BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEVIN OIL CO., INC.,
Petitioner,

vs.

MORROW COUNTY,
Respondent,

and

GREG FLOWERS and LOVE'S TRAVEL STOPS & COUNTRY STORES, INC.,
Intervenors-Respondents.

LUBA No. 2009-103

FINAL OPINION
AND ORDER

Appeal from Morrow County.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Davis Wright Tremaine LLP.

Ryan M. Swinburnson, Kennewick, filed a joint response brief and argued on behalf of respondent. With him on the brief were William K. Kabeiseman, Carrie A. Richter, Jennifer M. Bragar, and Garvey Schubert Barer PC.

William K. Kabeiseman, Portland, filed a joint response brief and argued on behalf of intervenors-respondents. With him on the brief were Carrie A. Richter, Jennifer M. Bragar, Garvey Schubert Barer and Ryan M. Swinburnson.

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

REMANDED 01/20/2010

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

Petitioner appeals a county decision approving a partition, to facilitate development of a travel center.

FACTS

The subject property is a 456-acre parcel owned by the City of Boardman, and zoned Space Age Industrial (SAI). The City of Boardman acquired the parcel in 2000 to accommodate a planned waste water treatment facility. The parcel lies just south of Interstate-84, and is bordered on the west by Tower Road, a paved county road with a right-of-way width of 60 feet that is located within a 150-foot wide easement.[1]

Intervenor-respondent Flowers filed an application on behalf of the city and intervenor-respondent Love's Travel Stops and Country Stores, Inc. to partition the subject parcel into a 49-acre Parcel 1 and a 407-acre Parcel 2. Proposed Parcel 1 is located in the northwest corner of the subject property, near the intersection of I-84 and Tower Road, and would require access from Tower Road. Once the partition is approved, intervenors plan to acquire Parcel 1 from the city and seek zone changes and permits necessary to develop a travel center.[2] The SAI zone does not allow such a use.

The county planning commission held a hearing on the partition application April 28, 2009, continued to May 8, 2009, and May 19, 2009, after which the planning commission voted to approve the partition. Petitioner appealed the approval to the county court, which

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[1] We discuss the history of the creation of the 150-foot Tower Road access easement later in this opinion. *See* n 10.

[2] The partition application did not describe what the contemplated travel center might consist of, but petitioner argues and intervenor does not dispute that a "travel center" typically consists of one or more of the following uses: automobile and truck fueling stations, truck wash, truck repair shop, convenience store and/or restaurant.

held an on-the-record hearing and affirmed the planning commission decision. This appeal followed.

FIRST, SECOND AND FOURTH ASSIGNMENTS OF ERROR

Morrow County Zoning Ordinance (MCZO) 5.030(2) requires a finding that each proposed parcel "is suited for the use intended or offered[,] including, but not limited to, size of the parcels, topography, sewage disposal approval and guaranteed access."[3] Petitioner contended below that MCZO 5.030(2) requires that the county evaluate the use intended for Parcel 1, a travel center, and determine that Parcel 1 is suited for a travel center.

The county court disagreed, finding that MCZO 5.030(2) requires evaluation of the use for which the parcel is intended only when the "future use of the property is known and proposed in the application."[4] Because no use was proposed in the partition application, the

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[3] MCZO 5.030 provides, in relevant part:

> "No application for partitioning will be approved unless the following requirements are met:
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> "1. Proposal is in compliance with ORS 92 and the County and affected City Comprehensive Plans and applicable Zoning.
>
> "2. Each parcel is suited for the use intended or offered; including, but not limited to, size of the parcels, topography, sewage disposal approval and guaranteed access. Proof of access must show that each parcel has an easement sufficient for continued ingress and egress to a public, county or state highway or has a deeded access way.
>
> "3. All required public service and facilities are available and adequate."

[4] The county court found, in relevant part:

> "The appellant argues that the Planning Commission improperly found that the parcel is 'suited for the use intended or offered.' MCZO 5.030(2). The Planning Commission reviewed this issue and concluded that, because the site is zoned SAI and that no zone change or other development application had been filed, this portion of the provision was not at issue. The Court agrees with the Planning Commission * * *. Although the potential use of the property for a travel center was discussed, the nature of the development was not the purpose of the application and that use was not 'offered' or 'intended' as part of the application. The Court interprets this provision to apply only when the future use of the property is known and proposed in the application. In this case, the future use is not known. * * * Accordingly, because no use was offered, the Planning Commission properly evaluated this provision. This interpretation is supported by Section 4.165 and 4.17[0] of the MCZO, one of which will be applicable any eventual development of the property. MCZO 4.165(D)(2) requires the application to demonstrate that the lot area is adequate to meet the needs of the establishment

county concluded, no determination that the property is "suited" for a travel center was required. That interpretation is challenged in the first assignment of error.

