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 Nos. 2013-110 and 2014-012

LOVE'S TRAVEL STOPS
AND COUNTRY STORES INC.,
Petitioner,

vs.

MORROW COUNTY,
Respondent,

and

DEVIN OIL CO. INC.,
Intervenor-Respondent.

LUBA Nos. 2014-010 and 2014-011

FINAL OPINION
AND ORDER

Appeal from Morrow County.

E. Michael Connors, Portland, filed a petition for review and a response brief and argued on behalf of Devin Oil Co. With him on the briefs was Hathaway Koback Connors LLP.

Ryan M. Swinburnson, Kennewick, WA, filed response briefs and argued on behalf of respondent. With him on the briefs was Harkins Swinburnson and Wagar PLLC.

William K. Kabeiseman, Portland, filed a petition for review and a response brief and argued on behalf of Love's Travel Stops and Country Stores. With him on the briefs was Garvey Schubert Barer PC.

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

LUBA NO. 2013-110	REVERSED	12/09/2014
LUBA NO. 2014-010	DISMISSED	12/09/2014
LUBA NO. 2014-011	DISMISSED	12/09/2014
LUBA NO. 2014-012	AFFIRMED	12/09/2014

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

Opinion by Ryan.

INTRODUCTION

These consolidated and earlier related appeals have a complicated history. In 2010, the county first approved Love's Travel Stops & Country Stores, Inc. (Love's) conditional use permit application for a travel center located off of Interstate-84 near the city of Boardman. That approval was appealed to LUBA by Devin Oil Co., Inc. (Devin), and remanded to the county. *Devin Oil Co. Inc. v. Morrow County*, 62 Or LUBA 247 (2010), *aff'd* 241 Or App 351, 250 P3d 38 (2011), *rev den* 350 Or 408. In October, 2011 the county again approved the conditional use permit (the 2011 CUP).[1]

In June, 2013, Love's filed an application to extend the 2011 CUP. The decision challenged in LUBA No. 2014-011 is a decision by the county court that reverses a planning commission decision that grants an extension of the 2011 CUP based on Love's June, 2013 application.

In October, 2013 Love's filed a separate application to extend the 2011 CUP. The decision challenged in LUBA No. 2013-110 is an October, 2013 decision by the county planning director approving Love's October 2013 application for an extension of the 2011 CUP. Devin is the petitioner in LUBA No. 2013-110.

In March 2014, Love's applied for site plan review approval for its travel center. The decision challenged in LUBA Nos. 2014-010/012 is a January, 2014 decision by the county court approving Love's site plan review application for the travel center that is the subject of the 2011 CUP. Love's is

[1] That decision was appealed to LUBA by Devin in LUBA No. 2011-107, and affirmed. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012), *aff'd* 252 Or App 101, 286 P3d 925 (2012).

the petitioner in LUBA No. 2014-010 and Devin is the petitioner in LUBA No. 2014-012.

MOTION TO DISMISS LUBA NO. 2014-011

As explained above, in June 2013, Love's filed an application with the county planning commission for an extension of the 2011 CUP. As we discuss in detail below, that June 2013 application was filed under a previous version of the Morrow County Zoning Ordinance (MCZO) that was later amended effective October 1, 2013. The planning commission approved the June, 2013 extension request, but in a January, 2014 decision the county court reversed the planning commission's decision and denied the request.

The decision challenged in LUBA No. 2014-011 is an appeal by Love's of that January, 2014 county court decision reversing the planning commission decision. Love's moves to dismiss its own appeal.

LUBA No. 2014-011 is dismissed.

REPLY BRIEFS

Devin Oil Co, Inc. (Devin) and Love's each move for permission to file a reply brief to respond to new matters raised in the respective response briefs filed in response to the remaining appeals. The reply briefs are allowed.

