BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEVIN OIL CO., INC,
Petitioner,

vs.

MORROW COUNTY,
Respondent,

and

LOVE'S TRAVEL STOPS
& COUNTRY STORES, INC.,
Intervenor-Respondent.

LUBA No. 2010-044 and 2010-046

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, WA, filed a joint response brief on behalf of respondent.

William K. Kabeiseman, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were Carrie A. Richter and Garvey Schubert Barer.

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

REMANDED 11/19/2010

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 (1) a decision approving comprehensive text and map and zoning map amendments and (2) a conditional use permit to authorize a travel center.

REPLY BRIEF

Petitioner moves to file a reply brief to respond to several new matters raised in the response brief. There is no opposition to the reply brief and it is allowed.

FACTS

The subject property is an undeveloped 49-acre parcel located at the junction of Interstate Highway 84 and Tower Road, five miles from the City of Boardman urban growth boundary, and near the Boardman Airport.[1] The property is designated Industrial and zoned Space Age Industrial (SAI). On December 3, 2009, intervenor filed an application seeking (1) a comprehensive plan map amendment from Industrial to Commercial, (2) a zoning map amendment from SAI to Tourist Commercial (TC), and (3) comprehensive plan text amendments to provide plan policies to support the TC zoning designation. The plan/zoning amendments are intended to permit intervenor to seek approval for a "travel center" on 12 acres of the subject property, consisting of truck and automobile fueling stations, convenience store, restaurant, and tire changing facility. The TC zone allows as outright permitted uses auto-oriented uses such as fueling stations, retail outlets, restaurants, and vehicle-repair services.

At the first planning commission hearing on the plan/zoning amendments, on January 19, 2010, an opponent noted that the subject property is subject to the Airport Approach

[1] The same property and its parent parcel were at issue in *Devin Oil Co., Inc. v. Morrow County*, 60 Or LUBA 336, *aff'd* 236 Or App 164, __ P3d __ (2010), in which the county approved the partition creating the subject 49-acre parcel. LUBA remanded the partition approval to address the question of access to Tower Road under a partition standard, and the county appealed the decision to the Court of Appeals, which affirmed LUBA's decision. The parties inform us that, as of the date of oral argument before LUBA, the county has not undertaken remand proceedings.

(AA) overlay zone, at Morrow County Zoning Ordinance (MCZO) 3.090. The AA overlay zone allows an airport as an outright permitted use, allows a number of non-airport related uses as conditional uses, and imposes a number of limitations on allowed and conditional uses. The list of conditional uses allowed in the AA overlay zone does not specifically include a travel center or anything similar, but does include "[r]etail and wholesale trade facilities." MCZO 3.090(B)(13).

On February 8, 2010, intervenor filed a conditional use permit (CUP) application seeking approval of the proposed travel center in the AA overlay zone as a "[r]etail * * * trade facilit[y]." On February 23, 2010, the planning commission held a hearing on the plan/zone change application and the CUP, and at the conclusion of the hearings issued two separate decisions (1) approving the CUP application and (2) recommending that the county court approve the plan/zone change application.[2] The notice of the CUP decision stated that the CUP approval would be final unless appealed to the County Court within 15 days. The county scheduled a hearing before the county court on the plan/zone change application, for March 24, 2010.

Shortly after the planning commission hearing, petitioner learned of the CUP approval and filed a timely appeal of that decision to the county court. On March 24, 2010, the county court conducted a hearing on the planning commission's recommendation to approve the plan/zone change application, which was continued to April 7, 2010. On that date, the county court held hearings on both the plan/zone change application and petitioner's appeal of the CUP approval.

On April 28, 2010, the county court issued its decision denying petitioner's appeal and approving the CUP application for a travel center as a "[r]etail * * * trade facilit[y]," with additional findings and conditions. On May 5, 2010, the county court issued its

[2] Under MCZO 6.060(C), the planning commission makes a decision on a conditional use permit application, and that decision is appealable to the county court.

decision approving the plan/zone change application, with conditions. Petitioner appealed both decisions to LUBA, which consolidated the decisions for review.[3]

FIRST ASSIGNMENT OF ERROR

Petitioner contends that the county erred in concluding that the proposed development is allowed in the AA overlay zone as a "[r]etail and wholesale trade facilit[y]." According to petitioner, the proposed travel center is most accurately characterized as a "truck stop," which is a defined use category that is expressly allowed in the county's General Commercial (C-G) zone as a conditional use, but which is not among the listed permitted or conditional uses allowed in the AA overlay zone.[4] Petitioner notes that the definition of "truck stop" includes dispensing fuel into "trucks *or motor vehicles*," and argues that "truck stop" thus incorporates automobile fueling stations, which is a separate use category allowed under several variant names in three other county zones, but not the AA overlay zone.[5] Because the primary elements of the proposed travel center are truck and automobile fueling stations, petitioners argue, the proposed development is most accurately viewed as falling within the "truck stop" use category.[6] Petitioner contends that because the

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[3] The county submitted two separate records, which overlap considerably. We follow the parties in referring to the record of the CUP approval at issue in LUBA No. 2010-044 as "044 Record __," and the record of the plan/zone change approval at issue in LUBA No. 2010-046 as "046 Record __."

[4] Morrow County Zoning Ordinance (MCZO) 1.030 defines "Truck Stop" as:

> "Any building, premise or land in or on which the service of dispensing motor fuel or other petroleum products directly into trucks or motor vehicles is rendered. A truck stop may include the sale of accessories or equipment for trucks or similar motor vehicles and may also include the maintenance, service, storage, or repair of commercially licensed trucks or motor vehicles."

[5] The Rural Service Center zone allows "Automobile Service Station" as a permitted use. The C-G zone allows "Service Station" as a conditional use, as well as "Truck Stop." As noted, the TC zone allows "Auto-dependent and auto-oriented uses and facilities (e.g. fueling stations, drive-in restaurants, and similar uses)" as permitted uses.

[6] The county rejected that argument below, concluding that the proposed use is not a "Truck Stop," but rather an agglomeration of various retail commercial uses (truck and automobile fueling, convenience store, restaurant, vehicle service) allowed in the base TC zone. Petitioner challenges that interpretation on appeal in a separate subassignment of error, repeating its argument that the proposed use is properly viewed as a "Truck

proposed use fits within a defined use category that is not allowed in the AA overlay zone, the county erred in concluding that the proposed use is allowed under the broader, undefined "[r]etail and wholesale trade facilit[y]" use category in the AA overlay zone.

Petitioner's argument explicitly invokes an inference that LUBA described in *Sarti v. City of Lake Oswego*, 20 Or LUBA 387, *rev'd* 106 Or App 594, 809 P2d 701 (1991). In *Sarti*, LUBA held that where one zone lists a specific type of use as a permitted use, and a second zone does not list that specific use, but does list a broader use category that arguably includes the more specific use, an inference arises that the local government did not intend to allow the specific use under the broader use category. The specific use category at issue in *Sarti* was a dance studio, and the broader use category was "institutional uses," which included educational and cultural facilities. We applied that inference, and concluded that the city did not intend to allow dance studios under the broader use category as either an educational or cultural facility. The Court of Appeals disagreed, stating:

> "In the absence of any definition or extrinsic or intrinsic evidence showing a contrary legislative intent, the words 'cultural facility' must be construed in accordance with their plain and ordinary meaning. * * * 'Cultural' is defined in *Webster's Third New International Dictionary* 552 to mean, in part, 'of or relating to the artistic and intellectual aspects or content of human activity.' The ordinary meaning of 'artistic' clearly encompasses the dance activities that the city would permit at the school. * * *" 106 Or App at 597.

