BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DIANA V. GARDENER and JUDSON M. PARSONS,
*Petitioners,*

vs.

MARION COUNTY,
*Respondent,*

and

LENA PAGE LIVING TRUST,
*Intervenor-Respondent.*

LUBA No. 2007-226

FINAL OPINION
AND ORDER

Appeal from Marion County.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioners.

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

Alan M. Sorem, Salem, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Saalfeld Griggs PC.

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

RYAN, Board Chair, did not participate in the decision.

REMANDED 05/13/2008

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 approving a 33-lot subdivision on a 50-acre parcel zoned for exclusive farm use.

**MOTION TO FILE REPLY BRIEF**

Petitioners move to file a reply brief. There is no objection to the motion, and it is allowed.

**FACTS**

Intervenor-respondent (intervenor) filed its application for a 33-lot subdivision on March 1, 2007, pursuant to previously granted state and county waivers under *former* ORS 197.352 (2005), otherwise known as Ballot Measure 37. Those Ballot Measure 37 waivers were granted to Lena Page. The proposed lots range in size from 1.36 to 1.69-acres in size. At the time of the hearings before the county, the county's Measure 37 waiver was on review at the Marion County Circuit Court.

The planning commission approved the subdivision application, but reduced the number of approved lots to 10, with the option of obtaining up to 33 lots if the applicant submitted a Hydrogeology Review that demonstrated adequate groundwater to serve the proposed lots, pursuant to the requirements of Marion County Rural Zoning Ordinance (RZO) Chapter 181.

Both petitioners and intervenor appealed the planning commission decision to the board of county commissioners. The county commissioners held a hearing on the appeals on August 15, 2007. At the conclusion of the hearing, the commissioners closed the record, deliberated, and voted to deny petitioners' appeal and accept intervenor's appeal, effectively approving the original subdivision application for 33 lots, without requiring a Hydrogeology Review. The commissioners also voted to approve draft conditions of approval proposed by intervenor, which included a condition requiring that, prior to recording the final plat, the

appeal of the county's ORS 197.352 waiver must be resolved in intervenor's favor. However, the commissioners did not adopt a final written decision on that date.

On September 14, 2007, intervenor's counsel mailed to the county a written request for reconsideration, addressed to the board of county commissioners. Intervenor advised the county that the circuit court had issued a decision in its favor, that the circuit court decision had been appealed to the Court of Appeals, and that no stay of the circuit court decision had been sought. Intervenor requested that the proposed conditions of approval be modified to not require that the Court of Appeals case be resolved prior to recording the final plat. Neither petitioners nor their counsel were provided a copy of intervenor's request for reconsideration.

On September 17, 2007, the planning director submitted intervenor's request for reconsideration to the office of the county commissioners as an agenda item, and the request was placed on the agenda for the commissioners' next public meeting, on September 19, 2007. Petitioners were not notified of that hearing. Intervenor's attorney attended the September 19, 2007 meeting, but did not speak. During the meeting, the commissioners discussed the request and voted to reconsider the oral decision to (1) re-open the record, (2) include intervenor's September 14, 2007 letter, and (3) modify the condition of approval. At county counsel's suggestion, the commissioners modified Condition 20 to read:

> "Prior to the recording of the plat, applicant shall execute a written agreement with the county that provides that the plat be vacated and that applicant will remove any improvements located on the property if the order approving applicant's measure 37 claim is overturned by any court of competent jurisdiction." Record 26.

On October 12, 2007, the commissioners signed the final order approving the subdivision application, with the modified condition of approval. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

Petitioners argue that the county erred in accepting and acting upon an *ex parte* request for reconsideration without notice to petitioners, contrary to the requirements of

ORS 215.422(3).[1] Alternatively, petitioners argue that in re-opening the record to accept intervenor's request the county accepted new evidence, testimony or argument without providing petitioners an opportunity to raise new issues regarding that evidence, testimony or argument, contrary to ORS 197.763(7).[2] In either case, petitioners argue, the county's error prejudiced petitioners' substantial rights. ORS 197.835(9)(a)(B).[3]

Intervenor responds that the September 14, 2007 letter requesting reconsideration cannot possibly be an *ex parte* contact for purposes of ORS 215.422(3), because it was discussed at a public meeting and entered into the record of the county's proceeding on the application. Intervenor cites to *Brome v. City of Corvallis*, 36 Or LUBA 225, 231-32, *aff'd sub nom Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999), for the proposition that re-opening the record to receive new evidence after the record has closed is not an "ex parte" contact, although it may violate the procedural requirements of

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[1] ORS 215.422(3) provides:

> "No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

[2] ORS 197.763(7) provides:

> "When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue."

