BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2014-050

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioners.

Joel C. Benton, County Counsel, Medford, filed the response brief and argued on behalf of respondent.

Bonnie Heitsch, Assistant Attorney General, Salem, filed a state agency brief and argued on behalf of Oregon Department of Transportation.

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

AFFIRMED 09/30/2014

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county ordinance that amends a condition of approval of a prior ordinance that required a highway rest area to be serviced by water from the City of Ashland.

FACTS

This is the fourth appeal related to a proposed Oregon Department of Transportation (ODOT) highway rest area project. The subject property is an agriculturally zoned 18-acre parcel adjacent to Interstate 5 and located about 500 feet south of the City of Ashland urban growth boundary. Petitioners own nearby agricultural land. In 2007, ODOT filed applications for exceptions to Statewide Planning Goal 3 (Agricultural Land), Goal 11 (Public Facilities and Services) and Goal 14 (Urban Development) to allow the subject property to be developed with a rest area, including restrooms, parking and a welcome center. The Goal 11 exception was required because ODOT proposed that the rest area would connect to the City of Ashland's sewage disposal system. ODOT also proposed that the rest area would connect to city water, but ODOT did not seek a Goal 11 exception for that connection.

In September 2009, the county approved the comprehensive plan and land use regulation amendments and requested exceptions. The 2009 decision included Condition 27, which required that ODOT obtain City of Ashland city council approval to connect city sewer and water lines to the rest area.[1]

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[1] Condition 27 as adopted in 2009 stated:

> "Prior to the issuance of any permits or statements of land use compatibility by Jackson County, ODOT must obtain final

Petitioners appealed the 2009 decision to LUBA, which rejected most of petitioners' challenges, but remanded the decision after concluding that a Goal 11 exception was also necessary to connect to city water. *Foland v. Jackson County*, 61 Or LUBA 264, 314 (2010) (*Foland I*), *aff'd* 239 Or App 60, 243 P3d 830 (2010).

While the county processed the additional Goal 11 exception required by *Foland I*, ODOT sought city council approval to connect to city sewer and water lines, as required by Condition 27. ODOT proposed, however, that city water be used only for potable or domestic uses, and that irrigation water for landscaped areas be obtained elsewhere. The city council approved the use of city water only for potable and domestic uses. ODOT ultimately acquired the right to use water from Talent Irrigation District (TID), with a 1912 priority date and in amounts more than 10 times needed for irrigation. The source of the TID water is a creek approximately 31 miles distant from the subject property. ODOT proposes to use the TID allotment to irrigate the landscaping during the dry summer months.

During the county's public hearing on remand from LUBA to consider an exception to Goal 11 for water service from the city of Ashland, project opponents argued that the city's approval of only limited water service required re-evaluation of the proposal's compliance with the county's Land Development Ordinance (LDO). LDO 3.7.3(C)(1) requires county commissioners to review minor comprehensive map amendments to ensure

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> 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 Board's approval of this application." Record 1.

"adequate" public safety and utility facilities, and to verify that services "can be provided" prior to approval. In 2011, the commissioners adopted the additional Goal 11 exception for water service, but did not address the opponents' arguments regarding LDO 3.7.3(C)(1). Petitioners appealed the 2011 exception decision to LUBA.

In *Foland v. Jackson County*, 64 Or LUBA 265, 274 (2011) (*Foland II*), *aff'd* 248 Or App 755, 275 P3d 1017 (2012), we remanded the decision for the county to consider the opponents' arguments regarding LDO 3.7.3(C)(1), and adopt any necessary interpretations of that code provision. On remand from *Foland II*, the county rejected petitioners' arguments regarding the meaning of LDO 3.7.3(C)(1), and concluded that the proposal to supply the rest area's water from a mix of city and TID water was consistent with LDO 3.7.3(C). Petitioners appealed that decision to LUBA, and we affirmed the county's decision. *Foland v. Jackson County*, __ Or LUBA __ (LUBA No. 2013-082), January 30, 2014 (*Foland III*).