The county also adopted two sets of alternative findings. First, the county concluded that if MCZO 5.030(2) required consideration of the intended use, a travel center, Parcel 1 is suited for a travel center, considering the size of the parcel, topography, sewage disposal approval and guaranteed access. The county acknowledged that the list of considerations in MCZO 5.030(2) is non-exclusive, but concluded that there was no need in the present case to consider whether Parcel 1 is suitable for a travel center with respect to other considerations, such as stormwater disposal. That interpretation is challenged in the second assignment of error.

As a final set of alternative findings, the county in fact considered whether Parcel 1 is suitable for a travel center, considering other issues such as stormwater disposal. The evidentiary basis for those alternative findings is challenged in the fourth assignment of error. Because these assignments of error all concern MCZO 5.030(2) and are linked by a series of alternative findings, we address them together.

A. First Assignment of Error

Under the first assignment of error, petitioner argues that the county's interpretation that MCZO 5.030(2) does not require a finding that Parcel 1 is suited for the intended use, a travel center, is inconsistent with the express text and context of MCZO 5.030(2). Petitioner contends that the county's interpretation cannot be affirmed under the scope of review LUBA applies to a governing body's interpretation of local regulations, at ORS 197.829(1).[5]

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and MCZO 4.170(E)(1)(l)(m) and (n) requires an applicant to show that there is adequate water, sewer, storm drainage, transportation and other public services. If the applicant were required to make that showing at this stage in the process, the standards contained in Section four would be superfluous. At this point, if no particular use is offered, all that the applicant needs to do is show that the size meets the minimum size [in] the zone and that there are no impediments in topography, sewage disposal or access and the applicant has met that standard." Record 10.

[5] ORS 197.829(1) provides, in relevant part:

According to petitioner, there is no dispute that intervenors intend to develop the proposed use with a travel center. The text of MCZO 5.030(2) requires a finding that the parcel is suited for a use that is either "intended or offered." Petitioner contends there is nothing in the text or context of MCZO 5.030(2) supporting the county's interpretation that a determination of suitability for the intended use must be made only when a use is "proposed in the application."

Even if MCZO 5.030(2) is triggered only when the intended use is "known and proposed in the application," petitioner notes that MCZO 5.020(6) expressly requires a partition applicant to submit a "[s]tatement regarding the use for which the parcel(s) are to be created." Petitioner contends that because MCZO 5.020(6) requires that every partition application identify the proposed use, that context supports its reading of MCZO 5.030(2) to require the county to determine whether Parcel 1 is suited for the intended use that is identified in the partition application. Petitioner notes that the county form used to apply for a partition includes the question "For what use or uses are the parcels intended," to which the applicant answered "Travel Stop." Record 216.

Considering other context, petitioner notes that MCZO 5.020(4) requires a "[s]tatement regarding contemplated water supply, sewage disposal, solid waste disposal, fire protection, access, etc." Petitioner argues that informational requirement would be meaningless if no consideration of the intended use is required. Similarly, petitioner argues that several MCZO 5.030(10) criteria for tentative partition approval require the county to

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

"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

consider matters that are specific to the use intended, and that cannot be considered in a vacuum, such as the placement and availability of utilities, the need for onsite and offsite improvements, the need for additional setback, screening, landscaping, and the need for street and other improvements. MCZO 5.030(10)(a), (e), (f) and (g). Again, petitioner argues, this context is contrary to the county's interpretation that suitability for the intended use need not be considered, unless the applicant chooses to propose the use in the application.

In addition, petitioner notes that LUBA and the Court of Appeals rejected a similar interpretation of an arguably similar code provision, in *Mountain West Investment Corp. v. City of Silverton*, 39 Or LUBA 507, *aff'd in relevant part*, 175 Or App 556, 30 P3d 420 (2001). At issue in *Mountain West Investment Corp.* was a lot line adjustment approval criterion requiring findings that "adequate public facilities shall be available to serve the existing and the newly created parcels" and the proposal is "compatible with all applicable policies" in the comprehensive plan and with the requirements of the applicable zone. The city interpreted the code provisions to not require any consideration of the use contemplated for the parcel being adjusted, which was an assisted living facility. The Court rejected that interpretation, concluding that "[w]ithout [a] use-specific inquiry, the city cannot meaningfully determine whether there are adequate public facilities available to serve the newly created parcels * * * or whether the proposal will be compatible" with applicable plan and zone requirements. 175 Or App at 565. In addition, the Court noted that the context of the code provision included requirements to submit a site plan "showing the proposed use of the property." The Court commented that "[i]t is implausible that the city would demand such information without being able to make use of it." *Id.* at 563. Petitioner contends that the Court's reasoning in *Mountain West Investment Corp.* is even more appropriate in the present case, because the code provisions at issue in that case imposed only an implicit requirement to consider the proposed use, while MCZO 5.030(2) imposes an express requirement to consider the proposed use. Moreover, like the Silverton code, the county's

code expressly requires the partition applicant to identify the intended use of the property, and petitioner argues it is implausible that the city would require that information for no purpose.

