BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL E. FOLAND and CONSTANCE J. FOLAND,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

OREGON DEPARTMENT OF TRANSPORTATION,
Intervenor-Respondent.

LUBA No. 2013-082

FINAL OPINION
AND ORDER

Appeal from Jackson County.

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

No appearance by Jackson County.

Bonnie E. Heitsch, Assistant Attorney General, Salem, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Mary H. Williams, Deputy Attorney General.

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

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

AFFIRMED 01/30/2014

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county ordinance, on remand from LUBA, which approves goal exceptions necessary to approve a proposed highway rest area.

FACTS

This is the third challenge before us to the county's approval of the Oregon Department of Transportation's (ODOT's) application to build the Siskiyou Safety Area/Welcome Center (rest area), to replace a closed rest area further south. The rest area is proposed along Interstate 5, roughly 500 feet south of the City of Ashland's urban growth boundary, on land zoned for exclusive farm use. An existing city water line runs adjacent to the site, and in 1997 the city council had approved connecting the city water line to serve a rest area on the site. In 2007, ODOT submitted to the county applications for exceptions to Statewide Planning Goals 3 and 14 necessary to construct the rest area on the site. As relevant here, the applications proposed that the water needs of the rest area be served by connecting to the existing adjacent city water line, and represented that the city water system has sufficient capacity to provide the needed water. The county initially approved the applications in 2009, subject to a condition requiring that ODOT obtain final city council approval to connect the site to city water.

In *Foland v. Jackson County*, 61 Or LUBA 264, 314 (2010), *aff'd* 239 Or App 60, 243 P3d 830 (2010) (*Foland I*), we remanded the county's approval of the safety rest area so that the county could adopt a required exception to Statewide Planning Goal 11 (Public Facilities and Services) to extend city water and sewer services to the site. On remand, the county commenced proceedings to adopt the required Goal 11 exception. At around the same time,

1 ODOT sought city council approval to connect to city water, as required by
2 condition of the 2009 approval. ODOT advised the city council that it intended
3 to obtain water for landscaping purposes from elsewhere. The city council
4 subsequently adopted a decision that limited use of city water at the site to
5 potable or interior domestic use, and did not allow use of city water for
6 irrigation.

7 Before the county commissioners on remand from *Foland I*, opponents
8 argued that the city council decision limiting use of city water to potable or
9 interior domestic use required re-evaluation of compliance with Jackson
10 County Land Development Code (LDC) 3.7.3(C)(1), which requires that in
11 approving a minor comprehensive map amendment the county find that
12 "adequate" utility facilities and services "can be provided" to the site.[1] The
13 county's final decision did not adequately resolve that issue, or provide an
14 interpretation under which the county could reject the issue. On appeal of the
15 county's decision adopting the Goal 11 exception, we reviewed the county's
16 approval of the safety rest area and Goal 11 exception, concluding:

17 "* * * LDO 3.7.3(C)(1) is ambiguous regarding what evidence is
18 relevant to a determination that public utilities and services 'can
19 be provided to the subject property.' As ODOT argues, 'can be

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[1] LDO 3.7.3(C) 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[.]" (footnote omitted.)

> provided' could refer simply to the existence of physical infrastructure and capacity, and be unconcerned with discretionary choices by the utility provider whether to provide services. On the other hand, LDO 3.7.3(C)(1) might very well be concerned with evidence that the utility provider is unwilling or unable to supply the service, even though it has adequate capacity to do so. Either interpretation seems plausible, and would likely be sustained on appeal, if expressly adopted by the county. We believe that the county should have the opportunity to make that choice in the first instance."

Foland v. Jackson County, 64 Or LUBA 265, 274 (2011) (*Foland II*), *aff'd* 248 Or App 755, 275 P3d 1017 (2012). Specifically, we instructed the county as follows:

> "On remand, the county should interpret LDO 3.7.3(C)(1) in the first instance. The county may consider whether and to what extent LDO 3.7.3(C)(1) is applicable to the Goal 11 exception that was the sole basis for remand. If the county concludes that LDO 3.7.3(C)(1) is applicable, the county should interpret the meaning of LDO 3.7.3(C)(1) as necessary to determine whether the Ashland testimony is relevant to that criterion, and conduct any further proceedings or adopt any findings necessary under its interpretation." 64 Or LUBA at 278.

