BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRIAN HINES, LAUREL HINES, DON DEAN,
DEANA DEAN, EVAN LEHMAN, LAURIE LEHMAN,
JERRY JONES, TRACY JONES, and
KEEP OUR WATER SAFE COMMITTEE,
Petitioners,

vs.

MARION COUNTY,
Respondent,

and

LEROY LAACK, JEAN LAACK,
ANDREW RAINONE, MARGARET RAINONE,
M. DUANE RAWLINGS and GREG EIDE,
Intervenor-Respondents.

LUBA No. 2007-185

FINAL OPINION
AND ORDER

Appeal from Marion County.

James D. Brown and Ralph O. Bloemers, Portland, filed the petition for review and James D. Brown argued on behalf of petitioners. With them on the brief was the Crag Law Center.

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

Mark D. Shipman, Salem, filed a response brief and argued on behalf of intervenor-respondents. With him on the brief was Saalfeld Griggs, PC.

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

REMANDED 03/19/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision that grants preliminary subdivision approval to divide a 217.43-acre EFU-zoned property into 43 lots.

MOTION TO INTERVENE

Leroy Laack, Jean Laack, Andrew Rainone, Margaret Rainone, M. Duane Rawlins, and Greg Eide (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

INTRODUCTION

Intervenors own the subject property as tenants in common.[1] As such, each intervenor may occupy and use the entire property, so long as they do not exclude the other tenants in common. *United Bank of Denver v. Gardos*, 80 Or App 342, 347, 722 P2d 1261 (1986). The six property owners acquired their interests in the property in different years. Leroy Laack acquired his interest in 1971; Jean R. Laack acquired her interest in the property in 1997. The other property owners acquired their interests during the intervening years.[2] The disputed subdivision was approved pursuant to Ballot Measure 37 (2004) waivers.[3] Under Ballot Measure 37, which was codified at ORS 197.352 (2005), local governments were authorized to decide "not to apply" land use regulations that post-date a property owner's acquisition of real property, in certain circumstances. ORS 197.352(8) (2005). The

[1] According to intervenors, Leroy Laack and Jean Laak own an undivided ¼ interest in the property, Andrew Rainone and Margaret Rainone own an undivided ¼ interest in the property, M. Duane Rawlins owns an undivided ¼ interest in the property, and Greg Eide owns an undivided ¼ interest in the property. Intervenor-Respondents' Brief 4.

[2] Andrew Rainone and Margaret Rainone acquired their interests in 1973. M. Duane Rawlins acquired his interest in 1979. Greg Eide acquired his interest in 1992.

[3] The county and state Ballot Measure 37 waivers play a key role in determining the applicable law in this matter. Without those waivers, the disputed subdivision could not be approved. For reasons known only to the parties, the county Ballot Measure 37 waiver is not included in the record and only the first page of the state's Ballot Measure 37 waiver is included at Record 958. That page indicates it is the first of four pages. No party has requested that we take official notice of those Ballot Measure 37 waivers.

state and county Ballot Measure 37 waivers in this case constitute state and county decisions "not to apply" certain state and local land use laws that were adopted after the date each of the six property owners acquired their interest in the property. ORS 197.352(8) (2005). Such decisions under ORS 197.352(8) (2005) are commonly referred to as "waivers," and we refer to them as waivers in this opinion.

The State of Oregon takes the position that Ballot Measure 37 waivers are personal to the property owners that receive such waivers and that those waivers cannot be transferred to another person. *See* February 24, 2005 letter from the Special Counsel to the Oregon Attorney General to Lane Shetterly, Director of DLCD, (so concluding). The Department of Land Conservation and Development (DLCD) took the position below that each of the six property owners remain subject to land use laws that were in effect on the date each property owner acquired his or her interest in the subject property. Record 871-73. We do not understand the county or intervenor to dispute that the state and county Ballot Measure 37 waivers are personal or that all the applicant/owners in this case remain subject to state and local land use laws that were (1) adopted on or before the date they acquired their interest in the property and (2) were not waived by the state or county. The result of all of this is that certain state and county land use regulations that apply to this EFU-zoned property and would prevent its subdivision for residential development were waived for intervenor Leroy Laack, but those laws remain applicable to the other owners. *Id.*[4] The challenged decision identifies all six owners as applicants. Record 45.

BALLOT MEASURE 49 (2007)

Before turning to petitioners' assignments of error, we note that Ballot Measure 49 (2007) took effect on December 6, 2007 and significantly modifies the legal framework for obtaining relief from land use regulations that was established by Ballot Measure 37. In

[4] Because their acquisition dates differ, the land use laws that apply to these remaining owners vary somewhat.

particular, Ballot Measure 49 requires that some Ballot Measure 37 waivers be refiled and adjudicated under Ballot Measure 49. However, Section 5 of Ballot Measure 49 provides that the holders of some Ballot Measure 37 waivers remain entitled to just compensation as provided in "[a] waiver issued before the effective date of this 2007 Act to the extent that the claimant's use of property complies with the waiver and the claimant has a common law vested right on the effective date of this 2007 Act to continue the use described in the waiver." The county and state Ballot Measure 37 waivers were issued before the December 6, 2007 effective date of Ballot Measure 49.

No party has argued that Ballot Measure 49 renders this appeal moot. The only mention of Ballot Measure 49 is in a footnote in the petition for review:

> "* * * In addition, Measure 49 became effective on December 6, 2007 and the underlying Measure 37 waiver orders have expired. The applicant has been ordered to stop work. The petitioners do not believe that the applicants have established a common law vested right to the use in the applicable Measure 37 waivers. However, Marion County has promulgated an ordinance to determine vested rights. Applicants, on the other hand, have indicated that they believe they have vested rights to the use. The resolution of this appeal is relevant to any determination of vested rights under Measure 49." Petition for Review 10 n 1.

