BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WESTERN LAND & CATTLE, INC.,
and PLISKA INVESTMENTS, LLC,
Petitioners,

vs.

UMATILLA COUNTY,
Respondent,

and

FLYING J, INC.,
Intervenor-Respondent.

LUBA No. 2008-144

FINAL OPINION
AND ORDER

Appeal from Umatilla County.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Davis Wright Tremaine LLP.

No appearance by Umatilla County.

Corinne S. Celko, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief were Michael C. Robinson, Roger A. Alfred and Perkins Coie LLP.

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

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

REMANDED 02/04/2009

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 county approval of a conditional use permit for the construction of a travel plaza that includes automotive and commercial truck fuel stations, commercial truck services, a restaurant, and a travel convenience store.

FACTS

The subject property is a 70.39-acre parcel located at the southeast quadrant of the intersection of Interstate 82 and Lamb Road, approximately 5.5 miles southwest of the City of Hermiston. The property consists of two tax lots. The northeastern portion of the property is zoned Tourist Commercial (TC) and the remainder is zoned Light Industrial (LI). Adjacent land to the north is zoned Exclusive Farm Use (EFU). Interstate 82 and the Umatilla Army Depot abut the property to the west. The land to the south and east are zoned Industrial.

Petitioners submitted their application on November 10, 2005. The proposal consists of multiple uses, including (1) a restaurant; (2) a travel convenience store; (3) an automotive and commercial truck fueling stations; (4) a commercial truck service building; (5) a commercial truck wash building; and (6) accessory improvements. The majority of the proposed development would be located on the portion of the property zoned TC with some parking, drainage facilities, and truck scales located on the portion zoned LI.

Neither the TC nor the LI zone allow commercial truck stops, but both zones allow an "automobile service station" as a conditional use. The TC zone also allows as a conditional use "[o]ther uses similar to" permitted or conditional uses allowed in the TC zone.

The planning commission held public hearings regarding the application on March 23, 2006 and on January 24, 2008. The planning commission concluded that each of the various elements of the travel plaza was a permitted or conditional use in the TC zone,

including the commercial truck fueling station and service building, which the planning commission found qualifies as a "similar use."

Petitioners appealed the planning commission's decision to the board of county commissioners (BCC). The BCC held a public hearing on April 17, 2008. On May 8, 2008, the BCC voted to tentatively affirm the decision of the Planning Commission approving the project. Final approval of the application was granted on July 30, 2008. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners contend that the county erred in approving the proposed commercial truck fueling station, service building and truck wash as "similar uses" under Umatilla County Development Code (UCDC) 152.277(E).

The TC zone is codified at UCDC 152.275 *et seq*. The TC zone is "designed to serve the traveling public along major traffic corridors or at appropriate recreational locations." UCDC 152.275 ("Purpose"). Permitted facilities may include "service station, eating establishments or over-night accommodations." *Id.* As noted, the TC zone does not list a truck stop or truck service station as permitted or conditionally permitted uses. It does list an "automobile service station" as a permitted use, under UCDC 152.276(B)(1). UCDC 152.003 defines "automobile service station" as "[a]ny building, land area or other premises or portion thereof, used or intended to be used for the retail dispensing or sale of vehicular fuels; and including as an accessory use the sale and installation of lubricants, tire, batteries and similar accessories."

UCDC 152.277 lists the conditional uses allowed in the TC zone, and allows "[o]ther uses similar to the uses permitted or the conditional uses normally located in a Tourist Commercial Zone, providing that it has the approval of the Planning Commission." UCDC 152.277(E). In addition to that specific grant of authority to allow a "similar use" in the TC zone, UCDC 152.009 includes a general provision for "Authorization of Similar Uses,"

stating that "[t]he Planning Commission may permit as a conditional use in a particular zone a use not listed in this chapter, provided the use is of the same general type as the uses permitted there by this chapter."

The UCDC provides for a "truck stop" in only one zone within the county, the Commercial Rural Center (CRC), at UCDC 152.262(H). The code defines a "truck stop" as [a]ny building, premise or land in which or upon which maintenance, servicing, storage or repair of commercial licensed trucks or motor vehicles is conducted or rendered, including the dispensing of motor fuel or other petroleum products directly into the trucks or motor vehicles, the sale of accessories or equipment for trucks or similar motor vehicles." Further, a "truck stop" is subject to a special set of conditional use standards that apply only to truck stops, at UCDC 152.616(BBB).

