BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SPACE AGE FUEL, INC.,
Petitioner,

vs.

UMATILLA COUNTY,
Respondent,

and

TA OPERATING, LLC,
Intervenor-Respondent.

LUBA No. 2014-057

FINAL OPINION
AND ORDER

Appeal from Umatilla County.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hathaway Koback Connors LLP.

No appearance by Umatilla County.

Tia M. Lewis, Bend, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Schwabe Williamson & Wyatt, PC.

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

REMANDED 09/01/2015

You are entitled to judicial review of this Order. Judicial review is

governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a board of county commissioners' order that approves a development agreement.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new issues raised in intervenor-respondent's brief. The motion is granted.

INTRODUCTION

The development agreement that is the subject of this appeal was adopted in response to our remand in *Western Express v. Umatilla County*, 54 Or LUBA 571, *aff'd* 215 Or App 703, 170 P3d 368 (2007) (*Western Express*). In *Western Express*, LUBA remanded a county decision that granted conditional use approval for a truck stop for Petro Stopping Centers. Intervenor-respondent in this appeal, TA Operating, LLC (TA), is Petro Stopping Centers' successor. Petitioner in this appeal, Space Age Fuel, was a co-petitioner in *Western Express*.

One of the bases for our remand in *Western Express* concerned the two proposed entrances for Petro's truck stop from Westland Road, one for cars and one for trucks. The car entrance was to be located 605 feet north of the Westland Road/I-84 interchange and the truck entrance was to be located 1,105 feet north of the interchange. In both cases the entrances were closer to the interstate interchange than the general 1,320-foot minimum distance required by the county's transportation systems plan (TSP) and by ODOT administrative rule.

The county approved the two entrances, despite the TSP's general 1,320-foot minimum, based on an Interchange Access Transportation Plan (IATP),

which was adopted in 2004 by Ordinance 2003-09 as an amendment to the TSP. Paragraph 2 of Ordinance 2003-09 adopted an "exception" to the IATP. Paragraph 2 provided that upon execution of a development agreement to outline responsibilities for the transportation facility improvements shown on a figure that was attached to Ordinance No. 2003-09, the TSP would be amended to authorize an exception to the IATP authorized improvements, including the access improvements in the locations proposed by Petro.[1] In *Western Express*, petitioners argued the county erred by approving the access improvements in the locations proposed by Petro *before* the development agreement had been executed. The county took the position in *Western Express* that so long as conditional use approval was conditioned on subsequent execution of the development agreement, the county could grant conditional use approval of Petro's proposal for the two accesses prior to execution of the development agreement. In *Western Express* we rejected the county's argument, and concluded the development agreement must be executed before the access locations shown in the IATP would displace the TSP's general 1,320-foot

[1] Paragraph 2 of Ordinance 2003-09 provides:

> "At such time as a development agreement is executed with the property owner, outlining improvements and responsibilities (including realigned Livestock Road), the Umatilla County Transportation System Plan and the Umatilla County Comprehensive Plan will be amended to provide an exception to the Westland Area Plan north of I-84 to allow for local access improvements outlined in Figure 13 of Exhibit 62, with additional access on east to be granted at industrial area access." Record 86-87.

minimum spacing requirement as the criteria governing access spacing for Petro:

> "It is not exactly clear what the county intended paragraph 2 to provide, but we agree with petitioners that it is difficult to read that paragraph to make the exceptions to the TSP spacing standards the 'applicable' criteria for purposes of ORS 215.247(3)(a) prior to execution of the development agreement. Read literally, paragraph 2 states that the TSP and plan 'will be amended' to provide for the exception to TSP standards, which certainly suggests that Ordinance 2003-09 did not actually amend the TSP and comprehensive plan to include those exceptions. Even if paragraph 2 is not read literally, and the phrase 'will be amended' is understood to mean something like 'will be effective,' it seems clear their effectiveness as approval criteria is conditional upon execution of the development agreement. If prior to execution of the development agreement the exceptions are not effective, we do not understand how those exceptions can be 'applied' or become the 'applicable criteria' for purposes of ORS 215.247(3)(a)." 54 Or LUBA at 597-98.

It is clear from the board of commissioners' order adopting the development agreement and the development agreement itself, that the development agreement that is the subject of this appeal was adopted to respond to our remand in *Western Express* so that the county could proceed to consider (1) approval of the proposed access points that are 605 feet and 1,105 feet north of the Westland Road/I-84 interchange, and (2) the other bases for LUBA's remand in *Western Express*.[2]

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[2] The board of commissioners' order explains: "the development agreement must be executed before the exceptions to the County Transportation System Plan take effect and permit access points at 605 feet and 1105 feet from the Westland Road/I-84 ramp intersection." Record 8. The development agreement states: "[t]his Agreement constitutes the 'development agreement' referenced in paragraph 2 of Ordinance No. 2003-09." Record 11.

