

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

4 COTTONWOOD CAPITAL PROPERTY
5 MANAGEMENT, LLC, FRANK FLECK,
6 and GARRY GOSSETT,
7 *Petitioners,*
8

9 vs.

10 CITY OF PORTLAND,
11 *Respondent,*
12

13 and
14

15 RECOLOGY OREGON MATERIAL
16 RECOVERY, INC.,
17 *Intervenor-Respondent.*
18

19 LUBA No. 2011-120
20

21 FINAL OPINION
22 AND ORDER
23

24
25 Appeal from City of Portland.
26

27 Lee Davis Kell, Portland, filed the petition for review and argued on behalf of
28 petitioners. With him on the brief was Thomas Rask, III and Kell Alterman and Runstein
29 LLP.
30

31 Kathryn S. Beaumont, Senior Deputy City Attorney, and Linly F. Rees, Deputy City
32 Attorney, Portland, filed a joint response brief and Linly F. Rees argued on behalf of
33 respondent.
34

35 Michael C. Robinson, Portland, filed a joint response brief and argued on behalf of
36 intervenor-respondent. With him on the brief were Seth J. King and Perkins Coie.
37

38 RYAN Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
39 participated in the decision.
40

41 AFFIRMED

6/13/2012

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

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NATURE OF THE DECISION

Petitioners appeal a city council decision granting (1) a conditional use permit to allow food waste to be accepted at an existing material recovery facility, and (2) an adjustment to vehicle access standards that apply to the conditional use permit application.

MOTION TO INTERVENE

Recology Oregon Material Recovery Inc, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is granted.

FACTS

Intervenor leases the subject 6.2 acre property located at 6400 S.E. 101st Avenue, roughly in the middle of an existing approximately 100-acre industrial park that is zoned Heavy Industrial (IH). Interstate-205 is located adjacent to the industrial park on the west, and S.E. Foster Road intersects S.E. 101st Avenue approximately one-half mile to the north of the industrial park. A tree buffer surrounds the entire industrial park, and residential uses are located south of the subject property, south of S.E. Knapp Street.

Intervenor operates an existing transfer facility that currently accepts non-food waste, including yard debris and construction debris. Intervenor applied for a conditional use permit to allow the existing facility to accept mixed food waste and yard debris for recycling and transfer to an off-site composting facility. No composting is proposed to occur at the site. The hearings officer approved the application for the conditional use permit and the adjustment, and petitioners appealed the decision to the city council. The city council approved the applications, and this appeal followed.

FIRST THROUGH THIRD ASSIGNMENTS OF ERROR

A. Introduction

Portland City Code (PCC) 33.815.220 sets out the approval criteria for a conditional use permit for waste related uses. One of those approval criteria, PCC 33.815.220(C),

1 provides that the city must find that “[t]here will be no significant health or safety risk to
2 nearby uses” from the proposed use. A second approval criterion, PCC 33.815.220(G),
3 requires the city to find that “[t]he proposal complies with the regulations of Chapter 33.254,
4 Mining and Waste Related Uses.” In turn, PCC 33.254.060 requires the applicant to submit a
5 mitigation plan to mitigate any nuisance impacts from the use and an operating plan that
6 documents that the proposed use can comply with operating standards for odor and noise set
7 out in PCC 33.262.070 (Odor) and PCC 33.262.050 (Noise). In their first, second, and third
8 assignments of error, petitioners challenge various aspects of the city’s decision that
9 conclude that PCC 33.815.220(C) and (G) are met, and that the proposed use can comply
10 with the city’s operating standards for odor and noise set out in PCC 33.262.070 and PCC
11 33.262.050. In their second and third assignments of error regarding PCC 33.262.070 and
12 PCC 33.262.050 (odor and noise standards) petitioners largely repeat the arguments they
13 make concerning odor and noise under their first assignment of error regarding the city’s
14 PCC 33.815.220(C) health and safety standard. We therefore combine our discussion of
15 those assignments of error.