Finally, petitioner criticizes the county's reasoning that evaluating whether the property is suited for the intended use in a partition application would simply duplicate site plan review or site development review standards at MCZO 4.165 or 4.170, which respectively require findings that the lot area is adequate to meet the needs of the establishment and that there is adequate water, sewer, storm drainage, transportation and other public services. *See* n 3. Petitioner argues that the MCZO 4.165 and 4.170 site plan or development review standards are qualitatively different from the standards at MCZO 5.030(2), and that review to determine whether the proposed parcel is suitable for the intended use under MCZO 5.030(2) does not duplicate the subsequent review required of a specific site plan for proposed development. Moreover, petitioner contends that the obvious purpose of MCZO 5.030(2) requirement to determine whether the parcels to be created are suited for the intended use is to ensure *prior to partition approval* that the parcel size and characteristics and available infrastructure are suitable for the intended use, an inquiry that post-partition site plan or development review cannot duplicate. For this reason, petitioner argues, the county's interpretation is also inconsistent with the purpose and policy underlying MCZO 5.030(2), and therefore must be rejected under ORS 197.829(1)(b) and (c).

The county and intervenors (together, respondents) argue that the county's interpretation is consistent with the text and context of MCZO 5.030(2), and therefore LUBA must affirm that interpretation under ORS 197.829(1)(a). Respondents argue that, under *Foland v. Jackson County*, 215 Or App 157, 164, 168 P3d 1238 (2007) and, more recently, *Siporen v. City of Medford*, 231 Or App 585, __ P3d __ (2009), whether a local government's interpretation of its ordinance is consistent with the language of that ordinance depends on whether the interpretation is "plausible," under the interpretative principles set out in *PGE v.*

Bureau of Labor and Industries, 317 Or 606, 859 P2d 143 (1993).[6] Respondents contend that the county's interpretation that MCZO 5.030(2) applies only when the applicant actually "proposes" a specific use as part of the application is consistent with the text of that provision.

MCZO 5.030(2) requires a finding that the parcel is suited for the use "intended *or* offered." (Emphasis added.) If MCZO 5.030(2) used only the term "offered," and was viewed in hermetical isolation, we might agree with respondents that the county's interpretation is consistent with the text of that code provision. However, MCZO 5.030(2) applies when there is an "intended" use, and there is no dispute in this appeal that intervenors intend to use Parcel 1 to site a travel center. In the application intervenors identified the intended use as a "travel stop" and even submitted a site plan for a possible travel center. Nothing in the text of MCZO 5.030(2) or elsewhere supports the county's apparent view that a use is "intended" only if the applicant seeks *approval* of a specific use as part of the partition application.

When viewed in context, the county's interpretation becomes even more implausible. As petitioners note, the code requires partition applicants to identify "the use for which the parcel(s) are to be created." Further, the partition approval standards require evaluations that

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[6] In *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202, 210, 214 P3d 68, 72 (2009), the Court elaborated on the "interpretative principles" set out in *PGE*:

> "[T]he reference in ORS 197.829(1) to 'express language' requires the application of constructional rules related to the text of an ordinance. Therefore, in determining whether a local government's interpretation of its land use plan or regulation is 'inconsistent with the express language of the comprehensive plan or land use regulation' under ORS 197.829(1)(a), we apply the statutory construction principles in ORS 174.010 and ORS 174.020(2) that are based on the 'express language' of a provision. Although those statutes are written to pertain to 'the construction of a statute,' we use them as well in the interpretation of local ordinances. We also apply other textual canons of construction in evaluating a local government's interpretation of its plan or regulation under ORS 197.829(1)(a). Those canons include some rules applied in 'first level' *PGE* analysis, such as giving words of common usage their 'plain, natural, and ordinary meaning' and recognizing that 'use of the same term throughout a statute indicates that the term has the same meaning throughout the statute.'" (Footnotes and citations omitted.)

cannot be meaningfully made in the absence of an identified use. While the code language at issue in the *Mountain West Investment Corp.* case is somewhat different, the Court's reasoning in that case seems equally if not more appropriate in the present case. The county offers no suggestion why its code would require a partition applicant to identify an intended use if that identification played no role in approving the partition.

The only countervailing code context the county cites in its decision or brief is the site plan review and site development review standards at MCZO 4.165 and 4.170, one of which would presumably apply when intervenors seek development approval to construct a particular travel center.[7] However, as petitioner notes, those standards do not duplicate the "suitability" evaluation required by MCZO 5.030(2), and appear to be qualitatively different. Further, petitioner argues that the purpose of MCZO 5.030(2) is to ensure, prior to creating a parcel for an intended use, that the parcel is in fact suited for that use, an inquiry that would be untimely if made after the parcel is created. The county does not offer in its decision or brief any other view of the purpose of MCZO 5.030(2), and we agree with petitioner that that seems to be its likely purpose, or at least one of its purposes. Thus, even if the county's interpretation were consistent with the text of MCZO 5.030(2) for purposes of ORS 197.829(1)(a), it would likely fail under ORS 197.829(1)(b) or (c), since petitioner's interpretation is also consistent with the text of MCZO 5.030(2) and, unlike petitioner's interpretation, the county's interpretation is inconsistent with the apparent purpose and underlying policy of MCZO 5.030(2).