LUBA NO. 2013-110

A. Nature of the Decision

The decision challenged in LUBA No. 2013-110 is an October 22, 2013 decision by the county planning director approving Love's October, 2013 application for an extension of the 2011 CUP.

B. Facts

In early October, 2013, Love's filed an application with the county planning director for an extension of the 2011 CUP.[2] On October 22, 2013 the planning director approved the extension request, and on October 25, 2013 the planning director forwarded a copy of her October 22, 2013 decision to Love's. Extension Decision Record 5-7.[3] Devin appealed the planning director's decision to LUBA in LUBA No. 2013-110.

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[2] There is some confusion over whether the application was filed on October 3 or October 10 but in either event the application was filed after October 1, 2013.

[3] The county transmitted a separate record for LUBA No. 2013-110. We refer to the record in LUBA No. 2013-110 as the Extension Decision Record.

The county transmitted a consolidated record for LUBA Nos. 2014-010/011/012. The consolidated record in LUBA Nos. 2014-010/011/012 is confusingly organized into three separate sections.

The first section contains the combined record of the proceedings before the county court on the planning commission's site plan review decision and the planning commission's decision to grant Love's requested June, 2014 extension of the 2011 CUP. We refer to that record in this opinion as the "Site Plan Review Decision Record (County Court)."

The second section contains the record of the planning commission proceedings on Love's June 2013 request to extend the 2011 CUP. We do not refer to that record in this opinion.

The third section contains the record of the planning commission proceedings on Devin's appeal of the planning director's decision approving Love's site plan. We refer to that record in this opinion as the "Site Plan Review Decision Record (Planning Commission ZP-2238)."

C. Standing

It is undisputed that the planning director did not hold a hearing prior to adopting the challenged decision. Love's moves to dismiss LUBA No. 2013-110, arguing that Devin lacks standing under ORS 197.830(3) because Devin is not "adversely affected" by the decision. ORS 197.830(3) provides:

> "*If a local government makes a land use decision without providing a hearing*, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section * * *[.]" (Emphasis added.)

Love's previously moved to dismiss LUBA No. 2013-110 on the basis that Devin failed to satisfy the "appearance" requirement in ORS 197.830(2)(b), which provides in relevant part:

> "Except as provided in ORS 197.620, a person may petition the board for review of a land use decision or limited land use decision if the person:
>
> " * * * * *
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

In a September 23, 2014 Order we denied Love's motion to dismiss. *Devin Oil v. Morrow County*, __ Or LUBA __ (Order, LUBA Nos. 2013-110/2014-010/011/012, September 23, 2014). We concluded that an October 17, 2013 email from Devin to the planning director regarding Love's application for an extension was sufficient to constitute an "appearance" for purposes of satisfying ORS 197.830(2)(b). *Id*. at slip op 5-6 (citing *Smith v. City of Salem*, 60 Or LUBA 478, 479 (2010); *Century Properties, LLC v. City of Corvallis*, 51

Or LUBA 572, 576, *aff'd* 207 Or App 8, 139 P3d 990 (2006) (to "appear," the petitioner need not assert a position on the merits of the proposed land use action, and a bare, neutral appearance, such as a simple letter requesting that the local government accept the letter as an appearance and provide notice of the decision, is sufficient to satisfy ORS 197.830(2)). In its reply brief, Devin responds that, having satisfied the "appearance" requirement in ORS 197.830(2)(b), it need not also satisfy the requirements of ORS 197.830(3), even if the challenged decision was made without holding a hearing.

In *Cape v. City of Beaverton*, 40 Or LUBA 78, 83-84 (2001), we held that reliance on ORS 197.830(2) is not expressly limited to cases where a hearing is provided:

> "The city argues that because it held no hearing before adopting the challenged ordinance, the criteria governing petitioner's standing are set forth at ORS 197.830(3) rather than ORS 197.830(2). Respondent misreads the statute. *While ORS 197.830(2) applies in circumstances where a local government conducts a hearing, it is not expressly limited to cases where a hearing is provided.* Where the local government does not conduct a hearing, but provides an opportunity for written appearances, we see no reason why ORS 197.830(2) should not apply and provide standing to appeal based on such written appearances. We reject respondent's standing challenge." (Emphasis added.)