16 **B. Odor and Leachate**

17 PCC 33.262.070 provides:

18 “A. Odor standard. Continuous, frequent, or repetitive odors may not be
19 produced. The odor threshold is the point at which an odor may just be
20 detected.

21 “B. Exception. An odor detected for less than 15 minutes per day is
22 exempt.”

23 The application proposes to install a fully enclosed odor control system and a leachate
24 management system that is comprised of an aeration system and biofilters that includes an

1 aerated floor and negative air system.¹ The city council concluded that the proposed system
2 would control odors so that PCC 33.262.070 would be satisfied and that there would be no
3 significant health or safety risks from odors or leachate under PCC 33.815.220(C), and
4 further imposed additional conditions on the proposed use that limit the daily number of
5 garbage trucks and require the removal of mixed yard debris/food waste within 48 hours after
6 it is deposited.

7 In a portion of their first assignment of error, petitioners argue that the city's
8 conclusions that there will be no significant health or safety risks from odor and leachate and
9 that the proposed use can operate within the standard set out in PCC 33.262.070 is not
10 supported by substantial evidence in the record. According to petitioners, the evidence in the
11 record is insufficient to demonstrate that the proposed odor and leachate control systems will
12 work, since intervenor did not design and test a prototype of the systems. Petitioners also

¹ The decision describes the odor control and leachate management systems and the city's findings regarding the applicable approval criteria:

“* * *[T]rucks carrying mixed yard debris/food waste arrive at the Subject Property, drive to the building, back into the building through bay doors and dump the material onto the floor. The concrete floor of the building, at the location where the material is dumped, has channels covered by perforated grating. Furthermore, if mixed yard debris/food waste is not removed the same day as it is delivered, then it * * * will be covered/treated with debris and or hog fuel already located on the Subject Property. Covering the yard debris/food waste will minimize odors escaping from the mixed yard debris/food waste.

“Odors will be controlled, while in the building, with the installation of an aerated floor and negative air system. Specifically, the system entails vent holes being drilled into the floor of the building. A fan will be used to pull the air into the holes, into pipes that then lead to a biofilter. The biofilter is composed of wood chips which are used to scrub the odor. Also, the liquid by-product from the waste material, aka leachate, will be collected and piped into a tank and transported off site.

“ * * * * *

“[T]he collection piping system will be constructed of heavy-duty materials that will prevent leaking. Moreover, the system will be tested to ensure that it operates without leaking. * * * Further, the piping system is enclosed in concrete which would prevent contamination. Therefore, the risk of a leak in the leachate system is quite low and would be immediately apparent, which will prevent impacts to area groundwater and surface water.” Record 25-26, 32.

1 fault the city to failing to impose conditions of approval that petitioners proposed to mitigate
2 any odors.

3 LUBA is authorized to reverse or remand a land use decision if the local government
4 “[m]ade a decision not supported by substantial evidence in the whole record.” ORS
5 197.835(9)(a)(C). In reviewing the decision to determine whether it is supported by
6 substantial evidence in the whole record, LUBA must consider all the evidence in the record
7 that the parties cite and determine whether, based on that evidence, the city’s decision is
8 supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752
9 P2d 262 (1988). We have no trouble concluding that the record includes substantial evidence
10 to support the city’s decision. In addition to providing detailed specifications regarding the
11 proposed systems, intervenor introduced a letter from a registered engineer who reviewed the
12 proposed odor and leachate control systems and concluded that the systems would satisfy the
13 applicable approval criteria. Record 356-57. Petitioners point to no evidence in the record
14 that calls into question the evidence that the proposed systems will control odor and leachate
15 generated by the proposed use so that the facility will comply with the applicable approval
16 criteria, and petitioners have not explained why construction and testing of a prototype is
17 essential to verify that the odor control and leachate systems will work in the way they are
18 intended, when the evidence in the record supports a conclusion that they will work in the
19 way they are intended. Finally, petitioners have not explained why the city council’s failure
20 to impose the conditions of approval that petitioners proposed is error.

