for Review 10, 14-15, 24-25, 27-28.  
16 Further, petitioners argue that these CDC provisions provide that when a traffic  
17 impact analysis is required for a land division, the site, traffic and circulation  
18 design and facilities for all transportation modes, including mitigation  
19 measures, must be designed to meet certain standards.<sup>5</sup>

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<sup>5</sup> CDC 85.170 requires supplemental submittals for subdivisions. CDC 85.170(B)(2)(e)(1)(C)(1)-(5) provide that when a traffic impact analysis is required:

1           The provisions of the CDC governing appeals that applied at the time the  
2 city council’s decision was adopted, provided that an appeal of a planning  
3 commission decision is “confined to \* \* \* [t]hose issues set forth in the request  
4 to appeal[;]” that “[r]eview shall be limited to the issues clearly identified in  
5 the notice of appeal[;]” and that “[n]o issue may be raised on appeal that was  
6 not raised before the Planning Commission with sufficient specificity to enable  
7 the [Planning] Commission and the parties to respond.” CDC 99.280(B)(1) and

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“(C) The proposed site design and traffic and circulation design and facilities, for all transportation modes, including any mitigation measures, are designed to:

“(1) Have the least negative impact on all applicable transportation facilities; and

“(2) Accommodate and encourage non-motor vehicular modes of transportation to the extent practicable; and

“(3) Make the most efficient use of land and public facilities as practicable; and

“(4) Provide the most direct, safe and convenient routes practicable between on-site destinations, and between on-site and off-site destinations; and

“(5) Otherwise comply with applicable requirements of the City of West Linn Community Development Code.”

1 (D)(2014). Intervenor and the city (jointly respondents) respond by pointing to  
2 findings adopted by the city council that:

3 “[A]lthough appellants contend that Applicant’s transportation  
4 analysis is deficient because it does not address CDC  
5 85.170.B.2.e.1.C, the Council denies this contention because this  
6 issue is outside the scope of the appeal. It was not included in the  
7 appeal statement, and it was not raised with sufficient specificity  
8 to allow the parties to address the issue before the [Planning]  
9 commission closed the evidentiary record.” Record 17.

10 Because petitioners do not assign error to the above-quoted findings,  
11 those unchallenged findings mean that any assignments of error presented in  
12 the petition for review that argue that the TIAs fail to meet the requirements of  
13 CDC 85.170(B)(2)(e)(1)(C)(1)-(5) are outside the scope of issues that the city  
14 found were properly raised and provide no basis for reversal or remand of the  
15 decision. *Citizens for Responsible Development v. City of The Dalles*, 59 Or  
16 LUBA 369, 375 (2009).

17 **b. October 2016 Traffic Counts**

18 LUBA is required to reverse or remand the city’s decision if, as relevant  
19 here, the decision is not supported by substantial evidence in the whole record.<sup>6</sup>  
20 ORS 197.835(9)(a)(C). In their first assignment of error, petitioners argue that  
21 “intervenor’s traffic analysis is not supported by substantial evidence.” Petition  
22 for Review 12. That is so, petitioners argue, because the supplemental traffic

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<sup>6</sup> The challenged decision is a “limited land use decision” as defined in ORS 197.015(12). However, no party argues that our standard of review is the standard at ORS 197.828 for review of limited land use decisions.

1 counts that Kittleson conducted in October 2016 and relied on to prepare the  
2 March 2017 TIA are not included in the record. As a result, petitioners argue,  
3 the challenged decision is not supported by substantial evidence in the whole  
4 record.