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[7] Petitioner argues that MCZO 4.170 would be inapplicable to a travel center on Parcel 1, because MCZO 4.170 applies to "major development," which is defined as an industrial use requiring more than 100 acres. MCZO 4.170(C)(1). Therefore, petitioner argues, the less stringent site plan review standards at MCZO 4.165 would likely apply. Petitioner contends that the only standard under MCZO 4.165 that is remotely analogous to the MCZO 5.030(2) standards is MCZO 4.165(D)(1), which requires a finding that "[t]he lot area shall be adequate to meet the needs of the establishment." Such a finding might resemble a finding under MCZO 5.030(2) that the parcel is suited for the intended use, considering size. However, as petitioner argues, nothing else in MCZO 4.165 appears to address the suitability of the parcel with respect to the other considerations listed in MCZO 5.030(2).

In sum, the county's interpretation of MCZO 5.030(2) is inconsistent with the express language and context of that code provision, and is "plausible" only in a tenuous, linguistic sense, if that. The first assignment of error is sustained. As noted above, however, the county adopted alternative findings that may render its interpretative error harmless. We turn to the assignments of error challenging those alternative findings.

B. Second Assignment of Error

After articulating the above interpretation of MCZO 5.030(2), the county adopted the following alternative findings:

> "To the extent any review body concludes that the above interpretation is incorrect and that the County is required to review the use of the parcel for a travel center, the County Court concludes that the site is suitable for the uses allowed in the SAI zone. MCZO 5.030(2) specifically requires consideration of the size of the property, topography, sewage disposal and access. As far as the size of the property, after this issue was raised, the applicant provided a draft site plan that located a 12-acre travel center in the 49-acre parcel, leaving approximately 37 acres to accommodate stormwater disposal and a septic field—more than enough size to accommodate a travel center. As far as topography, the evidence is clear that this parcel is generally flat, with a slight sloping to the north (towards the Columbia River) and that the topography could accommodate any number of uses, including a travel center. Turning to sewage disposal, the applicant provided information that an engineer has evaluated the site and concluded that the site can accommodate an on-site sewage disposal system and that the 37 acres leftover from site development is more than adequate to site such a system in addition to disposing of stormwater. Access issues are discussed below in the response to issue 2.
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> "The appellant also raises issues regarding stormwater and other utilities. The Court concludes that these services are not at issue in this case. *Although the list in MCZO 5.030(2) is not exclusive, the County does not interpret this provision to include storm water.* Storm water is not mentioned specifically in the provision and the appellant provides no reason why it should be considered one of those requirements. To the extent the County is required to consider it, the applicant has demonstrated that a travel plaza could be sited on the property with 37 acres left over for facilities including septic systems and stormwater disposal. The applicant again indicated that an engineer has evaluated the site and found that this is more than adequate size to accommodate these concerns and, accordingly, the Planning Commission properly concluded that this criterion has been met." Record 10-11 (emphasis added).

Under the second assignment of error, petitioner challenges the interpretation stated in the emphasized language, that even though the list of considerations in MCZO 5.030(2) is non-exclusive, the county interprets MCZO 5.030(2) not to require consideration of whether the parcel is suited for the intended use with respect to stormwater disposal. That interpretation has its own nested alternative finding, that Parcel 1 is suited for stormwater disposal, a finding petitioner challenges under the fourth assignment of error.

We need not resolve whether the county's interpretation is affirmable, because as discussed below under the fourth assignment of error we reject petitioner's challenges to the county's alternative findings regarding stormwater disposal. Therefore, even if the county erred in concluding that stormwater disposal is not a consideration for purposes of MCZO 5.030(2), that error does not provide a basis for reversal or remand.

The second assignment of error is denied.

C. Fourth Assignment of Error

Under this assignment of error, petitioner challenges the adequacy and evidentiary support for the county's alternative findings that, even if MCZO 5.030(2) applies, the record demonstrates that Parcel 1 is suitable for a travel center. In particular, petitioner challenges the county's alternative findings with respect to water supply, sewage disposal, and stormwater disposal.