While the Court of Appeals perhaps did not *absolutely* reject use of the inference described in LUBA's opinion, the Court refocused the inquiry on text and context, and held that, absent textual and contextual indications to the contrary, a broad use category allowed in one zone can indeed encompass a use described in a narrower use category in a different zone, if under the plain and ordinary meaning of the relevant words the proposed use falls within the broad use category.

Stop" and only a "Truck Stop." We need not address that issue, because for the reasons explained below the relevant question is whether the county erred in interpreting the use category "[r]etail and wholesale trade facilit[y]" to include the proposed use, not whether the proposed use falls into the use category "Truck Stop."

In several subsequent cases, we have cited LUBA's *Sarti* opinion as support to conclude that a proposed use that is described in a narrow use category not listed as an allowed use in the pertinent zone does not fall within a broader use category that is allowed within that zone. *O'Shea v. City of Bend*, 49 Or LUBA 498, 506-10 (2005) (stand-alone "convention center" not allowed as accessory to "hotel and motel" use); *Roth v. Jackson County*, 40 Or LUBA 531, 535-36 (2001) ("winery" not allowed as "agriculture" in a farm zone); *Cotter v. Clackamas County*, 36 Or LUBA 172, 179-80 (1999) ("recreational vehicle park" not allowed as a "campground" in a forest zone). It is not entirely clear in those cases whether we applied the "inference" described in LUBA's *Sarti* opinion as some kind of dispositive principle of interpretation, or simply as shorthand for the text and context analysis that the Court of Appeals prescribed in its *Sarti* opinion. If the former, then our analytical methodology in those cases was not consistent with that described in the Court's *Sarti* opinion.

In a more recent case, *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295, *aff'd* 230 Or App 202, 214 P3d 68 (2009), we declined to apply the inference described in LUBA's *Sarti* opinion in circumstances with some factual and legal resemblance to the present case. In *Western Land & Cattle, Inc.*, the county approved a travel center similar to that proposed here in a commercial zone that allowed "Automobile Service Stations" and uses "similar" to automobile service stations, but did not list as an allowed use a "Truck Stop," which was an allowed use in a different zone. The county concluded based on an interpretation of text and context that the proposed travel center was a "similar use" to an "Automobile Service Station," and rejected the petitioner's arguments based on *Sarti* that the proposed use qualified as a "Truck Stop" and therefore cannot be permitted in the commercial zone under the open-ended "similar use" provision. We also rejected that argument, noting that providing broadly for unlisted uses as "similar uses" does not suggest that the county was concerned with maintaining bright lines between use categories. In that

context, we held, the inference described in *Sarti*, "to the extent it exists at all," is particularly weak. 58 Or LUBA at 302. We ultimately affirmed the county's interpretation under the deferential scope of review set out in ORS 197.829(1).[7]

Petitioner attempts to distinguish *Western Land & Cattle, Inc.*, arguing that Morrow County's zoning scheme treats "similar uses" more restrictively than Umatilla County's, indicating an intent to maintain bright lines between use categories, and thus that the inference in *Sarti* should be given full effect. However, in affirming LUBA's decision in *Western Land & Cattle, Inc.*, the Court of Appeals made it clear that the *Sarti* inference does not possess even the limited vitality that LUBA suggested in its opinion. 230 Or App at 212, n 4 (citing the Court's *Sarti* opinion as rejecting the argument that zoning ordinances implicitly preclude overlapping allowed uses among the zoning districts). The proper question under ORS 197.829(1)(a), the Court held, is whether the governing body's interpretation is consistent with the "express language" of the local land use regulation being interpreted, and any inferences that might be drawn from how use categories are provided for in other parts of the zoning code play little or no role in that inquiry. *Id.*

We turn then to the question of whether the county court's interpretation that the use category "[r]etail and wholesale trade facilities" at MCZO 3.090(B)(13) encompasses the

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

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

In *Siporen v. City of Medford*, 231 Or App 585, 599, 220 P3d 427 (2009), *affirmed* __ Or __, __ P3d __ (November 18, 2010), the Court of Appeals interpreted ORS 197.829(1)(a) to require LUBA to affirm a governing body's code interpretation unless the interpretation is not "plausible" under the interpretative principles that ordinarily apply in construction of ordinances.

proposed travel center is consistent with the express language of that provision, under ORS 197.829(1)(a). On its face, "[r]etail and wholesale trade facilities" appears to be a very broad use category that would encompass many kinds of commercial uses, absent some narrowing text or context. The county viewed that language in the context of the AA overlay zone, the purpose of which, the county court observed, is "to provide a [conditional use] review process for non-airport and non-agricultural uses proposing to locate within the airport approach zone to assure that such uses will not be detrimental to airport operations." 044 Record 13. In other words, the county concluded, conditional uses listed in the AA overlay zone include broad categories such as "[r]etail and wholesale trade facilities," because the conditional use component of the AA overlay zone is not intended to finely distinguish between categories and subcategories of related uses, but rather to ensure that uses allowed are consistent with airport operations, which is largely achieved by conditional use review and application of the AA overlay zone development standards.

Petitioner cites to no text or immediate context in the AA overlay zone that would narrow the otherwise broad and undifferentiated scope of "[r]etail and wholesale trade facilities," under the plain and ordinary meaning of those words.[8] We understand petitioner to argue, based on the reasoning in LUBA's *Sarti* opinion, that "[r]etail and wholesale trade facilities" should be interpreted to include only those types of commercial uses that are *not* listed in any of the county's other zones. However, the county's other zones list many different types of commercial uses, some in specific terms, some in very broad terms, and the set of unlisted commercial uses that would populate the category of "[r]etail and wholesale trade facilities" under petitioner's interpretation would appear to be very small, if not a null

[8] We note that the county rejected petitioner's argument below that the AA overlay zone category "retail and wholesale trade facilities" includes only those facilities with both a retail AND a wholesale component. 044 Record 14. On appeal, petitioner does not challenge that interpretation.

set.[9] That result is simply inconsistent with the broad, express language of MCZO 3.090(B)(13).

In any case, the question is not whether petitioner's preferred interpretation is consistent with the express language of MCZO 3.090(B)(13), but whether the county court's interpretation is *inconsistent* with that express language. ORS 197.829(1)(a). For the above reasons, petitioner has not demonstrated that the county's interpretation that the proposed travel center falls within the scope of the broad language "[r]etail and wholesale trade facilities" is inconsistent with the express language of that provision.

The county's findings include two other related interpretations that petitioner challenges in two separate subassignments of error. First, the county appears to agree with an interpretation proffered by intervenor's planning consultant that the broad scope of "[r]etail and wholesale trade facilities" would potentially encompass any commercial use allowed in the county's commercial zones. 044 Record 13. Second, the county rejected petitioner's counter-argument that adopting the consultant's interpretation would "open the floodgates to a surge of commercial uses" wherever the AA overlay zone is applied. The county found that, while it "might welcome such a surge," the underlying base zoning would control the uses allowed in the AA overlay zone. *Id.* The county's second interpretation appears to narrow the potentially broad reach of the first interpretation.