5 In findings the city council adopted in response to the issue when it was  
6 raised by petitioners for the first time during the proceedings before the city  
7 council, the city council found that it could rely on the January 2016 TIA as  
8 supplemented by the March 2017 TIA even though the October 2016 traffic  
9 counts were not included in the March 2017 TIA, because the counts were  
10 reflected in the trip figures that are derived from those traffic counts and  
11 included in the March 2017 TIA. Record 16-17. The city council found that the  
12 March 2017 TIA provided evidence in the record, submitted by experts, to  
13 support a city council conclusion that CDC 85.200 is met and that all  
14 transportation facilities are adequate or will be adequate with mitigation.  
15 Petitioners do not explain why the city council's decision — that adequate off-  
16 site transportation facilities exist — is not supported by substantial evidence in  
17 the record, namely the TIAs, when the March 2017 TIA includes trip figures  
18 that are derived from the October 2016 traffic counts. Record 664-65 (Kittleson  
19 letter explaining how the October 2016 traffic counts were applied and used to  
20 update the January 2016 TIA). Petitioners also do not point to any other  
21 evidence in the record that undermines the trip figures that are based on the  
22 October 2016 traffic counts, or argue that the trip figures are incorrect.

1 In reviewing a substantial evidence challenge, LUBA’s role is not to  
2 reweigh the evidence, but rather to determine if a reasonable person, viewing  
3 the whole record, could reach the conclusion that the decision maker reached.  
4 *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 587-88, 842 P2d  
5 441 (1992). We agree with the city and intervenor that a reasonable person  
6 could rely on the TIAs to conclude that CDC 85.200 is satisfied; *i.e.*, that with  
7 mitigation off-site transportation facilities are adequate to serve the proposed  
8 subdivision. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262  
9 (1988). The March 2017 TIA explains that it includes trip figures that  
10 “illustrate the supplemental traffic counts and summarize the results of the  
11 updated traffic analysis.” Record 665, 674, Figure 4. In essence, the included  
12 trip figures are a refinement of the raw traffic counts and a reasonable person  
13 could rely on those trip figures to conclude that CDC 85.200 is satisfied, even  
14 if the raw traffic counts are not separately included in the record.

15 In another portion of their first assignment of error, petitioners argue  
16 that “the [p]etitioners were prejudiced because they did not have the  
17 opportunity to review the underlying data.” Petition for Review 13 (citation  
18 omitted). Petitioners further argue that:

19 “[p]etitioners were not provided a full and fair opportunity to  
20 analyze whether the Applicant’s traffic study is correct.  
21 Respondent’s reliance on the incomplete TIA requires remand to  
22 allow the petitioners and the public to have a full and fair  
23 opportunity to review and analyze the October 2016 traffic count  
24 data, and the TIA’s conclusions about [the] adequacy of  
25 transportation facilities.” Petition for Review 15.

1 Although their argument is barely developed, we understand petitioners to  
2 argue that the city committed a procedural error in relying on the March 2017  
3 TIA when that TIA did not include the October 2016 traffic counts, and that  
4 alleged procedural error prejudiced petitioners' right to an opportunity to  
5 review the October 2016 traffic counts. We reject that argument for a few  
6 reasons. First, as noted, the city council adopted findings responding to the  
7 argument when it was presented for the first time during the on-the-record  
8 proceedings before the city council. Second, in order to prevail on a claim of  
9 procedural error, a petitioner must identify the procedure allegedly violated.  
10 *Stoloff v. City of Portland*, 51 Or LUBA 560, 563 (2006). Petitioners do not  
11 explain how the absence of the October 2016 traffic counts in the record is a  
12 procedural error, or identify any CDC or other provision that requires the city  
13 to include the October 2016 traffic counts in the record. Accordingly,  
14 petitioners have failed to establish a basis for reversal or remand.

15 **c. Assumed Growth Rate**

16 CDC 2.030's definition of "adequate public facilities" provides that "off-  
17 site facilities must have sufficient capacity to (1) meet all existing demands,  
18 [and] (2) satisfy the projected demands from projects with existing land use  
19 approvals, plus the additional demand created by the application[.]" The TIAs  
20 used the traffic counts collected in June 2015 (Record 1439)  
21 and October 2016, and applied a two percent growth rate "[t]o account for  
22 trips from in-process developments and additional growth in regional and local

1 traffic in the study area[.]” Record 16 (city’s findings explaining traffic  
2 projections); *see also* 664-65 (Kittleston letter explaining traffic projections  
3 used an assumed growth rate to “reflect growth in regional and local traffic  
4 within the study area between 2016 and the year the proposed development is  
5 expected to be fully built, 2018”).

