

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 PAUL E. FOLAND,  
5 and CONSTANCE J. FOLAND,  
6 *Petitioners,*

7  
8 vs.

9  
10 JACKSON COUNTY,  
11 *Respondent,*

12  
13 and

14  
15 OREGON DEPARTMENT  
16 OF TRANSPORTATION,  
17 *Intervenor-Respondent.*

18  
19 LUBA No. 2011-075

20  
21 FINAL OPINION  
22 AND ORDER

23  
24 Appeal from Jackson County.

25  
26 Paul E. Foland and Constance J. Foland, Ashland, filed the petition for review.  
27 Constance J. Foland argued on her own behalf.

28  
29 No appearance by Jackson County.

30  
31 Bonnie E. Heitsch, Assistant Attorney General, Salem, filed the response brief and  
32 argued on behalf of intervenor-respondent. With her on the brief was John R. Kroger,  
33 Attorney General.

34  
35 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board Member,  
36 participated in the decision.

37  
38 REMANDED

11/08/2011

39  
40 You are entitled to judicial review of this Order. Judicial review is governed by the  
41 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a county decision approving a reasons exception to Statewide Planning Goal 11 (Public Facilities and Services) to extend a City of Ashland water line to a rest area and welcome center on agricultural land outside the city’s urban growth boundary.

**MOTION TO INTERVENE**

The Oregon Department of Transportation (ODOT), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion and it is allowed.

**FACTS**

The background facts regarding the proposed rest area and welcome center are described in detail in *Foland v. Jackson County*, 61 Or LUBA 264, *aff’d* 239 Or App 60, 243 P3d 830 (2010) (*Foland I*). As relevant here, the subject 18-acre property is a long north/south-oriented parcel adjacent to Interstate-5 a short distance south of the City of Ashland. The northern boundary of the subject parcel adjoins Crowson Road, a county road under which is located a 12-inch city water line, just within the city’s urban growth boundary. The site of the proposed rest area is located several hundred feet south of the urban growth boundary. To supply water to the rest area and welcome center, ODOT proposed to connect the rest area to the city water line in Crowson Road.

The county’s original 2009 decision adopted reasons exceptions to Goals 3, 11 and 14, and a comprehensive plan map amendment to redesignate the subject property to a Limited Use designation. The Goal 11 exception authorized connection to a city sewer line already located on the property. With respect to the proposed extension of water service, the county found that extending the water line in Crowson Road to the rest area was consistent with Goal 11 and did not require an exception to the goal. As part of its original application, ODOT had submitted an April 3, 2008 letter from the city public works director stating that the city’s water system has sufficient capacity to provide water service to the rest area. That

1 letter was apparently intended to demonstrate compliance with Jackson County Land  
2 Development Ordinance (LDO) 3.7.3(C)(1), a code standard for minor comprehensive plan  
3 map amendments requiring a showing that “adequate” utility facilities and services “can be  
4 provided to the subject property.” In its 2009 decision, the county imposed a condition of  
5 approval, Condition 27, that required ODOT to obtain final approval from the city to connect  
6 the approved land uses to the city water system.<sup>1</sup>

7 In *Foland I*, LUBA denied all assignments of error challenging the 2009 decision  
8 with, as relevant here, the exception of the fourth assignment of error, under which some of  
9 the petitioners argued that the county erred in failing to adopt an additional exception to Goal  
10 11 for the proposed water line extension. After analyzing the text and context of Goal 11, we  
11 agreed with that argument and remanded the county’s 2009 decision, to require the county to  
12 adopt an additional reasons exception to Goal 11 for the proposed extension of the city water  
13 line to the rest area. The Court of Appeals affirmed our decision.