The "Ashland testimony" referred to is the July 5, 2011 city council meeting minutes and subsequent testimony from the city director of public works explaining the city council's decision.

On remand from *Foland II*, the county commissioners first concluded that LDO 3.7.3(C)(1) is applicable to the Goal 11 exception decision, and that issue is not in dispute. The commissioners went on to interpret LDO 3.7.3(C)(1) to the effect that the requirement that "adequate" utility facilities and services "can be provided" to the site is concerned with the existence, capacity and availability of services, but is not concerned with whether a particular service provider has executed an agreement to supply those services

1 or whether the service provider has limited the use to which water may be put.[2]
2 Under that interpretation, the county concluded, the "Ashland testimony," to

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[2] The county commissioners' findings state:

> "Testimony was presented that the term '***adequate*** * * * utility facilities and services' requires an interpretation that would additionally require consideration of assurances of the adequacy of water service to meet the needs of the proposed use. This interpretation is not consistent with the express language of the provision and the practical considerations of development for the following reasons:
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> "1. The express language of the provision does not support this interpretation:
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> "a. LDO 3.7.3(C)(1) is broken into two sentences that distinguish transportation facilities from other types of facilities and services by requiring that, in the case of the former, 'transportation facilities must exist or be assured.' A demonstration that 'adequate * * * facilities and services can be provided' means only that it must be feasible that the facilities and services 'can be provided' and does not require that they 'must exist or be assured' as that more demanding criteria applies only to transportation facilities.'
>
> "b. The implementing term '***can be provided***' is not a mandate requiring a showing that utility facilities are actually provided or assured. Instead, the words '***can be provided***' requires a determination of the feasibility of providing those utility facilities and services to the site. The determination of whether utility facilities and services '***can be provided***' requires a determination that infrastructure is available or can be made available to extend the utility to the subject property and that a utility service provider is available to provide the identified utility.

Testimony was presented that the term '***can be provided***' should be interpreted as a mandate requiring evidence of a service agreement that demonstrates that the utility service will be assured. But the meaning of '***can be provided***' does not involve such a demanding interpretation. Had the intent been to make the provision mandatory, the terms '*shall be provided*' or '*will be provided*' would have been used. The word '***can***,'' unlike the words '***will***' or '***shall***,' requires a subjective determination of the 'ability to' provide, or the 'feasibility of' providing the infrastructure to the subject property.

"(2) Testimony was presented that an interpretation of this land use provision that does not require assurance of adequate water service would be contrary to the goals and objectives of the comprehensive plan to protect the public health, safety, and general welfare. The [county] finds that the above interpretation is not contrary to the goals and objectives of the comprehensive plan to protect the public health, safety[,] and general welfare.

"a. LDO 3.7.3(C)(1) reinforces the public requirements to coordinate and plan for public infrastructure consistent with Goal 11 to ensure that [ ] public infrastructure is available or will be available to the subject property at the time it is needed. Public facility plans are required to identify the water, sewer, and transportation facilities that are needed to support the designated land uses and to assure that this infrastructure is available for approved uses. The public bears the cost of constructing, extending, and maintaining this system of public facilities.

"In contrast, the property owner is responsible for negotiating and obtaining a utility service agreement and paying for the use of those utilities with a utility provider. These contractual agreements do not

1 the effect that the city council had limited use of city water to potable or
2 interior domestic use, was not germane to the question of compliance with
3 LDO 3.7.3(C)(1). The county then re-adopted the ordinances taking an
4 exception to Goal 11. This appeal followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 Petitioners argue that the county misinterpreted LDO 3.7.3(C)(1). The
7 core of petitioners' argument, spread out among several sub-assignments of
8 error, is that the county's interpretation gives no meaning to the term
9 "adequate." According to petitioners, the only plausible interpretation of LDO
10 3.7.3(C)(1) is that service is "adequate" if the applicant demonstrates that the
11 service provider is both willing and able to provide the service needed to
12 support the approved use. Under that interpretation, petitioners, argue, the
13 county should have considered the Ashland testimony and other evidence that
14 the service provider, the city, is willing to provide only potable water, and has
15 not agreed to provide water for landscaping uses.