6 In their second assignment of error, petitioners argue that the city’s  
7 decision is not supported by substantial evidence because intervenor failed to  
8 provide evidentiary support for using a two percent growth rate to estimate  
9 existing demands from growth in traffic in the area. Petition for Review 14.  
10 Also according to petitioners, in order to account for projected demand from  
11 approved but not yet built developments, CDC 2.030 requires “input of actual  
12 trip generation, not a growth rate.” Petition for Review 15.

13 The city council adopted findings that conclude that the assumed growth  
14 rate of two percent is consistent with CDC 2.030’s requirement to calculate “all  
15 existing demands” under CDC 2.030:

16 “Although appellants contended that [Kittleston’s] assumption of a  
17 one percent annual growth rate (two percent overall for the 2017-  
18 18 time period) was not supported by any evidence, the Council  
19 denies the appellants’ contention. Matt Bell, Transportation  
20 Planner with [Kittleston], testified during the public hearing that  
21 the one percent annual growth rate is common throughout the  
22 Portland area and was coordinated with the transportation  
23 engineers at both the City and ODOT. Although appellants  
24 disagree with the selected growth rate, they do not cite to any  
25 substantial evidence in the record that conflicts with or  
26 undermines the selected growth rate nor do they contend that it is  
27 not an acceptable industry standard.” Record 17.

1 The city council also adopted findings that conclude that intervenor properly  
2 relied on that growth rate to project demand from both the project and from  
3 approved projects, consistent with CDC 2.030:

4 “[T]he Council finds that Kittleson correctly accounted for trips  
5 from in-process developments and adjusted its counts to consider  
6 school year trips. *To account for trips from in-process*  
7 *developments and additional growth in regional and local traffic*  
8 *in the study area*, Kittleson assumed a two percent (one percent  
9 per year for each of two years) in its traffic counts. \* \* \* *Kittleson*  
10 *testified that this adjustment was sufficient to account for trips*  
11 *from in-process developments such as the new duplexes on*  
12 *Willamette Drive and the expansion of Mary's Woods*. \* \* \* Stated  
13 another way, if Kittleson had separately added in trips from in-  
14 process developments and assumed a two percent growth in area  
15 traffic, it would have resulted in double-counting of these  
16 background trips. Further, to account for school year trips,  
17 Kittleson conducted supplemental traffic counts at the affected  
18 intersections in October 2016 and seasonally adjusted these  
19 counts. \* \* \* This type of seasonal adjustment is industry standard  
20 and consistent with the ODOT Analysis Procedures Manual. \* \* \*  
21 Kittleson re-ran its analyses with the adjusted October 2016 counts  
22 and found that, subject to implementing the identified mitigation  
23 measures, all affected intersections would operate consistent with  
24 applicable performance standards.

25 “Although appellants contended that Kittleson’s analysis failed to  
26 account for trips from in-process developments (including new  
27 duplexes on Willamette Drive and the expansion of Mary’s  
28 Woods), the Council denies the appellants’ contention for the  
29 reasons stated above. The Council further finds that \* \* \* the  
30 Mary’s Woods development is not expected to occur until after  
31 full build-out of the development; therefore, the Council finds  
32 that trips associated with the Mary’s Woods expansion would not  
33 actually affect the system in 2018, the occupancy date for  
34 applicant’s development in Kittleson’s analysis. Stated within the  
35 terms of the CDC 2.030 definition of ‘adequate public facilities,’  
36 there will be no ‘projected demand’ from Mary’s Woods in the



1 year the subject development opens. Therefore, these trips need  
2 not be part of the analysis. On a related point, the Council denies  
3 the appellants' contention that Kittleson erred in its assumed  
4 distribution of trips from Mary's Woods. Appellants did not cite to  
5 any alternative trip distribution in the record. Moreover, the  
6 Council finds that, as stated, the Mary's Woods expansion is not  
7 expected to occur until later, meaning that any trip distribution is  
8 not part of the 'projected demand' that must be considered in  
9 determining whether there are 'adequate public facilities.'" Record  
10 16-17 (emphases added).

