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

STEVE VANSICKLE, JOHN WHITE, SARAH DEXTER,
and BART BALLARD,
Petitioners,

vs.

KLAMATH COUNTY,
Respondent,

and

LEON WHISTLER, JR.,
Intervenor-Respondent.

LUBA No. 2019-042

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Tim Fitchett, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Staterra Law.

No appearance by Klamath County.

Byron Farley, Salem, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Martinis and Hill.

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

AFFIRMED 08/20/2019

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Rudd.

NATURE OF THE DECISION

Petitioners appeal a decision of the board of county commissioners approving an application for a post-acknowledgement plan amendment (PAPA), zone change, and exceptions to Statewide Planning Goal 4 (Forest Lands) to change a 5-acre property's comprehensive plan designation from Forestry to General Commercial and zoning designation from Forestry-Range to General Commercial.

FACTS

Intervenor-respondent Leon Whistler's (intervenor's) five-acre parcel (the property) is located approximately two miles south of the unincorporated community of Sprague River and is within an area designated Antelope High Density Winter Range Habitat. The property is currently improved with a store, a use not permitted in the underlying Forestry-Range (FR) zone but considered by the county to be allowed as a lawfully established nonconforming use. Intervenor sought a comprehensive plan and zoning map change to General Commercial (GC) to facilitate future expanded uses on the property, to include a laundromat (with bathing facilities) and a gas station.

The county found that locating a laundromat and gas station on the property would provide services to residents of nearby Klamath Forest Estates (KFE). KFE is located one mile from the property, four miles from the community of Sprague River and 30 miles from the community of Chiloquin.

Sprague River has a fueling station but is, again, four miles away from KFE and testimony was received that the Sprague River fueling station had either closed or on occasion did not have fuel. The nearest laundry facility is in Chiloquin, again, thirty miles away from KFE. Given that many of the KFE residents "are of extremely limited means" and "do not own a vehicle (or have lawful means to operate the same) or have access to water" the county determined that the proximity of the property to KFE provided unique value as a site for a laundry/bath and gas station. Record 65.

This case follows our decision in *VanSickle v. Klamath County*, __ Or LUBA __ (LUBA Nos 2018-014/036, Aug 8, 2018) (*VanSickle I*) in which we remanded a prior county approval of the request to change the comprehensive plan and zoning designation of the property due to inadequate findings. Following remand, the county held a public hearing, adopted findings and again approved the application. This appeal followed.

STANDARD OF REVIEW

As required by ORS 197.835(9)(a)(D), we will reverse or remand a local government decision if the local government improperly construes applicable law. We review the county board of commissioners' interpretation of its own regulations under ORS 197.829(1) and affirm it, so long as that interpretation is not inconsistent with the express language of the regulation or its underlying purposes and policies, and not contrary to state law. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010); *see also Matiaco v. Columbia County*, 42

Or LUBA 277, *aff'd*, 183 Or App 581, 54 P3d 636 (2002) (affirming the county's interpretation of its big game habitat density standard under ORS 197.829(1)).

PAPAs must be consistent with statewide planning goals. ORS 197.835(6). Goal exceptions must comply with ORS 197.732. Local interpretations of state law are not given deference and are reviewed for legal correctness. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392, 403 (1999); *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009).

FIRST ASSIGNMENT OF ERROR

Article 57 of the Klamath County Zoning Ordinance (KCZO) contains the county's Significant Resource Overlay (SRO) code. KCZO 57.010 explains that the purpose of the SRO provisions is

> "to implement provisions of the Klamath County Comprehensive Plan to preserve significant natural and cultural resources, to address the economic, social, environmental and energy consequences of conflicting uses upon significant natural and cultural resources, and to permit development in a manner that does not adversely impact identified resource values."