14 On remand, the county scheduled a hearing on May 11, 2011. Meanwhile, on April  
15 19, 2011, the City of Ashland city council considered ODOT’s request, presumably pursuant  
16 to Condition 27, to approve the extension of water and sewer services to the rest area.  
17 ODOT informed the city that it would require approximately 1400 gallons per day, about the  
18 same amount required by 3.7 single family dwellings, for the rest area and welcome center.  
19 Record 140. For irrigation water for landscaping the grounds, ODOT advised the city that it  
20 intended to contract with a local irrigation district. The city public works director testified  
21 that ODOT’s water request would have little or no effect on the current city water system.

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<sup>1</sup> Condition 27 states, in full:

“Prior to the issuance or statements of land use compatibility by Jackson County, ODOT must obtain final approval to connect the land uses that are the subject of this application to city water services and to city sewer services through the City Council of Ashland. The City Council’s approval shall be made subsequent to the [County] Board’s approval of this application.” Record 26.

1 The city council accepted public testimony on the request, some in favor, some against. A  
2 city councilor moved to deny the request, but the motion failed 3-4. Another city councilor  
3 moved to approve the request, subject to a condition that the use of city water be limited to  
4 “potable use only.” Record 143. That motion passed, 4-3.

5 At the May 11, 2011 remand hearing before the county board of commissioners, an  
6 ODOT representative requested that the county modify Condition 27 to clarify that the  
7 condition requires ODOT to obtain city water only for the rest area and welcome center, and  
8 does not require ODOT to use city water to irrigate landscaping. Record 135. There was  
9 considerable public testimony opposing ODOT’s request to modify Condition 27, including  
10 arguments that because the city council had voted to limit use of city water to potable use  
11 ODOT cannot now satisfy Condition 27. Among other evidence, opponents submitted the  
12 minutes of the April 19, 2011 city council meeting, and the city public works director  
13 testified regarding the April 19, 2011 city council action. *See* n 3. The parties refer  
14 collectively to these minutes, testimony and evidence as the “Ashland testimony.”

15 The county commissioners’ hearing was continued to May 25, 2011. At the  
16 continued hearing, ODOT withdrew its request to modify Condition 27. On June 24, 2011,  
17 the commissioners adopted an ordinance approving the additional exception to Goal 11 to  
18 extend city water to the subject property. In their decision, the commissioners expressly  
19 limited the scope of the remand decision to the Goal 11 exception, and therefore declined to  
20 consider any of the Ashland testimony, which the commissioners understood to have  
21 relevance only to the question of modifying or complying with Condition 27. This appeal  
22 followed.

23 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

24 **A. LDO 3.7.3(C)(1)**

25 Petitioners argue that the county erred in refusing to consider the Ashland testimony,  
26 which petitioners contend has a direct bearing on compliance with LDO 3.7.3(C)(1). As

1 noted, LDO 3.7.3(C)(1) requires that the applicant for a minor comprehensive plan map  
2 amendment demonstrate that “adequate” utility facilities and services “can be provided to the  
3 subject property.”<sup>2</sup>

4 In its original 2009 decision, the county adopted a finding of compliance with LDO  
5 3.7.3(C)(1) with respect to providing water services to the subject property, based on the city  
6 public director’s April 3, 2008 letter stating that the city water system has sufficient capacity  
7 to provide water. That finding was not challenged in *Foland I*. On remand, the county again  
8 applied LDO 3.7.3(C)(1) as an approval criterion, although it is not clear to us why. In its  
9 2009 decision, the county applied a Limited Use map designation to the subject property,  
10 based on reasons exceptions to Goals 3, 11 and 14 that were affirmed in *Foland I*. We  
11 remanded the 2009 decision to the county solely to adopt an additional reasons exception to  
12 Goal 11 for the extension of city water, but nothing in our remand required the county to re-  
13 apply LDO 3.7.3(C)(1) to approve or re-approve the Limited Use map amendment. LDO  
14 3.7.3(C)(1) is a minor map amendment criterion and has nothing to do, at least directly, with  
15 Goal 11. Given that the county restricted the remand proceedings to the Goal 11 exception  
16 needed to extend city water, it is arguable that any issues regarding approval of the Limited  
17 Use map designation under LDO 3.7.3(C)(1) could not be re-litigated or raised for the first  
18 time on remand. *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992).