We similarly conclude here that nothing in the express language of ORS 197.830(3) identifies it as either the exclusive or a required statutory basis to appeal a decision in cases where a hearing is not provided. We agree with Devin that ORS 197.830(2) applies in the circumstances presented in this appeal, where the county did not conduct a hearing but provided an opportunity for written appearances and the petitioner appeared. Having satisfied the

appearance requirement in ORS 197.830(2)(b), Devin need not also satisfy the requirements of ORS 197.830(3).

D. Devin's First and Second Assignments of Error (LUBA No. 2013-110)

At the time the county approved the 2011 CUP, the applicable version of Morrow County Zoning Ordinance (MCZO) 6.070 provided:

> "Authorization of a conditional use shall be void after one year or such lesser time as the authorization may specify unless substantial construction has taken place or the proposed use has occurred. However, the Planning Commission may extend authorization for an additional period not to exceed one year upon request."

We refer to that version of MCZO 6.070 in this opinion as *former* MCZO 6.070.

In September, 2013, the county adopted Ordinance No. OR-1-2013 (the 2013 Ordinance), which took effect on October 1, 2013. Petition for Review App. 26-29. The 2013 Ordinance amended the county's comprehensive plan text, the comprehensive plan map and the MCZO in various ways that we discuss later in this opinion. As relevant here, the 2013 Ordinance repealed Article 6, Conditional Uses, and replaced it with a new Article 6 that includes a new MCZO 6.070. MCZO 6.070(2013) now provides that "[o]n land zoned other than Farm or Forest Use, a conditional use is valid for two years," and allows additional one year extensions to be authorized if the extension request is submitted "prior to the expiration of the approval period[.]"[4] MCZO 6.070(C)(2013).

[4] MCZO 6.070(C)(2013) provides in its entirety:

"SECTION 6.070. TIME LIMIT TO INITIATE A CONDITIONAL USE.

"C. On land zoned other than Farm or Forest Use, a conditional use is valid for two years. In the case of appeals, the two year permit period shall be tolled until a decision by a review authority with final jurisdiction is made that is not appealed.

"Additional one-year extensions may be authorized by county staff without providing notice and opportunity for a hearing under the following conditions:

"1. An applicant makes a written request for an extension of the development approval period;

"2. The request is submitted to the county prior to the expiration of the approval period, excepting any request under consideration on the date of adoption of this amendment;

"3. The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and

"4. The county finds that any of the following conditions occurred within the approval period:

"a. State or Federal permits were applied for, but not issued within the approval period.

"b. At least 10 percent of the cost of development, based on estimated or actual expenditures, has been expended to develop plans, file for permits, and complete other preliminary designs such as sewage disposal, provision of potable water, storm water management and other engineering designs necessary for the development.

The planning director relied on MCZO 6.070(C)(2013) to approve Love's October, 2013 application to extend the 2011 CUP. The planning director concluded that MCZO 6.070(C)(2013) is "remedial in nature and therefore would be applicable to the Love's decision granted on October 26, 2011, effectively giving the original decision a two year life with an expiration date of October 26, 2013." Extension Decision Record 6. We understand the planning director to have concluded that MCZO 6.070(C)(2013) applies retroactively to a previously-approved conditional use permit to make it valid for two years.[5] She then concluded that the "[extension] request was timely submitted." *Id*.