Because it appears to be undisputed that our resolution of this appeal is not moot, because it may have some bearing on the applicant's determination to seek a vested rights determination under Ballot Measure 49, we do not consider the issue further and turn to petitioners' assignments of error.

FIRST ASSIGNMENT OF ERROR

A. Petitioners' First Assignment of Error

Petitioners' first assignment of error is set out below:

> "* * * Respondent Violated and Misconstrued ORS 197.352 and Failed to Make Adequate Findings in Approving the Application for All Applicants Regardless of a Specific Owners' Date of Acquisition." Petition for Review 7.

Intervenors first argue that petitioners failed to raise the issue presented in the first assignment of error during the county's proceedings in this matter and therefore have waived their right to raise this issue at LUBA. ORS 197.763(1); 197.835(3).[5] We reject intervenors' waiver argument. Petitioners adequately raised the issue. Record 643, 825; Supplemental Record 17. We consider petitioners' first assignment of error on the merits.

B. The County's Findings and Condition 7

To address the issue raised in the first assignment of error, the county adopted the following findings:

> "The board [of commissioners] determined that each owner held an undivided interest in the entire property. Under this interpretation, waivers granted to Leroy Laack, Andrew Rainone, and Margaret Rainone are specific to them and would allow each of them to develop the property in a manner consistent with his or her waiver. Leroy Laack's waiver allows the entire parcel to be considered for a subdivision. *A condition of approval will require that their ownership interest in the subject property remain unchanged until the subdivision plat is recorded*. * * *" Record 47 (emphasis added).

The county's conclusion approving the disputed subdivision is set out below:

> "**Conclusion**. Based upon a review of the subdivision and zoning provisions of the Marion County Rural Zoning Ordinance, comments received from participating agencies, testimony received by interested parties, and the evidence in the record, the Board finds that the applicants' proposal meets all of the mandatory approval criteria for a subdivision in the EFU zone under the provisions granted in the applicants' Measure 37 application M05-17, and hereby grants the subdivision request subject to the conditions of approval contained in Exhibit B." Record 64.

The condition that is referenced in the above findings is condition 7, which is set out below in relevant part:

> "Transferring ownership of the subject property from Leroy Laack, Andrew Rainone, and Margaret Rainone prior to the final plat being recorded could void this approval." Record 67.

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[5] LUBA's scope of review is set out at ORS 197.835. ORS 197.835(3) provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

C. Petitioners' and DLCD's Arguments

Our primary difficulty in sorting through the parties' arguments is that petitioners' arguments do not acknowledge or directly address the above-quoted county findings or condition 7 and intervenors' arguments depend almost entirely on those findings and condition 7 and largely ignore petitioners' arguments. We turn to petitioners' arguments first. Petitioners argue the county erred by not applying all land use laws that apply to *any* applicant/owner:

> "As DLCD indicated in its letter, the Respondent must address applicable statewide planning goals, statutes and regulations that were in place at the time *each owner* acquired an interest in the property. Specifically, DLCD has indicated that the Respondent must consider Goal 3, ORS 92.010(6) and ORS 215.263, in effect since 1973, which do not allow for the subdivision of land as requested in the present application. The Respondent similarly must make findings related to the County laws in place at the time of acquisition that would similarly apply to specific owners, which limit the owners' ability to subdivide the property. This specifically includes, but is not limited to, MCRZO sections 120.070, 136.010, 136.050, 136.060, 136.090, and Marion County Comprehensive Plan Agricultural Policies 2, 3, 4, 5 and 9. The Respondent has not made the required findings and, accordingly, the challenged Order must be remanded." Petition for Review 11-12 (emphasis in original).

Although we cannot be sure, because the petition for review is unclear, petitioners appear to be arguing that any state or local land use law that applies to any applicant/owner must be applied to the disputed subdivision application, with the result that the subdivision application cannot be approved and should have been denied. Petitioners' apparent theory is that because all property owners signed the application the state and local land use laws that apply to any of the applicant/owners must be satisfied.

If we understand petitioners correctly, their argument appears to be a broader argument than the argument that appears to have been advanced by DLCD before the county. DLCD seems to have taken the position below that the application must be judged separately for each applicant/owner, based on the laws that apply to each applicant/owner following the Ballot Measure 37 waivers. In particular, in DLCD's October 13, 2006 letter to the county,

DLCD appears to take the position that under Goal 3 (Agricultural Lands), ORS 92.010(6) and (8) and ORS 215.263 the application for subdivision approval must be denied under applicable state law for all applicants except applicant Leroy Laack.[6] Based on DLCD's October 18, 2006 letter to the county, it is not clear to us whether DLCD changed it position concerning the applicability of ORS 215.263 with regard to applicants/owners Rainone.[7] For purposes of this opinion, we assume without deciding that DLCD did not change its position that ORS 215.263 applies to the Rainones as owners of the subject property.

To summarize, we understand DLCD to have taken the position that ORS 92.010(6) and (8) and ORS 215.263 apply to all owners of the subject property, with the exception of Leroy Laack, and that those statutes prohibit subdivision (as opposed to partition) of the subject property. It is reasonably clear from DLCD's letters that DLCD believed the county must deny the application for all applicant/owners except Leroy Laack. One can infer from DLCD's letters that DLCD believes the county could approve the subdivision application of Leroy Laack, if the county finds that the application complies with applicable state and county land use regulations that were not waived with regard to Leroy Laack by the state and county Ballot Measure 37 waivers.