[3] ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a land use decision if LUBA finds that the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

ORS 197.763 if other parties to the proceeding have no opportunity to respond to that new evidence.

Intervenor concedes that re-opening the record to accept the September 14, 2007 letter and to consider intervenor's request without giving petitioners an opportunity to participate "may have violated ORS 197.763(6)." Intervenor's Response Brief 4. However, intervenor argues that any such procedural error did not prejudice petitioners' substantial rights. According to intervenor, petitioners participated fully in the August 15, 2007 hearing and had an opportunity to address the draft conditions of approval. Further, intervenor argues that the modified Condition 20 actually imposes greater restrictions on intervenor than the original condition, and therefore petitioners' interests could not have been harmed by re-opening the record to consider intervenors' request for reconsideration. As for ORS 197.763(7), intervenor argues that that statute "merely gives Petitioners the right to make new arguments related to the new evidence, and therefore it is irrelevant." Response Brief 5.

It is not entirely clear to us whether the September 14, 2007 letter is more accurately viewed as an *ex parte* contact for purposes of ORS 215.422(3), or as new evidence, testimony or argument for purposes of ORS 197.763(7), but we agree with petitioner that it is clearly one or the other. To the extent it is considered an *ex parte* contact, the county partially remedied that problem in accordance with ORS 215.422(3)(a) by placing on the record the substance of the written ex parte communications. The problem is that the county failed to comply with ORS 215.422(3)(b), the requirement to make a "public announcement of the content of the communication and of the parties' right to rebut the substance of the communication * * * at the first hearing following the communication * * *." ORS 215.422(3)(b) is not satisfied by entering the communication into the record of the land use proceeding at an irregular meeting for which participants to the land use proceeding have no notice or a reasonable opportunity to attend.

It is probably more accurate to describe the county's acceptance of the September 14, 2007 letter as re-opening the record for purposes of ORS 197.763(7). The county commissioners voted to re-open the record of the subdivision review proceeding to include the September 14, 2007 letter. Intervenor does not dispute that the September 14, 2007 letter includes "new evidence, arguments or testimony" related to the merits of the decision, and that the county commissioners in fact reconsidered its initial oral decision and modified a condition of approval as a result of intervenor's request. We do not understand intervenor's argument that ORS 197.763(7) is "irrelevant." Intervenor appears to argue that ORS 197.763(7) merely allows a participant to "raise new issues" *before LUBA* regarding the new evidence, argument or testimony, but does not impose any actual procedural requirements on the county. We understand intervenor to argue that ORS 197.763(7) does not require the county to provide participants an opportunity to learn that the record has been re-opened and to "raise new issues" before the county regarding the new evidence, argument or testimony.

If that is intervenor's view, we reject it. Implicit in ORS 197.763(7) is the requirement that, when the local government re-opens the record to include new evidence, argument or testimony, it must either do so at a hearing or meeting that is a previously announced or noticed continuation of the earlier evidentiary proceedings, or otherwise provide reasonable notice to the participants of earlier evidentiary proceedings that it has or intends to re-open the record.[4] In either case, the local government must offer any participants who request it an opportunity to "raise new issues" before the local government regarding the new evidence, argument or testimony. The September 19, 2007 meeting was not a previously announced or noticed continuation of the August 15, 2007 hearing, and the

[4] The local government always has the option of *not* re-opening the record to accept or consider any new evidence, argument or testimony submitted after the close of the record, in which case ORS 197.763(7) would not apply. *Brome*, 36 Or LUBA at 234-35.

county did not provide any notice to petitioners that it intended to or had re-opened the record. Nor did the county offer petitioners any opportunity to respond to or "raise new issues" regarding intervenor's request or the September 14, 2007 letter. That violated ORS 197.763 and was procedural error.