In portions of its first and second assignments of error, Devin argues that the planning director's interpretation and application of MCZO 6.070(C)(2013) improperly construes the provision and is inconsistent with its express language.[6] Devin first argues that nothing in the express language of MCZO 6.070(C)(2013) or the 2013 Ordinance that enacted the provision supports the planning director's conclusion that MCZO 6.070(C)(2013) is "remedial." Devin also argues that even if MCZO 6.070(C)(2013) is remedial, it cannot operate to revive and extend a conditional use permit that became void by operation of law before the 2013 Ordinance was effective. According to Devin,

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> "c. Provisions of the County Code applicable to the original approval have not changed."

[5] No party cites, and we therefore do not address, ORS 215.110(6), which provides that "no retroactive ordinance shall be enacted under the provisions of this section."

[6] ORS 197.835(9)(a)(D) authorizes LUBA to reverse or remand a land use decision if it "improperly construes the applicable law."

former MCZO 6.070 applied to the 2011 CUP when it was approved in October, 2011, and as noted above, *former* MCZO 6.070 provided that "[a]uthorization of a conditional use shall be void after one year * * * unless substantial construction has taken place or the proposed use has occurred."[7] Under *former* MCZO 6.070, then, the 2011 CUP became "void" on October 26, 2012, and was accordingly also void on the date that the extension application was submitted in October, 2013.

Love's responds that its application to extend the 2011 CUP was filed under MCZO 6.070(C)(2013) and under that provision, conditional use permit approvals are valid for two years so the 2011 CUP was valid for two years from October 26, 2011. Love's next cites the fixed goal post rule at ORS 215.416(8)(a) and argues that the fixed goal post rule required the planning director to make her decision on the extension application based on MCZO 6.070(C)(2013), which provides that conditional use permits are valid for two years.[8] However, while Love's argument that the fixed goal post rule applies to its *extension* application is correct, as far as it goes, that argument does not

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[7] Love's does not argue that "substantial construction has taken place or the proposed use has occurred."

[8] ORS 215.416(8)(a) provides:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

assist Love's in explaining why MCZO 6.070(C)(2013) applies to the 2011 CUP that was approved prior to the effective date of the 2013 Ordinance.

Love's also responds that Devin is precluded under ORS 197.763(1) and ORS 197.835(3) from raising several of the issues raised in the first and second assignments of error. In our September, 2014 order we concluded that in circumstances where the local government makes a decision without holding a hearing, ORS 197.835(3) does not apply to limit the issues that LUBA may consider in an appeal of that decision. *Devin Oil v. Morrow County*, __ Or LUBA __ (Order, LUBA Nos. 2013-110/2014-010/011/012, September 23, 2014), slip op 6-7.

Finally, Love's also responds that the planning director correctly concluded that MCZO 6.070(C)(2013) operates retroactively to make valid for two years all previously approved conditional use permits. That is so, according to Love's, because MCZO 6.070(C)(2013) uses the present tense and does not place any limitations on what approvals are valid, so that a presumption exists that the county intended it to be retroactive.

The county's response to Devin's arguments is peculiar. First, the county responds that the January, 2014 county court *denial* of a different, June 2014 application by Love's to extend the 2011 CUP, applying *former* MCZO 6.070, renders the appeal of the planning director's October 22, 2013 decision that approves a CUP extension "moot."[9] County's Response Brief 3. According to the county, the county court's decision in a different proceeding on a different application to extend the same 2011 CUP, from the same

[9] That county court decision is the decision that was challenged by Love's in LUBA No. 2014-011, the appeal that is dismissed in this opinion.

applicant, means that the planning director's decision "has no practical effect."[10] County's Response Brief 1-2.

LUBA will dismiss an appeal as moot where LUBA's review of the appealed decision would have no practical effect. *Jacobsen v. City of Winston*, 61 Or LUBA 465, 466 (2010); *Friends of Clean Living v. Polk County*, 36 Or LUBA 544, 549-50 (1999); *Davis v. City of Bandon*, 19 Or LUBA 526, 527 (1990). We disagree with the county that the county court's January, 2014 decision to deny a different application filed by Love's to extend the 2011 CUP, that was subject to *former* MCZO 6.070, renders Devin's appeal of the planning director's October, 2013 decision moot or had any effect on the planning director's decision challenged in LUBA No. 2013-110, made after a different application was filed under the newly-enacted version of MCZO 6.070(2013).[11]

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[10] Alternatively, the county responds that the planning director's decision should be affirmed, but does not develop any argument in support of that response. County's Response Brief 1-2.