11 The findings explain that the city accepted intervenor's traffic expert's  
12 explanation that a one percent per year growth rate is a commonly used  
13 assumption, and also relied on the agreement of ODOT and the city's engineers  
14 with using that assumption. Moreover, as we understand it, the two approved  
15 developments are not yet built, so any trip projections from those approved but  
16 not constructed developments will be just that – projections, rather than actual  
17 trip counts. Accordingly, petitioners' argument that CDC 2.030 requires "input  
18 of actual trip generation, not a growth rate," simply makes no sense for  
19 approved but not yet built developments. Petition for Review 15. Stated  
20 differently, if a project is not yet built, no actual trips are associated with that  
21 project, and any projections about future trips must necessarily rely on some  
22 assumptions about growth. Petitioners do not point to any evidence in the  
23 record that undercuts the TIAs' reliance on an assumed two percent growth rate  
24 to calculate existing demand and to project future demand from existing  
25 approved projects and the proposed subdivision. Accordingly, we think that a

1 reasonable person could rely on the TIAs' assumed growth rate to conclude  
2 that CDC 85.200 is satisfied.

3 The first and second assignments of error are denied.

#### 4 **THIRD ASSIGNMENT OF ERROR**

5 During the proceedings below, participants raised concerns about  
6 construction-related traffic on affected streets, including Upper Midhill Drive.  
7 The planning commission imposed a condition of approval that prohibited  
8 truck traffic on Upper Midhill Drive between Arbor Drive and Marylhurst  
9 Drive. Record 288.

10 The city council disagreed with the planning commission that a  
11 condition prohibiting truck traffic on Upper Midhill Drive was necessary, but  
12 found that use of a loop route for inbound and outbound truck traffic "may  
13 provide for a more efficient and safer circulation of temporary truck traffic[.]"  
14 Record 18. The city adopted two conditions of approval that require (1) a  
15 Traffic Management Plan (TMP) that routes inbound truck traffic from  
16 Willamette Drive up Arbor Drive to Upper Midhill Drive, and outbound truck  
17 traffic down Upper Midhill Drive to Marylhurst Drive to Willamette Drive  
18 (condition 11); and (2) intervenor to install a paint stripe four feet from the  
19 eastern edge of Upper Midhill Drive, between Arbor Drive and Marylhurst  
20 Drive, to establish a safety zone for pedestrian traffic (condition 17). Record  
21 18, 23.

1           The arguments in petitioners’ third assignment of error are difficult to  
2 follow, but we understand petitioners to argue that the record does not include  
3 substantial evidence that the TMP and pedestrian striping are sufficient to  
4 support the city’s determination that the subdivision complies with CDC  
5 2.030’s definition of “adequate public facilities.” Specifically, petitioners argue  
6 the TMP and the pedestrian striping requirements do not meet “city engineering  
7 standards.” Petition for Review 31; Reply Brief 4. If that is petitioners’  
8 argument, we reject it. The CDC 2.030 definition provides that to be  
9 “adequate,” off-site facilities must have sufficient *capacity* to “remain  
10 compliant with all applicable standards.” CDC 2.030 does not require a  
11 demonstration that an off-site facility complies with engineering standards.

12           In other portions of their third assignment of error, we also understand  
13 petitioners to argue that the record does not include substantial evidence that  
14 CDC 85.170(B)(2)(e)(1)(C)(1)-(5) is met by the TMP and the pedestrian  
15 striping. We reject that argument. First, for the reasons explained above in our  
16 resolution of the first and second assignments of error, challenges to the  
17 proposal’s compliance with CDC 85.170(B)(2)(e)(1)(C)(1)-(5) are outside of  
18 the scope of review in this appeal and the decision includes a finding not  
19 challenged by petitioners to that effect. Second, petitioners’ arguments  
20 regarding CDC 85.170(B)(2)(e)(1)(C)(1)-(5), a lengthy and detailed CDC  
21 provision set out in n 5, are not sufficiently developed for our review.  
22 *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

1 Finally, we understand petitioners to argue that the city committed two  
2 procedural errors that prejudiced their substantial rights. First, citing *Dodds v.*  
3 *West Linn*, \_\_ Or LUBA \_\_ (LUBA No. 2016-071, January 12, 2017),  
4 petitioners argue that the city committed a procedural error when it included  
5 conditions 11 and 17 in the final decision, without providing petitioners an  
6 opportunity to raise concerns about the TMP and pedestrian striping  
7 requirements that are required by those conditions.

