

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

3  
4 JUDY UPRIGHT,  
5 *Petitioner,*

6  
7 vs.

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9 MARION COUNTY,  
10 *Respondent,*

11 and

12  
13  
14 ALAN HART, CAROLINE HART,  
15 and GREGORY E. KUPILLAS,  
16 *Intervenors-Respondent.*

17  
18 LUBA No. 2005-127

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from Marion County.

24  
25 Norman R. Hill, Salem, filed the petition for review and argued on behalf of  
26 petitioner. With him on the brief was Martinis and Hill.

27  
28 Jane Ellen Stonecipher, County Counsel, Salem, filed the response brief and argued  
29 on behalf of respondent.

30  
31 Alan Hart and Caroline Hart, Salem, and Gregory E. Kupillas, Mulino, represented  
32 themselves.

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

36  
37 AFFIRMED

03/02/2006

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

**NATURE OF THE DECISION**

Petitioner appeals county approval of a partition of a 6.67-acre parcel into a 2.0-acre parcel and a 4.67-acre parcel.

**FACTS**

The subject 6.67-acre parcel property is zoned Acreage Residential (AR) and located in a Sensitive Groundwater Overlay zone (SGO-5). The minimum parcel size in the AR zone is two acres. The property is developed with an existing dwelling. Petitioner owns an adjoining parcel.

In January 2005, intervenors-respondent (intervenors) applied to partition the property into a 2.0-acre parcel and a 4.67-acre parcel, which would allow an additional homesite. The county evaluated the proposed partition under Marion County Zoning Ordinance (MCZO) Chapter 181. Under MCZO 181.070(A)(1)(b), any proposal to partition land within the SGO-5 zone resulting in parcels with an average size less than five acres must be accompanied by a Water Use Inventory.<sup>1</sup> The specifications for a water use inventory are set out in MCZO 181.090(A), which require a map showing “all lots and parcels within at least one-quarter mile of the proposed development,” and specified information on wells and groundwater use within that one-quarter mile radius.<sup>2</sup> Under

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<sup>1</sup> MCZO 181.070(A)(1)(b) provides:

“If the average parcel size proposed in the application is smaller than the ‘threshold’ lot size displayed in the zone label on the official zoning map, the application shall be accompanied by a Water Use Inventory pursuant to section 181.090.”

<sup>2</sup> MCZO 181.090 provides, in relevant part:

“The purpose of a Water Use Inventory is to use existing information to gain specific information to make conclusions regarding groundwater availability for an individual lot or a partition. \* \* \*

“(A) A Water Use Inventory shall include, at a minimum, the following information in addition to the application requirements in section 181.040:

1 MCZO 181.090(B), the water use inventory must demonstrate the density of lots or parcels  
2 within one-quarter mile of the proposed development, and the rate of recharge for the same  
3 area.<sup>3</sup> If the inventory establishes that the average size of lots and parcels within one-quarter  
4 mile of the proposed development is smaller than the “threshold” size of five acres, or that  
5 the new use will result in consumption of more than 80 percent of the available recharge,  
6 MCZO 181.090(C) requires the applicant to submit a more detailed hydrogeology review  
7 pursuant to MCZO 181.100.<sup>4</sup> Depending on the result of that hydrogeology review, a more

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- “(1) A map showing all lots and parcels within at least one-quarter mile of the proposed development;
  - “(2) The location of permitted wells with valid water rights within at least one-quarter mile of the proposed development, and the quantity of water permitted to be used;
  - “(3) The estimated use of groundwater within at least one-quarter mile of the proposed development, including 525 gallons/day use for each lot and parcel and water use from permitted wells (as required in subsection (2) of this section);
  - “(4) The quantity of water the proposed land use will utilize. If the proposal is for residential use, water use shall be calculated as 525 gallons/day. If the proposal is for a land division for residential purposes, all proposed lots or parcels shall be included in the calculation.”

<sup>3</sup> MCZO 181.090(B) provides:

“A Water Use Inventory shall demonstrate the following:

- “(1) Whether the density of lots and parcels within one-quarter mile of the proposed development is greater or less than, or the same as, the threshold parcel size for the subject parcel. In the case of applications for a land division, the density calculation shall assume full development (i.e., the maximum number of lots or parcels that could be created, considering the minimum lot size in the zone) of the subject lot or parcel.
- “(2) The percent of available recharge that will be utilized by all users (exempt and permitted), including the proposed new use, for the area within one-quarter mile of the subject lot or parcel based on the aquifer likely to be used by the proposed use.  
\* \* \*”

<sup>4</sup> MCZO 181.090(C) provides, in relevant part:

“Water Use Inventory Results.