Finally, we note that the board of commissioners believed its action approving the development agreement did not constitute a "land use decision," as that term is defined at ORS 197.015(10).[3] Paragraph 9 of the development agreement provides:

> "Non-Statutory Development Agreement. The County does hereby confirm that it is executing this Agreement pursuant to its charter and not pursuant to ORS 94.504 *et. seq.*, and does further confirm that this Agreement does not constitute or concern the adoption, amendment or application of the statewide planning goals, a comprehensive plan, provision or a land use regulation approving the proposed development, and the County and TA acknowledge and agree that any and all land use approvals required for the proposed development are to be obtained through the land use process in accordance with all applicable laws and regulations." Record 12.

Intervenor TA earlier moved to dismiss this appeal, arguing that the development agreement is not a land use decision. In a December 22, 2014 Order we denied that motion to dismiss, concluding that the county in approving the disputed development agreement in one instance applied the Umatilla County Development Code (UCDC), and in another instance should have applied the UCDC. Because the UCDC qualifies as a "land use regulation," and the county applied or should have applied the UCDC in adopting the development agreement, the development agreement qualifies as a "land use decision." *See* n 3. The county's failure to appreciate that its decision to approve the development agreement is a land use decision probably

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[3] As relevant here, a land use decision is "[a] final decision or determination made by a local government * * * that concerns the adoption, amendment or application of * * * [t]he goals; * * * [a] comprehensive plan provision; * * * [a] land use regulation; or [a] new land use regulation."

explains the county's failure to adopt findings addressing several issues that petitioner raised before the board of commissioners below.

FIRST ASSIGNMENT OF ERROR

Amendments to the UCDC are governed by UCDC 152.750 through 152.755. UCDC 152.753(B)(1) places a time limit on conditions to amendments:

> "Conditions to amendments shall be completed within the time limitations set forth by the county, or if no such time limit is set, within a reasonable time."

Petitioner contends in its first assignment of error that the condition in Section 2 of Ordinance No. 2003-09 that a development agreement be executed with Petro did not specify a time for completion and, therefore, under UCDC 152.753(B)(1) had to be completed "within a reasonable time."[4]

Citing UCDC 152.753(B)(1), petitioner raised this issue before the board of county commissioners:

> "The development agreement was not executed within a reasonable time period. Ordinance No. 2003-09 was adopted on January 12, 2004 and therefore it has been 10 years since the condition requiring execution of a development agreement was imposed. Over ten years to satisfy this condition is not reasonable. Petro should have proposed a development agreement in

[4] In our order denying the motion to dismiss, we noted that UCDC 152.753(B)(1) applies to conditions to amendments of the *UCDC* (a land use regulation) and that Ordinance 2003-09 adopted amendments to the TSP, which is part of the county's *comprehensive plan*, and we questioned whether UCDC 152.753(B)(1) applies to Ordinance 2003-09. In its petition for review, petitioner points out that pursuant to UCDC 151.02 the comprehensive plan and all amendments to the comprehensive plan have been adopted as part of the UCDC. Petition for Review 11. We do not understand intervenor to dispute the point.

> 2005/2006 when it pursued its conditional use permit application. TA waited over six and one-half years since LUBA remanded the County's decision to propose the development agreement. It is simply not reasonable by any measure to allow TA more than ten years to satisfy this condition to Ordinance 2003-09. Nor has TA provided a justifiable excuse for this delay. Given that TA failed to satisfy this condition with[in] the required reasonable time period, the local access exceptions adopted pursuant to Ordinance 2003-09 are no longer valid." Record 44.

The board of commissioners did not adopt any findings that either acknowledge or address the issue presented in the first assignment of error. LUBA has explained many times, "that when a relevant issue is adequately raised by evidence and testimony in the record, it must be addressed in the decision maker's findings." *Blosser v. Yamhill County*, 18 Or LUBA 253, 264 (1989) (citing *Norvell v. Portland Metropolitan LGBC*, 43 Or App 849, 852-53, 604 P2d 896 (1979)); *see also Friends of Umatilla County*, 55 Or LUBA 330, 337 (2007); *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 107-08 (1995). The issue (that the delay in executing the development agreement violates the UCDC 152.753(B)(1) "reasonable time" standard) is a relevant issue that was adequately raised. The board of commissioners' failure to adopt findings that respond to that issue requires remand.