19 However, because no party questions whether petitioners’ challenges related to LDO  
20 3.7.3(C)(1) are within LUBA’s scope of review, we will assume, for purposes of this

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<sup>2</sup> LDO 3.7.3(C)(1) is part of the criteria for a minor comprehensive plan map or zoning map amendment, and provides:

“All proposed minor map amendments will be reviewed for compliance with the criteria set forth below and with all other applicable provisions of this Ordinance and the Comprehensive Plan:

- “1) Adequate public safety, transportation, and utility facilities and services can be provided to the subject property. In the case of a minor zoning map amendment, adequate transportation facilities must exist or be assured[.]”

1 opinion, that the county’s findings regarding LDO 3.7.3(C)(1) can be challenged in this  
2 appeal.

3 Petitioners do not dispute that the county was entitled to limit the remand proceeding  
4 to the Goal 11 exception to extend the city water system, and was not required to consider  
5 arguments or evidence regarding Condition 27.<sup>3</sup> As noted, Condition 27 requires ODOT to  
6 obtain city council approval to “connect the land uses that are the subject of this application  
7 to city water services[.]” See n 1. It is Condition 27, and not LDO 3.7.3(C)(1), that

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<sup>3</sup> The commissioners’ findings state, in relevant part:

“2.1 The Board of Commissioners finds that this proceeding is appropriately limited to the determination of whether a Goal 11 exception should be approved to extend an urban level of water to the approved Siskiyou Safety Rest Area/Welcome Center (‘Rest Area’) and that issues not on remand concerning the Board’s previous approval of the Rest Area are irrelevant. \* \* \*

“2.2 The Board of Commissioners finds that testimony and evidence addressing the terms, interpretation and application of Ordinance 2009-7’s Condition #27 has been accepted into the record. Such testimony and evidence is irrelevant to these proceedings and has not been considered by the Board in the rendering of this decision. The Board also notes that ODOT’s requests to modify Condition #27 were formally withdrawn at the public hearing held on May 25, 2011.

“2.3 The Board of Commissioners finds that testimony and evidence has been accepted into the record that includes:

- “\* A copy of the Ashland City Council minutes with a proposed decision and conditions to approve the extension of water to the Rest Area;
- “\* Testimony from the City of Ashland’s Public Works Director Mike Faught regarding the terms of the City’s proposed decision;
- “\* A copy of a writ of review to the Circuit Court that challenges the City’s authority to extend water to the Rest Area;
- “\* Testimony that the City of Ashland’s decision and conditions to extend water should be reconsidered and that the conditions imposed by the City cannot be met by ODOT;
- “\* A letter from ODOT indicating that it is negotiating with the Talent Irrigation District (TID) to obtain water for irrigation at the Rest Area;
- “\* Testimony that water from TID is not available and cannot be relied upon and the extension of that water from the TID would be contrary to policy and could impact other water rights in the area; and
- “\* Testimony challenging the validity of the approval of the Rest Area.

“Consistent with findings 2.1 and 2.2 above, this testimony and evidence is irrelevant to these proceedings and has not been considered by the Board in the rendering of this decision.”  
Record 2-3.

1 specifically requires ODOT to seek to connect the “land uses” approved in the 2009 decision  
2 to city water. If ODOT now proposes to supply some of the water for land uses approved in  
3 the 2009 decision, such as landscaping, with a source other than the extended city water  
4 system, it may well be that Condition 27 must be modified or cannot be satisfied. However,  
5 no issues regarding Condition 27 are within the scope of remand and those issues cannot be  
6 raised in this appeal. The specific question presented here is whether the Ashland testimony  
7 is relevant to compliance with LDO 3.7.3(C)(1). Petitioners apparently view LDO  
8 3.7.3(C)(1) to require a finding that the extended city water system will actually supply all  
9 authorized land uses approved in the 2009 decision, including landscaping and other non-  
10 potable uses. If that is the case, then petitioners would be correct that at least some of the  
11 Ashland testimony is relevant to compliance with LDO 3.7.3(C)(1), and the county erred in  
12 believing that the Ashland testimony is relevant only to the dispute over Condition 27. We  
13 turn then to the meaning of LDO 3.7.3(C)(1).