KCZO 57.030.A provides that "[a]ll land uses, developments and associated activities which represent actual or potential conflicting uses to a resource as identified in Section 57.040 shall be processed as conditional uses *unless otherwise specified*." (Emphasis added.) KCZO 57.030.A.1 provides that uses permitted in the underlying zone are reviewed solely against the standards and criteria in Article 57. The board of county commissioners adopted findings that conclude that the proposed PAPA is required to comply only with the standards

and criteria in Article 57 and is not required to secure a conditional use permit (CUP) in compliance with KCZO Article 44, the CUP provisions.

The decision applies a zoning designation which will allow limited commercial uses on the property. KCZO 57.040.D recognizes that commercial uses conflict with big game habitat and petitioners argue that the county's conclusion that KCZO 57.030 does not require a CUP or satisfaction of the CUP criteria in KCZO Article 44 in this case is in error. Petitioners contend that the county's interpretation of KCZO 57.030 improperly construes that provision because "[t]he question is not whether the use is allowed in the new zoning category, but rather if the new use conflicts with the big game overlay," and argue that the county's interpretation renders all future conditional use reviews for uses allowed in the GC zone "moot." Petition for Review 8-9. Petitioners argue that the county may only avoid the CUP process if, as provided by KCZO 57.030, the applicant provides substantial evidence demonstrating that Article 57 does not apply and the Planning Director or his/her designee consults "with appropriate resource management agencies and issue[s] an order of determination pursuant to the Type II Administrative Review Procedure[.]" KCZO 57.030.D. Lastly, petitioners argue that the county failed to require the applicant provide documentation "regarding requirements for state or federal permits or licenses, and that appropriate resource management agencies have reviewed the development proposal against its plans, policies, and programs" as required by

KCZO 57.060. Petition for Review 9-10. We deny the first assignment of error for the reasons set forth below.

The board of county commissioners found that under KCZO 57.030(1), the laundry/bath and gas station uses are permitted in the GC zone, and therefore uses permitted in the underlying zone and reviewed solely against the standards and criteria in Article 57. The board of county commissioners concluded that no CUP review is required for the PAPA. Record 17, 206-207.

Given that the uses are permitted in the GC zone, we conclude that the county's interpretation of its code is consistent with the express language of KCZO 57.030(1) providing that a conditional use process is required *unless otherwise specified*, and then specifying that "[u]ses identified as a permitted use in the underlying zone shall be reviewed solely against the standards and criteria of this article."

We also conclude that, contrary to petitioners' argument, the county's interpretation does not render all future CUP reviews for future proposed uses on the property moot. Petition for Review 8-10. The code provides that if the use is identified as a conditional use in the underlying zone, that use "shall be reviewed against the standards and criteria of [Article 57] in addition to all other applicable standards and criteria of the code." KCZO 57.030.A.2. Conditional uses in the GC zone include, but are not limited to, churches, truck stops, schools and mobile home parks. KCZO 52.430. Nothing in the county's interpretation prohibits CUP review of these types of uses at the time of development.

In addition to being consistent with the express language of the code, we find that the county's interpretation of its code is consistent with the underlying policy, because the interpretation preserves application of the KCZO resource protection provisions. KCZO 57.030 provides that Article 57 applies to "all land uses, land divisions, developments and associated activities coincident with a resource identified or mapped as significant ('1-C') in the Klamath County Comprehensive Plan." The General Review Criteria of Article 57 are set out in KCZO 57.060 and will apply when development is proposed, as set out in the language of KCZO 57.030, as well as in the conditions of approval.[1] KCZO 57.060 provides that:

> "The following review criteria shall apply to all actions governed by this article unless otherwise specified. Criteria and standards enumerated in Section 57.070 shall also apply as appropriate.

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[1] The decision imposes the following conditions of approval:

> "1. A Limited Use Overlay shall be placed on the 5 acres that only allows the existing store and additional uses to include a fueling station and laundromat with shower facilities. Any additional uses will require a future amendment to the Limited Use Overlay.
>
> "2. The location of the fueling station and laundromat shall be reviewed through a commercial site plan review which shall require compliance with the General Review Criteria of Article 57." Record 18.