On August 30, 2013, ODOT filed an application with the county to modify Condition 27 to allow ODOT to supply water for landscape irrigation from the TID or other off-site sources. On November 13, 2013, the planning commission held a hearing on the request, and on January 23, 2014, issued a recommendation to the board of commissioners to approve the request. On March 12, 2014, the board of commissioners held a hearing on the planning commission recommendation, and on May 7, 2014, adopted an ordinance approving the modification to Condition 27, based on the planning commission's recommendation and findings.[2] This appeal followed.

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[2] As amended, Condition 27 states:

FIRST ASSIGNMENT OF ERROR

OAR 660-004-0018(4) provides:

> "(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.
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> "(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." (Emphasis added.)

Petitioners argue that the modification to Condition 27 to allow ODOT to use TID water to irrigate landscaping instead of city water constitutes a change to the "types or intensities of uses or public facilities and services" within the project area, and therefore triggers the requirement for the county to adopt a new "Reasons" exception to Goal 11. Specifically, petitioners argue that the "type" of public facilities has changed, in that ODOT will use TID or other sources to irrigate landscaping, rather than city water. In addition, petitioners argue that "intensity" of public services has also changed, because the modification effectively decreases the amount of water the city supplies to the site.

> "Prior to issuance of an occupancy permit for the Siskiyou Safety Rest Area & Welcome Center, ODOT shall connect those structures to City of Ashland sewer and water systems and demonstrate that it has an adequate supply of water for landscaping purposes from the Talent Irrigation District or other off-site sources." Record 84.

The county argues, and we agree, that the modification to Condition 27 to allow use of TID water for landscaping does not change the "type" of public facilities and services, within the meaning of OAR 660-004-0018(4)(b). We note, initially, that read together with OAR 660-004-0018(4)(a), OAR 660-004-0018(4)(b) seems intended to require a new reasons exception in circumstances where the use or a public facility serving the use is changed in way that makes the use or facility *less* conforming to the applicable statewide planning goal or goals. It is less clear to us that OAR 660-004-0018(4)(b) requires a new reasons exception when the change would make the use or facility *more* conforming with Goal 11, as appears to be the case here. Generally, goal exceptions are required only for uses or facilities that are not allowed by the goals. No party in the present case contends that irrigating landscaping with TID water requires a goal exception.

In any case, even if OAR 660-004-0018(4)(b) is potentially triggered by a change that makes the use or facility more conforming to the goals, we disagree with petitioners that the modification to Condition 27 constitutes a "change" in the "type" of a public facility within the meaning of the rule.

The "public facility" at issue here is the extension of a city water system to the rest area to provide for human consumption. OAR 660-011-0005(5), part of the administrative rule that implements Goal 11, defines "public facility" in relevant part to include a water system. OAR 660-011-0065(1)(c), which concerns extension of a water system into rural areas, defines "water system" to have "the same meaning as provided in Goal 11, and includes all pipe, conduit, pipeline, mains, or other physical components of such a system." However, Goal 11 itself defines "water system" as a "system for the provision of piped water for human consumption subject to regulation under ORS

448.119 to 448.285."[3] Thus, the "water system" that required a Goal 11 exception in the present case was the extension of city water to the rest area for human consumption, including pipes or physical components needed to provide water for human consumption. That "water system" does not include facilities for non-human consumption, such as for landscape irrigation. *See also* OAR 660-011-0005(5) ("public facility" does not include structures or equipment incidental to the direct operation of public facilities). Petitioners do not contend that Condition 27 changes anything with regard to the city-supplied water system, *i.e.*, the pipes and equipment for human consumption of water.