Petitioner argues that both of the above interpretations are inconsistent with the purpose and policy underlying the AA overlay zone, under ORS 197.829(1)(b) and (c). Petitioner notes that the express purpose of the AA overlay zone is to "restrict development"

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[9] The county's General Commercial (C-G) zone, for example, lists many different kinds of permitted and conditionally permitted uses, some of which appear to be broad catch-all categories, such as "[r]etail trade establishment." MCZO 3.060(A)(7). It is not clear to us under petitioner's view of mutually exclusive use categories what retail commercial uses would be left in the category of "[r]etail * * * trade facilit[y]," if it excludes all uses that would fall within the category of "[r]etail trade establishment." The county argues, and we tend to agree, that the county's zones and use categories were developed over many years without much attempt to use consistent terms for use categories in different zones, *see* n 4, or to maintain bright lines between use categories.

near the airport, and argues that both interpretations are inconsistent with that purpose, because they expand rather than restrict potential development near the airport. Petitioner contends that the county's principle interpretation, discussed above, that the proposed travel center falls within the plain and ordinary meaning of the words "[r]etail and wholesale trade facilities," is dependent on both of the above interpretations, and if either is reversed, then the county's principle interpretation must also be reversed.

However, we do not see that the challenged interpretations are so interdependent. The county might well go too far in suggesting that *all* commercial uses allowed in each of the county's commercial zones potentially could be allowed in the AA overlay zone as "[r]etail and wholesale trade facilities," and yet still be correct that the *proposed use* falls within the plain and ordinary meaning of the terms "[r]etail and wholesale trade facilities." Similarly, the county might well be incorrect that *all* uses allowed in the underlying TC base zone are necessarily also allowed in the AA overlay zone, but still be correct that the *proposed use* is allowed in the AA overlay zone. In other words, the two challenged interpretations appear to be potentially overbroad *dicta* rather than interdependent interpretations necessary to support the county's principle interpretation of the express language of MCZO 3.090(B)(13).

To illustrate, we tend to agree with petitioner that the underlying TC zone allows some uses that do not appear to fit within any of the AA overlay zone use categories (*e.g.*, government offices, libraries, museums).[10] If the county had interpreted the relationship between the two zones to allow a proposed use that is permitted in the TC zone but that is not allowed in the AA overlay zone, petitioner's challenge of that interpretation might be well taken and warrant reversal or remand. However, that is not the present circumstance. The

[10] We note, conversely, that the AA overlay zone allows uses that do not appear to fit within any use category allowed in the TC zone (*e.g.*, mining extraction and processing, agriculture, solid waste disposal site). Presumably, if there is a conflict between the AA overlay zone and the base zone, the overlay zone would control.

county interpreted the AA overlay zone to allow the proposed use, which no party disputes is also allowed in the TC zone, and we have affirmed that interpretation under the deferential standard of review required of governing body code interpretations under ORS 197.829(1)(a). Thus, any interpretative error the county might have made in describing the relationship between the TC zone and the AA overlay zone does not provide a basis for reversal or remand. Similarly, any error the county might have made in finding that all uses allowed in the county's commercial zones, as narrowed and filtered by the base zone, are also allowed in the AA overlay zone does not constitute reversible error.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, intervenor initially applied to the county for a zone change from SAI to TC to authorize the proposed travel center. The SAI zone does not allow the travel center or its component uses; the TC zone allows the component uses of the proposed travel center as outright permitted uses. However, it transpired that the subject property is also subject to the AA overlay zone, and the proposed use required a conditional use permit under that zone. Intervenor subsequently filed a CUP application, and that CUP application was processed at the same time as the zone change application, resulting eventually in two separate decisions issued on April 28, 2010 (CUP) and May 5, 2010 (zone change).

Under the second assignment of error, petitioner argues that the county violated the "fixed goal-post rule" at ORS 215.427(3)(a) by approving the CUP application on April 28, 2010, in reliance on a zone change application that had not yet been approved.[11] ORS

[11] ORS 215.427(3)(a) provides.

> "If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

215.427(3)(a) requires that approval of the CUP application be "based upon the standards and criteria that were applicable at the time the application was first submitted." When the CUP application was submitted, petitioner argues, the subject property was zoned SAI, which does not permit a travel center or its component uses. According to petitioner, a permit application decision can be based on the standards of a new zone to be applied to the property only if the applicant requests a consolidated procedure for both the permit and zone change applications pursuant to ORS 215.416(2), which permits an applicant to "apply at one time for all permits or zone changes needed for a development project."[12] Petitioner contends that the two applications were never consolidated and processed together, as evidenced by the fact that the two applications followed different procedures, the decisions were adopted on different dates, and the CUP decision issued on April 28, 2010, included a condition of approval providing that the permit is valid only when "both the zone change and pending land partition are complete." 044 Record 20. That condition would not have been necessary, petitioner argues, if the two applications had been consolidated.

Intervenor responds, and we agree, that the county did not violate the goal post rule. The general purpose of the goal post rule is to prevent local governments from enacting and applying new legislation to development applications after those applications have been filed and timely completed. This keeps local governments from "moving the goal posts" in the middle of the game, the goal posts being the substantive criteria that govern approval or denial of permit applications. *DLCD v. Jefferson County*, 220 Or App 518, 523, 188 P3d 313 (2008). That concern is not implicated in circumstances where the applicant is

[12] ORS 215.416(2) provides:

> "The governing body shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 215.427. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations."

contemporaneously seeking both (1) permit approval and (2) a zone change, and the only "new" legislation being applied to the permit are the standards under the requested new zone.[13] For that reason, LUBA has rejected arguments that the "consolidated procedure" requirement of ORS 215.416(2) must be applied in a rigid, lock-step manner, to avoid running afoul of the goal post rule. In *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or App 277, 282, *aff'd* 214 Or App 46 162 P3d 1059 (2007), we held that ORS 215.416(2) does not require that permit applications and zone change applications be filed on the same date in order to be "consolidated" and gain protection from the goal post rule requirement that the standards governing the permit be those in effect when the permit application was filed.[14] In that case, the permit application was filed first, and the need for the zone change application was not recognized until later in the proceedings on the permit application. In the present case, we have the reverse situation: the plan/zone change application was filed first, and the need for the permit application was not recognized until proceedings on the plan/zone change application were well underway. However, that distinction makes no difference that we can see for purposes of ORS 215.427(3)(a) and 215.416(2).

Petitioner argues nonetheless that to take advantage of ORS 215.416(2) and avoid running afoul of the goal-post rule the permit and plan/zone change applications must be formally "consolidated" and processed together. Further, petitioner contends that the

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[13] That concern seems even less an issue where, as here, the permit application is made necessary and driven by the standards in the AA overlay zone, which applied on the date of the permit application and continued to apply throughout the proceedings. The comprehensive plan map and zone map amendments requested by intervenor arguably have nothing to do with the standards that govern the permit application, which remained constant throughout the proceedings below. As far as we can tell, the county did not apply any TC zone standards to approve the CUP.

[14] *See also Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190, 206-08 (2009) (even though ORS 215.416(2) requires a consolidated procedure only for permit and zone change applications, where consolidated applications are filed for (1) a comprehensive plan amendment, (2) zone change, and (3) permit approval, the zone change and permit applications are governed by the new comprehensive plan designation, not the comprehensive plan designation in effect when the zone change and permit applications were filed).

decisions on the two applications, if embodied in separate decisions, must be issued contemporaneously or at least the zone change approval must be issued first, to avoid issuing a final permit decision that relies on a yet-to-be adopted zone change approval. Petitioner contends that intervenor did not request consolidation and the two applications were not in fact processed under a consolidated procedure. Petitioner notes that under the county code the CUP application and plan/zone change application are subject to very different procedural requirements and timelines, with the planning commission issuing the final decision on the CUP application, with appeal possible to the county court, while the planning commission could only make a recommendation to the county court whether to adopt the ordinance required to effect the plan/zone change application.