"A. The resource site will not be altered or impacted to a degree that destroys its significance;

"B. The proposed development will not result in the loss of habitat for threatened or endangered species of animals or plants as identified by the U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife or other appropriate state or federal agency;

"C. All feasible alternatives to the development have been considered and rejected which would not result in a substantial adverse impact on an identified resource value;

"D. The development is sited on the property in such a manner that minimizes adverse impacts on the identified resource; and

"E. Documentation has been provided to the County regarding requirements for state or federal permits or licenses, and that appropriate resource management agencies have reviewed the development proposal against its plans, policies and programs."[2] KCZO 57.060.

As intervenor explains, the county's interpretation of this provision as applicable at the time of a specific development proposal is consistent with the level of project specificity routinely associated with a specific development application. Response Brief 9. For example, when applicable, the CUP process requires an analysis of the location, size, design and operating characteristics of the proposed use. Response Brief 6; KCZO 44.030(C). This information may not

[2] KCZO 57.070 is incorporated by reference and with respect to Big Game Habitat provides standards for land divisions and residential development.

be known at the time of a comprehensive plan amendment and zone change application.

KCZO 57.030.D sets forth a review process if an applicant believes that, because an identified resource is not located on the site or is not adversely impacted by the proposal, the remainder of Article 57 should not apply. The findings explain, however, that "appropriate scrutiny [is] applied at the permitting stage" and that the county only preliminarily found that there is not a meaningful adverse impact on resources onsite. Record 67-68. Petitioners have not established that the decision requires a demonstration of compliance with KCZO 57.030.D.

Finally, petitioners' argument that the decision fails to comply with the requirement in KCZO 57.060.E that "[d]ocumentation [be] provided to the County regarding requirements for state or federal permits or licenses, and that appropriate resource management agencies have reviewed the development proposal against its plans, policies and programs" similarly lacks merit. As explained above, KCZO 57.030 establishes the broad applicability of Article 57 to land use and development within the county. The conditions of approval also require compliance with KCZO 57.060 at the time of commercial site plan review. Nothing in the findings obviates the required review at the permitting stage, as set forth in the conditions of approval. As intervenor explained, the criterion is related to a development proposal, "when a site plan for development is actually submitted and can be reviewed against agency plans, policies and

programs. There is no 'development proposal' to be reviewed by agencies—there is simply a zone change and comprehensive plan amendment with a limited use overlay." Response Brief 12.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Article 48 sets forth the process and review standards applicable to requests to change a property's comprehensive plan designation. KCZO 48.030(B)(1) requires that the proposed comprehensive plan designation change be "supported by specific studies or other factual information, which documents the public need for the change[.]" Petitioners argue that the existing facilities and facilities that intervenor may develop in the future provide convenience as opposed to meeting a public need. Petition for Review 13. Petitioners also argue that even if the facilities are needed, the evidence in the record does not demonstrate that the services may be provided only on the property. *Id.* Intervenor responds that the county found a "public health need for the reasonable accessibility of fuel, bathing and laundry services that will be accomplished for the residents of the Klamath Forest Estates by the proposed zone change and anticipated development in conformance with the limited use overlay." Response Brief 14.

To the extent petitioners dispute the adequacy of the underlying evidence, that challenge fails. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that

finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). The board's determination–that a standard requiring a finding of public need is met–is a very subjective determination. The county found that public need included providing nearby residents, many of whom are of limited financial means and mobility, close access to fuel, bathing stations and laundry facilities. Record 36-37. Members of the public testified as to the need for the proposed facilities. Record 75. Petitioners fail to address the testimony from members of the public in support of the need for the change or explain why that testimony is not substantial evidence of public need and have not established a basis for reversal. *Burlison v. Marion County*, 52 Or LUBA 216, 221 (2006) (petitioners must explain why, given the evidence in the record, the county decision was unreasonable); *Belluschi v. City of Portland*, 53 Or LUBA 455, 477, *aff'd*, 213 Or App 391, 161 P3d 955 (2007) (that another local decision maker or LUBA might have weighed subjective considerations differently based on the evidence in the record "is not the question").

