

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

3
4 OREGON COAST ALLIANCE, SANDY DOUMA,
5 MIKE GLOWA, and CARL WHITING,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF WHEELER,
11 *Respondent,*

12
13 and

14
15 BOTTTS MARSH, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA Nos. 2020-064/065

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Wheeler.

24
25 Sean Malone filed the petition for review and reply brief and argued on
26 behalf of petitioner.

27
28 David Doughman and Jennie Bricker filed the joint response brief and
29 argued on behalf of respondent and intervenor-respondent. Also on the brief were
30 Sarah Stauffer Curtiss and Max Yoklic.

31
32 RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board
33 Member, participated in the decision.

34
35 REMANDED 03/09/2021

36
37 You are entitled to judicial review of this Order. Judicial review is
38 governed by the provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

3 In LUBA No. 2020-064, petitioners appeal a decision by the city council
4 approving a conditional use permit for a 28-room hotel. In LUBA No. 2020-065,
5 petitioners appeal a decision by the city council approving a conditional use
6 permit for a commercial building with seafood retail, wholesale, and storage; a
7 110-seat restaurant; and four apartments above the restaurant for employee
8 housing.

9 **FACTS**

10 Intervenor-respondent (intervenor) owns vacant land adjacent to Nehalem
11 Bay that is zoned Water-Related Commercial (WRC). The parcel is accessed
12 from Hemlock Street, which intersects with Highway 101 approximately 30 feet
13 to the east at a controlled intersection with eastbound and westbound stop
14 signage.

15 Intervenor submitted applications for two conditional use permits to
16 construct and operate (1) a 28-room hotel and (2) a commercial building with
17 wholesale and retail seafood sales, a restaurant on the ground floor, and four
18 apartments on the second floor.¹ “Retail/wholesale fish and shellfish sales”
19 facilities are permitted outright in the WRC zone, while restaurant, hotel, and

¹ The hotel application originally proposed a 44-room hotel that would have required a variance, but was later revised to propose a 28-room hotel.

1 above-street-level residential uses are conditionally allowed in the zone. Wheeler
2 Zoning Ordinance (WZO) 2.020-2.030.

3 The planning commission held seven hearings on the applications and, at
4 the conclusion, voted to approve the commercial seafood
5 sales/restaurant/housing building application but deny the hotel application.
6 Intervenor appealed the planning commission’s decision to deny the hotel
7 application to the city council, and petitioners appealed the planning
8 commission’s decision to approve the commercial seafood
9 sales/restaurant/housing building application to the city council. The city council
10 held a *de novo* hearing on the appeals and, at the conclusion, voted to approve
11 both applications. These appeals followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 WZO 15.020 provides, in relevant part, that “[a] conditional use may be
14 authorized if the Planning Commission finds that it is in conformity with the
15 comprehensive plan.” In their first assignment of error, petitioners argue that the
16 city’s findings that the applications comply with the 2011 Wheeler Vision Plan
17 (Vision Plan) are inadequate.

18 The Vision Plan was adopted by the city in 2012 as a background report to
19 the Wheeler Comprehensive Plan (WCP). The Vision Plan includes a section
20 entitled “Wheeler’s Priorities and Recommendations for Action,” which includes
21 a list of six “rank ordered” priorities. Those are:

- 22 1. Protect the Natural Beauty;

- 1 2. Preserve Small Town Atmosphere;
- 2 3. Keep Town Safe and Functional;
- 3 4. Improve Livability of Wheeler;
- 4 5. Support a Vital Economy; and
- 5 6. Enhance Citizen Enjoyment.

6 For the application that includes the restaurant and second-story apartments,
7 which are conditional uses in the WRC zone, the city council adopted the
8 following findings of consistency with the Vision Plan:

9 “The project will replace vacant commercial land with small-scale,
10 attractive commercial and residential development, including
11 revegetation along the shoreline, preservation of open, natural
12 spaces, and construction of a public walking and recreational trail.
13 These features are consistent with the Vision document as well as
14 the Waterfront Development Plan. Also consistent with the Vision
15 document, the project will ‘support a vital economy’ for Wheeler.

16 “Several citizens offered testimony that opposed the project based
17 on inconsistency with the Vision document. However, the Council
18 finds that the project, viewed as a whole, conforms with the Vision
19 document.” Record 4.