1 detailed and rigorous hydrogeology study may be required, under MCZO 181.110.  
2 However, if the water use inventory establishes that the average lot size within the one-  
3 quarter mile study area is larger than the minimum threshold, and that the new use will not  
4 result in consumption of more than 80 percent of the available recharge, then no further  
5 evidence of water availability is required. MCZO 181.090(3).

6 County staff used a specialized computer program to calculate the average density  
7 within the study area. The computer program is apparently written or set up in a way that it  
8 includes the total acreage of lots and parcels that lie partially within and partially outside the  
9 one-quarter-mile radius, in calculating average density. Under this method, the study area  
10 consisted of lots and parcels totaling approximately 400 acres. County staff determined that  
11 the average density within the study area is 8.09 acres. Because the average density exceeds  
12 the five-acre threshold in the SGO-5 zone, and the consumption rate did not exceed 80  
13 percent of the available recharge, the county did not require intervenors to submit a more

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“(1) A Hydrogeology Review pursuant to section 181.100 shall be required if the Water Use Inventory establishes that either of the following circumstances exist:

“(a) The average size of lots and parcels within one-quarter mile of the proposed development, including all existing lots and parcels and all proposed parcels in the subject application (if any), is smaller than the ‘threshold’ size indicated on the applicable zone label on the official zoning map (for example, if the applicable zone is ‘SGO-5’ and the average size of lots and parcels in the area is four acres); or

“(b) The new use will result in consumption of more than 80 percent of the available recharge within one-quarter mile, based on use information generated for the Inventory and recharge data contained in ‘Geologic and Hydrogeologic Study of the Residential Acreage-Zoned Areas of Marion County Underlain by the Columbia River Basalt and Older Rocks’ (NGS, 1997), and assuming one dwelling results in use of 525 gallons/day.

“\* \* \* \* \*

“(3) If the results of the Water Use Inventory establish that none of the circumstances described in subsections (1) or (2) of this section exist, no further evidence of water availability is required.”

1 detailed hydrogeology review under MCZO 181.100. The county planning director  
2 ultimately approved the requested partition.

3 Petitioner appealed the planning director's decision to the county hearings officer,  
4 who conducted several hearings. Petitioner argued in relevant part that the county  
5 misconstrued MCZO Chapter 181 in calculating average density by including land that lies  
6 outside the one-quarter mile radius study area in its calculation. According to petitioner, the  
7 county correctly counted all lots that fall wholly or partially within a one-quarter mile radius  
8 of the subject property. However, petitioner contends that for any lots or parcels that fall  
9 partially outside the one-quarter mile radius, only the part of those lots or parcels that  
10 actually fall within the one-quarter mile radius should be included in the average density  
11 calculation. Under that approach, petitioner argued, the average density would be less than  
12 five acres, triggering the obligation to submit a hydrogeology review.

13 On July 21, 2005, the hearings officer issued a decision approving the partition. The  
14 hearings officer disagreed with petitioner's interpretation of MCZO Chapter 181, based in  
15 part on a county manual for conducting hydrogeology reviews specifying that the study area  
16 includes the entirety of lots bisected by the one-quarter mile radius line. Petitioner appealed  
17 the hearings officer's decision to the county board of commissioners, which adopted the  
18 hearings officer's decision as its own and approved the partition. This appeal followed.

19 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

20 Petitioner challenges the county's interpretation that the one-quarter mile radius study  
21 area includes the entire acreage of lots bisected by the radius line. As noted, the hearings  
22 officer relied principally on a county manual for conducting hydrogeology reviews and  
23 studies. The manual specifies that the study area for reviews and studies includes the entirety  
24 of lots bisected by the one-quarter mile radius line.<sup>5</sup>

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<sup>5</sup> The hearings officer's findings state, in relevant part:

1           Petitioner contends that the hearings officer’s interpretation, which was adopted by  
2 the board of commissioners, is inconsistent with the express language, purpose and policy of  
3 MCZO 181.090.   ORS 197.829(1).<sup>6</sup>   According to petitioner, MCZO 181.090 clearly  
4 requires a determination of the average size of lots or parcels “*within* one-quarter mile” of

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“The parcel density within the study area, according to a computer generated water use inventory, is one lot per 8.09 acres. The computer program takes the entire area of parcels bisected by the one-quarter mile study area boundary into consideration when calculating lot density. Appellant argues that this approach conflicts with the plain meaning of the ordinance.