According to petitioner, the only evidence submitted to support a finding that parcel 1 is suited for a travel center with respect to water supply, sewage disposal, and stormwater disposal is the unsupported testimony of the applicant (and intervenor) Greg Flowers, who is a land surveyor and manager for USKH, Inc., an engineering firm hired by intervenor Love's Travel Stops & General Stores, Inc. Petitioner contends that the applicant submitted no engineering studies, facility designs or other information necessary to determine whether the parcel is suited for a travel center with respect to water supply, sewage disposal or stormwater disposal. There is no evidence, petitioner argues, on the expected demands of the

travel center, such as how much water it will require, or how much sewage or stormwater it will generate. Petitioner notes that the applicant admitted that only preliminary engineering work had been performed to date. Without specific studies and plans, petitioner argues, the county is in no position to determine that Parcel 1 is suited for the water, sewage, and stormwater facilities required by a travel center.

Respondents initially argue, and we agree, that petitioner has not established that a determination that a proposed parcel is suited for the intended use under MCZO 5.030(2) necessarily requires submission of engineering studies or design plans for water, septic, or stormwater facilities. Such specific studies or designs might well be necessary to approve a specific travel center, under other county regulations that would apply at the time of development approval. However, for purposes of approving a partition under MCZO 5.030(2), petitioner has not demonstrated that such detailed information is necessary, at least in the present case. There could be circumstances, based on the limited size of the proposed parcel or the existence of geologic, topographic or other constraints, where it might be necessary for a partition applicant to submit engineering studies or facility plans to allow the county to determine whether a proposed parcel is in fact suited for the intended use. However, petitioner identifies no such circumstances in the present case. The applicant submitted site plans indicating that a travel center would occupy approximately 12 of the 49 acres in Parcel 1, and testified based on input from USKH engineers and consultations with state agencies that the remaining 37 acres provide more than adequate area to accommodate any septic, stormwater and well designs required for a travel center. Petitioner identifies not one scintilla of evidence in the record to the contrary. In our view, a reasonable person could rely on the excess acreage of Parcel 1, and the absence of any suggestion of topographic or other constraints on facility design or adequacy, to conclude that engineering studies or specific facility design plans are not necessary to determine whether Parcel is suited for the intended travel center use.

Petitioner is correct that the applicant did not submit any specific estimates of how much water a travel center would likely need,[8] or how much sewage or stormwater such a use would likely generate. We might agree that such estimates would be necessary if, again, there is some reason to believe that there may not be adequate room or capacity on Parcel 1 to accommodate the facilities needed to serve a travel center. However, petitioner identifies no such reason.

As a final general argument, petitioner contends that unsupported assurances by the applicant are not sufficient to constitute substantial evidence that a proposal complies with approval standards, citing *Weaver v. Linn County*, 40 Or LUBA 203, 210 (2001) (an unsupported assurance from the applicant's attorney that a 1.69-acre parcel can accommodate a septic system for a church is not substantial evidence that the "physical characteristics" of the development site are "suitable for a sewage treatment system"). Petitioner argues that applicant Greg Flowers, while employed at an engineering firm, is not an engineer professionally qualified to render an expert opinion regarding whether Parcel 1 can accommodate the water, septic and stormwater needs of a travel center.

Respondents counter, and we agree, that the present case is distinguishable from that in *Weaver* and similar cases. Flowers is a registered land surveyor and survey manager for an engineering firm, who testified that engineers at his firm conducted preliminary investigations and consulted with the appropriate state agencies regarding the suitability of the property to accommodate a travel center, with respect to water, sewage and stormwater disposal, and concluded based on that investigation and consultation that Parcel 1 is suitable.[9]

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[8] The applicant did testify that the Port of Morrow can deliver up to 2,000 gallons of water per minute if needed, which "can adequately serve this proposal." Record 108.

[9] Flowers testified that "[a] 49-acre parcel is being proposed to insure that there is adequate area to provide approved sewage disposal, drain field replacement and well placement. Preliminary investigation indicates that the proposed site is more than adequate and conversations with DEQ [Department of Environmental Quality] and Department of Water Resources have supported the preliminary engineering report." Record 159.

That testimony is hardly an "unsupported assurance" from someone, such as an attorney, who is unqualified to testify on a technical engineering matter in a pending development proposal, as was the case in *Weaver*. While such testimony might not constitute substantial evidence if the application were to approve a specific development and its facilities under more focused and rigorous development standards, for purposes of approving a partition under MCZO 5.030(2) we disagree with petitioner that only *direct* testimony from an engineer is sufficient to constitute substantial evidence that Parcel 1 is suited for a travel center, considering water supply, sewage and stormwater disposal.

Turning to petitioner's specific challenges, with respect to water supply the county court found:

> "The applicant testified that an on-site well is feasible and that water is available from an aquifer. Moreover, the applicant testified that the Oregon Water Resources Department ('OWRD') has agreed that an on-site well is a feasible option. Thus, the applicant has established that the water supply is adequate." Record 11.

