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 No. 2015-033

FINAL OPINION
AND ORDER

Appeal from Morrow 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.

Justin W. Nelson and Richard S. Tovey, Heppner, filed a joint response brief and Justin W. Nelson argued on behalf of the county. With them on the brief was Garvey Schubert Barer PC.

William K. Kabeiseman, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were Justin W. Nelson, Richard S. Tovey, and Garvey Schubert Barer PC.

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

AFFIRMED 10/06/2015

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving a conditional use permit to authorize a travel center.

MOTION TO INTERVENE

Love's Travel Stops & Country Stores, Inc. (Love's), the applicant below, moves to intervene on the side of the county. The motion is granted.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to alleged new matters raised in the response brief. Respondents objects to the reply brief, arguing that it does not respond to new matters. We agree with petitioner that the reply brief is appropriate under OAR 661-010-0039, and it is allowed.

FACTS

Love's proposes to develop a travel center on approximately 15 acres of a 49-acre parcel located at the Tower Road interchange on Interstate Highway 84. The proposed travel center consists of truck and automobile fueling stations, a convenience store, a restaurant, and a tire changing facility. The subject property is zoned Tourist Commercial (TC) and is subject to the Airport Approach (AA) Overlay due to its proximity to the Boardman Airport. The AA zone allows non-airport related uses as conditional uses. In 2010, Love's sought and the county approved an application for comprehensive plan text and map amendments, a zoning map amendment, and a conditional use permit to authorize the travel center. That county decision was the subject of our opinion in *Devin Oil Co. v. Morrow County*, 62 Or LUBA 247 (2010), *aff'd* 241 Or App 351, 250 P3d 38 (2010), *rev den* 350 Or 408, 256 P3d 121 (2011). The

conditional use permit approved by the county in 2010 expired in 2014. Record 160.

In January 2015, Love's submitted an application for a conditional use permit for the travel center. The planning commission approved the application, and petitioner appealed the planning commission's decision to the county court. The county court approved the application, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

The proposed travel center is subject to both the TC base zone requirements and the AA overlay zone requirements. The first assignment of error concerns the county's interpretation of one of the conditional uses in the AA Overlay zone and two of the permitted uses in the TC zone. Because the Morrow County Zoning Ordinance (MCZO) terminology is somewhat awkward, we set out the complete text of those uses below before turning to the parties arguments:

> 1. One of the conditional uses allowed in the AA Overlay zone is "[r]etail and wholesale trade facilities." MCZO 3.090(B)(13).
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> 2. A permitted use in the TC zone is "auto-dependent and auto-oriented uses and facilities (e.g. fueling stations, drive in restaurants and similar uses)[.]" MCZO 3.061(B), Table TC1, 2.a.
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> 3. A second permitted use in the TC zone is "[g]ift shops, retail and wholesale outlets (enclosed within a building or buildings)[.]" MCZO 3.061(B), Table TC1, 2.b.

In the challenged decision, the county court concluded that the proposed travel center is allowed as a conditional use in the AA overlay zone as a "[r]etail and wholesale trade facilit[y]." For purposes of the TC zone the county court also

concluded that the proposed travel center is a permitted use in the TC zone as an "[a]uto-dependent and auto-oriented use[] and facilit[y] (e.g. fueling stations * * *)[.]" Record 2a-2b.

During the proceedings before the county court, petitioner argued that because the county viewed the travel center as a "retail and wholesale trade facilit[y]" for purposes of the AA overlay zone, the county must, for purposes of determining whether the proposed travel center is allowed in the TC zone, classify the proposed travel center as a "retail and wholesale outlet[] (enclosed within a building or buildings)." That TC zone permitted use classification would necessarily prohibit the fueling stations that are not "enclosed within a building or buildings[.]" Petitioner's argument is based on the similarity of the wording "retail and wholesale trade facilit[y]" in the AA Overlay zone and "retail and wholesale outlet[]" in the TC zone.