For the same reason, we disagree with petitioners that because the modification to Condition 27 will likely result in less water flowing to the site through city water pipes that the modification changes the "intensity" of the water system. The amount of water flowing through city pipes for human consumption remains the same. The only thing that has changed is the source of the water that will be used for landscape irrigation. In our view, that change does not constitute a change in the "intensity" of the water system, for purposes of OAR 660-004-0018(4).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue the county lacked the authority or jurisdiction to commence proceedings to modify Condition 27 while the county's decision at issue in *Foland III* was pending before LUBA, pursuant to the reasoning in

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[3] The regulations at ORS 448.119 to 448.285 are concerned with safe drinking water systems. *See* ORS 448.123 (the purpose of ORS 448.119 to 445.285 is to ensure that all Oregonians have safe drinking water).

Standard Insurance Co. v. Washington County, 17 Or LUBA 647, 660, *rev'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989).

Standard Insurance involved a comprehensive plan map amendment that was remanded by LUBA, but LUBA's decision was then appealed to the Court of Appeals and ultimately to the Supreme Court. While the appeal was pending before the Court of Appeals and Supreme Court, the county responded to LUBA's remand by re-adopting, with modifications, the comprehensive plan map amendment at issue before the Court of Appeals and Supreme Court. We held that the County lacked the authority or jurisdiction to adopt the modified comprehensive plan map amendment, and reversed the remand decision.

In the present case, the county did not adopt its decision to modify Condition 27 until May 7, 2014, more than three months after LUBA issued its decision affirming the ordinance at issue in *Foland III*. No party appealed LUBA's decision to the Court of Appeals, and thus there was no pending appeal on the date the county issued the decision at issue in this appeal. For that reason alone, the holding in *Standard Insurance Co.* simply does not apply.

We understand petitioners to argue, nonetheless, that LUBA should extend the holding in *Standard Insurance Co.* to conclude that local governments lack the authority or jurisdiction to even *commence* proceedings to modify a decision that is on appeal, even if the local government does not *adopt* the modification until after appellate proceedings are finally concluded. In petitioners' view, while the county may have had full authority to modify Condition 27 following the conclusion of *Foland III*, because the request to modify Condition 27 was filed and initially processed prior to the conclusion of *Foland III*, petitioners contend that that initial lack of authority tainted the

county's entire proceedings, and therefore the county's May 4, 2014 final decision to modify Condition 27 must be reversed.

We disagree with petitioners that the holding in *Standard Insurance Co.* should be extended to effectively prohibit local governments from commencing proceedings to modify a decision that is pending on appeal. The concerns expressed in *Standard Insurance Co.* focused on actions that actually modify *the decision on appeal*, not interlocutory actions that simply commence or initially process applications that may lead to a future modification. Tellingly, petitioners identify no purpose that would be served by reversing the county's decision to modify Condition 27 based on the requested extension of the holding in *Standard Insurance Co.*, other than to cause further delay to re-adopt the very same decision. LUBA's review statutes embody the legislative policy that "time is of the essence in reaching final decisions in matters involving land use[.]" ORS 197.805. It would be inconsistent with that policy to exercise our review authority as petitioners request. Accordingly, we decline to extend the holding in *Standard Insurance Co.*

Petitioners' second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that the county erred in approving a modification of Condition 27 to allow use of TID water to irrigate landscaping without also requiring ODOT to submit and obtain approval of a final landscape plan.

In its 2009 decision, the county imposed Condition 4, which provides that prior to issuance of development permits ODOT must submit and obtain approval of a final landscape plan in compliance with LDO 9.2. Record 91. ODOT has not yet applied for development permits, and has not yet submitted the final landscape plan for approval. During the proceedings on ODOT's

request to modify Condition 27, some participants argued that certain drought-resistant plants that could be used for landscaping could increase fire risk to nearby homes. The commissioners adopted the following responsive finding:

> "We heard testimony regarding the nature of the plant selection identified for the proposed landscape plan. This Board is not approving the landscape plan at this time. Approval of the landscape plan is an administrative decision subject to review under LDO 9.2." Record 5.