Intervenor points to the applicant's response below, that the delay was not unreasonable given the challenge to the county's conditional use permit decision and the economic recession. Intervenor also points to minutes of a board of commissioners meeting where two commissioners suggest the reasonableness of the delay should be determined by whether there have been significant changes in traffic conditions. Based on the applicant's response and the minutes, intervenor contends LUBA should invoke ORS 197.835(11)(b)

and overlook the board of commissioners' failure to adopt responsive findings.[5]

ORS 197.835(11)(b) authorizes LUBA to overlook "defective" findings regarding the issue petitioner presented under UCDC 152.753(B)(1), if a party can identify evidence that "clearly supports" a decision that the delay did not violate UCDC 152.753(B)(1). However, the board of commissioners' findings regarding UCDC 152.753(B)(1) are not merely "defective," they are missing altogether. Moreover, the UCDC 152.753(B)(1) "reasonable time" standard is highly subjective and the "evidence" cited by intervenor, to the extent it qualifies as "evidence," falls far short of "clearly support[ing]" a decision that the 10 year delay in executing a development agreement qualifies as a "reasonable time." *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129, 137-38 (2001); *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995).

Petitioner for its part goes further and argues the county "could not have concluded that TA complied with [UCDC 152.753(B)(1)] based on its plain language and the substantial evidence in the record." Petition for Review 12. For the same reason we disagree with intervenor that the county's decision can

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[5] ORS 197.835(11)(b), provides

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

be affirmed as "clearly support[ed]" by the evidentiary record under ORS 197.835(11)(b), we disagree with intervenor that the evidentiary record precludes a finding that the delay in this case was "reasonable." The standard imposed by UCDC 152.753(B)(1) is highly subjective and fact-dependent. The board of commissioners erred by failing to address the issue when it approved the development agreement; on remand it will have a second opportunity to do so.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

In a March 18, 2014 letter to the county, petitioner argued the development agreement calls for transportation improvements that in three respects are at odds with the improvements that are authorized by Ordinance 2003-09:

> "Regardless of whether the differences between the road improvements contemplated in Ordinance No. 2003-09 and those proposed by the development agreement are minor or major, the proposed development agreement attempts to amend Ordinance No. 2003-09. Ordinance No. 2003-09 adopted very specific local access exceptions, including the express incorporation of Figure 13 from Kittleson & Associates, Inc.'s Traffic Access Management Analysis, dated December 4, 2003 ('Traffic Access Management Analysis'). The Traffic Access Management Analysis provides specific recommendations for the local access exceptions, as shown on [Figure] 13 and page 25 of the Traffic Access Management Analysis.[6] Any changes to these specific local access exceptions adopted by Ordinance No. 2003-09 are an amendment to the Ordinance.

[6] Figure 13 and page 25 of the Traffic Access Management Analysis appear at Record 48 and 49.

> "The differences are in fact substantial, not minor in nature. The development agreement proposes a completely different realignment of Livestock Rd., removes the exclusive left turn lane for southbound movement on Westland Road, removes the requirement to improve and extend Stable Road to the western boundary of the TA property. These are hardly minor changes." Record 33.

The county failed to adopt any findings responding to the issue petitioner raised above regarding the three inconsistencies between the improvements authorized by Ordinance No. 2003-09 and the improvements authorized by the challenged development agreement. In its second assignment of error, petitioner raises two issues. We address those two issues separately below.

A. The Development Agreement is Inconsistent with the County Comprehensive Plan and Land Use Regulations

The TSP is part of the county's comprehensive plan and as we have already noted, the county has adopted its TSP as part of the UCDC (a land use regulation) so the TSP qualifies as a land use regulation as well. Umatilla County's comprehensive plan and land use regulations have been acknowledged by the Land Conservation and Development Commission. ORS 197.251. County land use decisions must be "in compliance with the acknowledged plan and land use regulations[.]" ORS 197.175(2)(d). Under ORS 197.835(8),[7] if the county adopts a land use decision that does not comply

[7] The text of ORS 197.835(8) is set out below:

> "The board shall reverse or remand a decision involving the application of a plan or land use regulation provision if the decision is not in compliance with applicable provisions of the comprehensive plan or land use regulations."

with the county's acknowledged plan and land use regulations, the decision must be reversed or remanded.