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[6] In next to last paragraph of its October 13, 2006 letter, DLCD states:

> "ORS 215.263 and ORS 92.010(6) and (8), in effect * * * since 1973, [do] not allow for the subdivision of land but only for its partition. As a result, the provisions of ORS 215.263 required to be applied by Goal 3 were in effect when the applicants (with the exception of Leroy Laack) acquired their interest in the property and apply to any division of the property in the implementation of their Measure 37 waiver." Record 873.

[7] The next to the last paragraph of the October 18, 2006 letter states:

> "With regard to Andrew and Margaret Rainone, the interim planning goals need not be applied, as they purchased their interest in the property prior to the adoption of ORS 215.515 (1973 edition)." Record 871.

As we have already noted above, the county either did not understand DLCD's position or, if it did, the county elected to follow a different approach. We turn to intervenors' arguments.

D. Intervenors' Arguments

Intervenors point out that all six owners signed the application because Marion County Rural Zoning Ordinance (MCRZO) "requires the signature of all persons who have a recorded interest in the Property before it will accept a land use application. MCRZO 122.045." Intervenor-Respondent's Brief 4-5.[8] In their brief, intervenors set out the county findings that were quoted earlier and describe condition 7. Intervenors then argue:

> "The County's findings and conditions limit the scope of the subdivision approval in a manner that is consistent with the Waivers. Moreover, the subdivision approval, as the conditions require, has no affect on the Intervenor-Respondents' ownership interest. Petitioners' assertions are factually incorrect and not substantiated by the evidence in the Record. Thus, the County's approval is consistent with the Waivers. * * *" Intervenor-Respondents' Brief 5.

We are not sure we understand intervenors' argument. Intervenors appear to argue that condition 7 is sufficient to ensure that the challenged subdivision approval is consistent with the county and state Ballot Measure 37 waivers. For the reasons explained below, we do not agree.

E. Discussion and Conclusion

If the challenged application for tentative subdivision approval is shown to comply with all state and county land use laws that remain applicable to Leroy Laack but is not shown to comply with state or local land use laws that remain applicable to other applicants/owners, we see no reason why the county could not approve the application for

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[8] MCRZO 122.045 requires "[s]ignatures of all owners of the subject property" on applications for *variances*. Intervenors offer no explanation for why they think MCRZO 122.045 applies here. However, the application form in the record has signature lines for "each owner of the subject property." Record 952. Intervenors and respondent do not dispute that the county requires that all property owners sign subdivision applications, and we assume that the county imposes that requirement.

Leroy Laack and deny the application for all other applicant/owners. As a tenant in common, Leroy Laack has a right to use and enjoyment of the entire property, so long as he does not exclude the other tenants in common. *United Bank of Denver*, 80 Or App at 347. Even if the county's land use regulations require that all owners sign the application for preliminary subdivision approval, we see no reason why the county could not issue an applicant-specific subdivision approval decision. We do not understand petitioners to argue otherwise, but to the extent they do argue otherwise they identify no legal authority for that position.[9]

Why the county did not take this more straightforward approach and grant tentative subdivision approval only to Leroy Laack, we do not know. The county appears to have taken the position in its findings that it could approve the disputed subdivision for all applicants, so long as it conditioned the subdivision approval to require that Leroy Laack, Andrew Rainone, Margaret Rainone remain owners of the property until the final subdivision plat is approved and recorded.[10] We seriously question whether that approach is consistent with the county and state Ballot Measure 37 waivers, since it appears to leave open the possibility that one or more of the applicant/owners who are not entitled to subdivision approval could then independently seek and receive final plat approval, record the final plat and develop the property, so long as Leroy Laack, Andrew Rainone, Margaret Rainone remain owners of the subject property until the final plat is recorded. However, we need not and do not address that question here, because even if that approach is potentially open to the county, condition 7 does not ensure that result.

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[9] In fact, petitioners took the position below that Leroy Laack's application for subdivision approval was "arguably approvable," if the proposal complies with all land use regulations that remain applicable to him following the county's and the state's Ballot Measure 37 wavier. Record 825.

[10] The county apparently understood DLCD to have taken the position that the Rainones are not subject to statutes that would preclude approval of the proposed subdivision. As we noted earlier, we need not and do not decide that question.

Condition 7 does not condition the county's approval of the disputed subdivision on Leroy Laack, Andrew Rainone, and Margaret Rainone remaining the owners of undivided interests in the subject property until the final subdivision plat is approved and recorded. Condition 7 is not a condition at all. Condition 7 is a warning that the subdivision approval "could" become "void" if those property owners transfer their interests in the subject property before the final plat is approved and recorded. Record 67. We agree with petitioners that a warning that subdivision approval "could" at a future date become void in that circumstance is a legally insufficient substitute for limiting subdivision approval to the property owner or owners who have been granted the Ballot Measure 37 waivers that are a legal necessity to approve the disputed subdivision of EFU-zoned land.

On remand, we leave open the possibility that the subdivision can be approved for all applicants with a condition that would actually make preliminary subdivision approval void if the holder or holders of the Ballot Measure 37 waivers that are necessary to grant preliminary subdivision approval cease to own the subject property. Such an approach seems problematic for the reason already noted, but we need not and do not decide whether Ballot Measure 37 categorically precludes such an approach. The county might also consider the approach that DLCD appears to have suggested below, *i.e*. approve the subdivision, but limit that approval to the applicant/owner or applicant/owners who have the Ballot Measure 37 waivers that are required to subdivide land that is now zoned EFU, and deny the subdivision application with regard to all other applicant/owners. Whichever approach the county pursues on remand, the county should adopt a more complete explanation of its understanding of the legal effect of the Ballot Measure 37 waivers on each of the property owners. In addition, a more complete explanation of DLCD's position and petitioners' position and the county's basis for accepting or rejecting those positions would improve the chances that the county's decision can be defended in the event of an appeal of the county's decision on remand.