Under the third assignment of error, petitioners challenge that finding. According to petitioners, modification of Condition 27 to allow use of water from TID to irrigate landscaping necessarily will require changes in the landscape plan to be evaluated under the LDO 9.2 criteria, pursuant to Condition 4. Petitioners contend that under these circumstances the county cannot "defer" evaluation of the landscape plan to a future administrative proceeding, but must require ODOT to submit the landscape plan for approval under LDO 9.2 as part of the current proceeding to modify Condition 27. In addition, petitioners argue that the LDO 9.2 landscape plan criteria will require the exercise of discretion and therefore the landscaping plan cannot be evaluated in an administrative proceeding, but rather the county must evaluate the landscaping plan under procedures that offer notice and an opportunity for a hearing.

The county responds, and we agree, that petitioners have not established that the county was required to evaluate the final landscaping plan as part of the current proceeding to modify Condition 27. Even if using TID water to irrigate landscaping means that ODOT's final landscaping plan will involve different types of plants than if city water were used to irrigate landscaping, nothing cited to us in the LDO or elsewhere obliges the county to approve the

final landscaping plan as part of the current proceeding. Condition 4, adopted in 2009, provides that the final landscaping plan will be evaluated in a later proceeding conducted prior to issuance of development permits. Petitioners' argument that evaluation of the final landscaping plan must be accelerated to the present proceeding is something in the nature of a collateral attack on Condition 4.

As to petitioners' challenge to the statement that "[a]pproval of the final landscape plan is an administrative decision subject to review under LDO 9.2," petitioners have not demonstrated that that statement is erroneous, or that any error warrants reversal or remand. Even if that statement turns out to be incorrect, something we do not address or decide, the statement is at best harmless error, because nothing in the present decision to modify Condition 27 was required to, or purports to, determine the appropriate procedure for evaluating the final landscaping plan when that plan is ultimately submitted for approval pursuant to Condition 4.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the county's findings regarding fire suppression and the adequacy and reliability of the TID water source are inadequate and not supported by substantial evidence.

Finding 2.1.3 states in relevant part that Condition 27 was intended to avoid water conflicts with surrounding agricultural operations, and that the county heard no testimony from surrounding farmers that using TID water will adversely affect surrounding farm practices.[4] Finding 2.1.10 addresses

[4] Finding 2.1.3 states, in relevant part:

testimony about fire safety, and relies on testimony from the local fire district chief that a municipal water source is not necessary for fire suppression, and noting that ODOT has proposed a 22,000 gallon tank on-site, four times the recommended size.[5] Finding 2.1.6 notes testimony that landscaping irrigation

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> "Connecting to an urban water source, as required through the imposition of Condition #27, also serves to avoid water conflicts with the surrounding agricultural operations in conformance with the requirements of ORS 215.296 (LDO 4.2.3). * * * We are aware that the Rest Area site has well and irrigation rights from Dunn Ditch which could supply some or all of the water needs at the facility. We are also aware that some of the surrounding agricultural operators raised concerns regarding potential impacts to their wells and water sources if the Rest Area was supplied by a ground water source or from Dunn Ditch. In response to these very concerns, we imposed Condition #27, in part, to avoid any real or perceived conflicts with the water use of these surrounding operations. We heard no testimony from surrounding agricultural operators that the addition of the Talent Irrigation District (TID) water rights to Tolman Creek will adversely affect surrounding farm practices." Record 3.