Intervenor responds that the county at least partially consolidated the procedures on the two applications, citing a county court finding that the county "consolidated the hearing on [the CUP application] with the hearing on the Plan amendment and zone change * * *." 044 Record 11. Intervenor argues that no formal or complete "consolidation" is required under ORS 215.416(2), and that the purpose of the goal post statute was met here, because the applicable criteria remained unchanged throughout the proceedings, and there was no doubt on anybody's part regarding what those criteria were. The only significant difference between *NE Medford Neighborhood Coalition* and the present case, intervenor argues, is that due to the requirement for a second hearing on the plan/zone change ordinance the CUP approval was issued several days before the plan/zone change ordinance. However, intervenor argues, the CUP condition of approval prevents the CUP decision from taking effect unless and until the accompanying plan/zone change decision is complete, and that condition is adequate to ensure consistency with the goal-post statute.

We agree with intervenor that no formal consolidation is required under ORS 215.416(2), or strict adherence to a single, consolidated procedure. Different types of permit applications and comprehensive plan and zoning amendment applications may have

different procedural requirements and deadlines, many imposed by statute. In such circumstances, we believe it is consistent with ORS 215.416(2), and not inconsistent with ORS 215.427(3)(a), to process the different applications together on the same time-line as much as possible, and if necessary impose conditions of approval, like that imposed by the county in the present case, to ensure that permit decisions do not take effect before the accompanying plan or zoning amendment decisions become final. That is what happened in the present case. We agree with intervenor that the two applications were sufficiently "consolidated" for purposes of ORS 215.416(2), and therefore the county did not violate the goal-post rule.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The county's plan/zone change decision approved reasons exceptions to Statewide Planning Goal 3 (Agricultural Lands) and Goal 14 (Urbanization). OAR 660-004-0018(4) provides that when a local government takes a reasons exception, "plan and zone designations must limit the uses, density, public facilities and services, and activities to only those that are justified in the exception."[15] MCZO 3.110 is the county's Limited Use [LU] overlay zone, the express purpose of which is to "limit the list of permitted uses and

[15] OAR 660-004-0018(4) provides, in relevant part:

"'Reasons' Exceptions:

"(a) When a local government takes an exception under the 'Reasons' section of ORS 197.732(1)(c) and OAR 660-004-0020 through 660-004-0022, plan and zone designations must limit the uses, density, public facilities and services, and activities to only those that are justified in the exception;

"(b) When a local government changes the types or intensities of uses or public facilities and services within an area approved as a 'Reasons' exception, a new 'Reasons' exception is required[.]"

activities allowed in the zone to only those uses and activities which are justified in the comprehensive plan 'reasons' exception statement * * *." [16]

At the final hearing before the county court on the plan/zone change application, petitioner argued that the county must apply the LU overlay zone to ensure that permitted uses are limited to that justified in the reasons exception, a travel center. The court rejected that argument, concluding that the LU overlay zone was not the exclusive means to ensure that uses are limited to that justified in the reasons exception, but that end could also be served by conditional zoning, *i.e.*, by imposing a condition on the plan/zone change approval

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[16] MCZO 3.110 provides, in relevant part:

> "The purpose of the Limited Use Overlay Zone is to limit the list of permitted uses and activities allowed in the zone to only those uses and activities which are justified in the comprehensive plan 'reasons' exception statement under ORS 197.732(1)(c). The Limited Use Overlay Zone is intended to carry out the administrative rule requirement for 'reasons' exceptions pursuant to OAR 660-14-018(3).
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> "A. Overlay Zone Requirements. When the Limited Use Overlay Zone is applied, the uses permitted in the underlying zone shall be limited to those uses and activities specifically referenced in the ordinance adopting the Limited Use Overlay Zone. The Limited Use Overlay Zone cannot be used to authorize uses other than those expressly provided in the underlying zone. Reasonable conditions may also be imposed by the Limited Use Overlay Zone when necessary to carry out the provisions of the comprehensive plan and this ordinance. Until the overlay zone has been removed or amended through the plan amendment process the only permitted uses and activities in the zone shall be those specifically referenced in the adopting ordinance.
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> "The Limited Use Overlay Zone is to be applied through the plan amendment and rezoning process at the time the primary plan and zone designation is being changed. The ordinance adopting the overlay zone shall include findings showing that
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> "1. No other zoning district currently provided in the zoning ordinance can be applied consistent with the requirements of the 'reasons' exception statement because the zoning would allow uses beyond those justified by the exception;
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> "2. The proposed zone is the best suited to accommodate the desired uses(s); and
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> "3. It is required under the exception rule (OAR 660, Division 4) to limit the uses permitted in the proposed zone.
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> "B. Official Plan/Zoning Map. The official plan/zoning map shall be amended to show an LU suffix on any parcel where the Limited Use Overlay Zone has been applied."

limiting use to a travel center. 046 Record 20. The court accordingly imposed a condition providing that "[t]his zone change is conditioned to allow only the construction of a travel center or other use of similar density, configuration or type." 046 Record 21.

Petitioner argues that under the MCZO the LU overlay zone is the exclusive means for the county to comply with OAR 660-004-0018(4) and limit uses to those justified in the reasons exception statement. The county court's interpretation, petitioner argues, is inconsistent with the express language of MCZO 3.110, which according to petitioner mandates that the LU overlay zone "is to be applied" when rezoning land pursuant to a reasons exception. Further, petitioner argues that the county's interpretation is inconsistent with the purpose of the LU overlay zone, which petitioner argues is in part concerned with ensuring that the public and the Department of Land Conservation and Development (DLCD) have adequate notice, via the post-acknowledgment plan amendment process, of proposals to expand uses beyond those authorized in the reasons exception. According to petitioner, a conditional of approval would not serve that purpose, since it can be removed simply by seeking a modification of the condition of approval.

Respondents argue that the county court's interpretation of the LU overlay zone is consistent with the express language and purpose of the zone, as nothing in MCZO 3.110 or elsewhere states that the overlay zone is the *exclusive* vehicle for ensuring that land zoned pursuant to a reasons exception is limited to the uses that justified the exception. Further, respondents note that LUBA held in *VinCEP v. Yamhill County*, 53 Or LUBA 514, 551 (2007), *aff'd* 215 Or App 414, 171 P3d 368 (2007), that a condition of approval restricting development to that justified in the exception was adequate to demonstrate compliance with OAR 660-004-0018(4). Thus, respondents argue, interpreting the LU overlay zone to be a nonexclusive means of complying with OAR 660-004-0018(4) is not inconsistent with the purpose of the LU overlay zone.

Finally, intervenor disagrees that the condition imposed in this case can be eliminated or modified to allow other uses simply by seeking a modification of condition. Intervenor notes that the plan/zone change ordinance provides that "[t]he decision shall be incorporated into the Morrow County Comprehensive Plan by reference." 046 Record 21. Intervenor argues that this incorporation is sufficient to ensure that any future proposal to expand the uses allowed on the subject property beyond those justified in the exception would require a comprehensive plan amendment, pursuant to the post-acknowledgment plan amendment process.