With respect to intervenor's argument that petitioners' substantial rights were not prejudiced by the county's procedural error because modified Condition 20 is more restrictive than the original condition, again we disagree. As *Brome* indicates, the "substantial rights" referenced in ORS 197.835(9)(a)(B) are the rights to meaningful participation in the local government's land use proceedings, including the right to respond to material evidence submitted after the close of the evidentiary record. *Id*. at 234-35. Petitioners were denied that right, and even if the modified condition is in fact more favorable than the original condition to petitioners' "interests," whatever those are, we cannot say that the county's procedural error did not prejudice petitioners' participatory rights protected by ORS 197.763(7).

In the usual case, sustaining a procedural assignment of error such as this one would result in remand for additional evidentiary proceedings, likely followed by adoption of new or amended findings. In that circumstance, LUBA typically would not go on to address challenges to the adequacy or evidentiary support for the county's current findings. However, we deem it appropriate to address the remaining assignments of error, for two reasons. First, it is possible, even likely, that the Court of Appeals will dismiss the pending appeal of the circuit court's decision on the county's Measure 37 waiver. *See Corey v. DLCD*, __ Or __, __ P3d __, May 8, 2008, (dismissing as moot an appeal of a state Measure 37 waiver). If so, the disputed condition of approval might well become a moot point, making remand solely to address the procedural error pointless. Second, the remaining assignments of error have little or nothing to do with the disputed condition of approval, and it seems unlikely that proceedings on remand to address the procedural error would result in

new evidence or new findings affecting resolution of the remaining assignments of error. Because the record is sufficient to allow review of those assignments of error, we will resolve them. ORS 197.835(11)(a).

The first assignment of error is sustained.

**SECOND ASSIGNMENT OF ERROR**

**A. RZO 110.830**

RZO 110.830 is part of a section of the county's code entitled "General Provisions." It provides in its entirety:

> "The impact of proposed land uses on water resources shall be evaluated and potential adverse impacts on the water resource shall be minimized.
>
> "Where evidence indicates groundwater limitations and the development will use groundwater as a water supply, the developer shall demonstrate that adequate water can be provided without adversely affecting the ground water resource."

Intervenor proposes to provide water to the each lot by drilling individual wells for each lot, 32 new wells in total. Petitioners submitted extensive evidence, discussed below, that the groundwater resource in the area is declining and inadequate to serve the proposed subdivision without adversely affecting the groundwater resource, on which neighboring wells depend. Petitioners argued, among other things, that a hydrogeology review under RZO 181 was required. As noted, the planning commission approved 10 lots, with the potential to obtain 33 lots if the applicant submitted a hydrogeology review that complied with RZO 181.

Initially, the county did not identify RZO 110.830 as an approval criterion, and the planning commission decision does not discuss it. However, the board of county commissioners' decision identifies RZO 110.830 as an approval criterion, and adopts findings to demonstrate that the 33-lot subdivision is consistent with that code provision. Record 13, 21-22. Under this assignment of error, petitioners challenge the adequacy and evidentiary support for those findings.

**1. Waiver**

Intervenor responds, initially, that petitioners failed to raise any issues regarding RZO 110.830 below, and thus any issue based on that code provision is waived. ORS 197.763(1); 197.835(3).[5] Petitioners respond that they raised a number of issues below regarding the adequacy of the groundwater resource, in response to which the county adopted the challenged findings addressing RZO 110.830. Even if petitioners had not raised any issues regarding the adequacy of the groundwater resource, petitioners argue, because the notice of hearing did not identify RZO 110.830 as an approval criterion, petitioners would be entitled to raise new issues regarding that omitted criterion for the first time before LUBA, pursuant to ORS 197.835(4)(a).

We agree with petitioners that the issue of compliance with the groundwater resource provisions of RZO 110.830 was adequately raised below. As discussed below, petitioners raised with considerable specificity the issue of the adequacy of the groundwater resource. Based on that testimony, someone—presumably county staff—belatedly identified

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[5] ORS 197.736(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835 provides, in relevant part:

> "(3) Issues [before LUBA] 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.
>
> "(4) A petitioner may raise new issues to [LUBA] if:
>
> (a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

RZO 110.830 as an approval criterion, and the county commissioners' findings address that code provision. Under these circumstances, we do not think petitioners' failure to cite RZO 110.830 means that they are precluded from challenging the county's findings addressing that criterion before LUBA. In any case, the county does not dispute that RZO 110.830 is an applicable approval criterion, and that it was omitted from the notice of hearing. Therefore, petitioners are entitled to raise new issues regarding that omitted criterion before LUBA, even if no issues were raised below specifically directed at that criterion. ORS 197.835(4)(a).