8 In *Dodds*, the city council concluded that the applicant's drainage plan  
9 failed to satisfy various approval criteria that applied to drainage from the  
10 property. \_\_ Or LUBA \_\_ (slip op at 7). However, in spite of that conclusion,  
11 the city council approved the application, and imposed a condition of approval  
12 that required the applicant to submit a revised drainage plan for review, without  
13 any evidence in the record that the revised drainage plan would meet the  
14 applicable approval criteria and without public review of that revised drainage  
15 plan. *Id.* (slip op at 11-12).

16 In the present case, as far as we can tell, conditions 11 and 17 do not  
17 relate to any approval standards. For example, the city did not impose the  
18 conditions to ensure that Upper Midhill Drive has the *capacity* to meet existing  
19 standards, pursuant to CDC 2.030. The evidence in the record is that Upper  
20 Midhill Drive has capacity to meet the standards that apply to a local street.  
21 Record 363. Rather, the city imposed conditions 11 and 17 in order to address  
22 concerns raised by neighbors during the proceedings below about construction-

1 related traffic. In any case, the issue in *Dodds* was the total lack of evidence  
2 supporting the conditions imposed, not the fact that the city imposed the  
3 conditions without allowing participants to review them. The city did not err in  
4 imposing conditions 11 and 17 in the final decision.

5 Second, petitioners argue that the city committed procedural error when  
6 it accepted new evidence into the record after the record was closed, in the  
7 form of staff testimony during the city council's deliberations at its June 19,  
8 2017 city council meeting. Respondents respond, and we agree, that the  
9 transcript of the city council hearing that is attached to the petition for review  
10 demonstrates that the city council did not accept new evidence during the  
11 meeting. Petition for Review Appendix A 49. In fact, in their reply brief  
12 petitioners concede that, after being advised by the city's attorney that in order  
13 to consider new testimony it had to re-open the record, the city did not re-open  
14 the record to accept the new testimony. Reply Brief 1. Accordingly, petitioners'  
15 arguments provide no basis for reversal or remand.

16 The third assignment of error is denied.

#### 17 **FOURTH ASSIGNMENT OF ERROR**

18 Intervenor submitted a geotechnical study and a grading plan.<sup>7</sup> Record  
19 1774-1877. The study was prepared based on geologic mapping for the site and  
20 on excavations from eleven test pits on the property. Record 9.

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<sup>7</sup> No party identifies the approval criteria implicated in this assignment of error. However, in a staff report to the planning commission, the city relied on

1 In response to petitioners’ second appeal issue, the city council adopted  
2 additional findings that concluded that “it is geotechnically feasible to develop  
3 the proposed project on the site.”<sup>8</sup> Record 9. At intervenor’s suggestion, the  
4 city imposed a condition of approval (condition 13) that requires intervenor to  
5 prepare and submit to the city engineer for review and approval “a  
6 supplemental geotechnical analysis addressing the soils conditions across the  
7 property and in the areas of the local streets within the subdivision, including  
8 an estimate of the amount of soil to be removed in order to construct the streets  
9 and develop the building sites.” Record 10.

10 In their fourth assignment of error, petitioners argue that condition 13  
11 lacks a future public review process that petitioners argue is required under  
12 *Gould v. Deschutes County*, 216 Or App 150, 159-60, 171 P3d 1017 (2007).<sup>9</sup>

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the geotechnical study and grading plan to find that CDC 85.200(E) was met.  
Record 1280. Accordingly, we understand that the geotechnical study and  
grading plan were submitted in order to demonstrate compliance with CDC  
85.200(E).