OAR 660-004-0018(4) does not require a local government to use the mechanism of an overlay zone to ensure that use of property subject to a reasons exception is limited to the uses justified in the exception, and to ensure that any expansion of uses is authorized by a new reasons exception. A limited use overlay zone mechanism may well be the most effective means of complying with OAR 660-004-0018(4), as a glance at the zoning map would give any observer plain warning that uses of the property are limited, and direct them to the original reasons exception ordinance to discover what those limitations are. However, the rule does not preclude using conditional zoning to achieve the same ends. Because the original reasons exception is part of the comprehensive plan pursuant to OAR 660-004-0015(1), any attempt to expand uses allowed under the original reasons exception will necessarily require a new post-acknowledgment plan amendment, with attendant notice and procedures. In addition, under OAR 660-004-0018(4)(b), where a local government changes the types or intensities of uses or public facilities and services within an area approved under a reasons exception, a new reasons exception is required, which will necessarily entail adopting a new ordinance amending the comprehensive plan, pursuant to the post-acknowledgment plan amendment process. Thus, petitioner is incorrect that a condition of approval applied to a plan/zone change to ensure compliance with OAR 660-004-0018(4)(a) can be lawfully removed simply by requesting a modification of the condition.

We review the county's interpretation of the LU overlay zone against that background. While nothing cited to us in MCZO 3.110 or elsewhere expressly states that the LU overlay zone is the *exclusive* vehicle for ensuring compliance with OAR 660-004-0018(4), it is the only MCZO provision that is expressly intended for that purpose. Its terms contemplate that the LU overlay zone "is to be applied" when adopting the plan and zoning amendments justified in the reasons exception, and there is nothing in that language or elsewhere suggesting other alternatives. We note that, although the county found that conditional zoning is "explicitly allowed" under its code, 046 Record 20, neither the decision nor intervenor cites to any MCZO provision authorizing conditional zoning, much less the use of conditional zoning to comply with OAR 660-004-0018(4). MCZO Article 8, which governs plan and zoning changes, says nothing about conditional zoning.

Further, we note that MCZO 3.110(A) sets out three mandatory requirements that each must be met in order to impose the LU overlay zone. *See* n 15. MCZO 3.110(A)(1) requires a finding that "[n]o other zoning district currently * * * can be applied consistent with the requirements of the 'reasons' exception statement because the zoning would allow uses beyond those justified by the exception." That language indicates that the LU overlay zone is not warranted if the *primary* zone being applied is sufficient to limit uses to those justified in the exception. Missing from MCZO 3.110(A) is any suggestion that attaching conditions to the primary zone is also a sufficient basis to avoid applying the LU overlay zone. If that were a possible alternative, then *any* primary zoning district, suitably conditioned, could be applied consistent with the requirements of OAR 660-004-0018(4). If so, then MCZO 3.110(A)(1) could never be satisfied and the LU overlay zone could never be lawfully applied.

Similarly, MCZO 3.110(A)(3) requires a finding that the LU overlay zone "is required under the exception rule (OAR 660, Division 4) to limit the uses permitted in the proposed zone." That suggests there are circumstances where the LU overlay zone is *not*

required to comply with OAR 660-004-0018(4). However, again, if the possibility of conditional zoning is one of those circumstances, then the LU overlay zone would never be applied, as in all cases the answer to the inquiry posed by MCZO 3.110(A)(3) would be that the LU overlay zone is not required. Read in context with MCZO 3.110(A)(1), it is reasonably clear that the circumstance in which the LU overlay zone is not required to comply with OAR 660-004-0018(4) is when the primary zone being applied already limits allowed uses to those justified in the exception, under MCZO 3.110(A)(1). Either the primary zone is sufficient to ensure that uses are limited to those justified in the exception, or the LU overlay zone is required. In either case, it is clear that the county has chosen to rely on zoning, either the unconditioned primary zone or the LU overlay zone, as the mechanism to ensure compliance with OAR 660-004-0018(4). There is no text or context cited to us that carries the slightest suggestion that conditional zoning is a permissible option.[17]

In sum, the county's interpretation that conditional zoning can be used instead of an already limited primary zone or the LU overlay zone to ensure compliance with OAR 660-004-0018(4) has no support in the language of the code, and is inconsistent with the express language and purpose of the LU overlay zone.

The third assignment of error is sustained.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

The county concluded that the proposed travel center authorized under the plan/zoning amendments is not an urban use of rural land, and therefore no exception to Goal 14 is required. However, given uncertainty regarding what constitutes an "urban" use of rural land, and the need to take a reasons exception to Goal 3 in any event, the county in the

[17] In a footnote, the county acknowledged two prior occasions in which it has applied the LU overlay zone, "both times at the request of the applicant." 046 Record 20. The county did not note any occasions in which it has used conditional zoning to ensure compliance with OAR 660-004-0018(4). The county does not explain its suggestion that the LU overlay zone is applied only at the request of the applicant, and nothing cited to us in the MCZO supports that suggestion. The mandatory criteria at MCZO 3.110(A) indicate that the LU overlay zone is to be applied or not applied based on the circumstances and findings set out in that provision.

alternative addressed the criteria for a reasons exception to Goal 14, at OAR chapter 660, division 014. 046 Record 17-18. Under the fourth assignment of error, petitioner challenges the county's conclusion that the proposed travel center is not an urban use of rural land. Under the fifth assignment of error, petitioner challenges the analysis of alternative sites the county conducted in taking reasons exceptions to Goals 3 and 14.

For the reasons set out below, petitioner's challenges to the exceptions to Goals 3 and 14 are not well taken. Therefore, even if the county erred in concluding that the proposed use is not an urban use, that error would not provide a basis for reversal or remand.[18]

The county adopted a reasons exception to Goal 3 pursuant to criteria at OAR 660-004-0020 and 660-004-0022, and a reasons exception to Goal 14 pursuant to criteria at OAR 660-014-0040. Both sets of criteria require a demonstration that the proposed development cannot be "reasonably accommodated" on lands that do not require an exception, including lands within an existing urban growth boundary. OAR 660-004-0020(2)(b); 660-014-0040(3)(a). The county conducted an alternative site analysis and concluded that the proposed travel center could not be reasonably accommodated on lands that do not require an exception. The county's findings, and petitioner's arguments under the fifth assignment of error, focus on whether the proposed travel center could be reasonably accommodated within the City of Boardman urban growth boundary, which is five miles east

[18] The distinction between "urban" and "rural" uses is notoriously ill-defined. In *1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P3d 268 (1986) (*Curry County*), the Court discussed several factors to be considered in determining whether Goal 14 applies to development of rural land. In particular, the Court suggested that a key consideration in determining whether proposed commercial use of rural land is an urban use is whether the use (1) is appropriate for, but limited to, the needs and requirements of the rural area to be served, and (2) is likely to serve as a "magnet" attracting people from outside the rural area. *Id.* at 507 (citing *Conarow v. Coos County*, 2 Or LUBA 190, 193 (1981). The first factor seems inconclusive: the proposed travel center is mainly intended to provide travel-related services to travelers along a rural stretch of I-84, a linear transportation facility crossing a lightly populated area of eastern Oregon, and it is not clear whether that type of commercial use is accurately viewed as serving any particular geographic "area," either rural or urban. The second factor would suggest that the proposed travel center may not be an urban use, because it is not a commercial destination that "attracts" customers, but simply provides services to travelers already on the highway. *See Doherty v. Morrow County*, 44 Or LUBA 141 (2003) (reviewing a Goal 14 exception to site a large speedway with associated uses, including a 250-room hotel, on rural land intended to attract large numbers of patrons from outside the immediate rural area and the county). However, we do not consider the question further.

of the subject property. Petitioner challenges only the findings addressing two alternative sites within the city, tax lot 400 and tax lot 3000, which are both approximately 12 acres in size, located near I-84 within one-half mile of an exit, zoned commercial and would allow for the proposed travel center as a permitted use.