14 ODOT responds that LDO 3.7.3(C)(1) merely requires a finding that adequate public  
15 facilities or services “can be provided to the subject property,” and is silent regarding the  
16 source of public utility or services, or the extent of such services. ODOT emphasizes that  
17 LDO 3.7.3(C)(1) does not expressly require any particular assurance that public water  
18 services actually *will be* provided to the subject property. According to ODOT, the county  
19 commissioners interpreted LDO 3.7.3(C)(1) to be satisfied by a finding that “public facilities  
20 exist that are adequate to serve the Rest Area.” Record 3. In other words, ODOT argues the  
21 commissioners interpreted LDO 3.7.3(C)(1) to require only a finding that there is adequate  
22 public infrastructure and capacity to supply water to the authorized uses of the subject  
23 property, regardless of whether the public utility in fact agrees to supply water to all or some  
24 or none of the authorized uses. ODOT contends that that interpretation is consistent with the  
25 express language of LDO 3.7.3(C)(1), and must be affirmed under the deferential standard of

1 review applicable to a governing body’s code interpretation. ORS 197.829(1)(a); *Siporen v.*  
2 *City of Medford*, 349 Or 247, 243 P3d 776 (2010).<sup>4</sup>

3 The county’s findings, including incorporated findings, regarding LDO 3.7.3(C)(1)  
4 are brief and do not include an explicit interpretation of that code provision. LUBA must  
5 recognize as adequate for review for purposes of ORS 197.829(1) a governing body’s  
6 *implicit* interpretation of local legislation, in circumstances where the findings sufficiently  
7 identify and explain in writing the decision-maker’s understanding of the meaning of local  
8 legislation, or the practical effect of the findings is to give definition to the provision at issue,  
9 or where the county’s understanding of the provision is “inherent in the way that it applied  
10 the standard.” *Alliance for Responsible Land Use v. Deschutes Cty*, 149 Or App 259, 267-  
11 68, 942 P2d 836 (1997); *see also Green v. Douglas County*, 245 Or App 430, 439, \_\_\_ P3d \_\_\_  
12 (2011) (to be adequate for review, a local government’s implicit interpretation of an  
13 ordinance “must carry with it only one possible meaning of the ordinance provision and an  
14 easily inferred explanation of that meaning”).

15 In the present case, the finding that ODOT cites to as best embodying the county  
16 commissioners’ understanding of LDO 3.7.3(C)(1) is the conclusion that the evidence in the

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<sup>4</sup> ORS 197.829 provides, in relevant part:

- “(1) [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; [or]
  - “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.] \* \* \*
- “(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct.”



1 record shows that “public facilities exist that are adequate to serve the Rest Area.” Record 3.  
2 In our view, that finding and other findings regarding LDO 3.7.3(C)(1) do not include a  
3 reviewable implicit interpretation of that standard. It is fair to say, as ODOT argues, that the  
4 county’s findings regarding LDO 3.7.3(C)(1) with respect to water supply to the rest area  
5 seem almost entirely concerned with whether there is existing capacity in the city’s water  
6 system to supply the authorized uses, and pay little or no attention to the possibility that the  
7 city council might choose, or even has already chosen, not to authorize use of the city’s  
8 system for all of the proposed rest area uses, even though there is adequate capacity. In the  
9 2009 decision, the working assumption seems to have been that ODOT would obtain city  
10 council approval, and the county presumably relied upon Condition 27 to ensure that the  
11 approved uses will not go forward unless and until the city in fact agrees to provide water to  
12 supply the authorized uses. In the 2011 decision, the commissioners ignored testimony that  
13 the city council had in fact decided not to authorize use of city water for all rest area uses, but  
14 it is possible that the commissioners believed that testimony went only to issues surrounding  
15 Condition 27, excluded from the scope of remand, and simply failed to recognize that that  
16 testimony might also be relevant to the question of compliance with LDO 3.7.3(C)(1), which  
17 the county treated as an applicable criterion on remand. In short, the county commissioners’  
18 understanding of LDO 3.7.3(C)(1) is not “inherent in the way that it applied the standard,”  
19 and the findings do not carry with them “only one possible meaning of the ordinance  
20 provision and an easily inferred explanation of that meaning.” *Alliance*, 149 Or App at 267;  
21 *Green*, 245 Or App at 439.