[11] To the extent the county is arguing that principles of issue preclusion limit LUBA's scope of review of the planning director's decision, we reject that argument. Generally, such "issue preclusion" applies if (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Nelson v. Emerald People's Utility Dist*, 318 Or 99, 104, 862 P2d 1293 (1993). Here, requirement one is not met, since the issue before the planning director was the effect of MCZO 6.070(2013) on the October, 2013 application for an extension, and the issue before the county court was the effect of *former* MCZO 6.070 on a separate, June, 2013 application for an extension. Requirement five is also not met, because the

We review the planning director's interpretation of MCZO 6.070(2013) to determine whether it is correct. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994); *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). *Black's Law Dictionary* 1432 (9th ed 2009) defines "retroactive law" as "[a] legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect." In *State ex rel. Juv. Dept. of Multnomah County v. Nicholls*, 192 Or App 604, 608, 87 P3d 680 (2004), the court of appeals explained that a "'retroactive law' refers to any enactment that changes, from its effective date forward in time, the legal effect of past actions."

In order to determine whether the county intended MCZO 6.070(2013) to apply retroactively to the 2011 CUP, we first look to the text and context of the provision. The absence of an express retroactivity clause points to MCZO 6.070(2013) as being prospective only, because, as the court of appeals noted in *Nicholls*, those clauses are "commonplace and easy to draft in concept as well as in practice." *Id*. at 610.

We also consider whether provisions of the 2013 Ordinance include any express retroactivity provisions. The 2013 Ordinance does not state that it is remedial or that the county intends it to apply retroactively to existing approvals and does not contain an express retroactivity clause. Rather, language in the preface section of the 2013 Ordinance suggests that it is

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county court proceeding has no preclusive effect on a separate proceeding under a different application and different MCZO provision. *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519-20 (2001), *aff'd* 180 Or App 495, 43 P3d 1192 (2002) (the doctrine of issue preclusion does not deny an applicant the right to file a successive application that an ordinance specifically permits to be filed).

intended to be prospective. The 2013 Ordinance explained that the county's comprehensive plan was outdated and required updating "the language whereby OAR Division 23 governs how the [c]ounty *may permit* aggregate sites as well as other Goal 5 resources[.]" Devin Petition for Review App 26 (emphasis added). It explains that the ordinance is in part a response to a 2007 application to approve mining of several gravel sites owned or operated by the Oregon Department of Transportation (ODOT). The 2007 ODOT application revealed the need for revisions to the county's comprehensive plan section that implements Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) to incorporate updated Land Conservation and Development Commission (LCDC) rules regarding the process of siting and protecting aggregate resources. The 2013 Ordinance states that "the new language before the County Court sets forth the necessary pathways to approve an aggregate mine in Morrow County specifically identifying [three] paths available for mining on land zoned for Farm Use." Devin Petition for Review App 27. The reference to an available path suggests that the Ordinance is intended to operate prospectively to future mining applications. Finally, the "Effective Date" section of the 2013 Ordinance suggests that the ordinance is prospective. It provides:

> "As this process has taken an extended period of time, and because ODOT requests use of these amendments to *further protect* aggregate sites, an emergency is declared and this ordinance shall be effective on October 1, 2013." Devin Petition for Review App 28 (emphasis added.)