21 In their second assignment of error, petitioners argue that the city’s findings that the
22 proposed system will meet the operating standard in PCC 33.262.070 are “unlawful in

1 substance.”² The city council adopted findings that the proposed use will operate in
2 compliance with PCC 33.262.070:

3 “The food waste will be confined within a fully-enclosed building.
4 Furthermore, [the applicant] intends to install a biofilter aeration system and
5 will capture the liquid waste from the processing building and remove it off
6 site under Condition D. The condition requires the installation of both
7 systems as identified in the submitted plans. If the biofilter system does not
8 adequately reduce detectable odors, [the applicant] must implement other
9 means of addressing the off-site impacts in order to achieve obgoing
10 compliance with this Zoning Code, DEQ and Metro requirements. See
11 findings under approval criterion 33.815.220(C).” Record 42.³

12 Petitioners maintain that the findings are internally inconsistent and are inconsistent with
13 other findings in the decision. The city and intervenor (respondents) respond that the
14 decision clearly finds that the proposed use will meet the operating standards for odor and
15 that there will be no significant health or safety risks to nearby uses, and that the quoted
16 findings merely state that the proposed use is subject to the ongoing operating standard set
17 out in PCC 33.262.070, and if the proposed system does not function in compliance with that
18 operating standard the applicant must ensure that its use complies with the standard.
19 Accordingly, respondents argue, there is nothing in the challenged findings that allows
20 LUBA to reverse or remand the decision. We agree with respondents.

21 **C. Noise**

22 PCC 33.262.050 provides:

23 “The City noise standards are stated in Title 18, Noise Control. In addition,
24 the Department of Environmental Quality has regulations which apply to

² “Unlawful in substance” is not one of the bases for reversal or remand set out in ORS 197.830, which specifies LUBA’s standard of review. ORS 197.850(9) provides the standard of review that the Court of Appeals employs in reviewing final orders issued by LUBA. ORS 197.850(9)(a) provides in relevant part that the Court shall reverse or remand a LUBA order if it finds “[t]he order to be unlawful in substance or procedure * * *.”

³ In the petition for review, petitioners quote findings adopted by the hearings officer that address PCC 33.262.070 that are found at Record 319. The findings that petitioners quote are similar, but not identical, to findings that the city council adopted that are found at Record 42.

1 firms adjacent to or near noise sensitive uses such as dwellings, religious
2 institutions, schools, and hospitals.”

3 Title 18 of the City Code provides that 65 decibels (dba) is the maximum permissible sound
4 level that may be generated from an industrial source and received by a residential use
5 between 7:00 a.m and 10:00 p.m. PCC 18.10.010 (A).

6 Intervenor submitted into the record a noise study prepared by a registered acoustical
7 engineer that concluded that maximum noise from intervenor’s operations would be in the
8 range of 56 to 60 dba at the nearest residence located approximately 550 feet south of the
9 subject property, below the maximum permissible level set out in PCC 18.10.010(A) of 65
10 dba. Record 1259. Based on that noise study, the city concluded that noise from the
11 proposal would not create a significant risk to health or safety of nearby uses and that noise
12 from the operations would meet the operating standard in PCC 33.262.050 and PCC
13 18.10.010(A).

14 In a portion of its first assignment of error, and in its third assignment of error,
15 petitioners argue that the city’s decision is not supported by substantial evidence in the whole
16 record. Petitioners first argue that intervenor’s sound study is flawed because the study does
17 not include data regarding the noise generated by other activities that contribute to the total
18 noise level in the area. In making that argument we understand petitioners to argue that
19 intervenor was required to demonstrate that the cumulative noise level from all noise
20 generating sources within the vicinity of the subject property will not exceed PCC
21 18.10.010’s maximum permissible dba levels.