In addition, the county court adopted the following planning commission finding, which accurately reflects the applicant's testimony, at Record 108, and elsewhere:

> "Water for the site is proposed to come from an onsite well. The applicant has indicated that conversations with Oregon Water Resources have been positive and that water should be available from a deeper aquifer approved initially through a 'limited license' after which a water right can be obtained. If it is determined that this process is not feasible an alternative would be to request water be delivered to the subject property by the Port of Morrow from the property to the west on the other side of Tower Road. The Port of Morrow does have a municipal well and could provide this public service. If that is the mechanism used at some future date for water delivery an exception to Goal 11 would be required." Record 92.

Petitioner argues that the applicant's testimony is not substantial evidence supporting the county's findings with respect to water supply, unless that testimony is supported by a test well to determine exactly how much water is available from the aquifer, the filing of a water rights application with OWRD, or similar evidence. Petitioner also contends that the alternative water source identified from the Port of Morrow's existing well is speculative and

its extension across Tower Road would require a Goal 11 exception. However, petitioner has not established that the applicant's testimony regarding water supply is insufficient for purposes of approving a partition under MCZO 5.030(2). Petitioner cites to no evidence suggesting any difficulty in obtaining an adequate water supply from an on-site well, and all the evidence in the record indicates that an on-site well is feasible. The record also discloses no technical difficulty with supplying the proposed use by extension from a municipal well on the adjoining property. While that would require a Goal 11 exception, petitioner has not established that a Goal 11 exception is unobtainable. A reasonable person could rely on the applicant's testimony to conclude that Parcel 1 is suited for a travel center, considering water supply.

With respect to sewage disposal, the county court found that "the applicant provided information that an engineer has evaluated the site and concluded that the site can accommodate an on-site sewage disposal system and that the 37 acres leftover from site development is more than adequate to site such a system * * *." Record 10. Further, the planning commission found that "[t]he applicant has indicated that a review by various licensed staff of USHK has determined that the subject property should support an onsite waste water treatment system. The [DEQ] will need to approve the final design and location of any onsite system." Record 92. Those findings are based in part on the applicant's testimony that DEQ "will conduct a site evaluation to determine suitability of the site for various design options. This evaluation will determine what kind of system is appropriate for this project, based on site conditions." Record 108.

Petitioner focuses on the fact that at the time of the local proceedings in this matter DEQ had not yet performed an evaluation to determine what type of septic system design is appropriate for the site, arguing that until DEQ performs that evaluation there is not substantial evidence that Parcel 1 is suited for a travel center with respect to sewage disposal. However, the testimony in the record indicates that the parcel is suited for an on-site septic

system, although the exact design has not yet been determined. Petitioner does not explain why the particular design of the septic system must be known in order to find that the parcel is suited for a travel center regarding sewage disposal, for purposes of MCZO 5.030(2).

Finally, with respect to stormwater disposal, the applicant testified:

> "Due to the nature of the site, stormwater will be infiltrated at the north end of the property. Natural topography lends itself to discharging runoff to this area. Stable discharge locations will be provided to eliminate erosion issues. Adequate area exists to dispose of stormwater utilizing these methods, while maintaining separation from septic and potable water systems." Record 187-88.

Based on that testimony, the county found that the parcel is suited for a travel center, regarding stormwater disposal. Petitioner argues, however, that without knowing how much stormwater runoff the travel center will generate and without knowing the size and type of disposal facilities, the county is in no position to find that the parcel can accommodate runoff from a travel center.

Again, petitioner identifies no evidence suggesting that providing stormwater disposal for a 12-acre travel center on the remaining 37 acres of Parcel 1 will be a concern of any kind, either in terms of quantity of runoff or facility design. In our view, given the absence of any reason to believe otherwise, a reasonable decision maker could have some confidence based on the large size of Parcel 1 that the parcel is suited for the intended use with respect to stormwater disposal, notwithstanding that the applicant failed to specify the amount of runoff that could be generated by a travel center or propose a specific facility design.

The fourth assignment of error is denied.

D. Conclusion

We sustained the first assignment of error, which challenged the county's initial interpretation that MCZO 5.030(2) does not require a finding that Parcel 1 is suited for the intended use. However, because we have rejected petitioner's challenges to the county's

alternative findings addressing MCZO 5.030(2), that interpretative error does not provide an independent basis for reversal or remand.

THIRD ASSIGNMENT OF ERROR

MCZO 5.030(3) requires a finding that "[a]ll required public service and facilities are available and adequate." The planning commission found compliance with MCZO 5.030(3), noting that the subject property is served by public electric and telephone utilities, and is within a rural fire protection district. Petitioner argued to the county court, however, that MCZO 5.030(3) also requires the county to find that other services and facilities, such water supply, sewage disposal and stormwater disposal, are available and adequate. The county court rejected that argument, finding:

> "The appellant does not challenge the availability or adequacy of electricity, telephone or fire protection; instead, it raises the issue of whether water, sewer and stormwater [services] are available. However, in this part of the County, these services are not provided as 'public services,' but instead, must be provided by the individual user. *Because these services are not provided by a public agency, the court interprets this provision to not apply to water supply, sewage disposal or stormwater disposal.*" Record 11 (emphasis added).