Petitioner argues that the siting criteria or thresholds used to evaluate alternative sites under OAR 660-004-0020(2)(b) and OAR 660-014-0040(3)(a) must be "essential or necessary characteristics" of the proposed development, not merely characteristics desired by the applicant. *VinCEP*, 55 Or LUBA at 441-42. Petitioner argues, and we tend to agree, that most of the reasons that the county cites for concluding that tax lots 400 and 3000 cannot "reasonably accommodate" the proposed travel center are make-weight reasons related more to the desires of the applicant than the "essential or necessary characteristics" of the proposed travel center. However, the county rejected tax lot 400 in part because the "established uses around the site limit the potential for expanding the rights of way or reconfiguring the intersection of Boardman Avenue and Main Street to accommodate the turning movements for larger vehicles." 046 Record 11. Similarly, the county found that tax lot 3000 "has a 30-foot wide flag lot access that takes a sharp turn west from Laurel Road, changing to a 50-foot wide access at a 90 degree angle corner. This situation alone precludes larger vehicles, many of which have a turning radius exceeding 40 feet." *Id.* In other words, the county found that access limitations at the two identified alternative sites limit access by large trucks. If supported by substantial evidence in the record, those findings alone appear to be sufficient grounds for concluding the two alternatives cannot reasonably accommodate the proposed travel center.

Petitioner offers no evidentiary or other challenge to that conclusion with respect to tax lot 3000. Regarding tax lot 400, petitioner argues that the area near tax lot 400 includes two service stations, which cater to both automobiles and trucks, and contends that given the existence of those service stations the county has not adequately demonstrated that access

limitations in the area preclude the proposed travel center. However, the specific intersection that the county identified as limiting access to tax lot 400 is the intersection of North Main and Boardman Avenue, which the county found cannot accommodate or be reconfigured to accommodate turning movements for large vehicles. Petitioner does not contend, and it does not appear to be the case, that either of the two service stations in the area have access through that intersection. 046 Record 252, 262.

Petitioner has not demonstrated that the county erred in concluding that no alternative sites not requiring an exception can reasonably accommodate the proposed travel center.

The fourth and fifth assignments of error are denied.

SIXTH ASSIGNMENT OF ERROR

The Transportation Planning Rule (TPR), at OAR 660-012-0060(1) requires that where a plan or zone amendment would "significantly affect" a transportation facility within the meaning of the rule, the local government must adopt one or more of the measures set out in OAR 660-012-0060(2), including conditions of approval, to assure that allowed land uses are consistent with the function, capacity and performance standards of the facility.[19]

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[19] OAR 660-012-0060 provides, in relevant part:

> "(1) Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. A plan or land use regulation amendment significantly affects a transportation facility if it would:
>
> "* * * * *
>
> "(c) As measured at the end of the planning period identified in the adopted transportation system plan:
>
> "* * * * *
>
> "(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; * * *

To support the plan/zone change, intervenor's engineer initially submitted a traffic impact analysis (TIA) dated July 2009. 046 Record 467-506. The TIA evaluated only the impacts of the proposed travel center assuming 2010 background conditions, concluded that the travel center would generate 3,907 daily trips, but that the proposed use would not cause any transportation facility to fail when constructed. To address the requirements of the TPR, which requires evaluation through the end of the county's planning period, to 2025, the engineer subsequently submitted a TPR analysis dated December 28, 2009. In relevant part the TPR analysis compared the impacts of full-development scenarios under the existing SAI zone and the proposed TC zone, and projected those impacts against background increases in traffic over the end of the county's planning period. 046 Record 509-525. The December 28, 2009 analysis concluded that the worst-case, full development scenario under the SAI zone would generate 2,906 trips per day, while the worst-case, full development scenario under the TC zone would generate 7,198 trips per day. The TPR analysis concluded that both worst-case scenarios would cause transportation facilities to fail within the planning period, but that the rezone to TC would generate significantly more traffic than under the SAI zone, and therefore the rezone to TC would "significantly affect" transportation facilities

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"* * * * *

"(2) Where a local government determines that there would be a significant effect, compliance with section (1) shall be accomplished through one or a combination of the following:

"(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.

"* * * * *

"(e) Providing other measures as a condition of development or through a development agreement or similar funding method, including transportation system management measures, demand management or minor transportation improvements. Local governments shall as part of the amendment specify when measures or improvements provided pursuant to this subsection will be provided."

under OAR 660-012-0060(1)(c), presumably by hastening the performance failure of those facilities within the planning period. The December 28, 2009 TPR analysis recommended that transportation improvements including a left-turn lane and signalization at the access intersection be required.

The planning commission recommended approval of the plan/zone change, but without adopting specific recommendations regarding transportation improvements. Before the county court, petitioner submitted an analysis by its traffic engineer, dated March 23, 2010, questioning a number of conclusions in the July 2009 and December 28, 2009 traffic analyses. In response, intervenor's engineer submitted a supplemental report dated March 31, 2010, that revised the initial analyses. In relevant part, intervenor's engineer revised downward the number of daily trips generated in the SAI zone under the worst case scenario, to 1,420 trips per day. 046 Record 162. The March 31, 2010 supplement agreed that under the worst-case TC zone scenario, left turn lanes and signalization would be required to prevent the rezone from significantly affecting Tower Road. 046 Record 163. However, intervenor's engineer concluded that left turn lanes and signalization are not needed as of the date of opening (2010) and "will not be necessary" through the planning period if the site is not developed beyond the proposed travel center.[20] In a rebuttal dated April 6, 2010, petitioner's engineer criticized that conclusion as being unsupported by any data.

The county court relied on the statement of intervenor's engineer that if limited to development of the proposed travel center, no transportation improvements would be "necessary" to ensure compliance with the TPR. Accordingly, the county court imposed

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[20] The March 31, 2010 report states, in relevant part:

> "* * * In order for the area transportation system to accommodate the potential development under the TC zoning, turn lanes and a traffic signal would need to be installed at the Tower Road/Site Access intersection. Also, the Tower Road/North Ramp intersection would need to be changed to stop control. These projects are not required now, and if the site is not developed beyond the proposed [travel center], they will not be necessary. * * *" 046 Record 165.

Condition 6, which limits the uses that can be developed on the subject property under the TC zone to "the construction of a travel center or other use of similar density, configuration and type." 046 Record 21. Because the zone change is conditioned on development being limited to the proposed use, the county concluded, allowed land uses are consistent with the performance standards of Tower Road, and therefore the zone change will not significantly affect any transportation facility within the meaning of the TPR. 046 Record 7.

Petitioner argues that Condition 6 is insufficient, because the TPR analysis evaluated only the "worst case scenario," assuming that the property would be developed with the most traffic-intensive uses allowed in the TC zone, and failed to evaluate the traffic impacts of the proposed travel center within the 20-year planning period.[21] And, petitioner argues, the TIA evaluated the traffic impacts of the proposed travel center only under current (2010) conditions, and did not evaluate traffic impacts of the travel center through the end of the planning period. According to petitioner, there is no substantial evidence in the record demonstrating that development of the site, even limited to the travel center, will not "[r]educe the performance" of the Tower Road/Access Road intersection below the minimum acceptable performance standards within the planning period, without transportation improvements (left turn lane and signalization) that the county did not require. Petitioner argues that there is not substantial evidence in the record indicating that those transportation improvements will not be necessary to ensure that the rezone does not significantly affect the Tower Road/Access Road intersection.

Intervenor responds that the March 31, 2010 report is sufficient to support the county's conclusion at 046 Record 7 that, if conditioned to limit development to the proposed travel center, the zone change to TC will not significantly affect any transportation facility within the meaning of the TPR. Intervenor argues that between the TIA, the TSP

[21] Petitioner does not dispute that OAR 660-012-0060(2) authorizes the county to impose Condition 6 on the plan/zone decision.

analysis, and the March 31, 2010 report, a reasonable person could conclude that under Condition 6 the TC rezone will not reduce the performance of the access intersection below the applicable performance standard.