22 If the governing body fails to interpret a key code provision, or its interpretation is  
23 inadequate for review, under ORS 197.829(2) LUBA may interpret the code provision in the  
24 first instance, or remand the decision to the governing body for an interpretation. *Opp v. City*  
25 *of Portland*, 153 Or App 10, 14, 955 P2d 768 (1998). However, where the meaning of the  
26 local legislation is “far from obvious,” and the governing body is in a better position than

1 LUBA to clarify the meaning of that legislation through interpretation of contextually related  
2 provisions and legislative history, LUBA should exercise its discretion under ORS  
3 197.829(2) to remand to the governing body for an interpretation, rather than interpret the  
4 local legislation in the first instance. *Green*, 245 Or at 241. That is particularly the case  
5 when the challenged decision must be remanded to the local government in any event, and no  
6 finality can be gained through having LUBA interpret the local legislation. *Id.* at 241-42.

7 Here, LDO 3.7.3(C)(1) is ambiguous regarding what evidence is relevant to a  
8 determination that public utilities and services “can be provided to the subject property.” As  
9 ODOT argues, “can be provided” could refer simply to the existence of physical  
10 infrastructure and capacity, and be unconcerned with discretionary choices by the utility  
11 provider whether to provide services. On the other hand, LDO 3.7.3(C)(1) might very well  
12 be concerned with evidence that the utility provider is unwilling or unable to supply the  
13 service, even though it has adequate capacity to do so. Either interpretation seems plausible,  
14 and would likely be sustained on appeal, if expressly adopted by the county. We believe that  
15 the county should have the opportunity to make that choice in the first instance.

16 **B. Goal 11 Exception**

17 Petitioners also appear to argue that the county erred in refusing to consider the  
18 Ashland testimony, because that testimony has a direct bearing on the exception to Goal 11  
19 to extend the city water system. According to petitioners, all aspects of the proposed rest  
20 area and welcome center, including the proposal for irrigated landscaped outdoor areas for  
21 the rest and relaxation of the visitors, must be viewed as “urban” uses, and must therefore be  
22 supplied with “urban levels” of water. We understand petitioners to argue that, because the  
23 Ashland testimony shows that at best only some of the authorized uses will be supplied with  
24 city water, and water for the remainder must presumably come from other, non-urban,  
25 sources, the county should have considered the Ashland testimony in deciding whether to

1 approve the requested exception to Goal 11 to allow the extension of the city water system to  
2 the site.

3           Petitioners do not explain the legal basis for their argument that all rest area uses  
4 authorized in the 2009 decision, including irrigated landscaping and other non-potable uses,  
5 must be supplied with an “urban level” of water or water from an urban source. The  
6 exception to Goal 11 was required to authorize the proposed extension of a water system  
7 from within the urban growth boundary to rural land outside the urban growth boundary.  
8 Goal 11 generally discourages or prohibits the establishment or extension of urban water or  
9 sewer systems to serve rural lands, absent an exception. However, nothing cited to us in  
10 Goal 11 mandates that an urban use of rural land pursuant to an exception to Goal 14 must be  
11 supplied, or supplied entirely, with urban levels or sources of water.