“MCZO 181.090(1)(a) requires a hydrogeology review if the water use inventory establishes that the average size of lots and parcels within one-quarter mile of the proposed development is smaller than the threshold lot size. Appellant points out that this provision does not say that land outside a one-quarter mile area is considered if it is part of a parcel bisected by the study area. That is true. The ordinance does not say what to do about parcels not wholly within the study area. Just as appellant claims that including the full area of partially included lots may allow lot size to be over estimated (labeled ‘edge effect’ by appellant), including partial lots as full lots will surely lead to lot sizes being under estimated. \* \* \*

“Lot size calculation is not addressed elsewhere in chapter 181, so other sources should be consulted. The best source for interpreting county intent in lot size calculation is *A Manual for Completion of Hydrogeology Reviews and Studies in Compliance with the Marion County Sensitive Groundwater Overlay Zone*, Marion County Planning Division, 1999. Appellant points out that the manual does not apply to water use inventories. Water use inventories are only mentioned in passing in the manual, but for hydrogeology studies and reviews, the study area is one-quarter mile, the same as the water use inventory study area. The manual specifically states for hydrogeology reviews that the one-quarter mile study area includes the entirety of lots bisected by the one-quarter mile radius line, and the requirements for studies includes the requirements for hydrogeology reviews with some additional requirements. Additionally, the computer program generating the water use inventories includes lots bisected by the one-quarter mile radius line, consistent with the manual. The best evidence in the record shows that the county interprets the one-quarter mile study area to include lots bisected by the one-quarter mile radius line. The hearings officer accepts and adopts that interpretation here.” Record 24-25.

<sup>6</sup> ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 the subject property, and does not authorize including those portions of lots that lie further  
2 than one quarter-mile from the property. With respect to purpose and policy, petitioner  
3 argues that the purpose of MCZO 181.090 is to assess the risk that a proposed well will have  
4 on water use within one-quarter mile of the subject property, by examining the lot density  
5 *within* that limited area. That assessment will give a false impression if large peripheral  
6 lots—only a small portion of which may lie within one-quarter mile of the property—are  
7 included in the study area. According to petitioner, in the present case the lots and parcels  
8 close to the subject property are in fact much smaller than more distant lots and parcels, and  
9 thus the county’s approach gives a false impression of the average density in the area that is  
10 actually within one-quarter mile of the subject property.

11 Petitioner further contends the correct method of applying MCZO 181.090 is to  
12 divide the total number of acres in a one-quarter mile radius from the subject property by the  
13 number of lots or partial lots within that radius. Under that method, petitioner argues that the  
14 average density is 3.2 acres per lot.

15 The county responds that the board of commissioners correctly interpreted  
16 MCZO 181.090 to include the entire acreage of lots and parcels that fall at least partially  
17 within a one-quarter mile radius. The county notes that MCZO 181.090(C)(1)(a) requires  
18 evaluation of “all existing lots and parcels” within a one-quarter mile radius. The ordinance  
19 does not limit the study area to those “portions of lots and parcels” that fall within one-  
20 quarter. The county argues that including only portions of parcels but counting those  
21 portions as if they were separate existing parcels would produce an artificially small average  
22 lot size for purposes of MCZO 181.090, because such partial parcels are not available for  
23 development. According to the county, unlike petitioner’s preferred approach the county’s  
24 approach recognizes the actual parcel pattern and development conditions existing in the  
25 area.

1 With respect to the purpose and underlying policy, the county explains that the  
2 general purpose of chapter 181 is to establish a program “to review land use applications to  
3 assess the risk that a proposed use will adversely affect the sustainability of aquifer  
4 production.” MCZO 181.010. The specific purpose of water use inventories, the county  
5 notes, is to “use existing information to gain specific information to make conclusions  
6 regarding groundwater availability for an individual lot or a partition.” MCZO 181.090. We  
7 understand the county to argue that the county’s approach allows the county to assess the risk  
8 to the aquifer in a manner that is at least as accurate as petitioner’s preferred approach, and  
9 that petitioner has not demonstrated that the county’s approach is inconsistent with the  
10 purpose and policy underlying MCZO 181.090.