The county went on to adopt alternative findings that water, sewer and stormwater services are available and adequate.

In the third assignment of error, petitioner challenges the interpretation emphasized in the above quote, that MCZO 5.030(3) applies only to services and facilities provided by a "public agency," and therefore does not apply to services and facilities provided on-site by the landowner. According to petitioner, nothing in MCZO 5.030(3) limits the scope of "public service and facilities" to those provided by a "public agency."

It is not clear what the county meant by "public agency." The county probably did not mean a publicly-*owned* municipal corporation, since electrical and telephone services in the county are almost certainly provided by privately-owned utilities, and the county considered the availability and adequacy of such services. The county appears to distinguish between (1) services and facilities provided on-site by the landowner that serve only the subject property,

and (2) services and facilities provided by third parties that serve more than one property. That distinction seems entirely consistent with the express language of MCZO 5.030(3). Petitioner does not explain why "public service and facilities" must be understood to include a private well that serves only the property on which the well is located, for example, or a private septic system that serves a single use on the property.

The third assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

As noted, MCZO 5.030(2) requires a finding that

> "Each parcel is suited for the use intended or offered; including * * * guaranteed access. Proof of access must show that each parcel has an easement sufficient for continued ingress and egress to a public, county or state highway or has a deeded access way."

As the county found, Tower Road is a dedicated county road with a right-of-way width of 60 feet, located within a 150-foot non-exclusive easement that is limited to "roadway" purposes. The western boundary of parcel 1 is separated from the Tower Road right-of-way by approximately 45 feet of property that is subject to this roadway easement, and during the proceedings below county staff expressed doubt that that easement is sufficient to provide legal ingress/egress access to Parcel 1. The planning commission concluded that "parcel 1 does not have direct access" to Tower Road, at least at the place where intervenor proposes the travel center, and that steps will need to be taken to "assure legal access[.]" Record 93.[10] The county court concluded, however, that Tower Road provides "guaranteed access" to Parcel 1, reasoning:

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[10] The planning commission findings explain the unusual history of the easement and the adjoining parcels:

> "* * * Tower Road was originally created as a private easement serving what is now Threemile Canyon Farms (including the dairies), Boeing activities and the Portland General Electric (PGE) Boardman Coal Fire Plant. It is understood that original parties to the agreement were: the State of Oregon Department of Administrative Services (DAS), PGE and Boeing * * *. It is also the understanding of Planning staff that the Port of Morrow was granted access to the easement some time after they purchased the airport property on the west side of Tower Road. It does not appear that the City of Boardman was added to the easement

> ""It is important to note that [MCZO 5.030(2)] does not require that a parcel be adjacent to or front on a public road. It is enough if there is an easement that allows access to the property. In this case, parcel 1 is directly adjacent to and has access to a 150-foot wide non-exclusive easement for roadway purposes. Tower Road, a dedicated County Road, is also located within the 150-foot wide easement; however, it is separated from parcel 1 by approximately 45 feet of roadway easement. As the Planning Commission concluded, the easement likely will need to be addressed in the future. However, for purposes of determining whether the proposal parcel is suitable and has guaranteed access, the County Court notes that the provision does not require direct access to a public road; it specifically allows connection to public roads through easements. Because the only thing separating parcel 1 from a public road is a strip of easement that is specifically usable only for roadway purposes, the County court concludes that the parcel does have guaranteed access for purposes of MCZO 5.030(2)." Record 11.

Petitioner challenges that finding, emphasizing that MCZO 5.030(2) requires *guaranteed* access to Parcel 1, and if that access relies in part on the 150-foot easement to cross property that is owned by others the 150-foot easement must be "sufficient for continued ingress and egress to a public, county or state highway[.]"[11] Given the legal

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> agreement when they purchased the subject property in 2000. This easement was created at 150 feet and parcels subsequently created along the easement have frontage to the easement.
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> "In approximately 2000 ownership changes, at what is now referred to as Threemile Canyon Farms, required two different land partitions—the first to create two dairy parcels and the second to create the conservation areas. During these land partitions the County, based on the Transportation System Plan, needed to assure access via a dedicated right-of-way based on the number of parcels to be served. Planning staff, at that time, were not aware of the width of the easement, or for other reasons currently unknown, did not require the dedication of Tower Road at the same width as the easement or require a mechanism to reduce the width of the easement to be congruent with the dedication. The dedication was for 60 feet of right-of-way as required by the Morrow County Transportation System Plan. It has since then come to the attention of current Planning staff that the 60-foot dedicated right-of-way actually sits on and over the 150-foot wide easement. It is not clear exactly where the actual road sits within the dedicated right-of-way or where the right-of-way sits relative to the 150-foot easement. What is clear is that 90 feet of the easement separates the dedication and the road from adjoining property owners along Tower Road. The effect is that proposed parcel 1 does not have direct access to the portion of Tower Road dedicated to the public at the point they wish to connect to Tower Road. Remedies to this need to be completed prior to development of the parcel to assure legal access can be obtained at points along Tower Road meeting requirements of the Morrow County Transportation System Plan." Record 93.