Based on the above textual and contextual analysis of MCZO 6.070(C)(2013) and the 2013 Ordinance, we conclude that MCZO 6.070(C)(2013) is not a retroactive law. Nothing in the express language of the

provision or the enacting ordinance expresses an intent that the ordinance be retroactive. Accordingly, we agree with Devin that the planning director's interpretation of MCZO 6.070(C)(2013) is inconsistent with the express language of the provision, to the extent that the planning director's interpretation relies on MCZO 6.070(2013) to revive a void conditional use permit and extend it. The 2011 CUP was void on October 26, 2012 and the planning director improperly construed MCZO 6.070(C)(2013) to authorize her to grant an extension of a void conditional use permit.[12]

Portions of the first and second assignment of error are sustained.

E. Remedy

Devin seeks reversal of the planning director's decision. OAR 661-010-0071(1)(c) provides in relevant part that LUBA shall "reverse a land use decision when: * * * [t]he decision violates a provision of applicable law and is prohibited as a matter of law." Here, the 2011 CUP was void on October 26, 2012. MCZO 6.070(2013) did not have the effect of reviving a void permit and accordingly, the planning director is prohibited from relying on MCZO 6.070(C)(2013) to extend that void CUP.

The decision is reversed.[13]

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[12] We expressly do not decide in this opinion whether MCZO 6.070(2013) has the effect of extending from a one-year duration to a two-year duration conditional use permits that were approved prior to the effective date of MCZO 6.070(2013) and that had not become void, under *former* MCZO 6.070, as of the effective date of MCZO 6.070(2013).

[13] Because our resolution of the first and second assignments of error requires that the county's decision be reversed, we need not and do not consider Devin's third assignment of error.

LUBA NO. 2014-012

A. Nature of the Decision

The decision challenged in LUBA No. 2014-012 is a decision by the county court approving a site plan for Love's travel center. Devin is the petitioner in LUBA No. 2014-012.

B. Facts

In March, 2013, Love's filed an application for site plan review for its travel center, and on Friday, April 12, 2013, the county planning director approved the site plan review application. On Monday, April 29, 2013, Devin appealed the planning director's site plan approval decision to the planning commission. The planning commission affirmed the planning director's decision approving the site plan. Devin appealed the decision to the county court. The county court approved the site plan. Site Plan Review Decision Record (County Court) 3.

C. Devin's Fourth Assignment of Error (LUBA No. 2014-012)

MCZO 4.165 provides in relevant part:

> "Site Plan Review is a non-discretionary or 'ministerial'review conducted without a public hearing by the County Planning Director or designee. Site Plan Review is for less complex developments and land uses that do not require site development or conditional use review and approval through a public hearing.
>
> "A. Purpose. The purpose of Site Plan Review (ministerial review) is based on clear and objective standards and ensures compliance with the basic development standards of the land use district, such as building setbacks, lot coverage, maximum building height, and similar provisions. Site Plan review also addresses conformity to floodplain regulations, consistency with the Transportation System Plan, and other standards identified below.

> "B. Pre-application review. Prior to filing its application for site plan review, the applicant shall confer with the County Planning Director or designee, who shall identify and explain the relevant review procedures and standards.
>
> "C. Applicability. *Site Plan Review shall be required for all land use actions requiring a Zoning Permit as defined in Section 1.050 of this Ordinance*. The approval shall lapse, and a new application shall be required, if a building permit has not been issued within one year of Site Review approval, or if development of the site is in violation of the approved plan or other applicable codes." (Emphasis added.)

In its fourth assignment of error, Devin argues that MCZO 4.165 requires Love's to obtain a conditional use permit *prior to* obtaining site plan review approval, and that the county erred in approving Love's site plan because Love's no longer had the requisite conditional use permit, since the 2011 CUP expired. Devin relies on the second sentence of the introductory paragraph of MCZO 4.165 that states that "[s]ite Plan Review is for less complex developments and land uses that do not require site development or conditional use review and approval through a public hearing," in support of its argument.