**2. Adversely Affecting the Ground Water Resource.**

On the merits, petitioners explain that they hired a certified engineering geologist, Rick Kienle, to review groundwater resource issues affecting the area of the subject property. Kienle and his company, Northwest Geological Services, Inc. (NGS) are the authors of a large study conducted in 1997, found at Record 239 to 1024, commissioned by the county's Community Development Department. In the review directed at the subject property, Kienle reviewed the available data, including the 1997 study, conducted a water budget for four sections including the subject property, and concluded in relevant part:

> "The data indicate a deficit of ground water resources in the site area. The Pratum decline area—defined in our 1997 study—extends east to the Page property. Addition of 33 new residences will, in our opinion, exacerbate the current ground water decline in the area. It will probably lower the water level in the area and adversely impact some nearby domestic and irrigation wells.
>
> "Based on the data, interpretations and conclusions presented herein, it is our opinion that the County should severely limit new residential development in this area to protect the existing resource for existing users. Alternative[ly], the County should require Applicant to demonstrate that a sustainable resource is available for additional exploitation through rigorous hydrogeology studies (i.e., a detailed assessment of the ground water resource)." Record 134.

Further, Kienle stated:

> "Development of the Page property with 33 residential lots will add new domestic use of at least 33 x 0.588 acre ft = 19.4 acre ft. The new development does not really replace an irrigation use because the water right has not been exercised since 2002.
>
> "Consequently the development is a new use of ground water that will, in our opinion, exacerbate the existing deficit and increase the decline. Addition of over 50 acre ft of use per year (including lawn watering) would, in our opinion, seriously exacerbate the present severe budget deficit and presently moderate ground water decline. In our opinion this increase in decline rate will negatively impact the established water rights and exempt wells. The practical effect of this impact would be to jeopardize water supplies for the proposed new lots. Hence, the applicant has failed to prove the adequacy of water for this proposal." Record 139 (footnote omitted).

In the omitted footnote, Kienle concluded that a conservative estimate of lawn watering would add 33 acre feet per year of ground water consumption, in addition to the 19.4 acre feet of domestic use, for a total in excess of 50 acre feet per year. In addition to Kienle's report, neighboring opponents submitted testimony regarding declining water levels in their wells.

The county dismissed Kienle's report as relating largely to groundwater decline in an area that the county as designated as subject to a Sensitive Groundwater Overlay (SGO) zone, noting that the subject property is not zoned SGO. The county chose instead to rely on the evidence submitted by intervenor, primarily the testimony of a well constructor who dug a well on the subject property, and the existence of another new well in the area:

> "The Board reviewed the written testimony submitted by [NGS], well logs submitted by Applicant, and oral testimony by Floyd Sippel, a Bonded and Certified Well Constructor, and testimony from opponents regarding the impact of [the] Subdivision on water resources * * *.
>
> "The Board finds that adequate water can be provided without adversely affecting the groundwater resource. The evidence submitted by NGS and the opponents related to concerns regarding groundwater decline in the area was largely limited to impacts within the SGO zone. The * * * SGO zone map adequately address[es] impacts to those aquifers. The Subject Property is outside the SGO boundary and this evidence related to potential impacts with the zone is not relevant or credible.

> "The evidence in the record relating to the Subject Property indicates that it does contain adequate groundwater. Well report data shows that new wells are being constructed in the area around the Subject Property. Specifically, a new irrigation well was created for Tax Lot 600 * * *. This well * * * received * * * a WRD [Oregon Water Resources Department], which determines whether the area is in decline as part of their application process. Additionally, Applicant has two wells on the Subject Property. The first well is 300 feet deep and produces 15 gallons per minute. The newly constructed well is at 260 feet deep and produces over 50 gallons per minute.
>
> "Applicant's proposed development will also be subject to a condition of approval requiring a Water Management Plan, which will limit the amount of groundwater consumed by the proposed subdivision and monitor the newly created wells. Applicant has the legal authority to create such restrictions and well monitoring systems, thus these conditions are feasible. As conditioned, Applicant satisfies this criterion." Record 21.