12           Goal 11 is to “plan and develop a timely, orderly and efficient arrangement of public  
13 facilities and services to serve as a framework for urban and rural development.” Goal 11  
14 requires in relevant part that “[u]rban and rural development shall be guided and supported  
15 by types and levels of urban and rural public facilities and services appropriate for, but  
16 limited to, the needs and requirements of the urban, urbanizable, and rural areas to be  
17 served.” If a particular urban use of rural land authorized pursuant to an exception to Goal  
18 14 does not require urban levels or sources of water for a particular aspect of that use, if  
19 anything Goal 11 would seem to require that urban levels or sources of water should *not* be  
20 supplied for that particular aspect of the use, because that would not be appropriate and  
21 limited to the needs and requirements of that use of rural land. Stated differently, if part of  
22 the water needs and requirements of a particular urban use of rural land can be supplied  
23 *without* the extension or establishment of an urban water system, that would seem to be  
24 consistent with Goal 11. It certainly is not clear to us why that circumstance would require  
25 an *exception* to Goal 11.

1           The thrust of the Ashland testimony as we understand it is that the rest area may have  
2 to obtain water for some of its water needs from a source or by means other than the  
3 extended city water line. Petitioners have not established that, in considering whether to  
4 grant an exception to Goal 11 to extend a city water system to serve an urban use of rural  
5 land, Goal 11 requires the county to consider such evidence. The scope of remand was  
6 expressly and narrowly limited to the issue of taking an exception to Goal 11 *for the*  
7 *extension of the city water line*. Petitioners have not demonstrated that the Ashland  
8 testimony is relevant to the issue of whether the rest area may have to rely on sources of  
9 water other than the city water line. Accordingly, petitioners have not established that the  
10 county erred in refusing to consider the Ashland testimony for purposes of adopting the Goal  
11 11 exception to extend the city water system.

12           **C.     Prejudice to Petitioners' Substantial Rights**

13           Finally, petitioners argue that by refusing to consider the Ashland testimony during  
14 the remand proceedings on the Goal 11 exception, the county has denied petitioners the  
15 opportunity to ever raise issues regarding whether and how ODOT intends to supply water to  
16 some authorized uses, such as landscaping, by means other than the extended city water line.  
17 According to petitioners, ODOT intends the county to resolve that issue only when ODOT  
18 submits building permit applications for the rest area. However, petitioners argue that  
19 building permit applications provide no notice or opportunity for the public to participate or  
20 request a hearing, and therefore deferring such questions to the context of building permit  
21 applications would deprive petitioners of an opportunity to raise issues regarding how  
22 authorized uses will be supplied water. Petitioners observe that certain solutions, such as use  
23 of on-site wells or buying water from the irrigation district, may impact neighboring  
24 agricultural operations or affect existing water rights.

25           ODOT responds that the county will make a determination regarding compliance with  
26 Condition 27 and how the authorized uses will actually be supplied with water, given any

1 final city council restrictions on the use of city water that apply, when ODOT submits the  
2 required site development plan review application, pursuant to LDO 3.2. According to  
3 ODOT, site development plan review in the present case will be a discretionary review that  
4 occurs prior to issuance of building permits, and will require notice to nearby property  
5 owners and the opportunity to request a hearing. In addition, ODOT argues that if ODOT  
6 requests that Condition 27 be modified that request will also be reviewed under procedures  
7 that require notice and the opportunity for public participation.

8 We tend to agree with ODOT that the questions of compliance with or needed  
9 modifications to Condition 27, and whether and how water will be supplied to rest area uses  
10 by means other than the extended city water line, can be addressed in land use review  
11 proceedings that provide notice and the opportunity for public participation, and need not be  
12 addressed in the current proceedings to adopt the Goal 11 exception, to the extent that is  
13 necessary to avoid prejudicing petitioners' substantial rights. However, we need not resolve  
14 that issue, because as explained above we remand the decision for the county to interpret  
15 LDO 3.7.3(C)(1) in the first instance. Depending on how the county interprets that  
16 provision, the Ashland testimony may be deemed relevant to compliance with LDO  
17 3.7.3(C)(1). If so, that would likely obviate any alleged procedural error.