We agree with petitioner that the county's finding is not supported by substantial evidence. We are cited to no data or analysis supporting the statement that the two transportation improvements needed under the TC zone full-development, worst case scenario within the planning period to ensure compliance with the TPR are not needed under the TC zone as conditioned to limit development to the travel center. At best, as we understand the evidence, the reports submitted by intervenor's engineer show that in 2010 no such improvements are needed to prevent the travel center from causing an immediate performance failure, but there was apparently no analysis of the impacts of the proposed travel center over the planning period.[22]

That omission seems problematic, because as noted above, the TSP analysis concluded that both the full-development scenario under the existing SAI zone (2,906 trips per day, later reduced to 1,420 trips), and the full-development scenario under the TC zone (7,198 trips per day), would cause or hasten performance failure within the planning period and require transportation improvements to prevent failure. What is missing is any data or analysis indicating that the proposed travel center (3,907 daily trips) will not also cause or hasten a performance failure within the planning period, and thus also require transportation improvements or other measures to ensure that TC rezone as conditioned does not significantly affect a transportation facility. If the travel center generates 1,000 or more daily trips than the worst-case scenario under the SAI zone, which scenario the TSP analysis found would cause or hasten performance failure within the planning period and require improvements to avoid, it is not clear to us why the same conclusion would not apply to the

[22] As discussed below under the seventh assignment of error, there is evidence that left turn lanes, at least, are warranted under current conditions.

TC rezone, as limited to the travel center, over the planning period. In other words, the record does not support the county's conclusion that Condition 6, by itself, is sufficient to ensure compliance with the TPR, without requiring transportation improvements or other measures. There may be substantial evidence in the record that would support a finding that Condition 6 by itself is sufficient, but if so no party cites us to it.

Finally, petitioner argues that the TPR analysis erred in assuming that the subject property is 49.1 acres, when there is evidence in the record that the subject property is actually 52 acres in size. According to petitioner, the traffic impacts of the worst-case scenario under TC zoning would be larger based on full-development of a 52-acre parcel compared to a 49.1-acre parcel, and therefore the TPR analysis may have underestimated the mitigation needed under that scenario. However, the county found that the subject property is 49.1 acres in size, and intervenor cites to substantial evidence supporting that finding.

The sixth assignment of error is sustained, in part.

SEVENTH ASSIGNMENT OF ERROR

The seventh assignment of error challenges the county's findings under MCZO 6.020(C), a general conditional use standard requiring that the "proposal will not exceed carrying capacities of natural resources or public facilities." One of the "public facilities" the county considered under MCZO 6.020(C) was the capacity of the surrounding public roads. Petitioner challenges the county's interpretation of MCZO 6.020(C) and the evidence, specifically the TIA, supporting the county's finding that the proposed travel center will not exceed the carrying capacity of public roads.

Petitioner first argues that the county misinterpreted the MCZO 6.020(C) "carrying capacity" standard to be violated only if the "proposed development would prevent the use of the road system by another user."[23] 044 Record 15. Petitioner contends that it is unclear

[23] The county court's findings state, in relevant part:

what this means: is MCZO 6.020(C) violated only when the roadway is so full of traffic that not one single additional car can find room on the roadway?

Intervenor responds initially that MCZO 1.030 defines "carrying capacity" in a manner that supports the county's interpretation, as a "[l]evel of use that can be accommodated and continued without irreversible impairment of natural resources productivity, the ecosystem, and the quality of air, land and water resources." However, we note that that definition seems exclusively concerned with the carrying capacity of "natural resources," and does not mention, or seem readily applicable to, the carrying capacity of "public facilities" such as public roads.

We agree with petitioner that the above-quoted interpretation is obscure and, if understood in its most broad and literal sense of physically "preventing" other residents from using county roads, may not be sustainable even under the deferential standard of review afforded a governing body's code interpretation under ORS 197.829(1). The county inexplicably seems to equate "natural resources" with "public facilities," without recognizing that the concept of "carrying capacity" may have a different meaning in those two contexts. And if "prevent the use of the road system by another user" means that the carrying capacity standard is violated only when no additional vehicle can physically enter the roadway, then the county's interpretation appears to set the bar so low that MCZO 6.020(C) becomes meaningless as a conditional use approval standard. However, it is not clear to us that that is indeed the proper understanding of the county's interpretation.

> "* * * In order to comply with [MCZO 6.020(C)] it does not require that there be no impact; in fact, through the use of the term 'carrying capacity' the Court assumes that the public facilities can accommodate, or 'carry' impacts. In order to show compliance with this provision, an applicant can have impacts to the County's natural resources, even significant impacts, so long as the impacts do not prevent other residents and visitors to the County from enjoying those same public facilities. This means that, in order to show an exceedence of the only public facility impacted by this development, the road system, a proposed development would prevent the use of the road system by another user." 044 Record 15.

In any event, even if the county's interpretation of MCZO 6.020(C) was more clearly expressed, petitioner notes that the county failed to address a similarly worded, and apparently more germane, approval standard under the AA overlay zone. MCZO 3.090(H) requires the county to consider the "capacity of transportation and other public facilities" in approving uses in the AA overlay zone. Relatedly, MCZO 3.090(J), entitled "Transportation Impacts," requires the applicant for a project that generates more than 400 vehicle trips per day to submit a TIA that includes a "level of service assessment, impacts of the project, and, mitigation of the impacts" and if the impacted facility is a state highway, to use Oregon Department of Transportation (ODOT) standards. Intervenor submitted a TIA pursuant to MCZO 3.090(J), which addresses county and ODOT level of service and mobility standards and concludes when built under 2010 conditions the proposed travel center will comply with those standards. Petitioner advances three specific challenges to the TIA, which we address below, but initially argues that the decision must be remanded for the county to adopt findings addressing the MCZO 3.090(H) requirement to consider the "capacity of transportation" facilities.

Petitioner is correct that nothing cited to us in the county's findings addresses the MCZO 3.090(H) requirement to consider the "capacity of transportation" facilities. Further, the county's findings do not explain the difference, if any, between the MCZO 3.090(H) "capacity of transportation" facilities standard and the MCZO 6.020(C) "carrying capacity" of public facilities standard. Because the decision must be remanded for the county to consider MCZO 3.090(H), we agree with petitioner that the decision should be remanded as well to clarify its interpretation of MCZO 6.020(C).

Finally, petitioner argues that the county erred in relying on the TIA to address applicable transportation standards, which petitioner contends is deficient in three areas. We address each contention in turn.

A. Queue Length Calculations

Petitioner's traffic engineer criticized the TIA for failing to calculate queuing lengths at the I-84 off-ramp, to prevent traffic backing up into the deceleration lanes. The traffic engineer cited Action 1F.1 of the Oregon Highway Plan (OHP) as indicating that preventing off-ramp queues from backing up into deceleration lanes as a "significant traffic safety concern." 044 Record 117-18. In its findings, the county dismissed this criticism, finding that petitioner's engineer

> "never identifies any legal requirement for those [queue] calculations and the Court is aware of none. The Applicant submitted its analysis to both the County Transportation Department and ODOT, both of which indicated that the analysis adequately addressed this issue. Accordingly, we find no error with not submitting the calculations, which [petitioner's engineer] was free to do on its own." 044 Record 16.