22 Respondents respond that the applicable approval criteria require intervenor to
23 demonstrate only that noise from its operations will not create a significant health or safety
24 risk to nearby uses, and that the evidence in the record shows that noise from its operations
25 will satisfy the ongoing operating standard at PCC 18.10.010(A). Respondents argue that
26 nothing in the applicable approval criteria require intervenor to demonstrate that total noise
27 from all noise sources will satisfy the applicable criteria. We agree. PCC 33.815.220(G)

1 requires the city to determine that “the proposal” can satisfy the operating standards for
2 mining and waste related uses in PCC 33.252. The word “proposal” suggests that the city did
3 not intend for an applicant to demonstrate that noise from all sources that have off-site
4 impacts to a nearby use must be below the noise threshold set out in PCC 18.10.010(A).
5 Absent any developed argument that other applicable standards, such as the Oregon
6 Department of Environmental Quality (DEQ) standards that PCC 18.10.010(A) refers to,
7 require the city to demonstrate that cumulative noise from all noise generating sources does
8 not exceed a maximum permissible sound level, petitioners’ argument provides no basis for
9 reversal or remand.

10 In their third assignment of error, petitioners also argue that the evidence in the record
11 does not support the city’s conclusion that the operating standard for noise can be met
12 because the sound study is based on assumptions or predictions about future noise from
13 operations. However, petitioners do not explain why a noise study that is based on
14 reasonable assumptions about the noise that will be produced from operations from the
15 property is inherently unreliable. Neither do petitioners challenge the assumptions that the
16 noise study is based on. The noise study is a model of future behavior and events, and absent
17 any argument or evidence that calls into question the assumptions that it is based on, we
18 conclude that it is evidence a reasonable decision maker could rely on to predict the likely
19 noise impacts from operations on the property. *Brockman v. Columbia County*, 62 Or LUBA
20 394, 402 (2011).

21 **D. Stormwater**

22 Finally, in the first assignment of error, petitioners argue that the city’s finding that
23 the proposal does not require a new or modified stormwater permit is not supported by
24 substantial evidence in the record.⁴ During the proceedings before the city council,

⁴ The city found:

1 petitioners argued that the application did not provide enough detail about stormwater
2 permitting for the facility and that the proposal might require a modification to intervenor's
3 existing National Pollutant Discharge Elimination System (NPDES) permit. The city
4 adopted findings in response to those arguments. Petitioners argue that the statement in the
5 findings quoted in n 4, that the city's Bureau of Environmental Services (BES) staff
6 determined that the proposal would not impact Johnson Creek or the stormwater system, is
7 not supported by evidence in the record, because a letter from BES that is in the record
8 instructs the recipient to contact BES to inquire about stormwater impacts. Thus, petitioners

“Because [intervenor] is proposing no new development or exterior changes to the Subject Property, and because of the leachate collection system, BES has determined that the proposal will not impact the existing stormwater system and/or the Johnson Creek resources. Stormwater from impervious surfaces [is] proposed to drain/flow to numerous existing catch basins and eventually drain/flow into a detention pond (located on the West side of the site). To address BES Source Control requirements, the City Council found that a condition is necessary that requires containment and off-site disposal of leachate waste. Condition of Approval D requires an internal drain and containment system.

“The Appellants contended that the application did not satisfy PCC 33.815.220(C) because of possible stormwater impacts. The opponents identified two separate contentions under this heading. First, they asserted that the application did not include sufficient detail regarding stormwater permitting for the facility. The Appellants further contend that the facility may require modifications to the existing NPDES permits for the site.

“ * * * * *

“[Intervenor] submitted an Operations Plan that explains that stormwater from the Facility will drain into numerous catch basins before discharging into an existing culvert. Consistent with the Operations Plan, City BES staff determined that the proposal would not impact the stormwater system and/or Johnson Creek resources and thus no new stormwater permits would be required in conjunction with the Facility. The Appellants do not contend that staff erred in reaching this conclusion.

“ * * * * *

“The City Council has weighed the argument and evidence submitted by opponents and [intervenor] and finds that stormwater/water pollution will not cause a significant health or safety risk to nearby uses for the reasons stated above. The City Council Finds that this criterion is satisfied. * * *.” Record 29-30.

1 argue, there is not substantial evidence in the record to support the city’s conclusion that no
2 modified or new NPDES permit is required.