The county court rejected petitioner's argument and concluded that the proposed travel center is a permitted use in the TC zone as an "[a]uto-dependent and auto-oriented use[] and facilit[y.]" The county court interpreted the language of MCZO 3.061(B), Table TC1, 2.a and .b, and MCZO 3.090(B)(13) as follows:

> "[T]he Court finds that the TC zone allows the proposed travel center, and explicitly allows the fueling stations, outright under MCZO 3.061(B), Table TC1, Use 2(a), which authorizes 'auto-dependent and auto-oriented uses and facilities (e.g., fueling stations, drive-in restaurants, and similar uses).' The Court concludes that the travel center is designed to serve people traveling in the County in automobiles and that the travel center, by its nature is auto dependent auto oriented. The entire facility is dependent on its location adjacent to the interstate highway, and its combination of uses are oriented to and dependent upon automobile traffic. The existence of fueling pumps out of doors is expressly contemplated by the permitted use categories of MCZO

3.061(B) and Table TC1. The proposed fueling stations fall directly within the outright permitted uses allowed in the TC zone as part of MCZO 3.061(B)(a) 'auto-dependent and auto-oriented uses and facilities.' Devin Oil's objection has no merit.

"Perhaps more importantly, Devin Oil's argument is based on an entirely false premise. Devin Oil argues that the County has 'already concluded that the travel center is a retail and wholesale trade facility for purposes of addressing the AA overlay zone and therefore it must be reviewed as a retail and wholesale trade facility for purposes of the TC zone as well.' * * *

"Devin Oil misunderstands the interplay between the base zone and the overlay zone in the Morrow County Zoning Ordinance. LUBA stated the Court's understanding of the AA overlay zone well when it explained as follows:

> "'The county viewed that language in the context of the AA overlay zone, the purpose of which, the county court observed, is 'to provide a [conditional use] review process for non-airport and non-agricultural uses proposing to locate within the airport approach zone to assure that such uses will not be detrimental to airport operations.' * * * *In other words, the county concluded, conditional uses listed in the AA overlay zone include broad categories such as '[r]etail and wholesale trade facilities,' because the conditional use component of the AA overlay zone is not intended to finely distinguish between categories and subcategories of related uses,* but rather to ensure that uses allowed are consistent with airport operations, which is largely achieved by conditional use review and application of the AA overlay zone development standards.' *Devin Oil v. Morrow County*, 62 Or LUBA 274 (2010) * * *.

"The TC zone, in contrast, is intended to 'finely distinguish' between categories of uses and, in this case, has a specific use category that, as discussed above, specifically encompasses the proposed travel center, i.e., the 'auto-dependent and auto-oriented' facility.

> "The Court expressly interprets the broad use category of 'retail and wholesale trade facilities' in MCZO 3.090(B)(13) to not be congruent with the use identified in section 2(b) of Table TC1 as 'gift shops, retail and wholesale outlets (enclosed within a building or buildings).' Instead, the Court finds that the travel center is properly classified in the TC zone as an 'auto-dependent and auto-oriented use and facilities' under the use 2(a) of the same table." Record 2b-2c (emphasis in original).

In its first assignment of error, petitioner argues that the county court's interpretation of the applicable MCZO provisions "improperly construes the applicable law" because, according to petitioner, the county's interpretation is "arbitrary, contradictory and internally inconsistent." Petition for Review 7. As primary support for its argument, petitioner cites portions of the county court's previous 2010 decision approving Love's prior conditional use permit application that expired, and argues that the challenged decision is inconsistent with previous interpretations of various MCZO provisions in its 2010 decision. Petition for Review 9-11. Citing *Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701, *rev den* 328 Or 115 (1998), petitioner argues that the county court improperly adopted contradictory interpretations and applied them differently to the same proposed use. The contradictory interpretations, as we understand it, are twofold. First, petitioner argues the county's interpretation in 2010 that the proposed travel center is not an "automobile service station" as defined in MCZO 1.030 is inconsistent with the interpretation in the challenged decision that the proposed travel center is allowed in the TC zone as "[a]uto-dependent and auto-oriented uses and facilities (e.g. fueling stations * * *)[.]" Second, petitioner argues the county's interpretation that the proposed travel center falls within the "[r]etail and wholesale trade facilities" AA Overlay conditional use category is inconsistent with its finding that it does not fall

within the "[g]ift shops, retail and wholesale outlets (enclosed within a building or buildings)" TC permitted use category.

Love's and the county (respondents) first respond that the county court's 2010 decision did not, as petitioner alleges, conclude that the proposed travel center was not an "automobile service station." Respondents also respond that the county court's interpretation of the various provisions of the MCZO at issue is not inconsistent with any of the express language of the provisions and must be affirmed. ORS 197.829(1).