16 LUBA's review of the county commissioners' interpretation is governed
17 by ORS 197.829(1), which provides that LUBA must affirm a governing
18 body's interpretation of local plan or land use regulations, unless the
19 interpretation inconsistent with the express language, purpose, and underlying

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involve the county or require the county to take action. If the applicant is unable to secure an adequate service agreement with the utility provider, then the county will not issue permits for occupancy. Thus, the interests of the public are appropriately protected by this interpretation." Record 7-8 (emphases in original).

1 policies of the plan or land use regulations.[3] Review under ORS 197.829(1)(a)
2 through (c) is a deferential standard, and LUBA must affirm a governing
3 body's interpretation as long as the interpretation is "plausible." *Siporen v.*
4 *City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

5 In the present case, the county chose to adopt one of two interpretations
6 of LDO 3.7.3(C)(1) that we characterized in *Foland II* as "plausible." Under
7 the county's interpretation, LDO 3.7.3(C)(1) is not concerned with whether the
8 service provider has actually agreed to provide water for all possible purposes
9 or whether service is contractually assured. Instead, LDO 3.7.3(C)(1) requires
10 only that it is feasible to provide the service, in that the necessary infrastructure
11 exists or can be constructed, and the service provider has sufficient capacity to
12 provide the service. Petitioners argue, essentially, in favor of the second
13 interpretation that we characterized as "plausible." Under petitioners' preferred
14 interpretation, LDO 3.7.3(C)(1) requires in addition evidence that the service
15 provider has actually agreed to provide the service or the service is otherwise
16 assured, and that the water service provider has not imposed any limits on the
17 uses the water may be put to.

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[3] ORS 197.829(1) provides that LUBA shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless LUBA determines that the 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[.]"

The county's choice between two plausible interpretations of LDO 3.7.3(C)(1) is not reversible under ORS 197.829(1)(a). As the county's findings note, LDO 3.7.3(C)(1) expressly requires that transportation facilities needed for a minor zoning map amendment must "exist or be assured" but does not impose a similar requirement for assurance regarding utilities such as water service. Similarly, the standard of adequacy is whether the services "can be provided," which does not suggest that LDO 3.7.3(C)(1) requires assurances that a service provider will choose to provide the service. As the findings explain, whether or not a service provider agrees to provide water is a contractual matter between the property owner and the service provider. The county's interpretation gives meaning to the word "adequate" and is consistent with the text and context of LDO 3.7.3(C)(1). Petitioners' preference for a different interpretation does not demonstrate that the county's interpretation is reversible under ORS 197.829(1)(a).

Petitioners also contend that the county's interpretation is reversible because it is inconsistent with comprehensive plan policies that LDO 3.7.3(C)(1) furthers. This argument apparently invokes ORS 197.829(1)(b) and (c). However, petitioners do not identify any comprehensive plan policies that state a purpose or policy underlying LDO 3.7.3(C)(1). The county's findings conclude that its interpretation is consistent with the comprehensive plan goals of protecting the public health, safety, and general welfare, and for providing adequate infrastructure. *See* n 2. Further, the county concluded that if for some reason ODOT is unable to obtain an adequate service agreement with service providers, the county can withhold the certificate of occupancy, thus ensuring compliance with LDO 3.7.3(C)(1) and the comprehensive plan goals of protecting public health, safety and general welfare. Petitioners do not

challenge those findings, and have not established that the county's interpretation is inconsistent with any comprehensive plan provisions that state the purpose or policy underlying LDO 3.7.3(C)(1).

Finally, petitioners argue that the county's interpretation is reversible because it is inconsistent with the county's interpretation and application of LDO 3.7.3(C)(1) in the county's initial 2009 decision approving the minor map amendment. In the 2009 decision, the county found that the minor map amendment complied with LDO 3.7.3(C)(1), based on the city 1997 decision to provide sewer and water services to the site, and testimony that infrastructure and capacity exists to serve the site.