20 For the 28-room hotel, the city council found:

21 “The project will replace vacant commercial land with small-scale,
22 attractive commercial and residential development, including
23 revegetation along the shoreline, preservation of open, natural
24 spaces, and construction of a public walking and recreational trail.
25 These features are consistent with the Vision document as well as
26 the Waterfront Development Plan. Also consistent with the Vision
27 document, the project will ‘support a vital economy’ for Wheeler.

28 “Several citizens offered testimony that opposed the project based
29 on inconsistency with the Vision document. Some opponents

1 appeared to believe that the Vision document does not allow ‘large-
2 scale development,’ defined as any development with more than ten
3 ‘units.’

4 “Specifically, the Vision documents states that ‘large-scale
5 development’ lacks community support. City Council considered,
6 but did not adopt, a definition of ‘large-scale development’ as
7 ‘anything over 10 units.’ The Council questions whether hotel
8 rooms are ‘units’ and whether this project constitutes large-scale
9 development. In any event, the Vision document does not forbid
10 large-scale developments and the Council finds that the project,
11 viewed as a whole, conforms with the Vision document.” Record
12 12.

13 Petitioners argue that the city council’s findings are inadequate because they fail
14 to address all six of the Vision Plan’s ranked priorities and, instead, address only
15 one of the priorities.²

16 Adequate findings set out the applicable approval criteria and explain the
17 facts relied upon to conclude whether the applicable criteria are satisfied. *Heiller*
18 *v. Josephine County*, 23 Or LUBA 551, 556 (1992). The city and intervenor
19 (together, respondents) respond that the city council’s findings are adequate to
20 explain why the city council concluded that the applications conform to the
21 Vision Plan. Respondents argue that the Vision Plan requires neither the “check
22 the box” approach that petitioners advocate nor findings related to all six of the
23 ranked priorities. The problem with that interpretation of the Vision Plan,

² Petitioners acknowledge that the findings for the 28-room hotel proposal may also attempt to address the “Preserve Small Town Character” priority. Petition for Review 15.

1 however, is that it is not included in the city council’s findings. It also cannot be
2 implied from the city’s findings. As the Court of Appeals explained in *Green v.*

3 *Douglas County*:

4 “An implicit interpretation of an ordinance provision that is eligible
5 for ORS 197.829(1) deference is one where ‘[t]he practical effect of
6 the findings is to give definition to the term’ and where the ‘county’s
7 understanding of [the term] is inherent in the way that it applied the
8 standard.’ That is, a local government’s implicit interpretation of an
9 ordinance must carry with it only one possible meaning of the
10 ordinance provision and an easily inferred explanation of that
11 meaning.” 245 Or App 430, 439, 263 P3d 355 (2011) (quoting
12 *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App
13 259, 267, 942 P2d 836 (1997)).

14 Accordingly, we agree with petitioners that the city council’s findings are
15 inadequate to explain why it concluded that the applications conform to the
16 Vision Plan.

17 The first assignment of error is sustained.

18 **SECOND ASSIGNMENT OF ERROR**

19 WZO 15.090 provides standards for conditional uses:

20 “Before a conditional use is approved, findings will be made that the
21 use will comply with the following standards:

- 22 “1. A need exists for the use at the proposed location.
23 “2. The use will not overburden the following public facilities
24 and services: water, sewer, storm drainage, electrical services,
25 fire protection, and schools.

26 “* * * * *

1 “4. The topography, soils, and other physical characteristics of
2 the site are appropriate for the use.

3 “5. The use will not create traffic congestion on nearby streets.”

4 In four subassignments of error, petitioners challenge the city council’s findings
5 that WZO 15.090 is met.

6 **A. WZO 15.090(1)**

7 WZO 15.090(1) requires the city to find that “[a] need exists for the use at
8 the proposed location.” For both applications, the city council found, in relevant
9 part:

10 “[T]he Council views ‘need’ as a subjective assessment, and the
11 Council interprets ‘need’ broadly as it relates to the Section 15.090
12 criteria. Specifically, the need for a project may include the project’s
13 financial benefit to the City, as well as the desirability of utilizing
14 vacant property to develop uses consistent with its zoning.