Petitioner argues that its engineer did identify a legal requirement, OHP Action 1F.1, and the fact that the county engineer and ODOT reviewed the TIA and did not object to the absence of queue length calculations does not mean that the issue is adequately addressed.

Intervenor disputes that OHP Action 1F.1 is a "legal requirement" or approval standard for the CUP. In any case, intervenor notes that its engineer submitted responsive testimony addressing the queue length issue, provided queue length calculations, and concluded that there is "adequate room for queue storage and deceleration." 044 Record 91. We agree with intervenor that its engineer's testimony is substantial evidence that queue length is not a safety concern.

B. Left Turn Lane

In the initial July 2009 TIA, intervenor's traffic engineer concluded that traffic impacts of the proposed travel center do not warrant a left-turn lane at the entrance on Tower Road under 2010 build conditions. 044 Supplemental Record 109. However, the traffic engineer did not explain the basis for that conclusion. Petitioner's traffic engineer criticized that conclusion, using data from the TIA to show that under applicable highway standards "a

left turn lane *will* be warranted on Tower Road at the site access intersection with the proposed development in place." 044 Record 119 (emphasis original). In a March 31, 2010 response, intervenor's engineer stated that neither a turn lane nor a traffic signal are "required now, and if the site is not developed beyond the proposed [travel center], they will not be necessary. * * *" 044 Record 92. However, we are cited to no data or analysis supporting that conclusion.

The county rejected petitioner's arguments regarding whether a left turn lane is required under 2010 conditions, as irrelevant under its broad interpretation of the "carrying capacity" standard at MCZO 6.020(C). 044 Record 16. However, even if that conclusion is correct under MCZO 6.020(C), the county's findings do not address the MCZO 3.090(H) requirement to consider the "capacity" of Tower Road, based on mobility and level of service standards addressed in the TIA. Petitioner's engineer presented a detailed explanation, based on TIA data, for why a left turn lane is warranted under the applicable standards in 2010 conditions. Intervenor's engineer reached a contrary conclusion, but without explaining why or citing to any supporting evidence. On this particular issue, no reasonable person would rely on the apparently unsupported conclusion of intervenor's engineer, considering the countervailing expert testimony in the record. Remand is necessary to address this issue.

C. Speedway Traffic Impacts

Several years ago the county approved a large regional speedway in the vicinity of the subject property, which has apparently not yet been built. *See Doherty v. Morrow County*, 44 Or LUBA 141 (2003). If developed, the speedway will impact the same Tower Road/I-84 interchange that the proposed travel center will use. In response to criticism that the TIA did not take speedway traffic into account in evaluating the capacity of nearby transportation facilities, intervenor's engineer concluded that transportation improvements to Tower Road and the interchange required under the speedway approval decision would provide additional capacity to the road network on non-event days, but that during speedway

events the road network would be "overwhelmed," despite the improvements. 044 Record 92. Because speedway events would overwhelm the system, intervenor's engineer concluded "it is not reasonable for [speedway] event traffic to be included in the travel stop traffic study." 044 Record 92.

Petitioner's engineer responded that "[i]f the improved transportation system cannot accommodate the speedway [on event days], it appears as though there would not be any capacity remaining for the proposed travel center during [speedway] events." 044 Record 55.

The county rejected petitioner's arguments on this issue, summarily concluding that the TIA "did, in fact, address speedway traffic and that this issue is resolved." 044 Record 17. Petitioner argues, and we agree, that that finding is inadequate and not supported by substantial evidence. Intervenor's engineer *declined* to address speedway traffic impacts on capacity of the Tower Road/I-84 interchange, concluding that it was not "reasonable" to take those impacts into account, because traffic from speedway events would "overwhelm" the traffic system, even with required improvements. MCZO 3.090(H) requires the county to consider the "capacity of transportation" facilities. Neither intervenor's engineer nor the county provides any explanation we can understand for ignoring the impacts of speedway event traffic on the background capacity of the Tower Road/I-84 interchange, in evaluating the traffic impacts of the proposed travel center. Because the county did not address MCZO 3.090(H) in any event, remand is necessary for the county to consider the impact of speedway event traffic on capacity or explain why it need not be considered.

The seventh assignment of error is sustained, in part.

EIGHTH ASSIGNMENT OF ERROR

MCZO 3.090(C)(1), part of the standards and limitations that govern uses allowed in the AA overlay zone, provides that listed uses are permitted "if found to be in compliance with the Airport Master Plan and the standards, criteria and guidelines thereof." Similarly,

MCZO 3.090(H)(2) requires a finding that the proposed use "is in compliance with the Comprehensive Plan and the Airport Master Plan."

The county court affirmed the planning commission's finding that the Boardman Airport Master Plan applied only to the airport property, and did not apply to nearby lands that are within the airport approach zone, and thus subject to the AA overlay zone, but not part of the airport itself.[24] The county noted that during the proceedings below petitioner identified no policies or regulations in the Airport Master Plan that applied to the proposed use or subject property.

On appeal, petitioner argues that at least some Airport Master Plan policies and regulations apply outside the airport. Petitioner cites to noise and land use compatibility criteria stating that commercial uses are compatible with the airport outside the airport's –65-70 decibel noise contour, and language in Table 6-3 that indicates that "[f]uture uses in the vicinity must have the burden of demonstrating compatibility with aviation." Intervenor responds that the cited master plan provisions, which were not cited below, actually support the county's finding that the Airport Master Plan does not include policies or regulations that must be applied to the proposed use. According to intervenor, the noise and land use compatibility criteria state that the 55, 60 and 65 decibel noise contours are contained entirely on the airport property, which indicates that no noise compatibility evaluation is necessary for a commercial use located off the airport property. Airport Master Plan 6-5 (Petition for Review App 78-79). Similarly, intervenor notes that Table 6-3, immediately

[24] The county court found:

> "The Planning Commission found that the Boardman Airport Master Plan did not apply to the [subject property], only to the airport property. However, the restricted areas around the airport—the airport approach zone and the horizontal surface—are restricted by the AA Zone. Consideration of the CUP is sufficient to demonstrate compliance with the Boardman Airport Master Plan by assuring that uses within areas of concern will not be detrimental to airport operations. Appellant identified no policies or regulations in the Airport Master Plan that otherwise apply." 044 Record 15.

after stating that "[f]uture uses in the vicinity must have the burden of demonstrating compliance with aviation," states that the county "must adopt and Map Airport Overlay Zoning consistent with State law." Intervenor argues that the county complied with Table 6-3 by adopting the airport overlay zones, which impose a number of limitations and standards designed to ensure that future development is compatible with airport operations.

We agree with intervenor that petitioner has not demonstrated that the county's findings under MCZO 3.090(C)(1) and MCZO 3.090(H)(2) are inadequate or erroneous. Intervenor argues, and no party disputes, that the airport is subject to the AA overlay zone, indeed comprises the bulk of AA overlay zoning, so it is understandable that the overlay zoning standards require compliance with the Airport Master Plan, which governs the airport property and airport operations. While there could be some policy or regulation in the master plan that governs uses on property other than the airport, the two examples petitioner cites on appeal do not clearly apply to the proposed use or the subject property. Petitioner faults the county for failing to review the Airport Master Plan and make a positive finding that the proposed use complies with the plan and its "standards, criteria and guidelines thereof." According to petitioner, the county impermissibly shifted the burden of proof to petitioner to identify applicable policies or regulations. However, the county found, essentially, that the plan includes no policies or regulations that apply to the proposed use and subject property, and petitioner on appeal has not identified any applicable policies or regulations or demonstrated that the county erred in concluding otherwise.

The eighth assignment of error is denied.

The county's decision is remanded.