[5] Finding 2.1.10 states, as relevant:

> "We heard testimony that a municipal water source is needed for fire suppression. Correspondence in the record shows that Jackson County Fire District #5 Chief Dan Marshall has concluded that the 'main thing that is needed for fire safety is good access for fire department vehicles' and that 'a fire hydrant' (connecting to a municipal water source) 'would not likely be required.' Chief Marshall instead recommended a 5,000 gallon water tank for fire suppression needs. ODOT has proposed a 22,000 gallon tank holding more than four times the amount recommended by Chief Marshall. We therefore find that the use of off-site water sources for irrigation will not adversely affect fire suppression efforts for this site." Record 5.

will need only 10 percent of the TID water right acquired by ODOT. Finding 2.1.7 addresses testimony that the TID water supply is unreliable in dry years, and relies on contrary testimony, also noting that ODOT's water right has a 1912 priority, and finally noting that if for some reason TID water becomes insufficient ODOT has the capability of using tanker trucks and storage tanks from its nearby Central Point facility to supplement the TID water supply.[6]

Petitioners contend that these findings are inadequate and not supported by substantial evidence. Petitioners cite to testimony expressing concern that in dry years the TID water supply may be insufficient to irrigate the Rest Area, causing dry vegetation that increases fire risk to surrounding agricultural operations. According to petitioners, the findings are inadequate because they do not address that testimony. The county responds, and we agree, that the findings directly address the issue of fire risk and the reliability and adequacy of the TID water supply. The findings set out the evidence relied upon and, as discussed below, that evidence is substantial evidence. Adequate findings must

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[6] Finding 2.1.7 states, as relevant:

> "We heard testimony that there will be an inadequate water supply during dry years. Based upon expert testimony from ODOT's landscape architect, we find that the TID water supply is sufficiently robust to meet the short-term water demands to establish the landscape plants and sufficiently adequate to meet the water needs of plants requiring long-term maintenance. ODOT testified that the water right it acquired from Arrowhead Ranch has a priority right from 1912. ODOT also testified that should the need arise it has the ability to supplement the TID water supply with tanker trucks and storage tanks on site. Our condition requiring that replacement of plant materials that do not survive the establishment period adequately addresses concerns regarding a potential water shortage." Record 4.

set out the evidence relied upon, but need not address conflicting evidence on which the decision maker did not choose to rely. *Tandem Development Corp. v. City of Hillsboro*, 33 Or LUBA 335, 344 (1997); *Miller v. City of Ashland*, 17 Or LUBA 147, 158 (1988).

Petitioners argue that several statements in the findings are not supported by substantial evidence. For example, petitioners argue that the district fire chief's testimony is "hearsay," second-hand information based on a planner's "alleged" phone conversation with the chief, rather than direct testimony. Similarly, petitioners question the landscape architects' credibility regarding the adequacy of the TID water supply during dry years. And petitioners argue that the fact that ODOT's water right has a 1912 priority does not support the county's conclusion that the TID water supply will be adequate in dry years, noting testimony that the TID does not reduce water allotments in dry years based on priority alone, but on a combination of factors.

The county responds, and we agree, that petitioners have not demonstrated that the evidence the county relied upon regarding fire risk and the reliability and adequacy of the TID water supply is not substantial evidence. Land use proceedings are not governed by rules of evidence, and that the fire district chief did not provide what petitioners characterize as direct testimony does not mean that his testimony regarding fire risk as relayed by the city planner is not evidence a reasonable person could rely upon. The landscape architect's testimony regarding the adequacy of the TID water supply in dry years is evidence that a reasonable person could rely upon. And that the TID takes additional factors into account in allocating water supplies in dry years does not mean that ODOT's 1912 priority date does not provide some assurance that ODOT will be able to obtain the amount of water necessary for

irrigation even in dry years, especially given the undisputed testimony that the amount needed for irrigation is only 10 percent of ODOT's allocation. Petitioners' other assorted evidentiary critiques amount to disagreement with the evidence that the county chose to rely upon, and fail to establish that the county's findings are not supported by substantial evidence. A reasonable person could conclude, based on the whole record, that the TID water supply is sufficiently reliable and adequate to provide the amount of water needed for landscape irrigation and that, with the storage tank and other measures identified by ODOT, the modification of Condition 27 to allow ODOT to obtain water for landscaping irrigation from the TID, instead of from the City of Ashland, does not increase fire risk to surrounding farm practices.

The fourth assignment of error is denied.

The county's decision is affirmed.