15 “Based on [intervenor’s] presentation at the hearing, the Council
16 finds that the proposed use will contribute substantial local tax
17 revenue to the City, which in turn will provide funding for public
18 improvements—many of which are described in the Vision
19 document. Additionally, the Council views the project as providing
20 an appropriate use for long-vacant land, and finds that developing
21 that land will benefit the City. For these reasons, too, the Council
22 finds there is a need for the project at the proposed location.” Record
23 5, 13-14.

24 In the first subassignment of error, petitioners argue that the city council
25 improperly construed WZO 15.090(1) when it failed to interpret the word “need”
26 according to its dictionary definition, which petitioners quote as “circumstance
27 in which something is necessary, or that require some course of action;

1 necessity.” Petition for Review 18.³ Petitioners argue that the city council’s
2 conclusions that a need exists for the proposed developments because the
3 developments will provide financial benefits to the city and utilize vacant land
4 misconstrues the word “need” because financial benefits and the utilization of
5 vacant land are not “necessit[ies].”⁴

6 Respondents respond that the city’s interpretation of the word “need” in
7 WZO 15.090(1) is not inconsistent with any of the express language of the WZO
8 or the WCP and is therefore plausible. Respondents also respond that nothing in
9 the WZO or anything cited by petitioners requires the city to adhere to a
10 dictionary definition when interpreting undefined terms in the WZO. We agree
11 with respondents. Petitioners do not identify any provision of the WZO or the
12 WCP that requires the city to interpret the word “need” according to the
13 dictionary definition. The city council interpreted the word “need” less
14 stringently than the dictionary definition cited by petitioners and concluded that
15 there is a need for the developments if the developments will provide tax revenue
16 and utilize vacant land. Petitioners have not established that that interpretation is
17 inconsistent with any of the express language of the WZO or the WCP or is

³ Petitioners do not cite or identify the dictionary on which they rely for their quoted definition of “need.”

⁴ LUBA will reverse or remand a local government decision that “improperly construes the applicable law” ORS 197.835(9)(a)(D).

1 implausible, and we affirm it. ORS 197.829(1); *Siporen v. City of Medford*, 349
2 Or 247, 259, 243 P3d 776 (2010).

3 Petitioners also argue that the evidence in the record does not support the
4 city council’s conclusion that there is a need for the developments because there
5 is evidence in the record that two restaurants in the city do not have enough
6 business to stay open during the off-season.⁵ “Substantial evidence exists to
7 support a finding of fact when the record, viewed as a whole, would permit a
8 reasonable person to make that finding.” *Dodd v. Hood River County*, 317 Or
9 172, 179, 855 P2d 608 (1993) (citing *Younger v. City of Portland*, 305 Or 346,
10 351-52, 752 P2d 262 (1988)). Respondents identify the evidence in the record on
11 which the city council relied to support its conclusions that there is a need for the
12 developments. That evidence includes testimony from the Tillamook County
13 Visitors Association and an experienced hotel developer that visitor counts are
14 increasing throughout Tillamook County, that additional dining and lodging in
15 the city will be needed, and that the increased visitor numbers will benefit
16 existing businesses. Record 5, 13, 594. Petitioners argue that that evidence lacks
17 credibility because it was not related specifically to the city of Wheeler. However,
18 we agree with respondents that that evidence is evidence on which a reasonable
19 person would rely to conclude that WZO 15.090(1) is met. Petitioners’

⁵ LUBA will reverse or remand a local government decision that “is not supported by substantial evidence in the whole record.” ORS 197.835(9)(a)(C).

1 disagreement with how the city council viewed the evidence in the record does
2 not demonstrate that the decision is not supported by substantial evidence in the
3 whole record.

4 The first subassignment of error is denied.

5 **B. WZO 15.090(2)**

6 WZO 15.090(2) requires the city to find that “[t]he use will not overburden
7 the following public facilities and services: water, sewer, storm drainage,
8 electrical services, fire protection, and schools.” For both applications, the city
9 council found:

10 “[Intervenor] has demonstrated that the project will not overburden
11 public facilities and services, with the exception of obtaining final
12 approval from the Nehalem Bay Wastewater Agency [(NBWA)].
13 The Council will impose a contingency requiring [intervenor] to
14 satisfy any concerns about sewer and stormwater management
15 raised by the [NBWA]. With that contingency, the Council finds that
16 this criterion is met.” Record 6, 14.

17 Thus, in each decision, the city council imposed a single condition of approval
18 that requires intervenor “to satisfy any concerns raised by [NBWA].” Record 8,
19 16.