Under certain circumstances, a local government may err in changing previously adopted interpretations. *See, e.g., Alexanderson v. Clackamas County*, 126 Or App 549, 552, 869 P2d 873 (1994) (reinterpretation that is a product of a design to act arbitrarily or inconsistently from case to case may be a basis for reversal or remand). However, petitioners have not demonstrated that the present case involves one of those circumstances. Petitioners have not identified any "interpretation" in the county's 2009 decision that conflicts with the interpretation adopted in its decision on remand. At best, the 2009 decision assumed that the city would provide full water service to the site, and imposed a condition of approval requiring ODOT to obtain final city council approval to provide water service. But the 2009 decision did not interpret LDO 3.7.3(C)(1) to the effect that water service is "adequate" only if the city council in fact agrees to provide both potable and non-potable water service to the site. Rather, the 2009 decision appears to have applied LDO 3.7.3(C)(1) consistently with the county's current interpretation, as a feasibility requirement. ODOT points out that the 2009 decision included a finding that

"extension of water to serve the [safety rest area] is feasible." *Foland I* Record 4. Petitioners have not established that the county has re-interpreted LDO 3.7.3(C)(1), that its interpretation on remand is inconsistent with an interpretation in the 2009 decision, or that the county's interpretation is reversible for any other reason.

Petitioners' first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

The second and third assignments of error are stated in the alternative, in the event that LUBA sustains the county's interpretation of LDO 3.7.3(C)(1). Under the second assignment of error, petitioners argue that the county failed to adopt any findings of compliance with LDO 3.7.3(C)(1), as interpreted. Under the third assignment of error, petitioners argue that the county erred in concluding that the Ashland testimony is irrelevant under the county's interpretation.

ODOT responds that the county's remand decision ratified its decision at issue in *Foland II*, which contains findings that the city's water service can reasonably be extended to the safety rest area. Record 9, 65, 79. Those findings include a discussion of ODOT's ability to "connect directly to the existing water line within its public right-of-way[,]" which will "minimiz[e] any disturbance to adjoining lands and assure[] a reliable, high-quality water supply." Record 79. Further, those findings reference an April 3, 2008 letter from the city public works director addressing public facilities at the site and describing the size, age, location, and pressure of the water main that would connect to the safety rest area, and calculating water capacity and future city water needs. *Foland II* Record 244-245.

We agree with ODOT that petitioners have not established that additional findings regarding compliance with LDO 3.7.3(C)(1) are necessary under the county's interpretation. As discussed, the county's earlier approach in determining compliance with LDC 3.7.3(C)(1) is consistent with the interpretation adopted on remand. Petitioners do not explain why the county's earlier findings of compliance with LDO 3.7.3(C)(1) are insufficient to demonstrate compliance with that code provision, under the interpretation adopted on remand from *Foland II*, or why additional findings are necessary.

With respect to the Ashland testimony, the county characterized that testimony as concerning the "lack of assurances from a utility provider," and concluded that, under its interpretation that LDO 3.7.3(C)(1) no assurances must be shown, the Ashland testimony is irrelevant to compliance with LDO 3.7.3(C)(1). Record 8. Petitioners argue, however, that as interpreted by the county LDO 3.7.3(C)(1) nonetheless requires evidence that a utility service provider is "available." Record 7. Petitioners contend that it is impossible to determine that city water service is "available" without considering the Ashland testimony, which includes the minutes of the city council proceeding on ODOT's request.

Under the county's interpretation, a service provider must be "available," but the county apparently understands that term to mean only that the infrastructure exists or can be constructed, and the service provider has the capacity to provide the service. Petitioners do not argue that anything in the Ashland testimony concerns whether city water service is "available" under the county's limited interpretation. Specifically, petitioners do not argue that the Ashland testimony is concerned with the city's capacity or ability to provide

1 water service to the site. Accordingly, petitioners have not demonstrated that
2 the county erred in not considering the Ashland testimony.
3 Petitioners' second and third assignments of error are denied.
4 The county's decision is affirmed.