3 Respondents point to ample evidence in the record to support the city’s conclusion
4 that there will be no significant health or safety impacts to nearby uses from stormwater on
5 the site, because there will be no stormwater impacts from the proposal. BES concluded that
6 there will be no stormwater impacts from the proposal because all activity authorized under
7 the permit will occur within the existing transfer building, and the leachate will be contained
8 at all times either in pipes or in a containment tank and removed from the site, and surface
9 stormwater will be directed to a detention pond system on the west side of the subject
10 property. Petitioners do not address that evidence or point to any evidence in the record that
11 calls into question that evidence. Accordingly, we agree with respondents that a reasonable
12 decision maker could conclude that there will be no significant risk to health or safety of
13 nearby uses from stormwater on the site.

14 The first, second and third assignments of error are denied.

15 **FOURTH ASSIGNMENT OF ERROR**

16 PCC 33.815.220(I) requires the city to determine that the “[p]ublic benefits of the use
17 outweigh any impacts that cannot be mitigated.” The city found that there are no impacts
18 from the proposed use that cannot be mitigated through conditions of approval.

19 “[T]he potential impacts identified by opponents are addressed by Recology’s
20 credible, substantial evidence and representations as to the operation of the
21 Subject Property and, to the extent necessary, mitigated through the conditions
22 of approval imposed in this decision.” Record 46.

23 Referring to their first three assignments of error, petitioners contend in their fourth
24 assignment of error that the city’s findings that impacts from odor, noise, leachate, and
25 stormwater from the project will be mitigated are not supported by substantial evidence in the
26 record. However, we do not see anything in the argument presented in support of petitioners’
27 fourth assignment of error that differs from the arguments in support of the first three

1 assignments of error. To the extent petitioners make the same argument in support of their
2 contention that the proposal will have impacts that cannot be mitigated, we reject it here as
3 well.

4 The city also found that the proposal benefits the public in helping implement the
5 city's food composting program:

6 "The opponents argue that there is no 'public benefit' because there are
7 existing transfer facilities with capacity to handle the additional food waste.
8 However, the criterion at issue does not require an alternatives analysis or
9 evidence of 'public need' as suggested by the opponents. Rather, the criterion
10 requires a finding that there will be public benefits of the use that will
11 outweigh any impacts that cannot be mitigated. As described above, the City
12 Council finds that adding a new facility in this particular location will provide
13 public benefit by helping the city to implement its food waste composting
14 program and providing a central location that will reduce the number of truck
15 trips and efficiently sort the organic material." Record 46.

16 In a portion of their fourth assignment of error, we understand petitioners to argue that the
17 city's finding that the proposal satisfies PCC 33.815.220(I) misconstrues that provision and is
18 not supported by substantial evidence in the record. As they argued below, we understand
19 petitioners to argue on appeal that the city is required under PCC 33.815.220(I) to determine
20 whether there is a need for the proposal, and that the evidence in the record demonstrates that
21 the proposal is not necessary in order for the city to implement its composting program
22 because there are existing facilities that have the capacity to accept the food waste. Petition
23 for Review 26-28.

24 The city council's interpretation of PCC 33.815.220(I) is not inconsistent with the
25 express language of the provision, and we therefore affirm that interpretation. ORS
26 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). Accordingly, even
27 if there is evidence in the record that demonstrates that the proposed facility is not needed
28 because there are other facilities that could accept the food waste, that evidence does not
29 undermine the city's conclusion that the public benefits of the proposal outweigh any impacts

1 from the proposal that will not be mitigated, particularly where the city has determined that
2 there are no impacts from the proposal that will not be mitigated.

3 The fourth assignment of error is denied.

4 **FIFTH ASSIGNMENT OF ERROR**

5 PCC 33.254.030 provides in relevant part that mining and waste related uses “must be
6 located so that vehicle access is restricted to Major City Traffic Streets or to streets in Freight
7 Districts, as designated in the Transportation Element of the Comprehensive Plan.” Access
8 to the industrial park is via S.E. Foster Road, located approximately one-half mile north of
9 the industrial park, then via S.E. 101st Avenue approximately one-half mile to the industrial
10 park entrance. The Springwater Corridor trail, a recreational biking and walking trail, is
11 located approximately ¼ mile north of the subject property. The Springwater Trail crosses
12 S.E. 101st Avenue at an at grade stop-controlled intersection. The Portland Comprehensive
13 Plan classifies S.E. Foster Road as a Major City Traffic Street and S.E 101st Avenue as a
14 Local Service Traffic Street.