20 In the second subassignment of error, petitioners argue that the city
21 council’s conditions unlawfully defer determinations of whether WZO 15.090(2)
22 is met without concurrently determining that compliance with WZO 15.090(2) is
23 “feasible.” Although petitioners do not cite it, we assume petitioners’ argument
24 relies on our decision in *Rhyne v. Multnomah County*, where we explained:

1 “Where the evidence presented during the first stage approval
2 proceedings raises questions concerning whether a particular
3 approval criterion is satisfied, a local government essentially has
4 three options potentially available. First, it may find that although
5 the evidence is conflicting, the evidence nevertheless is sufficient to
6 support a finding that the standard is satisfied or that feasible
7 solutions to identified problems exist, and impose conditions if
8 necessary. Second, if the local government determines there is
9 insufficient evidence to determine the feasibility of compliance with
10 the standard, it could on that basis deny the application. Third, if the
11 local government determines that there is insufficient evidence to
12 determine the feasibility of compliance with the standard, instead of
13 finding the standard is not met, it may defer a determination
14 concerning compliance with the standard to the second stage. In
15 selecting this third option, the local government is not finding all
16 applicable approval standards are complied with, or that it is feasible
17 to do so, as part of the first stage approval (as it does under the first
18 option described above). Therefore, the local government must
19 assure that the second stage approval process to which the decision
20 making is deferred provides the statutorily required notice and
21 hearing, even though the local code may not require such notice and
22 hearing for second stage decisions in other circumstances.” 23 Or
23 LUBA 442, 447-48 (1992) (citing *Holland v. Lane County*, 16 Or
24 LUBA 583, 596-97 (1988)) (footnotes omitted).

25 Respondents respond that the city council found that the developments
26 would not overburden wastewater facilities and that, accordingly, the
27 developments comply with WZO 15.090(2).⁶ According to respondents, the
28 “contingency” to which the findings refer and the companion condition of

⁶ NBWA’s representatives met with intervenor’s representatives approximately one year before intervenor submitted its applications. Record 137. NBWA determined that its facilities could serve the developments with specific improvements. *Id.* Apparently, the agency communicated this information to the city. Record 402.

1 approval are merely the city's acknowledgement that the developments will also
2 need to comply with NBWA's regulations, which are not city land use regulations
3 that apply to the property but, rather, regulations imposed by a separate special
4 district. We agree with respondents that the city council adopted a current finding
5 of compliance with WZO 15.090(2) that did not rely on a conclusion that
6 "feasible solutions to identified problems exist" or defer a current finding of
7 compliance to a later stage proceeding.

8 The second subassignment of error is denied.

9 **C. WZO 15.090(4)**

10 WZO 15.090(4) requires the city to find that "[t]he topography, soils, and
11 other physical characteristics of the site are appropriate for the use." The city
12 council found:

13 "[Intervenor] has updated the 2006 geotechnical report and has
14 satisfied the Planning Commission's contingency for geotechnical
15 engineering. [Intervenor's] new engineers supported the
16 recommendations in the 2006 report concerning construction on
17 historic fill material.

18 "Anna Maria St. John, a geologist, provided testimony that raised
19 concern about the 'poor structural quality of the underlying fill and
20 native alluvium'; she also pointed out that the proposal to use
21 geofoam in the foundation design will 'only reduce the risk of
22 excessive building foundation settlement, and the geofoam will not
23 eliminate the risk.' Carl Whiting's written comments raised a similar
24 concern, that the risk of excessive foundation settlement could not
25 be completely eliminated by the proposed design.

26 "WZO Section 11.020 provides requirements for geologic
27 investigations. Mr. Whiting and others cite to Section 11.020(4)(a),

1 which states that a proposed use will be permitted only if a ‘feasible
2 engineering solution to each potential building hazard is proposed
3 which could eliminate the hazard to the proposed structure or
4 surrounding properties.’ Ms. St. John and Mr. Whiting appear to
5 interpret ‘could eliminate the hazard’ to mean a complete and
6 guaranteed elimination of risk.