Petitioner first argues that Paragraph 2 of Ordinance No. 2003-09 delays the effective date of the IATP modifications of the TSP (including replacing the 1,320-foot spacing requirement to allow the two access points 605 and 1,105 feet north of the interchange) until the development agreement for the improvements authorized by Paragraph 2 of Ordinance No. 2003-09 is "executed." *See* n 1. We understand petitioner to argue that because the executed development agreement authorizes different improvements from the improvements authorized by Ordinance No. 2003-09, the development agreement fails in its intended purpose to make the TSP amendments approved by Ordinance No. 2003-09 effective. Therefore, the executed development agreement that is before LUBA in this appeal authorizes construction of two accesses to TA's property that are inconsistent with the TSP 1,320-foot spacing requirement, which remains in effect.[8]

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[8] Petitioner's argument is set out below:

> "* * * The County's decision is inconsistent with Ordinance No. 2003-09, the TSP and OAR 734-051-0125. Since both ODOT and the County require a minimum access spacing standard of 1,320 feet from a highway interchange, TA's substandard access points are contingent on the exceptions approved under Ordinance No. 2003-09. [*Western Express*, 54 Or LUBA] at 594; TSP Table 7-6; OAR 734-051-0125. As previously explained, the substandard access points approved pursuant to Ordinance No. 2003-09 were conditioned upon very specific local access improvements recommended in the 2003 Kittleson Memorandum. The County was not entitled to ignore or modify these specific local access improvements as part of its approval of the development agreement. Since the new local access improvements approved by

We agree with petitioner that the development agreement that was required by Paragraph 2 of Ordinance 2003-09 to make the "local access improvements outlined on Figure 13" part of the TSP is not any old development agreement. Rather, it calls for a development agreement for the improvements shown on Figure 13. Petitioner appears to be correct that the challenged development agreement calls for improvements that in some respects differ significantly from those envisioned by Ordinance No. 2003-09. We do not mean to foreclose the possibility that the county might be able to demonstrate that the improvements authorized by the disputed development agreement are consistent with those authorized by Ordinance 2003-09. But petitioner appears to be correct that at least the realignment of Livestock Road is sufficiently different from the realignment called for by Ordinance 2003-09 that Ordinance 2003-09 would first have to be amended to authorize that change.[9] If so the county must first amend Ordinance 2003-09 before executing the development agreement to comply with Paragraph 2 of

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> the [executed development agreement] are inconsistent with Ordinance No. 2003-09, neither the County nor TA can rely on the exceptions to the minimum access spacing standards authorized by Ordinance No. 2003-09. Therefore, the proposed access points are inconsistent with the TSP and ODOT's standards. TSP Table 7-6; OAR 734-051-0125." Petition for Review 19-20.

[9] The proposed realignment of Livestock Road to a point north of TA's property presumably is what eliminated the need for the four-leg intersection at the auto entrance opposite the location specified for the Livestock Road realignment shown on Figure 13 and eliminated the need for the left turn lane for southbound traffic at that entrance. The differences in Ordinance No. 2003-09 and the executed development agreement regarding Sable Road are less clear to us, but the county must consider whether that difference is sufficiently significant to require an amendment to Ordinance 2003-09 as well.

Ordinance 2003-09. We agree with petitioner that it was error for the county to fail to adopt findings that explain why improvements that appear to depart fairly significantly from those authorized by Ordinance 2003-09 can be authorized by a development agreement that was adopted to comply with Paragraph 2 of Ordinance No. 2003-09.

B. The Executed Development Agreement Amends Ordinance 2003-09

Much of the argument petitioner sets out under the second assignment of error takes the position that the executed development agreement amends Ordinance No. 2003-09 without following the required procedures for amending an ordinance. These arguments frankly detract from the argument we have just agreed with. The county obviously did not intend to amend Ordinance 2003-09 when it executed the development agreement. It simply did not recognize or acknowledge that the improvements authorized by the development agreement it was adopting to comply with Paragraph 2 of Ordinance No. 2003-09 are not consistent with the improvements authorized by Paragraph 2 of Ordinance 2003-09. Petitioner's argument that the development agreement amended Ordinance 2003-09 is without merit.

The second assignment of error is sustained in part.

THIRD ASSIGNMENT OF ERROR

In its final assignment of error, petitioner argues that the county erred by relying on a transportation impact analysis (TIA) update that was prepared by the same traffic consultant that prepared the 2003 TIA that justified the improvements authorized by Ordinance No. 2003-09. Petitioner contends the county relied on the TIA update to approve the deviations in the development

agreement from the improvements that were authorized by Ordinance No. 2003-09.

It is far from clear to us that the county relied on the TIA update to authorize improvements in the development agreement that differ from those authorized by Ordinance 2003-09, and we decline to reach the merits of the third assignment of error. Even if the county did rely on the TIA update for that purpose, pursuant to our resolution of the second assignment of error, the county's decision to do so likely will require that it first amend Ordinance 2003-09. On remand the county will have an opportunity to clarify the issues it is relying on the TIA update to resolve. And the county will also have an opportunity to adopt findings to address petitioner's allegations that the TIA update is flawed, which it did not adopt in the order that approved the disputed development agreement.

We do not reach the third assignment of error.

The county's decision is remanded based on our resolution of the first and second assignments of error.