15 Intervenor sought an adjustment to PCC 33.254.030 because the site does not have
16 direct access to a Major City Traffic Street, since vehicle access to the industrial park is taken
17 from S.E. 101st Avenue. One of the standards for granting an adjustment is set out at PCC
18 33.805.040(A), which provides that an adjustment may be allowed if “[g]ranteeing the
19 adjustment will equally or better meet the purpose of the regulation to be modified.” The
20 purpose of PCC Chapter 33.254 access restriction is set out in PCC 33.254.010:

21 “These regulations:

- 22 “• Reduce the impacts and nuisances resulting from mining and waste-
23 related uses on surrounding land uses;
- 24 “• Reduce the transportation impacts from these uses;
- 25 “• Ensure that land used for these purposes is restored so that it may be
26 reused; and

1 “• Provide security measures so that these land uses are not a safety
2 hazard to other land uses or to nearby residents.”

3 The city council found that the proposal equally or better meets the purposes of the vehicle
4 access requirement at PCC 33.254.030, which seem to be reflected in the first two bulleted
5 purposes quoted above, and granted the adjustment.

6 In their fifth assignment of error, petitioners challenge the city council’s approval of
7 the adjustment to allow vehicle access to the facility from S.E. 101st Avenue. First, we
8 understand petitioners to argue, the city misconstrued PCC 33.805.040(A) because it failed to
9 determine whether the adjustment meets goals set out in the Comprehensive Plan’s
10 Transportation Element to “reinforce[] the livability of neighborhoods” and to “reduce air,
11 noise and water pollution.” Portland Comprehensive Plan Goal 6. Petitioners argue that the
12 PCC implements the goals and policies of the comprehensive plan and for that reason these
13 transportation element goals should be considered to be additional “purposes” of PCC
14 33.254.030, the regulation to be modified.

15 Respondents respond that petitioners are precluded from raising an issue regarding
16 whether the purpose of PCC 33.254.030 includes the transportation element goals cited in
17 their petition for review, because petitioners failed to raise that issue below. Petitioners have
18 not pointed to any place in the record where any party raised an issue regarding whether the
19 “purpose of the regulation to be modified” includes the transportation element goals quoted
20 in the petition for review. Accordingly, we agree with respondents that petitioners are
21 precluded from raising the issue. ORS 197.835(3); ORS 197.763(1).

22 Next, we understand petitioners to argue that the city misconstrued PCC
23 33.805.040(A) because the city failed to compare the traffic impacts of the proposed use at
24 the proposed site with the same traffic impacts that would result if the use were located at a
25 different site with direct access to a Major City Traffic Street. We also understand
26 petitioners to argue that, based on the city’s misinterpretation of PCC 33.805.040(A), the
27 city’s findings are inadequate to explain how allowing the proposed use to be directly

1 accessed from a Local Service Traffic Street will “equally or better meet the purpose of”
2 PCC 33.254.030. According to petitioners, such findings cannot be made, because under no
3 circumstances could allowing additional trips to access the property via a Local Service
4 Traffic Street, as compared to requiring that the access be directly from a Major City Traffic
5 Streets, possibly *reduce* the impacts and nuisances from waste related uses on surrounding
6 land uses, or *reduce* transportation impacts from waste-related uses, two of the purposes set
7 out in PCC 33.254.010.