The first assignment of error is sustained.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

A. Introduction

MCRZO Chapter 181 is entitled Sensitive Groundwater Overlay Zone (SGO). The subject property is located within a SGO. Petitioners' second, third and fourth assignments of error concern the county's application of MCRZO Chapter 181. Although our ultimate resolution of those assignments of error is relatively brief and straightforward, an understanding of how the SGO works is necessary to understand our resolution of these assignments of error. We therefore describe the basic mechanics of the SGO before turning to petitioners' assignments of error. The purpose section of the SGO explains:

> "* * * This chapter implements the program to review land use applications to assess the risk that a proposed use will adversely affect the sustainability of aquifer production. This ordinance is not intended to act as a guarantee that a property owner will successfully locate an adequate water supply at a particular location or on a specific lot or parcel, or that any individual well will continue to provide adequate water for an existing land use." MCRZO 181.010.

1. MCRZO 181.070 (Step 1)

MCRZO 181.070 is the first step in determining whether water studies will be required to develop property in the SGO. For "[r]esidential partitions, planned unit developments, and subdivisions * * * where the residences will use exempt-use wells," MCRZO 181.070(A) sets out two sets of standards, one for partitions and one for subdivisions. MCRZO 181.070(A)(1) sets out the study requirement for partitions. Because the challenged decision concerns a subdivision rather than a partition, MCRZO 181.070(A)(1) does not apply. MCRZO 181.070(A)(2) sets out the study requirement for subdivisions.

County zoning districts display different "threshold" lots sizes. Under MCRZO 181.070(A)(2)(a), if the average lot size for a proposed subdivision is at least as large as the applicable threshold lot size, no further demonstration of water supply is required under

MCRZO chapter 181, and a subdivision applicant's obligations under the SGO end at Step 1. Under MCRZO 181.070(A)(2)(b), if the proposed lots are smaller than the applicable threshold lot size, a hydrogeology review is required under MCRZO 181.100, and a subdivision applicant must proceed to Step 2. MCRZO 181.070(A)(2) is set out below:

> "Within the 'SGO' zone, applications to subdivide a parcel of land shall be subject to the following requirements:
>
> "(a) If the average lot size proposed in the application is equal to or larger than the 'threshold' lot size displayed in the zone label on the official zoning map, no demonstration of water supply is required;
>
> "(b) If the average lot 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 Hydrogeology Review pursuant to section 181.100."

2. MCRZO 181.100 (Step 2 - Hydrogeology Reviews)

MCRZO 181.100 explains the purposes of hydrogeology review:

> "The purposes of a Hydrogeology Review are to provide information regarding the geology and hydrogeology of the area in the immediate vicinity of the proposed development and to furnish professional analysis of the information. A Hydrogeology Review generally requires compilation and analysis of existing information but not development of new data. Study findings, maps, and conclusions shall be presented in a clear and understandable report."

MCRZO 181.100(A) sets out in detail the information that must be included in a hydrogeology review. MCRZO 181.100(B) sets out five things that a hydrogeology review must demonstrate. Finally, MCRZO 181.100(C) requires preparation of a hydrogeology *study* under MCRZO 181.110 (Step 3) if the hydrogeology *review* shows that any of the following circumstances exist:

> "(1) More than 90 percent of the recharge in the area of concern will be used after the proposed development is completed;
>
> "(2) The proposed use will adversely affect the long-term water supply of existing uses or potential new uses on existing vacant parcels in the area of concern;

"(3) The additional proposed use will deplete the ground water resource over the long or short term; and

"(4) Existing information is inadequate to determine whether any of the circumstances described in subsection (1) through (3) of this section exist." MCRZO 181.100(C).

3. MCRZO 181.1010 (Step 3 - Hydrogeology Studies)

MCRZO 181.110 explains the purposes of a hydrogeology study:

"The purpose of a Hydrogeology Study is to provide professional conclusions and recommendations regarding long-term aquifer capacity in areas where there is already considerable evidence that the groundwater resource is inadequate to support additional development. A Hydrogeology Study will include development of new data to help determine the availability of groundwater in the immediate vicinity of a proposed development. Study findings, maps, and conclusions shall be presented in a clear and understandable report."

MCRZO 181.110(A) identifies the information that must be included in a Hydrogeology Study and MCRZO 181.110(B) requires that a Hydrogeology Study include findings and recommendations regarding the level and density of development that can be supplied by the aquifer and mitigation measures.

With the above overview of how the SGO works we turn to petitioners' assignments of error.

B. Second and Third Assignments of Error

As explained above, the first step under the MCRZO 181.070(A) study requirements is to identify the applicable "threshold" lot size and determine whether the subdivision proposes average lot sizes that are equal to or larger than that "threshold" lot size. The applicable "threshold" lot size in this case is five acres. Record 60. The largest number of lots that the subject 217.25-acre parcel could be subdivided into and have the average lot size be equal to or more than five acres is 43 lots. Intervenors' propose to create 43 lots. Forty-two of those 43 lots will be between 2 acres and 6 acres in size. One of those lots will be 92.9 acres in size. The board of county commissioners adopted the following findings to

explain its decision that because the proposed subdivision proposes an *average* lot size of 5.05 acres, MCRZO 181.070(A)(2)(a) applies, and no Hydrogeology Review or Hydrogeology Study was required:

> "The opponents claim that the applicants' method of averaging lot size is unlawful. Specifically, they allege that the applicants are using this method to avoid a Hydrogeology Review under 181.100.
>
> "The Board specifically interprets section 181.070(A)(2) and the use of 'average' to have * * * its common meaning, which Webster's dictionary defines in relevant part as '(1) the numerical result obtained by dividing the sum of two or more quantities by the number of properties; an arithmetic mean.' The subject property is 217.25 acres and the proposed development will result in 43 lots. Thus, the average is equal to 217.25 ac./43 lots = 5.05 ac. per lot, which is greater than the threshold amount of five (5) acres. The Board further finds that this interpretation is consistent with how Marion County has consistently interpreted section 181 and specifically 181.070(A)(2) in the past. The Board finds that the applicants' request satisfies the threshold number in 181.070(A)(2)." Record 60.