7 “The Council finds that no construction project can ever be free of
8 risk. The Council interprets Section 11.020(4)(a) to mean that there
9 is an engineering solution that ‘*could* eliminate the hazard,’ not a
10 solution that is guaranteed to eliminate the risk of such hazard. The
11 Council notes that Section 11.020(3) makes it clear that risk is
12 always a factor and must be evaluated in the context of conditional
13 use review. That provision states: ‘The site investigation report
14 should make it possible for engineers, planners, and city officials *to*
15 *calculate and design for geologic risks.*’

16 “The Council finds that the risks explained in the geotechnical
17 report, and specifically the ‘greater than normal risks associated
18 with constructing on highly compressible soils,’ do not make the site
19 inappropriate for this use, and that the engineers’ recommendations
20 are sufficient under Section 11.020(4)(a). Accordingly, the Council
21 finds that this criterion is met.” Record 6-7, 14-15 (emphases in
22 original).

23 As the findings explain, the city council relied on a geotechnical report completed
24 in 2020 (2020 Report) which updated a geotechnical report prepared in 2006
25 (2006 Report) for a different proposal on the same property.⁷

⁷ As relevant here, WZO 11.020 provides:

- “1. Site-specific investigations by a qualified professional engineering geologist or qualified professional soils engineer licensed in the State of Oregon shall be a prerequisite for:

-
- “a. The issuance of any building permits where ground disturbing activities are proposed;
 - “b. All proposals for divisions of land;
 - “c. Where required by the City prior to excavation for the installation of utilities; and
 - “d. For the construction of roads and streets.

“* * * * *

- “3. The site investigation report should make it possible for engineers, planners, and city officials to calculate and design for geologic risks. A complete site-specific report shall include the following types of information:
 - “a. Identification of topographic elements: soil and bedrock topology; depth of soil to bedrock; permeability and other engineering characteristics of soil and bedrock; contour mapping or slope analysis, comparison of contour with geologic bedrock bedding planes; and other structural details important to engineering and geologic interpretations.
 - “b. Identification of elements of the area water cycle including: identification and assessment of the surface water drainage pattern; characteristics of the area’s groundwater including groundwater depth and rate of accumulation; projects storm drainage runoff and design; and probable changes of the water cycle.
 - “c. Identification and location of any historic, existing or potential geologic hazard or major landslide activity affecting the proposed project, future landowners, adjacent properties, or public facilities.

1 In the third subassignment of error, we understand petitioners to argue that
2 the city council’s conclusion that WZO 15.090(4) is met is not supported by
3 substantial evidence in the whole record because the 2020 Report and the 2006
4 Report (together, the Geotechnical Reports) are flawed. That is so, petitioners
5 argue, because the 2006 Report was for a different proposal, did not analyze
6 building loads, and was prepared based on a prior version of the state structural
7 specialty code. Similarly, according to petitioners, the 2020 Report is flawed
8 because it relies on the 2006 Report and because it evaluates only the seafood
9 sales building location and not the hotel location. Finally, petitioners argue that
10 the city erred because the 2020 Report is preliminary and the final report will not
11 be reviewed in a public proceeding. Petition for Review 25-26.

“d. Results of field and laboratory investigations, including use of drill-hole data, aerial photography, soils testing or field check as necessary to verify project safety.

“e. Discussion of possible project design techniques for control of erosion, slope stability and storm runoff.

“f. The report should also contain a bibliography of references used, dates of field checks or other geologic literature pertinent to the site investigation.”

“4. The proposed use will be permitted only if:

“a. A feasible engineering solution to each potential building hazard is proposed which could eliminate the hazard to the proposed structure or surrounding properties.”

1 Respondents respond that a reasonable decision maker would rely on the
2 Geotechnical Reports to conclude that the “[t]he topography, soils, and other
3 physical characteristics of the site are appropriate for the use.” Respondents also
4 point to (1) the city council’s interpretation of WZO 11.020(4)(a) as not requiring
5 that geotechnical reports establish that a particular solution is guaranteed to
6 eliminate the risk of a particular hazard and (2) its findings that risk is always a
7 factor, that the risks identified in the 2020 Report do not make the soils
8 inappropriate for the intervenor’s proposed uses, and that the engineer’s
9 recommendations sufficiently mitigate those risks. Accordingly, respondents
10 argue, the Geotechnical Reports demonstrate that WZO 11.020(4)(a) is met.
11 Petitioners do not challenge the city council’s interpretation of WZO
12 15.090(4)(a). Rather, as noted, petitioners argue that the Geotechnical Reports
13 are not substantial evidence that WZO 15.090(4) is met.