Petitioner's characterization of the county's 2010 decision and the county's interpretation of the various MCZO provisions at issue in that decision is not accurate. In its 2010 decision, the county court concluded that the proposed travel center is a "[r]etail and wholesale trade facilit[y]" in the AA Overlay zone. In 2010 petitioner argued that the travel center was not an allowed use in the AA Overlay zone because it was a use allowed in other county zones, but not specifically allowed in the AA Overlay zone.[1] In

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[1] Briefly, petitioner argued that the county improperly construed MCZO 3.090(B)(13) and the provisions of the AA Overlay zone and the MCZO generally to allow the proposed travel center under a broader, undefined use category "[r]etail and wholesale trade facilities" because the proposed use also fit within defined use categories that are allowed in other zones:

> "Petitioner notes that the definition of 'truck stop' includes dispensing fuel into 'trucks or motor vehicles,' and argues that 'truck stop' thus incorporates automobile fueling stations, which is a separate use category allowed under several variant names in three other county zones, but not the AA overlay zone." 62 Or LUBA at 252 (italics and footnote omitted).

On appeal of the county court's 2010 decision, we rejected petitioner's argument and held that in determining whether the county court improperly

considering and rejecting that argument, the county court considered the different use categories that the travel center might fall into in other zones, *i.e.* a "truck stop" or an "automobile service station" as defined in MCZO 1.030. But the county court did not determine that for purposes of the TC zone and MCZO 3.061(B), Table TC1, 2.a that the proposed travel center is not an "[a]uto-dependent and auto-oriented use[] and facilit[y]."[2] Record 35-36. Accordingly, we agree with respondents, and reject petitioner's contention that the county has previously decided that the proposed travel center is not an "[a]uto-dependent and auto-oriented use[] and facilit[y]" for purposes of MCZO 3.061(B), Table TC1, 2.a in its 2010 decision on the previous conditional use permit.

In addition, *Holland* does not assist petitioner. In *Holland*, the question presented to the city was whether a provision of the city's subdivision design standards that limited the density of development on steep slopes applied to the application for a subdivision. The city's initial decision on the application did not apply the provision; however, after remand by LUBA, the city took the position that the subdivision design standard provision did apply to the application. That city position was contrary to the city's position on the subject application and on other applications for the same use. In that circumstance, the court held, the city erred in applying the provision because at the time the initial application was filed the city considered that provision inapplicable. The

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construed the MCZO, the relevant question was whether the county court's interpretation was consistent with the express language of MCZO 3.090(B)(13). 62 Or LUBA at 253.

[2] The county court did posit that some aspects of the proposed travel center are "auto oriented." Record 35.

question presented in this appeal is not whether a development standard applies or does not apply to the conditional use application, but rather the proper categorization of the proposed travel center among the many use categories in each of the AA overlay and TC zones.

Finally, petitioner argues that the county court's categorization of the use for purposes of the AA Overlay zone as a "[r]etail and wholesale trade facilit[y]" compels the county to conclude that the proposed use is a "[g]ift shop[], retail and wholesale outlet[] (enclosed within a building or buildings)" for purposes of the TC zone. According to petitioner, the county is required to interpret the two uses quoted above to be the same.

Respondents respond, and we agree, that the county court's interpretation of the two use categories as "not congruent" is not inconsistent with the express language of the two provisions. The two provisions are phrased similarly but differently, and the county could and did conclude that the different phrasing meant that they describe different uses. That interpretation of the operative MCZO provisions is not inconsistent with the express language of the two provisions. *Siporen v. City of Medford*, 349 Or 247, 258, 243 P3d 776 (2010).

The county court's interpretation that the travel center is properly classified in the TC zone as an "[a]uto-dependent and auto-oriented use[] and facilit[y]" is not inconsistent with all of the express language of the MCZO, and it is affirmed. ORS 197.829(1)(a).

The first assignment of error is denied.[3]

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[3] Because we affirm the county court's interpretation of the operative MCZO provisions, we need not address petitioner's challenge to the county court's alternative basis for rejecting petitioner's argument, at Record 2a-2b.

SECOND ASSIGNMENT OF ERROR

MCZO 3.090(C)(3) provides that in the AA zone:

> "In approach zones beyond the clear zone areas, no meeting place for public or private purposes which is designed to accommodate more than 25 persons at any one time shall be permitted, nor shall any residential use be permitted."