Apparently to address concerns that the 92.9 acre lot might be further divided in the future without a Hydrogeology Review or Hydrogeology Study and effectively defeat the purpose of the SGO, the Board of County Commissioners imposed the following condition of approval:

> "Once the subdivision plat is recorded, any new application to subdivide or partition any of the resulting lots and/or tracts shall be accompanied by a Hydrogeology Study meeting the requirements of Section 181.110 and 181.150. The study shall include all the land in this subdivision." Record 68.

We agree with intervenors that the board of county commissioners' interpretation of MCRZO 181.070(A)(2) is not reversible under ORS 197.829(1).[11] We must defer to the

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[11] ORS 197.829(1) provides:

> "The Land Use Board of Appeals 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;

county's interpretation of MCRZO 181.070(A)(2) unless it is inconsistent with the text, purpose or policy of MCRZO 181.070(A)(2).

> "Whether a local government's interpretation of its ordinance is 'inconsistent' with the language of the ordinance depends on whether the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE* [*v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993)]." *Foland v. Jackson County*, 215 Or App 157, 164, 168 P3d 1238, *rev den* 343 Or 690, 174 P3d 1016 (2007).

The county adopted the commonly understood meaning of "average," and there is nothing implausible about the county's interpretation of the term "average lot size" in MCRZO 181.070(A)(2). We also agree with intervenors that the apparent purpose of the SGO is not to ensure that development will never impact ground water resources. The SGO takes a more measured approach that excludes lower density development from the SGO information requirements and imposes an escalating requirement for information on the higher density development that is not excluded.

Petitioners' apparent view is that any lots that might be large enough to divide into additional lots in the future should be excluded when computing the average lot size. The difficulty with that view is that there is simply nothing in the language of MCRZO 181.070(A)(2) that would support computing average lot size in that way. While petitioners' refer to the 92.9-acre lot as a *remainder* lot, it is just as much a lot as the other 42 lots shown on the preliminary subdivision plan.[12] Record 949. The county had no basis for excluding new lot 43 when computing the proposed subdivision's average lot size.

> "(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; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[12] ORS 92.010(4) defines lot to mean "a single unit of land that is created by a subdivision of land."

What petitioners have identified is a potential loophole in step 1 of the SGO. If lot 43 could be subdivided in the future into eight 5.3-acre lots, then intervenors potentially could achieve in two subdivision applications what they could not achieve in one subdivision application (division of their 217 acres into lots that average less than 5 acres in size without submitting a Hydrogeology Review). We need not and do not consider whether such a loophole exists in MCRZO 181.070(A)(2). Even if it does, that would not provide a basis for requiring that lot 43 be excluded when computing the subdivision's average lot size. We note, however, that it is far from clear to us whether MCRZO 181.070(A)(2) could be or must be interpreted to allow the result that petitioners fear. Specifically, if intervenors seek to further divide lot 43 in the future it is far from clear to us that the county could ignore the fact that without the 92.9-acre lot 43, the remaining 42 lots of the disputed subdivision would not average more than 5 acres and could not have been subdivided without a Hydrogeology Study. We also note that the county imposed a condition of approval that, as noted above, expressly requires a Hydrogeology Study for the entire subdivision area if any lot is divided in the future. Petitioners question whether that condition is enforceable, but we do not see why it would not be enforceable. That condition would appear to close any loophole in the SGO, and intervenors have not assigned error to the county's imposition of that condition.

Petitioners also point out that intervenors voluntarily submitted a Hydrogeology Review, which was prepared by Pacific Hydro-Geology, Inc. (PHG). A peer review of the PHG Review was prepared by AMEC Earth & Environmental (AMEC). The AMEC peer review of the PHG Review concluded that PHG Review was "not adequate to demonstrate that the proposed development would not adversely affect the availability of groundwater for other existing users in the entire hydrologic system." Record 204. Based on the AMEC peer review, county planning staff took the position that a Hydrogeology Study was necessary.[13]

[13] Petitioners' water expert Groundwater Solutions Inc. (GSI) similarly concluded that the PHG Review was flawed and that a Hydrogeology Study should be required. Record 234-45.

Petitioners contend that intervenors should be estopped from arguing now that no Hydrogeology Review or Study is required under MCRZO 181.070(A)(2), based on the proposed average lot sizes, when the peer review of the PHG Review and other evidence concluded that more information is needed.

If intervenors in fact waived their rights under MCRZO 181.070(A)(2) to submit a subdivision application without a Hydrogeology Review, we likely would agree with petitioners that intervenors could not later decide to insist that the application be considered without a Hydrogeology Study, if the Hydrogeology Review or other evidence showed that a Hydrogeology Study is needed. But that is not what occurred here. It is sufficiently clear from the record that intervenors did not waive their right under MCRZO 181.070(A)(2) to submit their subdivision application for review without a Hydrogeology Review. Record 221, 657. The PHG Hydrogeology Review was submitted as "proof of good faith." Record 221. But intervenors maintained "the county does not have the authority to require a review or study pursuant to MCRZO 181.090(C)(3)." *Id*. We agree with intervenors that they never waived their position that under MCRZO 181.070(A)(2) a Hydrogeology Review was not legally required in this case for subdivision approval.