8 Respondents argue that PCC 33.805.040(A) does not require the city to compare the
9 traffic impacts of locating the proposed use at the subject property with the same impacts
10 from locating the use at a different, hypothetical site with direct vehicle access to a Major
11 City Traffic Street. Rather, according to respondents, PCC 33.805.040(A) requires the city to
12 conclude that the proposed access street has the capacity and infrastructure to handle the
13 traffic that will be created by the use and the surrounding street system will be no more
14 adversely affected by the use than if the use was sited with vehicle access to a Major City
15 Traffic Street. Respondents point to a traffic analysis in the record that concludes that S.E.
16 101st Avenue and S.E. Foster Road are expected to be able to handle the additional traffic
17 that the proposed use will generate, and that the intersections of (1) S.E. Foster Road and
18 S.E. 101st Avenue, and (2) S.E. 101st Avenue and the Springwater Trail will continue to
19 operate at Level of Service A even with the additional traffic.⁵ Record 226-27.

20 In *Loprinzi’s Gym v. City of Portland*, 56 Or LUBA 358, 366-67 (2008), we noted
21 that “the ‘equally or better’ language in PCC 33.805.040(A) seems to call for some sort of

⁵ That traffic analysis also takes the position that S.E. 101st Avenue is designated in the Transportation Element as a “Truck Access Street.” Policy 6.9(E) provides that “[t]ruck Access Streets are intended to serve as access and circulation routes for delivery of goods and services to neighborhood-serving commercial and employment uses.”

1 comparison,” and we remanded the decision for the city to better explain the purpose of the
2 regulation at issue. In the present appeal, the city council adopted the following findings:

3 “[Portland Bureau of Transportation] PBOT reviewed Recology’s
4 transportation analysis and had no concerns. As outlined in Recology’s
5 response, and summarized above, the proposed new Waste-Related use is not
6 anticipated to have a significant trip generation impact or generate trip types
7 that are inconsistent with the street designations * * *. PBOT agreed with
8 Recology’s traffic studies * * * *that the transportation system is capable of*
9 *supporting the additional traffic that is estimated to be generated by the use.*
10 *S.E. 101st Avenue and SE Foster Road can support the new use from a*
11 *capacity, safety, and access standpoint. PBOT and Recology’s traffic studies*
12 *concluded that the proposed use is not anticipated to have any detrimental*
13 *impacts on the overall safety of the Springwater Trail crossing at SE 101st*
14 *Avenue. The City Council agrees with the Hearings Officer and concurs with*
15 *the conclusions reached by PBOT and Kittleson and finds this approval*
16 *criterion is met.*

17 “* * * * *

18 “* * * The proposed use is located in an existing industrial park area that is
19 already accessed by large trucks. The Hearings’ Officer’s decision to approve
20 the adjustment is consistent with existing access to the site, and this
21 application is appropriate and eligible for an adjustment under the applicable
22 City criteria. * * *” Record 47-48 (Emphasis added.)

23 Notwithstanding our decision in *Loprinzi’s Gym* we do not agree with petitioners that a
24 comparison like the one that they suggest is called for here is the only way the PCC
25 33.805.040(A), “will equally or better meet the purpose of the regulation to be modified”
26 standard can be applied. Again, the purposes of the regulation to be modified are the
27 reduction of impacts and nuisances and reduction of transportation impacts. The PCC
28 33.254.030 Location and Vehicle Access requirement presumably was adopted to meet those
29 purposes by requiring facilities such as the one challenged in this appeal to locate on Major
30 City Traffic Streets, rather than lower functional classification streets such as the Local
31 Service Traffic Street from which access is proposed here. We understand the city council to
32 have found that, if the proposed access street is a street like S.E 101st Avenue, which is
33 apparently a designated Truck Access Street that is intended to carry truck traffic and has

1 ample capacity to carry the expected truck traffic, the reduction of impacts and nuisances and
2 reduction of transportation impacts purposes set out in PCC 33.254.010 are satisfied without
3 requiring application of and compliance with the PCC 33.254.030 Location and Vehicle
4 Access requirement. That interpretation and application of the PCC 33.254.030 requirement,
5 the purposes for that requirement, and the PCC 33.805.040(A) “will equally or better meet
6 the purpose of the regulation to be modified” standard are not reversible under ORS
7 197.829(1) and *Siporen*.

8 The fifth assignment of error is denied.

9 The city’s decision is affirmed.