11 MCZO 181.090 does not indicate how lots and parcels bisected by a one-quarter mile  
12 radius line should be treated, in calculating average density. While the county’s approach  
13 has its problems, petitioner’s preferred interpretation is not without its own textual  
14 difficulties. As the county notes, MCZO 181.090(C)(1)(a) requires a calculation of the  
15 “average size of lots and parcels within one-quarter mile,” including “all existing lots and  
16 parcels,” which suggests that the county must determine average lot size based on actual,  
17 existing lots and parcels, not artificially demarcated portions of existing lots and parcels.

18 It is also worth noting that under MCZO 181.090(A), a water use inventory must  
19 include lot and parcel information, well locations, and groundwater use estimates for an area  
20 “within *at least* one-quarter mile of the proposed development.” MCZO 181.090(A)(1), (2)  
21 and (3) (emphasis added). MCZO 181.090(A) clearly allows for a study area that may  
22 exceed one-quarter mile in radius. That makes some sense under the county’s approach, but  
23 it would generate useless information under petitioner’s interpretation, which takes no  
24 account of lot and parcel information, well locations, or groundwater use estimates for the  
25 area outside the one-quarter mile radius for purposes of MCZO 181.090.



1 We also agree with the county that it appropriately considered the context provided  
2 by MCZO 181.100 and the manual prescribing the techniques for conducting hydrogeology  
3 reviews and studies. It seems relatively clear that hydrogeology reviews and studies are  
4 more detailed and intensive analyses of the same area that is studied under the water use  
5 inventory. MCZO 181.100(A)(1) requires that the hydrogeology review shall include the  
6 information required for a water use inventory, while MCZO 181.110(A)(1) requires that the  
7 hydrogeology study shall include the information required for a hydrogeology review, which  
8 would include the information required of a water use inventory. As the county found, the  
9 manual for conducting hydrogeology reviews specifies that the study area includes the  
10 entirety of lots and parcels that are partially within a one-quarter-mile radius of the subject  
11 property. MCZO 181.100 provides that a hydrogeology review “requires compilation and  
12 analysis of existing information but not development of new data.” Under petitioner’s  
13 approach, the hydrogeology review may well need to develop “new data” with respect to lots  
14 and parcels only partially within one-quarter mile, because that information may not have  
15 been compiled and considered in the water use inventory. Although petitioner argues that  
16 the water use inventory and hydrogeology review and study provisions use their respective  
17 study areas for different purposes, it is not clear to us that those different purposes require a  
18 different study area. As far as we can tell from the pertinent code provisions, the code  
19 contemplates use of the same study area for the water use inventory, hydrogeology review  
20 and hydrogeology study. The fact that the study area for the hydrogeology review and study  
21 includes lots that are only partially within one-quarter-mile of the subject property supports  
22 the county’s interpretation that the same approach is required for the water use inventory  
23 study area. For the foregoing reasons, we cannot say that the county’s interpretation is  
24 inconsistent with the text and context of the pertinent code provisions.

25 As for the purpose and underlying policy, petitioner’s approach would certainly  
26 trigger hydrogeology reviews more often than the county’s approach. As petitioner notes,

1 the county's approach can give a false impression of the size of the lots closest to the subject  
2 property, in circumstances where peripheral lots and parcels are much larger in size than  
3 those closer to the subject parcel. However, it seems to us that petitioner's approach could  
4 give an equally false impression of the size of the lots closest to the subject property, in  
5 circumstances where peripheral properties are much smaller than the closer parcels. Further,  
6 as the county notes, under MCZO 181 lot size and density are proxies for existing and  
7 potential residential development and associated pressures on the aquifer, which are the true  
8 regulatory targets of the code. The county's approach more accurately represents the existing  
9 and potential development conditions in the area surrounding the subject property, whereas  
10 petitioner's approach considers artificially bisected portions of lots as whole lots, even  
11 though the portion of the lot within the one-quarter mile radius may not be developable. If  
12 the purpose of MCZO 181 is to accurately assess the risk to water supplies from residential  
13 development, the county's approach seems more consistent with that purpose. Petitioner has  
14 not demonstrated that the county's interpretation is inconsistent with the purpose of  
15 MCZO 181.090 or its underlying policy. Accordingly, we must affirm that interpretation.  
16 ORS 197.829(1).

17 The first and second assignments of error are denied.

18 The county's decision is affirmed.