Petitioners argue that the county erred in dismissing Kienle's report as being concerned only with areas zoned SGO.[6] According to petitioners, it is clear that the Kienle report identified groundwater resource problems in the four sections surrounding the subject property, and is not focused on SGO-zoned areas. Petitioners also contend that the county erred in relying on the existence of three wells in the area, two of them on the subject property, to conclude that "adequate water can be provided" to the proposed subdivision "without adversely affecting the ground water resource." Petitioners argue that the existence of three functioning wells in the area says nothing about whether the groundwater resource can support an additional 32 new wells.

Intervenor responds that the county is entitled to rely on the well constructor's testimony regarding the adequacy of the existing wells, and further that the county may rely on the WRD monitoring and permit process to ensure that new wells in the area will not adversely affect the groundwater resource.

[6] Neither the parties nor the decision indicate where the subject property is located in relation to the SGO-zoned areas of the county. We understand that the four sections immediately surrounding the subject property do not include any SGO-zoned areas.

We agree with petitioners that the county finding that the Kienle report is "largely limited to impacts within the SGO zone" is not supported by the record. While the Kienle report cited the 1997 study and other data that the county used to apply the SGO zone, the Kienle report is specifically directed at the adequacy of the groundwater resource in the four-section area of the county that includes the subject property. The estimated water budget for the area including the subject property is focused on that area, not the area subject to the SGO zone. Further, Kienle observed that

> "[T]he estimated ground water budget would trigger the requirement for an intermediate or major hydrogeology study (NGS, 1997, Appendix E) were the proposed development within the SGO. The only reason the area is not in the SGO is administrative—not scientific. The available data clearly show a need to limit development in this area." Record 140.

Kienle clearly understood that the subject property is not within the SGO zone. Nothing cited to us in the report suggests that Kienle studied impacts within the SGO zone instead of the estimated impacts on the groundwater resource in the area including the subject property.

Second, we agree with petitioners that, given the Kienle report and other contrary evidence, no reasonable person would rely on the well constructor's testimony regarding the current functioning of three wells in the area to conclude that the groundwater resource can support 32 new wells without adversely affecting that resource. As far as we are informed, the well constructor provided no estimated water budget or other testimony regarding recharge rates, depletion rates, or estimates of how much water the proposed new wells would draw from the aquifer. Only Kienle provides a water budget or other focused testimony on those points.

We also agree with petitioners that the county's reliance on the WRD well permit process is insufficient to support a finding that "adequate water can be provided without adversely affecting the ground water resource." It is the county's obligation to determine whether the proposed 33-lot subdivision as a whole complies with RZO 110.830. Presumably, the WRD evaluates wells on a case-by-case basis, and does not approve or deny

an individual well application based on the impacts of the future build-out of the entire subdivision.

Third, petitioners note that the county's finding references a condition of approval requiring a water management plan, which "will limit the amount of groundwater consumed by the proposed subdivision and monitor the newly created wells." Petitioners argue that the referenced condition is inadequate to ensure compliance with RZO 110.830. The condition, Condition 23, require that the homeowner's association create a water management plan that will "[d]evelop requirements and limitations on water use to minimize the amount of groundwater consumed by residents of the subdivision." Record 26. In addition, Condition 23 requires a well-monitoring system that twice yearly collects data on water levels for seven years, and requires submitting that data to the county. Petitioners argue that there is no evidence in the record suggesting that Condition 23, even if implemented and enforced, would ensure compliance with RZO 110.830. Petitioners contend that if the data collected shows adverse impacts on the groundwater resource, there is no required means to correct the problem.

We agree with petitioners that nothing cited to us in the record supports a conclusion that the water management plan is sufficient to ensure that the proposed development will not adversely affect the groundwater resource. Even assuming the water plan is implemented and enforced, without some estimate regarding how much the residents' water use can be "minimized" in the context of a proposed water budget or similar information there is no basis to conclude that the water plan is likely to succeed in avoiding an adverse impact on the groundwater resource. In addition, as petitioners note, the well-monitoring requirement merely collects data for a limited period of time and identifies no means to prevent, correct or mitigate any adverse impacts that may occur.