[11] Although the county's findings are not entirely clear on this point, we understand the county to have found that the disputed Parcel 1 is separated from the 60-foot Tower Road right of way by property that is owned by others, but the property that separates Parcel 1 from the 60-foot Tower Road right of way is subject to the 150-foot access easement.

uncertainty over whether the "roadway" easement separating Parcel 1 from Tower Road provides ingress and egress rights between Parcel 1 and Tower Road, petitioner argues, the county has no basis to conclude that Parcel 1 has "guaranteed access." Petitioner notes that the term "access" is defined in MCZO 1.070(A) as "the right to cross between public and private property allowing pedestrians and vehicles to enter and leave property." Petitioner contends that all the evidence in the record indicates that the easement separating Parcel 1 and Tower Road does not authorize ingress and egress to Parcel 1, and the county's findings do not explain the conclusion that there is "guaranteed access" between Parcel 1 and Tower Road.

Due to the unusual history of the easement, dedication of Tower Road, and creation of adjoining parcels, a strip of land apparently separates Parcel 1 from the dedicated right-of-way of Tower Road that is subject to the roadway easement. The current ownership of that strip of land is apparently uncertain. The roadway easement is not in the record, but petitioner argues, and no party disputes, that the terms of the easement do not expressly provide for access rights to any properties fronting on the easement, such as the subject property. At the time the easement was originally created, the 456-acre parent parcel apparently did not exist as a separate parcel. The planning commission findings recite that when the Port of Morrow acquired the airport property west of Tower Road the Port was granted access to the easement, which suggests that such permission is needed in order for adjoining properties to access the easement. *See* n 10. The planning commission also notes that the City of Boardman was *not* added to the easement agreement when it purchased the subject property in 2000. *Id.* The 456-acre parent parcel owned by the city has other access off Kunze Road, and the city may not have felt it necessary to request access from Tower Road, for purposes of developing its wastewater treatment facility.

Given that history, we agree with petitioner that the county court has not adequately explained how Parcel 1 has "guaranteed access" as required by MCZO 5.030(2). The county

found that Parcel 1 "has access to a 150-foot wide non-exclusive easement for roadway purposes." Record 11. However, we do not understand that conclusion, or what that conclusion is based on. The planning commission and the county court appear to acknowledge in their findings that the easement will need to be modified in some manner to provide the desired access to the proposed travel center from Tower Road, or that some action must be taken to provide access, which does not suggest that as currently worded the easement grants such access or that a right to access Tower Road for the proposed use exists or is "guaranteed." The easement apparently is limited to "roadway" purposes, and it is not clear to us that an easement so limited necessarily grants access rights to subsequently created parcels that are not expressly benefited by the easement. The easement was originally private, and the parties appear to agree that it became "non-exclusive" at the time the Tower Road right-of-way was dedicated to the county. However, the legal effect of that change is also not clear to us. It may be that the easement only became "non-exclusive" in the sense that the public can now utilize the portion of the easement that is occupied by the Tower Road right-of-way. If that is the case, it does not necessarily follow that such a non-exclusive right to use a portion of the 150-foot access easement as a "roadway" includes a right to rely on the portion of the 150-foot access easement that is not occupied by the Tower Road right of way to provide access to new parcels. Neither the county nor LUBA is in any position to answer that question, since the easement document is not in the record. And if the easement document is not sufficiently clear about whether it may be relied on to provide access to Parcel 1, it may be that the question will have to be answered by the Morrow County Circuit Court. *See Mohler v. Josephine County*, 26 Or LUBA 1, 7 (1993) (only the circuit court can provide a final determination concerning the nature and scope of an easement).

The simplest resolution may be for the underlying fee owner (whoever that is) to grant a new access easement to provide access from Parcel 1 to Tower Road, or for the county to approve a property line adjustment so that Parcel 1 fronts directly on the Tower Road right-

of-way. However, as the record now stands, the county has not adequately demonstrated that Parcel 1 has "guaranteed access" to Tower Road for purposes of MCZO 5.030(2).[12]

The fifth assignment of error is sustained.

The county's decision is remanded.

[12] Respondents argue that LUBA should defer to the county court's interpretation of MCZO 5.030(2) with respect to guaranteed access. However, respondents do not identify any "interpretation" with respect to the access requirements of MCZO 5.030(2) to which LUBA could defer. The county's conclusion that there is guaranteed access for purposes of MCZO 5.030(2) appears to rest on the terms of the roadway easement (which is not in the record), and the county's findings do not set out any explicit or implicit interpretation or explanation of the meaning of relevant code language that LUBA could review for consistency under ORS 197.829(1). To the extent there is an implicit interpretation of the term "guaranteed access," it is inadequate for review.