Love's responds that MCZO 4.165(C), "Applicability," requires site plan review "for all land use actions that require a zoning permit," the travel center requires a zoning permit, and that there is nothing in the second sentence of the introductory provision of MCZO 4.165 or elsewhere in MCZO 4.165 that requires conditional use approval prior to site plan review approval.

The county court's decision does not contain a reviewable interpretation of MCZO 4.165. Under ORS 197.829(2), LUBA is authorized to interpret county land use regulations in the first instance, in cases where the local

government has failed to do so. We conclude that the introductory paragraph of MCZO 4.165 does not have the legal effect of providing that site plan review for a land use that requires conditional use permit approval cannot precede the required conditional use approval. Nothing in the language of MCZO 4.165 includes a temporal requirement that a conditional use permit be obtained prior to site plan review.

Devin's fourth assignment of error is denied.

D. Devin's Fifth Assignment of Error (LUBA No. 2014-012)

MCZO 4.010, Access, applies to development proposals that abut public roadways. MCZO 4.010(B) provides:

> "Access Permit Requirement. Where access to or construction on a county road is needed, an access permit or right-of-way permit from Morrow County Public Works department is required subject to the requirements in this Ordinance. *Where access to a state highway is needed, an access permit from ODOT is required as part of the land use application*. * * *" (Emphasis added.)

In its fifth assignment of error, Devin argues that the county court erred in deferring compliance with MCZO 4.010(B) because that provision required "an access permit from ODOT * * * as part of the land use application."[14]

Love's responds that no access to a state highway is needed for its travel center and accordingly, no "access permit" from ODOT, within the meaning of

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[14] The county's decision includes a finding that:

> "Love's has demonstrated that it is feasible to obtain the ODOT permits and that ODOT is generally satisfied with ramp improvements as proposed. * * *" Site Plan Review Decision Record (County Court) 20.

MCZO 4.010(B), was required as part of its site plan review application.[15] Accordingly, Love's argues, Devin's fifth assignment of error provides no basis for reversal or remand.

We agree with Love's that Devin has not provided any reason to believe that Love's travel center will require "access to a state highway" and hence require an ODOT "access permit" for purposes of MCZO 4.010(B). While Love's travel center may require other types of ODOT permits, nothing in the record cited to us demonstrates that an ODOT access permit is required. Accordingly, Devin's fifth assignment of error provides no basis for reversal or remand of the decision.

Devin's fifth assignment of error is denied.

E. Love's Cross Petition for Review (LUBA No. 2014-012)

1. Background

In relevant part, MCZO 9.030 sets out a 15-day deadline for appealing a planning director decision approving a site plan:

> "A person may appeal to the County Court from a decision or requirement made by the Planning Commission. A person may appeal to the Planning Commission from a decision or requirement made pursuant to this Ordinance by the Commission Secretary, Planning Director or other county official. Written notice of the appeal must be filed with the county within 15 days after the decision or requirement is made. The notice of appeal shall state the nature of the decision or requirement and the grounds for appeal."

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[15] Love's explains that an "approach permit" from ODOT to authorize Love's to improve the Interstate 84/Tower Road ramps at the interchange will be required pursuant to ORS 374.305(1). Love's Response Brief 41.

Under MCZO 9.030, the fifteen-day appeal deadline fell on Saturday, April 27, 2013. Devin's appeal of the planning director's decision to the planning commission was filed on Monday, April 29, 2013, seventeen days after the decision was made.

During the proceedings before the planning commission on Devin's appeal of the planning director's site plan decision, Love's moved to dismiss the appeal because Love's argued that Devin's appeal of the planning director's decision failed to satisfy the requirement of MCZO 9.030 that it be filed "within 15 days after the decision * * * is made." Site Plan Review Decision Record (Planning Commission ZP-2238) 190. The planning commission affirmed the planning director's decision approving the site plan. Site Plan Review Decision Record (Planning Commission ZP-2238) 3-8. Devin appealed the planning commission's decision to the county court.[16]

