BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DALE BURLISON, BRADLEY S. HAWES,
DAVID L. SPURLOCK, JAMES R. VIG
and RON D. WOODRING,
Petitioners,

vs.

MARION COUNTY,
Respondent.

LUBA No. 2006-018

FINAL OPINION
AND ORDER

Appeal from Marion County.

Dale Burlison, Bradley Hawes, Dave Spurlock, James Vig and Ron Woodring, Jefferson, filed the petition for review. Dale Burlison argued on his own behalf.

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

BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 07/05/2006

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision granting conceptual and detail subdivision approval.

FACTS

The subject property is a 20-acre parcel designated Rural Residential (RR) and zoned Acreage Residential (AR). The applicant sought approval to subdivide the parcel into ten 2-acre lots. Because the property has a Sensitive Ground Overlay (SGO), a hydrogeology study and peer review were required. The planning commission approved the application, and petitioners appealed to the board of county commissioners. The board of county commissioners affirmed the planning commission's decision. This appeal followed.

MOTION TO TAKE EVIDENCE OUTSIDE OF THE RECORD

Petitioners move the Board to take evidence not in the record consisting of a letter from the Oregon State Board of Geologists Examiners (OSBGE) and copies of OSBGE minutes purporting to demonstrate that the applicant's hydrogeologist is unqualified. The county responds that our rules do not allow the evidence to be accepted. The county is correct. OAR 661-010-0045(1) provides:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

Petitioners argue that the proffered evidence constitutes "other procedural irregularities not shown in the record." The evidence, however, has nothing to do with

procedure. On the contrary, the proffered evidence concerns the competence, or lack thereof, of the applicant's expert.

The motion to take evidence outside the record is denied.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the decision does not comply with Marion County Rural Zoning Ordinance (MCZO) 172.01, which provides:

> **"PURPOSE**. In the interpretation and application of this Chapter, the provisions hereof shall be held to be the minimum requirements adopted for the public health, safety, and welfare. To protect the people, among other purposes, such provisions are intended to provide for adequate public services and *safe streets* for accomplishing, among other things, the following objectives:
>
> "(a) Better living conditions within new subdivisions.
>
> "(b) Simplification and definiteness of land descriptions.
>
> "(c) Establishment and development of streets, utilities, and public areas.
>
> "(d) Stabilization of property values in the subdivision and adjacent areas.
>
> "(e) Provide standards and regulations which will inform the public and aid in uniform enforcement.
>
> "(f) To regulate the subdividing and partitioning of land in areas outside urban growth boundaries in Marion County in accord with applicable state statutes and the State Planning Goals." (Emphasis added).

According to petitioners, existing substandard roads and the increased traffic to be generated by the proposed development will result in a lack of "safe streets" in violation of MCZO 172.01. The county responds that the purpose section of MCZO 172.01 is not an approval criterion. According to the county, the road standards applicable to the proposal are located in other sections of MCZO Chapter 172 and were addressed in the decision.

We agree with the county that MCZO 172.01 is not an applicable approval criterion. The purpose statement sets out the objectives to be achieved, and states that they are to be achieved by other provisions in that chapter. Such purpose statements are not mandatory

approval criteria for quasi-judicial land use decisions. *Bennett v. City of Dallas*, 17 Or LUBA 450, *aff'd* 96 Or App 645, 773 P2d 1340 (1989). In addition, MCZO 172.01 is generally a statement of aspirational objectives. When purpose statements are merely aspirational statements they are not approval criteria for quasi-judicial land use decisions like the subdivision decision before us in this appeal. *Ellison v. Clackamas County*, 28 Or LUBA 521, 525 (1995).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the proposal does not meet minimum lot size requirements. MCZO 172.36 provides:

> "**LOT SIZE** All lots approved under this Chapter shall have sufficient area to be consistent with the intent of the Comprehensive Plan and to provide adequate area for the intended structures and uses, all setbacks, access and spacing required for water supply and waste water disposal. Lots to be served by public or privately owned sewage collection and disposal system must meet the requirements and have approval of the Oregon State Department of Environmental Quality before being recorded or sold. State regulations, soil types, drainage, terrain, and location may be included as part of the criteria used by the State or County in determining appropriate lot sizes for lots using subsurface disposal of sewage. Lot size and dimension shall be as prescribed in the corresponding zone."

Initially, petitioners argue that the proposed lots are smaller than other lots in the area. MCZO 172.36, however, does not require that new lots be similar in size compared with other lots in the area. MCZO 172.36 requires that lot size "be as prescribed in the corresponding zone." The AR zone allows 2-acre lots, which is what the applicant proposes. Petitioners also argue that the lot sizes are not big enough for well and septic purposes because there is not enough room to drill a second well or locate a second drain field if necessary. There is nothing in MCZO 172.36 or any other provision cited to us that requires room for a second well or septic drain field.

Finally, petitioners argue that while the lots may have been 2 acres *before* dedications for right-of-ways and easements were granted, six of the ten lots will fall below the 2-acre minimum after the dedications. The county responds that it interprets its code to measure lot size before right-of-ways are dedicated.[1] The MCZO does not state how to calculate lot size. Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS 197.829(1), we may only overturn a governing body's interpretation of its own ordinances if that interpretation is inconsistent with the express language, purpose, or policy of the ordinance.[2] The burden of demonstrating that the county's interpretation is wrong falls on petitioners. Petitioners, however, do not explain why the county's interpretation is wrong; they merely assume that it is and provide mathematical calculations.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Because the property is located in an SGO, the applicant was required to provide a hydrogeology study (study). MCZO 181.070. Once a study is performed, it is subject to peer review by an expert chosen by the county. MCZO 181.150. The applicant retained a hydrogeologist who performed the study and that study was peer reviewed by a hydrogeologist retained by the county. Petitioners challenge the methodology of the study, in

---

[1] The county's decision states: "All lots shall be a minimum 2 acres in size, prior to required right-of-way dedication." Record 4.

[2] 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[.]"

particular the use of a ¼-mile radius study area and the inclusion of acreage of parcels bisected by the ¼-mile radius line. We recently addressed precisely this issue in *Upright v. Marion County*, ___ Or LUBA ___, (LUBA No. 2005-127, March 2, 2006). Without repeating all of our analysis from that case, we held that the county's interpretation of how to apply the ¼-mile radius study area boundary was correct. *Id*. at slip op 10. We see no reason to disturb that holding.

Petitioners then go to great lengths conducting calculations based on *their* preferred interpretation of the MCZO and state what the actual figures therefore are and cite evidence in the record which conflicts with the county's decision. Petitioners, however, misunderstand the standard of review; which is substantial evidence review.[3] While petitioners identify conflicting evidence that the county could perhaps have relied upon to deny the application, petitioners have not explained why it was unreasonable for the county to have relied upon the review prepared by the applicant's expert and approved under peer review by the county's expert.

The third assignment of error is denied.

The county's decision is affirmed.

[3] As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).