As a final response, intervenor argues that, properly understood, Kienle's report actually supports the county's finding that the 33-lot development will not adversely affect

the groundwater resource. Intervenor notes that Kienle estimated the recharge rate for the subject property to be approximately 20 to 22.5 acre feet per year. Intervenor argues that this recharge rate is less than the estimated 19.4 acre feet per year that the proposed 33 dwellings will consume.

Petitioners respond, and we agree, that intervenor fails to note that Kienle's estimates for domestic consumption exceed 50 acre feet per year, including a conservative estimate of water used for lawn watering. Record 139. Intervenor does not challenge that estimate or cite to any evidence indicating that the domestic consumption rate for the proposed dwellings is less than the recharge rate for the subject property.

**B. RZO 172.42**

RZO 172.42, part of the county's subdivision requirements, requires that all lots or parcels shall be served by an authorized public or private water supply system or individual private wells.[7] RZO 172.42(a) requires that public or private systems must meet "quantity, storage and distribution system requirements." RZO 17.42(b) requires that individual

[7] RZO 172.42 provides:

> "All lots or parcels shall be served by an authorized public or private water supply system or individual private wells.
>
> "(a) Public or Private Systems: Public or private systems shall meet the requirements of the Oregon State Health Division with reference to chemical and bacteriological quality. In addition, such systems must meet the quantity, storage, and distribution system requirements of the State Health Division and the Marion County Department of Public Works.
>
> "(b) Individual Private Wells: Individual private wells must meet the construction requirements of the Oregon State Water Resources Department and be located in accordance with requirements of the State Health Division in relation to public or private sewage disposal systems. The bacteriological quality of this water may be determined through the Marion County Health Department. Upon receiving the recommendations from the State Health Division or Marion County Health Department, the Hearings Officer or Commission may require the use of an engineered public or private water system in any proposed subdivision. Other criteria to be considered in making this determination are the recommendations contained in the Marion County Water Quality Management Plan, Marion County Comprehensive Plan, and Chapter 181 of the Marion County Rural Zoning Ordinance."

private wells must be constructed according to WRD requirements and that the "bacteriological quality of the water may be determined" by the county health department.

Petitioners argued to the county that RZO 172.42(b) requires a finding that there is an adequate *quantity* of water to support the proposed 32 new wells, as well as adequate *quality*. The commissioners disagreed, interpreting RZO 172.42(b) to regulate only water quality, not quantity.

On appeal, petitioners argue that the commissioners misconstrued RZO172.42(b) and that, like RZO 110.830, RZO 172.42(b) requires findings that there is adequate quantity of groundwater available to serve proposed individual wells.

Intervenor responds that, while RZO 172.42(a) requires that public or private water systems meet quantity requirements, nothing in RZO 172.42(b) imposes a similar requirement on individual private wells. According to intervenor, RZO 172.42(b) refers only to the "quality" of the water. We agree with intervenor that petitioners have not demonstrated that the commissioners' interpretation of RZO 172.42(b) as regulating only water quality is inconsistent with that code provision's language, purpose or underlying policy. ORS 197.829(1).

**C. Conclusion**

In sum, the county's finding that the proposed 33-lot development will not adversely affect the groundwater resource for purposes of RZO 110.830 is based on a material misunderstanding of the evidence, and is not supported by substantial evidence in the whole record.

The second assignment of error is sustained, in apart.

**THIRD ASSIGNMENT OF ERROR**

RZO 172.14 is a subdivision approval standard requiring that "[e]ngineering standards and requirements, including but not limited to streets, drainage, access, easements,

and thoroughfare improvements, shall be those currently approved by the Marion County Department of Public Works."

Petitioners explain that the county Department of Public Works (DPW) commented on the application that "[v]ision easements may need to be purchased or established near intersections to ensure adequate sight distance is maintained." Record 8. Based on that comment, the county imposed Condition 5(h), which repeats that "[v]ision easements may need to be purchased or established near intersections to ensure adequate sight distance is maintained." Record 24.