In its order approving the site plan, the county court addressed the issue of the timeliness of Devin's appeal and concluded:

> "The County Court affirms the planning Commission's determination that Devin Oil's appeal of the Planning Director's Site Plan Review decision was timely filed. Devin Oil's appeal was filed on April 29, 2013. Although the Planning Director's decision was dated April 12, 2013 and MCZO 9.030 requires an appeal to be filed within 15 days of the decision, April 27, 2013 was a Saturday and therefore an appeal could not have been filed on that date. If the appeal deadline falls on a weekend, holiday or similar date when the County offices are closed, the County Court interprets MCZO 9.030 as extending the appeal filing deadline to the next date in which the County offices are open. This is a common interpretation used by other local, state and federal

[16] Love's did not appeal the planning commission's decision to the county court.

> agencies and courts. Since the County's planning Department was closed on April 27th (Saturday) and April 28th (Sunday), the deadline for filing the appeal was automatically extended until Monday, April 29th. Devin Oil filed and the County received the appeal on April 29th, and therefore it was timely." Site Plan Review Decision Record (County Court) 14.

2. Cross Petition for Review

Love's is the intervenor-respondent in LUBA No. 2014-012. OAR 661-010-0030(7) expressly authorizes an intervenor-respondent to file a cross petition for review to assign error to aspects of a decision on appeal, whether they agree or disagree with the ultimate disposition in the decision:

> "Cross Petition: Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party."

Pursuant to OAR 661-010-0030(7), Love's filed a cross petition for review in LUBA No. 2014-012.

In the cross petition, Love's agrees with the ultimate disposition of approval of its site plan in the decision. Cross Petition for Review 2. Love's assigns error only to the part of the county court's decision that determined that Devin timely appealed the planning director's initial decision approving the

site plan to the planning commission. In its assignment of error in the cross petition, Love's argues that the county court erred in concluding that Devin's appeal satisfied the deadline in MCZO 9.030, and that the county court's interpretation of MCZO 9.030 is inconsistent with the express language of MCZO 9.030.

In the portion of its cross petition for review setting out the "relief sought," Love's asks LUBA alternatively to (1) *affirm* the challenged decision approving the site plan as "right for the wrong reason;" or (2) *dismiss* Devin's appeal of the county court's site plan review decision for failing to file a timely appeal of the planning director's decision. Cross Petition for Review 2. In its "conclusion," however, Love's asks LUBA to "*reverse* the County's decision to assert jurisdiction over this appeal." Cross Petition for Review 10.

Given the inherent incongruity among Love's three relief requests in its cross petition, and its lack of sufficient development of its arguments regarding the three different dispositions that it requests, we treat the single assignment of error in Love's cross petition for review as a *contingent* cross assignment of error, *i.e.*, one that seeks reversal of the decision only if the decision is remanded in our disposition of Devin's appeal of the decision, LUBA No. 2014-012.[17] Stated differently, we understand Love's to request reversal of the county court's decision *approving its site plan* only if LUBA remands the county court's decision approving its site plan.

Accordingly, because we deny the assignments of error in Devin's appeal of the county court decision approving Love's site plan (LUBA No.

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[17] Although Love's assignment of error is not "clearly labeled" as a contingent cross assignment of error, we treat that failure as a technical violation. OAR 661-010-0005.

2014-012) and affirm the decision, we need not address Love's contingent cross assignment of error in its cross petition for review in LUBA No. 2014-012.

F. Conclusion

The county court's decision approving Love's site plan is affirmed.

LUBA NO. 2014-010

Love's is the petitioner in LUBA No. 2014-010, an appeal of the same county court decision approving the site plan that Devin appealed in LUBA No. 2014-012. The single petition for review that Love's filed in these consolidated appeals is labeled on its cover and within as a cross petition for review.

Love's did not file a petition for review in LUBA No. 2014-010. Accordingly, LUBA No. 2014-010 is dismissed. ORS 197.830(11).