14 The 2006 Report evaluated a larger project on the entire site, and the 2020
15 Report confirmed the conclusions in the 2006 Report. Record 308-12. The
16 Geotechnical Reports identify the risks of soil compression and settlement and
17 recommend mitigation to address those risks. We agree with respondents that a
18 reasonable decision maker would rely on the Geotechnical Reports to conclude
19 that “[t]he topography, soils, and other physical characteristics of the site are
20 appropriate for the use.”

21 We also reject petitioners’ argument that the city council erred in failing to
22 provide for review of the final geotechnical report in a public proceeding. This

1 argument is largely derivative of petitioners’ argument that the 2020 Report is
2 not evidence on which a reasonable decision maker would rely to conclude that
3 WZO 15.090(4) is met. However, to the extent that the two arguments differ, the
4 fact that the 2020 Report refers to a final report that will be submitted after
5 construction is complete has no bearing on whether the city council adopted a
6 current finding that WZO 15.090(4) is met. Relying on the 2020 Report, the city
7 council did in fact find that WZO 15.090(4) is met. In this circumstance, nothing
8 obligates the city to provide for future public review in a public proceeding of a
9 final, post-construction geotechnical report.

10 The third subassignment of error is denied.

11 **D. WZO 15.090(5)**

12 WZO 15.090(5) requires the city to find that “[t]he use will not create
13 traffic congestion on nearby streets.” Intervenor provided a traffic study that was
14 initially completed in 2007 and updated in 2020 (2020 Updated Study).⁸ The
15 2020 Updated Study concluded that the proposed developments would generate
16 13 morning peak hour and 21 evening peak hour trips turning left from Highway
17 101 onto Hemlock Street westbound and that left-turn lane warrants for the
18 northbound approach to the intersection of Hemlock Street at Highway 101
19 would be met in 2023. However, the study did not recommend the installation of

⁸ The 2020 Updated Study estimated traffic from a 30-room hotel in addition to 28 cottages.

1 a dedicated left-turn lane from Highway 101 into the property. The study reached
2 that conclusion based on (1) the fact that no crashes had been reported at the
3 intersection, (2) the 25-miles-per-hour speed limit on northbound Highway 101
4 at the intersection with Hemlock Street and the low number of trips projected to
5 turn left during the morning and evening peak hours, and (3) the fact that no other
6 left-turn lanes are installed on Highway 101 in the city. Record 215.

7 The city found:

8 “[Intervenor] has updated the traffic study and has satisfied the
9 Planning Commission’s contingency for ODOT’s acceptance of the
10 Traffic Impact Analysis. The Council has examined the 2007 traffic
11 study and 2020 updated information and finds that the most recent
12 trip generation calculation indicates an acceptable level of additional
13 traffic on Highway 101, and little or no additional traffic on other
14 nearby streets. The Council finds that this criterion is met.” Record
15 7, 15.

16 In the fourth subassignment of error, petitioners argue that the 2020
17 Updated Study is not evidence on which a reasonable person would rely on to
18 conclude that “[t]he use will not create traffic congestion on nearby streets.”
19 According to petitioners, the 2020 Updated Study may demonstrate that a left-
20 turn lane is not warranted because the intersection will operate relatively safely,
21 but the study is not evidence that the proposed development will not create
22 “traffic congestion” at the intersection of Highway 101 and Hemlock Street
23 within the meaning of WZO 15.090(5). Rather, petitioners argue, the 2020
24 Updated Study is evidence that the use will in fact create traffic congestion at that
25 intersection. In addition, petitioners argue, absent a definition of the term

1 “congestion” or a city interpretation of that term, the city council’s findings are
2 inadequate.

3 We agree with petitioners in part. While we disagree with petitioners that
4 the 2020 Updated Study conclusively demonstrates that the use will create traffic
5 congestion on nearby streets, the 2020 Updated Study demonstrates at best that a
6 dedicated left-turn lane is not necessary to ensure that the intersection operates
7 safely. It does not demonstrate that the use will not create traffic congestion at
8 the intersection of Highway 101 and Hemlock Street within the meaning of WZO
9 15.090(5). WZO 15.090(5) requires the city to find that the proposed
10 development will not “create traffic congestion” at the intersection. The city
11 council’s decision does not address that issue.

12 The fourth subassignment of error is sustained.

13 The second assignment of error is sustained, in part.

14 The city’s decision is remanded.