Petitioners argue that the findings and record fail to establish that it is feasible to obtain vision easements, if necessary, from neighboring property owners to ensure adequate sight distance where the proposed subdivision access point intersects with the county road.

Intervenor responds that RZO 172.14 merely specifies that the engineering standards applied to street construction are those "currently approved by the Marion County Department of Public Works." According to intervenor, RZO 172.14 does not require the applicant to prove that the proposed development complies with the county engineering standards, and therefore RZO 172.14 is not an approval standard. Further, intervenor argues, nothing in RZO 172.14 or in the county's current engineering standards requires an applicant to obtain "vision easements."

Alternatively, intervenor contends that the county adopted findings based on the testimony of the applicant's engineer that, in his expert opinion, all conditions related to roads, streets and easements are feasible. Record 16.[8] Intervenor argues that those findings

[8] The county's findings state:

> "As conditioned, this application satisfies the criteria. Applicant has employed the services of Bill Lulay, a licensed engineer and surveyor * * *. He testified that he has reviewed all of the conditions of approval, met with Public Works engineering staff regarding this matter, and in his expert opinion believes that all conditions related to roads, streets, and easements are feasible. The Board finds his testimony credible and that all conditions of approval related to

and the supporting testimony are sufficient to demonstrate, to the extent a demonstration is necessary, that it is feasible to obtain vision easements and to construct proposed streets and intersections in accordance with county engineering standards.

The county treated RZO 172.14 as an approval criterion, and we therefore assume it is. While intervenor is correct that nothing cited to us in the county engineering standards requires that development applicants obtain "vision easements" from neighboring property owners, apparently DPW believed that such easements might be needed to ensure adequate intersection sight distance, and the county imposed a condition to that effect. However, we agree with intervenor that petitioners have not established that the findings or record are deficient in this regard. Petitioners identify no legal or practical impediment to obtaining vision easements, if necessary, from neighboring property owners. To the extent a finding of "feasibility" is even required under these circumstances, the county adopted a finding that it is feasible to comply with all county engineering standards, and imposed conditions requiring compliance with all county engineering standards, including intersection sight distance standards, and, if necessary, a requirement that intervenor obtain vision easements. Absent some identified legal or practical impediment to obtaining vision easements, we do not believe that the applicant must submit evidence that it has or can acquire such easements. Petitioners have not demonstrated that the findings and conditions are insufficient to ensure that proposed development complies with RZO 172.14 and county engineering standards.

The third assignment of error is denied.

**FOURTH ASSIGNMENT OF ERROR**

Petitioners note that the rural fire district commented that the proposed subdivision must comply with the fire district's road and turnaround standards, and that the county adopted a condition requiring that, prior to final plat approval, the applicant must submit

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roads, streets, and easements are feasible. The Board further finds that the Applicant has the legal authority to create all necessary easements and dedications." Record 15-16.

evidence of compliance with the fire district's standards. However, petitioners argue that the county adopted no findings regarding compliance with the fire district's standards, and the record includes no evidence that is it feasible to comply with those standards.

Intervenor responds, and we agree, that petitioners identify no applicable county approval standard that requires compliance with the fire district's road and turnaround standards. Absent an applicable county standard to that effect, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The fourth assignment of error is denied.

**FIFTH ASSIGNMENT OF ERROR**

As noted above, the application was initially submitted by intervenor, the Lena H. Page Living Trust, and not by Lena Page, who is the claimant for purposes of the county and state waivers under ORS 197.352 (2005). Petitioners argue that waivers under Ballot Measure 37 are personal to the claimant, and that rights under those waivers cannot be transferred to a third person. According to petitioners, the application reflects an impermissible transfer of Ballot Measure 37 rights and therefore the county erred in approving intervenor's subdivision application, based on Lena Page's waivers.

As petitioners concede, Lena Page subsequently signed the subdivision application shortly after it was first submitted. In approving the subdivision, therefore, the county necessarily approved Lena Page's application, pursuant to waivers granted her by the state and county. If that is error, petitioners do not explain why. The fact that the application was initially filed by the trust, and that the trust remained as co-applicant, does not mean that Lena Page transferred rights granted to her under the state and county waivers to the trust.

The fifth assignment of error is denied.

The county's decision is remanded.