<sup>8</sup> Petitioners’ second appeal issue was:

“We do not believe that sufficient geological studies have been  
done on this parcel. There is a history of drainage issues and  
mudslides in the surrounding area that we believe have not been  
sufficiently addressed in the application.” Record 9.

<sup>9</sup> Although petitioners do not identify a standard of review for the fourth  
assignment of error, we understand petitioners to argue that the city committed  
a procedural error that prejudiced their substantial rights to participate in the  
proceeding by deferring review of supplemental geotechnical studies to a  
future proceeding that lacks public participatory rights. ORS 197.835(9)(a)(B).

1 Petitioners argue that LUBA should remand the decision in order to amend  
2 condition 13 to allow public review of the supplemental geotechnical analysis.

3 In response, respondents argue that the city council adopted a current  
4 finding that the geotechnical study addresses all geotechnical issues, and that  
5 condition 13 does not defer a finding of compliance on that issue to a later  
6 stage proceeding. Having concluded that the geotechnical study supported the  
7 city council's conclusion that it is geotechnically feasible to develop the  
8 subdivision, respondents argue, the city's decision is consistent with *Meyer v.*  
9 *City of Portland*, 67 Or App 274, 678 P2d 741, rev den 297 Or 82 (1984). In  
10 *Meyer*, the court of appeals held that a city's determination that the property  
11 could be safely developed and that there were suitable methods of storm water  
12 and groundwater disposal was supported by a detailed geotechnical study of the  
13 area and extensive testimony from the city's experts, and the city could defer to  
14 the city's experts the selection of a particular solution to identified problems. In  
15 contrast, under *Gould* a local government may defer a final decision about  
16 whether one or more development standards is satisfied to a future date,  
17 assuming the public retains participation rights in that future decision making.

18 We agree with respondents that what the city council did here is identical  
19 to what the city council did in *Meyer*. Here, the city council adopted a current  
20 finding that the property can feasibly be developed from a geotechnical  
21 standpoint, and that finding is supported by the geotechnical study. The city

1 council imposed condition 13 at intervenor’s suggestion, not as a deferral of  
2 finding compliance with applicable approval criteria.

3 The fourth assignment of error is denied.

4 **FIFTH ASSIGNMENT OF ERROR**

5 In their fifth assignment of error, petitioners argue that conditions of  
6 approval 3, 12, and 14 unconstitutionally delegate to ODOT authority to  
7 modify the approved application, in violation of the Delegation Clause of the  
8 Oregon Constitution.<sup>10</sup> Article 1, section 21 of the Oregon Constitution  
9 prohibits passing any law, “the taking effect of which shall be made to depend  
10 upon any authority, except as provided in this Constitution[.]” The Delegation  
11 Clause prohibits laws that delegate the power to amend those laws to another

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<sup>10</sup> Condition 3 requires construction of the Interim Improvement, as described above in our resolution of the first and second assignments of error.

Condition 12 provides:

“**Crosswalk on Highway 43.** The Applicant shall propose to construct a crosswalk with pedestrian activated warning lights across Highway 43 at Arbor Street, subject to ODOT review, modification, and approval.” Record 22 (bold in original).

Condition 14 provides:

“**Tri-Met Bus Stops.** The Applicant shall coordinate with Tri-Met, and subject to ODOT review, modification, and approval, assure that bus stops meeting applicable standards are available on Highway 43 near Arbor Street.” *Id.* (bold in original).



1 entity. *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292,  
2 981 P2d 368 (1999).

3 Respondents respond that the city council’s decision, including its  
4 conditions of approval, is not a “law” for purposes of Article 1, section 21. We  
5 agree. The challenged decision approving a subdivision is not an amendment of  
6 the CDC, was not adopted by ordinance, and was the result of a quasi-judicial,  
7 rather than legislative process. Accordingly, any delegation that has occurred is  
8 not a delegation of the city’s legislative authority to make or amend laws, and  
9 petitioners’ arguments provide no basis for reversal or remand of the decision.

10 The fifth assignment of error is denied.

11 The city’s decision is affirmed.