For the reasons explained above, the county did not err by concluding that no Hydrogeology Review was required for the disputed subdivision under MCRZO 181.070(A)(2). It follows that the intervenors' obligations to submit groundwater information under the SGO ended at Step 1 under MCRZO 181.070(A)(2).

The second and third assignments of error are denied.

C. Fourth Assignment of Error

In their fourth assignment of error, petitioners offer another theory why they believe a Hydrogeology Review was legally required in this case. Where a Water Use Inventory must be submitted with an application for approval of a partition, a Hydrogeology Review is

required if either of the circumstances set out at MCRZO 181.090(C)(1) exist.[14] The county adopted findings regarding MCRZO 181.090(C)(1) and concluded that MCRZ 181.090(C)(1) did not require a Hydrogeology Review in this case:

> "The Board specifically interprets MCRZO 181.090(C)(1) and (3), to not impose a requirement for a Hydrogeology Review because the density is greater than the SGO number, 5, and both water consumption rates are below 80 percent." Record 62.

In their fourth assignment of error, petitioners assign error to the county's conclusion that a Hydrogeology Review is not required under MCRZO 181.090(C)(1). The county reached that conclusion for two reasons. First, as we have already explained, the county found no Hydrogeology Review is required because the average lot size exceeds five acres and therefore under MCRZO 181.070(A)(2)(a) no further information is required. Second, the county appears to have applied MCRZO 181.090(C)(1)(b) on the merits and concluded no Hydrogeology Review is required under MCRZO 181.090(C)(1)(b).

We need not consider petitioners' evidentiary and findings challenges to the county's second reason for concluding that no Hydrogeology Review is required, because we agree with the county that its finding that MCRZO 181.070(A)(2)(a) applies in this case means no additional information is required under the SGO.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Under their fifth assignment of error, petitioners challenge the adequacy of the county's findings concerning MCRZO 120.070(c) and (e) and argue that the county's findings are not supported by substantial evidence.

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[14] Because we conclude below that MCRZO 181.090(C) does not apply to the disputed subdivision, it is unnecessary to set out the complete text of MCRZO 181.090(C). Under MCRZO 181.090(C)(1)(b) a Hydrogeology Review is required if "[t]he new use will result in consumption of more than 80 percent of the available recharge within one-quarter mile * * *."

Under MCZO 120.070(c), the proposed subdivision must "be consistent with the general nature of the area." Under MCZO 120.070(e), the county must find that the proposed "[d]ivision will not create urban-farm conflicts." Record 51-52.[15]

A. Erroneous Interpretation

Petitioners first argue:

> "In their attempt to address [the requirements of MCZO 120.070(c) and (e)], the applicants simply claimed that the proposed use is rural residential. The applicants' interpretation is unreasonable and incorrect and misunderstands the very nature and purpose of the Rural Zoning Ordinance." Petition for Review 25.

How the *applicants* may have interpreted MCZO 120.070(c) and (e) is unimportant; it is the *county's* interpretations of its zoning ordinances that matter. While we agree with petitioners that the county characterized existing residential development and the proposed residential development as "rural," without more we do not see that that characterization is erroneous. To the extent petitioners suggest the county relied entirely on its *characterization* of the proposed subdivision as "rural," our discussion of the county's findings below show that that is not the case.

Under Statewide Planning Goal 14 (Urbanization), urban growth boundaries are adopted to separate "urban and urbanizable" lands from "rural" lands. The proposed residential development will be rural in the sense it will be located on rural land, because that land is not located within an acknowledged urban growth boundary. While it might be error to characterize dense residential development as "rural," simply because it is located outside an acknowledged urban growth boundary, all of the proposed lots are more than two acres in size. It is true that there are 43 of those lots and that a 43-lot rural subdivision can exhibit some of the same characteristics that "urban" subdivisions exhibit even if the rural

[15] It appears that these MCZO provisions are no longer in effect, but were in effect prior to the date applicant/owner Leroy Laack acquired his interest in the property and apply to the disputed subdivision for that reason.

subdivision lots are larger than urban lots. However, we do not agree that the county committed reversible error by referring to the disputed subdivision as rural residential use.

This subassignment of error is denied.

B. MCZO 120.070(c) – Consistency With the General Nature of the Area

The county adopted the following findings addressing the MCZO 120.070(c) "consistent with the general nature of the area" criterion:

> "The Board finds that the general nature of the area is primarily rural residential, with some EFU parcels to the north. The proposed subdivision is bordered on the north and east by EFU parcels; and to the west and south by rural residential parcels and lots. Both the EFU parcels and the AR parcels and lots are similar in nature and size to the Applicant's proposal. Additionally, the following chart lists the surrounding parcels within 750 feet the site, i.e., the notification area pursuant to MCRZO 111.030(c)(2). Twelve out of the eighteen parcels contain single-family dwellings. Moreover, half of the surrounding parcels are 3.25 acres or less and contain single-family dwellings. *See below*.
>
> "

Tax lot	Size	Single Family Dwelling	Zoning
093w02 00400	146.25 acres	Single Family Dwelling	EFU
093w03 00200	119.55 acres	No Residence	EFU
093w04 01100	75.50 acres	No Residence	EFU
093w04d 02200	2.63 acres	Single Family Dwelling	AR
093w04d 02400	0.68 acres	Single Family Dwelling	AR
093w04d 02600	0.13 acres	No Residence	EFU
093w02b 01100	61.31 acres	Single Family Dwelling	EFU
093w04d 02100	3.25 acres	Single Family Dwelling	AR
093w04d 02300	0.76 acres	Single Family Dwelling	AR
093w04d 02500	8.51 acres	No Residence	AR
093w04d 02700	0.59 acres	No Residence	EFU
093w04d 02800	9.94 acres	Single Family Dwelling	EFU
093w04d 03000	0.82 acres	Single Family Dwelling	AR
093w04d 03200	1.78 acres	Single Family Dwelling	AR
093w04d 03400	2.51 acres	Single Family Dwelling	AR
093w04d 03500	1.95 acres	Single Family Dwelling	AR
093w04d 03700	2.00 acres	Manufactured Structure	AR
093w04d 03900	2.86 acres	Single Family Dwelling	AR

> "The proposed development will consist of 43 lots, 42 of which range in size between 2 acres to 6 acres, for an average acre per lot size of 5.05 acres, leaving a remainder lot of 92.9 acres. The Board finds that the proposed land divisions will be consistent with the general nature of the area. The Board finds that MCZO 120.070(c) is satisfied." Record 56-57.