In its second assignment of error, petitioner argues that the proposed travel center is a "meeting place" within the meaning of MCZO 3.090(C)(3). "Meeting place" is not defined in the MCZO. The county court interpreted the phrase as meaning "uses that are designed to facilitate the gathering of people for a specific purpose, such as conference centers, theaters, churches, banquet facilities * * *" and concluded that the proposed travel center is not a "meeting place." Record 2c.

According to petitioner, MCZO 3.090(C)(3) implements the requirement in OAR 660-013-0080(1)(a) that "[a] local government shall adopt airport compatibility requirements for each public use airport" that "[p]rohibit new residential development and public assembly uses within the Runway Protection Zone (RPZ) identified in Exhibit 4 [to the rule]."[4] Therefore, petitioner argues, the county court's interpretation cannot be affirmed because it is contrary to the definition of "Public Assembly Uses" set out at OAR 660-013-0020(5). ORS 197.829(1)(d) (LUBA is required to affirm a local

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[4] OAR 660-013-0020(5) defines "public assembly use" as "a structure or outdoor facility where concentrations of people gather for purposes such as deliberation, education, worship, shopping, business, entertainment, amusement, sporting events, or similar activities, excluding air shows. Public Assembly Uses does not include places where people congregate for short periods of time such as parking lots and bus stops or uses approved by the FAA in an adopted master plan."

government's interpretation of its land use regulations unless the interpretation "[i]s contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements").

The county court concluded that MCZO 3.090(C)(3) does not implement OAR 660-013-0080(1)(a) because MCZO 3.090(C)(3) was adopted in 1980, sixteen years prior to promulgation of the rule.[5] Record 2d. Therefore, respondents respond, the county's interpretation of "meeting place" must be affirmed under ORS 197.829(1)(a). Respondents also respond that the county court correctly concluded that the term "meeting place" is not the same as the phrase "Public Assembly Uses" found at OAR 660-013-0020(5) and used in OAR 660-013-0080(1)(a) and for that reason the county court's interpretation of "meeting place" is not required to be consistent with the phrase "public assembly uses." Record 2d. Finally, respondents respond that even if MCZO 3.090(c)(3) could be construed to implement OAR 660-013-0080(1)(a), the rule is inapplicable because the proposed travel center is not located within the Runway Protection Zone.

We agree with respondents on all points. The county's interpretation of the phrase "meeting place" is affirmed. ORS 197.829(1)(a).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In its decision the county court concluded that:

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[5] Respondents ask LUBA to take official notice of Ordinance MC C-2, a county ordinance enacted June 25, 1980, attached as an appendix to the Response Brief, that includes the same operative language found in MCZO 3.090(C)(3). The motion is granted.

> "[A]ll of the conditions of approval necessary to comply with this approval criteria for this conditional use permit will be imposed with its decision in this matter. Given the multiple approvals that have already been obtained, as well as the length of time this process has taken, the conditions that are not included in the present approval have either already been satisfied or are covered by other approvals." Record 2h.

Petitioner argues that the county's decision that the eight conditions of approval the county imposed in 2010 are not required to be imposed in order to approve the application is not supported by substantial evidence in the record and that its findings are inadequate to explain its conclusion that the eight conditions "have either already been satisfied or are covered by other approvals."

Respondents respond that petitioner's assignment of error does not identify a basis for reversal or remand of the decision. We agree. The county was required to determine whether the application satisfied the applicable approval criteria in MCZO 3.090, MCZO 6.020 and MCZO 6.030. The county concluded that the approval criteria were satisfied, and petitioner does not challenge that conclusion or otherwise argue that the county should have imposed any conditions of approval in order to ensure that any approval criteria that were deferred to satisfaction at a later date are later satisfied. Rather, petitioner argues that the county should have imposed the same conditions of approval that it imposed in a decision the county made more than five years earlier approving the same proposal. Petitioner does not identify any requirement in the MCZO or state law or regulation that obligates the county to carry over previously imposed conditions of approval simply because they were imposed five years earlier in a decision that has since become void. Petitioner also does not identify any requirement in MCZO or state law or regulation that

requires a new condition of approval similar to those imposed in 2010, in order to satisfy some applicable approval criterion. Accordingly, the third assignment of error provides no basis for reversal or remand of the decision.

The third assignment of error is denied.

The county's decision is affirmed.