Petitioners' argument that the public need standard requires a determination that no other sites are available also fails. Petitioners must identify the legal basis for applying a standard when evaluating code compliance. *Burlison*, 52 Or LUBA at 219. Petitioners do not identify a requirement that the public need only be capable of fulfillment on the subject property.

The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners allege that the county failed to perform an alternatives analysis that petitioners argue is required under KCDC 57.060, ORS 197.732(2)(c)(B), and OAR 660-004-0020. For the reasons we explain below, we conclude that petitioners do not establish a basis for reversal.

As discussed in the first assignment of error, KCDC 57.060 will apply when development is proposed. It does not apply at this stage.

The reasons exceptions standards are set out in ORS 197.732(2)(c) and OAR 660-004-0020. ORS 197.732(2)(c) provides that an exception may be granted if "[t]he following standards are met:

> "(A) Reasons justify why the state policy embodied in the applicable goals should not apply;
>
> "(B) Areas that do not require a new exception cannot reasonably accommodate the use;
>
> "(C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
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> "(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts."

OAR 660-004-0020(2)(b) provides that in determining that "'[a]reas that do not require a new exception cannot reasonably accommodate the use,'" the exception

must identify the location of possible alternative locations not requiring an exception, and discuss why those areas cannot reasonably accommodate the use.

Petitioners challenge the county's findings concerning alternative locations—that the alternative locations are "too far away" and inconvenient and argue that siting adjacent to the existing store should not have been a consideration. Petition for Review 16-17. We agree with intervenor that the county concluded that proximity reflected a need rather than a convenience, and that the proposed location was the only accessible location. Response Brief 4. The county concluded that:

> "No other alternatives warranted consideration. With that said, alternatives of having the applicant pursue his proposed development in Sprague River or Chiloquin [are] not feasible to accomplish the goal of providing necessary services and goods to members of the nearby community [who] lack vehicular transport and/or finances to routinely travel to town." Record 69.

In addition, as intervenor observes, petitioners do not challenge all of the county's responsive findings regarding OAR 660-004-0020. Intervenor argues that "[p]etitioners recite the above-referenced rules and select two sentences from the multiple pages of findings by the Board to argue that the criteria have not been met." Response Brief 15. Intervenor points to the county's findings related to alternative locations under OAR 660-004-0020. *Id.* Where a party does not challenge responsive findings, that party does not establish a basis for reversal or remand. *Marine Street LLC v. City of Astoria,* 37 Or LUBA 587, 603 (2000).

Finally, the county adopted findings that the criteria for an irrevocably committed, physically developed, and reasons exceptions were met.[3] Record 42-47, 50-59. The county stated in its findings: "If any of the adopted exceptions should later fail upon further review, the remaining exception(s) shall be adequate to support the upholding of the approval of the application." Record 59. Petitioners do not challenge the findings adopted in support of an irrevocably committed or a physically developed exception. Given that petitioners did not address the county's alternative exception findings, petitioners' ORS 197.732(2)(c)(B) and OAR 660-004-0020 reasons exception challenges, if sustained, would not provide a basis for reversal or remand. The fourth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

KCZO Article 13 sets forth general regulations applicable to nonconforming lots, uses and structures. Petitioners argue that the existing convenience store is not a permitted use in the FR zone, was abandoned and has lost any legal nonconforming status. Petition for Review 14-15. Petitioners contend that the county finding–that the current commercial use of the exception

[3] The irrevocably committed exception analysis occurs at pages 43 through 47 of the record. The physically committed and reasons exception analysis occur at pages 50 through 59 of the record. Although the county's Goal 5 discussion is found in the middle of the exceptions analysis at Record 48 through 50, no exception was taken to Goal 5.

area was consistent with the rezoning–resulted in a decision that is impermissible spot zoning and arbitrary, capricious and otherwise contrary to law. Petition for Review 15. We agree with intervenor that petitioners have not identified any criterion requiring consideration of whether an existing use was non-conforming and/or abandoned and have not established a basis for reversal. Response Brief 7-8.

The third assignment of error is denied.

The county's decision is affirmed.