Petitioners argue the county's findings are inadequate and are not supported by substantial evidence because the record includes evidence from neighboring property owners and the U.S. Fish and Wildlife service that the proposed subdivision could interfere with nearby farming operations and the nearby Ankeny Wildlife Refuge. Petitioners also repeat their concerns about potential impact on groundwater resources.

As we explained in *Le Roux v. Malheur County*, 30 Or LUBA 268, 271 (1995):

> "[A local government's] findings must (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the request satisfies the approval standards."

LUBA is authorized to remand a land use decision if it is not supported by adequate findings and substantial evidence. ORS 197.835(9)(a)(C). But in making a findings and substantial evidence challenge, it is not sufficient for petitioners to cite evidence that the county might also have relied on to find that the proposed subdivision violates MCZO 120.070(c) because it is not "consistent with the general nature of the area." *Burlison v. Marion County*, 52 Or LUBA 216, 221 (2006). The MCZO 120.070(c) criterion is extremely subjective. The county's findings explain the county's view of the "general nature of the area" and why the county believes the proposed subdivision will be consistent with that general nature. The evidence that petitioners cite is not so overwhelming that the county was obligated to acknowledge and expressly discuss why it was not more persuaded by that evidence than the evidence it cited and relied on. *Tallman v. Clatsop County*, 47 Or LUBA 240, 246 (2004); *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68, 76, *aff'd* 161 Or App 199, 984 P2d 958 (1999); *Douglas v. Multnomah County*, 18 Or LUBA 607, 619 (1990). The county's findings concerning the MCZO 120.070(c) "consistent with the general nature of the area" criterion are adequate and supported by substantial evidence.

This subassignment of error is denied.

C. MCZO 120.070(c) – Urban-Farm Conflicts

The county adopted the following findings addressing the MCZO 120.070(e) "will not create urban-farm conflicts" criterion:

> "The Board finds that the proposed subdivision request will not create urban-farm conflicts as required under MCZO 120.070(e). The Board finds the proposed use is rural residential and not urban in nature. Moreover, the properties to the south and west are already primarily used as rural residences. Additionally, while the properties to the north and east are zoned EFU, Neil Creek and its tributaries effectively prohibit most of the properties from farming near the subject property. Similarly, the steep slopes of the neighboring parcels also limit the potential for a future residential-farm conflict. For example, the property to the immediate north * * * has slopes increasing up to 40 percent, and the property to the immediate east * * * has slopes increasing up to 30 percent. The combination of steep slopes and riparian areas creates a natural buffer between the Site and the high value farmland to the north and east.
>
> "Moreover, the fact that the majority of the EFU land surrounding the property is also specially designated as either wasteland or forestland increases the barrier affect * * * caused by the natural properties of the boundary area.
>
> "Lastly, the proposed development will include a 200-foot setback for dwellings and a 100-foot setback for accessory structures from farmed lands to the north. This setback requirement is 100 feet greater than the County required for the homes in the subdivisions to the south, which also abutted EFU properties at the time of development. Therefore, because the physical nature of the land creates a buffer between the subject property and the subject property will be subject to a 100-foot setback requirement for single family dwellings that abut the EFU boundary line, the potential conflict between the rural residents and the farmers is limited. The request satisfies MCZO 120.070(e)." Record 57.

Petitioners once again cite evidence of potential conflicts with nearby farm and forest use. Petitioners also repeat their concerns about possible impacts on groundwater resources.

The county's findings point out that some of the adjoining properties are already in rural residential use rather than farm or forest use. The findings cite topographic features that will act to buffer the site from high value farm land to the north and east and cite the

setbacks that will be imposed on residences and accessory structures as limits that will reduce the changes for conflicts with nearby farm and forest uses. The county's findings concerning the MCZO 120.070(e) "will not create urban farm conflicts" criterion are adequate and supported by substantial evidence in the record.

This subassignment of error is denied.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Under their final assignment of error, petitioners argue that the county's approval of the disputed subdivision is inconsistent with MCRZO 126.010 and for that reason the county's decision must be reversed. MCRZO 126.010 authorizes certain specified "uses, facilities and activities whether primary, accessory, secondary or temporary, * * * in all zones * * * except when specifically prohibited or when a conditional use is required in the applicable primary or overlay zones." The complete text of MCRZO 126.010 is set out in the margin.[16] We understand petitioners to argue that although MCRZO 126.010(b) and (c)

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[16] MCRZO 126.010 identifies uses that are allowed in all zones:

> "**126.010 USES PERMITTED IN ALL ZONES.** The following uses, facilities and activities whether primary, accessory, secondary or temporary, are permitted in all zones * * * except when specifically prohibited or when a conditional use is required in the applicable primary or overlay zones:
>
> "(a) Public rights-of-way and easements existing at the time of adoption of this Ordinance, including public streets, roads and utilities located therein, except as provided in SA, EFU, FT and TC zones.
>
> "(b) Except in SA, EFU, FT and TC zones, expansion and realignment of existing right-of-way and easements, including improvement and construction of streets, roads and utilities in conformance with the applicable comprehensive plan and the standards of the Department of Public Works. Street right-of-way shall not be expanded to a greater width than twice the special setback in Chapter 112 unless the expansion is necessary to include cut and fill slopes and turn lanes at intersections.
>
> "(c) Except in SA, EFU, FT and TC zones, establishment of new public right-of-way and easements, including construction of streets, roads and utilities in conformance with the applicable comprehensive plan, the standards of the Department of Public Works, and the County Subdivision and Partitioning Ordinance. Street right-of-way shall not be greater in width than twice the special setback in Chapter 112 unless the

authorize expansion, realignment and construction of streets in all zones, the EFU zone is expressly excepted. We understand petitioners to argue that because the county's Ballot Measure 37 waiver does not mention or waive MCRZO 126.010, the county erred by approving the disputed subdivision.[17]

The county adopted the following findings to respond to petitioners' arguments concerning MCRZO 126.010:

> "The Board finds that the opponent's interpretation of MCRZO 126.010 is incorrect. The Board Specifically interprets MCRZO 126.010 and the plain meaning of its text, to not apply to parcels located in EFU zoned property.
>
> "The Board specifically interprets MCRZO 126.010 to *permit* uses. While other ordinances may enumerate all permitted or conditionally permitted uses and then *prohibit* any use not expressly enumerated, the Board finds that MCRZO 126.010 does not restrict all non-enumerated uses. The Board further finds that the lack of a specific authorization for road improvements by MCRZO 126.010 is not determinative. In other words, the absence of specific approval does not equal a restriction or prohibition." Record 64.

We do not understand the first paragraph quoted above. To the extent it takes the position that MCRZO 126.010(b) and (c) do not exempt the county's EFU zone from the

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greater width is necessary to include cut and fill slopes and turn lanes at intersections.

"(d) Railroad tracks and related structures and facilities located within existing rights-of-way controlled by railroad companies. Also, except in SA, EFU, FT and TC zones, expansion and realignment of railroad right-of-ways. Railroad right-of-way shall not be greater in width than necessary to accommodate rail supporting structure and drainage facilities.

"(e) Use of non-geothermal groundwater, natural or man-made waterways and impoundments, and related structures and facilities for supply associated with permitted uses.

"(f) Creation, restoration, or enhancement of wetlands as defined in ORS 197.015(17).

"(g) Condominium buildings."

[17] Petitioners argue:

> "As the challenged [subdivision decision] indicates in its findings, [the county's Ballot Measure 37 waiver] specifically enumerated the provisions of the County law that were waived for the owners of the property. MCRZO 126.010 was not one of the provisions of law specifically enumerated." Petition for Review 33.

other zones where expansion, realignment or construction of streets is expressly allowed by MCRZO 126.010(b) and (c), that position is flatly inconsistent with the language of MCRZO 126.010(b) and (c). We reject the county's interpretation of MCRZOO 126.010 in the first quoted paragraph above.

We understand the second paragraph quoted above to find that MCRZO 126.010 is a limited *grant of authority*, not a *prohibition*. Stated differently, we understand the county to find that while MCRZO 126.010(b) and (c) do not *authorize* expansion, realignment or construction of streets in the county's EFU zone, it does not follow that MCRZO 126.010 *prohibits* expansion, realignment or construction of streets in the county's EFU zone. The county found that "other ordinances may enumerate all permitted or conditionally permitted uses and then prohibit any use not expressly enumerated," but the county found that "MCRZO 126.010 does not restrict all non-enumerated uses." By that, we understand the county to take the position that MCRZO 126.010 permits a number of uses but MCRZO 126.010 does not itself prohibit "non-enumerated uses." Such a prohibition, if it exists, must be found under some other legal authority which petitioners do not identify in their sixth assignment of error.

The county's interpretation is not inconsistent with the text or apparent purpose of MCRZO 126.010, which appears to be intended to authorize uses that are commonly allowed in most zoning districts so that those uses do not need to be individually listed in each zoning district. Although the second sentence of the second paragraph is somewhat obscure, we understand the county to argue that its individual zoning districts set out uses that are (1) permitted, (2) allowed as conditional uses or (3) allowed under specified standards and then prohibit all other uses.[18] Those individual zoning districts do prohibit all uses that are not

[18] For example, MCRZO 136.020, which lists permitted uses in the EFU zone, provides in part:

enumerated. But we understand the county to explain that MCRZO 126.010 is written differently. MCRZO 126.010 simply allows some uses in all zoning districts or in most zoning districts; it does not *prohibit* uses in any zoning districts. Any prohibition against uses under the MCRZO must be found in the individual zoning districts, not MCRZO 126.010. The county's interpretation of MCRZO 126.010 is not reversibly wrong under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003), and we defer to that interpretation.

While it may be that approving a subdivision that will require construction of new roads is inconsistent with some other applicable provision of the MCRZO, petitioners' only argument under the sixth assignment of error is that the county's decision violates MCRZO 126.010. We agree with petitioners that MCRZO 126.010 does not *authorize* expansion, realignment or construction of streets in the county's EFU zone. But we agree with the county that MCRZO 126.010 does not *prohibit* expansion, realignment or construction of streets in the county's EFU zone. Because petitioners do not identify a provision of the MCRZO or other applicable law that would prohibit the roads that are proposed in the subdivision, this assignment of error must be denied.

The sixth assignment of error is denied.

The county's decision is remanded.

> Within an EFU zone no building, structure or premise shall be used, arranged or designed to be used, erected, structurally altered or enlarged except for one or more of the following uses * * *."

Based on our review of other zoning districts in the MCRZO, they also generally list uses that are allowed outright, allowed conditionally, or allowed if special standards are met and specifically prohibit all uses that are not allowed in the zoning district.