18 The first and second assignments of error are sustained, in part.

19 **THIRD ASSIGNMENT OF ERROR**

20 Petitioners argue that, even if the county did not err in refusing to consider the  
21 Ashland testimony, in the alternative ODOT acknowledged during the proceedings below  
22 that the city has agreed to provide water for only some rest area uses and that ODOT intends  
23 to rely on other sources for water for irrigation or any rest area water needs not supplied by  
24 the city. According to petitioners, ODOT's testimony on those points is not part of the  
25 Ashland testimony and was not excluded from the commissioners' consideration. Petitioners  
26 argue that, for the reasons set out in the first and second assignments of error, ODOT's own

1 testimony in the record demonstrates that adequate urban water services cannot be provided  
2 to the subject property, even without considering the Ashland testimony.

3 As noted, the basic thrust of the Ashland testimony is that the city has not authorized  
4 city water to be supplied for all of the rest area uses, and that ODOT may ultimately have to  
5 seek other sources of water for certain uses such as landscaping that do not rely on the  
6 extension of the city water system. As explained above, we sustained the first and second  
7 assignments of error in part, and remand the decision to the county to interpret LDO  
8 3.7.3(C)(1) in the first instance. Depending on which interpretation the county adopts, the  
9 ODOT testimony that petitioners cite to may or may not be deemed relevant. Accordingly,  
10 we do not reach or resolve the third assignment of error.

#### 11 **FOURTH ASSIGNMENT OF ERROR**

12 Petitioners argue that if any of the first, second or third assignments of error are  
13 sustained, and the county must consider either the Ashland testimony or ODOT's testimony  
14 regarding the city council action in applying LDO 3.7.3(C)(1) or in adopting the Goal 11  
15 exception to extend the city water system, the county must also revisit other findings in its  
16 2011 decision and incorporated findings from its 2009 decision that relied or should have  
17 relied upon the provision of city water. As an example, petitioners cite to LDO 3.7.3(C)(1),  
18 which requires in relevant part a finding that adequate "public safety" can be provided to the  
19 subject property. *See* n 2. The incorporated 2009 findings on public safety did not discuss  
20 the possibility that some authorized rest area uses may not use city water, or the issue of  
21 water supply at all. Petitioners argue that such incorporated 2009 findings are now  
22 inadequate, because due to the April 19, 2011 city council vote there is now uncertainty what  
23 the source and quantity of water will be for fire prevention and fire suppression at the rest  
24 area.

25 The challenged decision is expressly limited to adoption of a reasons exception to  
26 Goal 11 to extend a city water line to the subject property; all other aspects and findings of

1 the 2009 decision were either unchallenged or affirmed on appeal, and cannot be challenged  
2 now. We disagree with petitioners' broad assertion that even if the county interprets LDO  
3 3.7.3(C)(1) to require consideration of the Ashland testimony, consideration of that  
4 testimony would necessarily require the county to revisit all of its unchallenged 2009 or 2011  
5 findings that have some arguable bearing on the question of water supply for the rest area.  
6 At most, the county would have to consider only evidence relevant to LDO 3.7.3(C)(1), as it  
7 interprets that standard. Because it is not yet clear how the county will interpret LDO  
8 3.7.3(C)(1), we do not reach or resolve the fourth assignment of error.

9 **CONCLUSION**

10 On remand, the county should interpret LDO 3.7.3(C)(1) in the first instance. The  
11 county may consider whether and to what extent LDO 3.7.3(C)(1) is applicable to the Goal  
12 11 exception that was the sole basis for remand. If the county concludes that LDO  
13 3.7.3(C)(1) is applicable, the county should interpret the meaning of LDO 3.7.3(C)(1) as  
14 necessary to determine whether the Ashland testimony is relevant to that criterion, and  
15 conduct any further proceedings or adopt any findings necessary under its interpretation.

16 The county's decision is remanded.