Petitioners argued below that the commercial truck fueling and service station and truck wash constitute a "truck stop" as that use is defined at UCDC 152.003. Because those elements of the project constitute a "truck stop," petitioners argued, and truck stops are not listed uses in the TC zone, the county cannot approve those elements as a "similar use" under UCDC 152.277(E).

The county rejected those arguments, finding:

> "The multiple uses proposed by the applicant are similar, if not identical, to the uses that are specifically allowed as permitted use in the TC zone under UCDC 152.276(B). The only proposed uses that are not expressly listed as permitted uses are the truck service station and truck wash. The Board finds that these uses are similar to an automobile service station, and therefore the entire composite of uses may be approved under UCDC 152.277(E). The Board finds that this interpretation of the code is consistent with long-standing County precedent regarding the application of the 'similar use' standard. In fact, the facilities operated by [petitioners] were approved under the same interpretation. * * *." Record 4-5.

The BCC also rejected petitioners' argument that UCDC 152.009 should be interpreted in context to prohibit approving a "similar use" under UCDC 152.277(E), where the proposed use is a listed use in one or more zones under UCDC chapter 152.

> "Opponents * * * contend that the proposed travel plaza is not an allowable use in the TC zone because of UCDC 152.009 * * *. Opponents note that at the time the applicant filed its application in 2005, 'truck stops' were listed as permitted uses in the Commercial Rural Center (CRC) zone (the UCDC was subsequently amended on November 15, 2005 to remove truck stops from the CRC zone). Opponents argue that because a truck stop was a listed use in another zone when the application was filed, that use cannot be allowed as a conditional use in another zone due to UCDC 152.009. * * *
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> "The Board finds that UCDC 152.009 does not require the opponents' desired result. First, the language of the code section allows a more reasonable and less restrictive interpretation. * * * [UCDC 152.009] provides a general permissive grant of authority to allow a particular use in a zone, even if that use was not expressly listed by the code. The purpose of this provision is to provide the County with flexibility to allow uses that were not expressly enumerated, so long as they are found to be similar to other listed uses. This section should not be read to require that such similar uses may *never* be allowed (as through the application of UCDC 152.277(E)), if the use *is* listed in another zoning district. In other words, the Board does not interpret the phrase 'a use not listed in this chapter' to create a limitation, but rather to expand the universe of uses that could be allowed (and in fact, are allowed by UCDC 152.277(E)). The opponents read this section as if it were written to say that the Planning Commission 'may not permit as a conditional use any use that is listed elsewhere in this chapter,' and the Board disagrees with that interpretation." Record 5 (emphasis in original).

Petitioners challenge the BCC's interpretation of UCDC 152.277(E) and the BCC's interpretation of UCDC 152.009. According to petitioners, LUBA has consistently held that where a zoning ordinance specifically lists a use as allowed or conditionally allowed in one zoning district, but does not list that same use in a second zoning district, an inference arises that the local government did not intend to allow that use in the second zoning district under an open-ended use category. *O'Shea v. City of Bend*, 49 Or LUBA 498, 506-10 (2005); *Roth v. Jackson County*, 40 Or LUBA 531, 535-36 (2001); *Cotter v. Clackamas County*, 36 Or LUBA 172, 179-80 (1999). Petitioners contend that inference is particularly strong in the present case, because the county's code separately defines and regulates "truck stops" and "automobile service stations." With respect to UCDC 152.009, petitioners contend that that general provision functions as a limitation on the "similar use" provisions in specific zoning

districts, such as UCDC 152.277(E), to ensure that only uses not listed anywhere in UCDC chapter 152 are allowed as "similar uses."

We turn first to the relationship between the general "similar use" provision at UCDC 152.009 and the specific "similar use" provision at UCDC 152.277(E) that applies within the TC zone. Petitioners appear to read UCDC 152.277(E) as a specific instance of the general similar use rule at UCDC 152.009, such that the only uses that may be authorized under UCDC 152.277(E) are uses that are not listed in any UCDC chapter 152 zoning district. The BCC, on the contrary, interprets the two provisions as independent, non-overlapping provisions. Under the BCC's interpretation, UCDC 152.009 authorizes the county to approve uses as "similar uses" if those uses are not listed anywhere in UCDC chapter 152, if those uses are of the same general type as uses permitted in the applicable zone, while UCDC 152.277(E) and other zone-specific similar use provisions have an independent function to authorize uses that are similar to listed uses, even if the proposed use is a listed use in a different zone.

LUBA must affirm a governing body's interpretation of local code provisions that are consistent with the express language, purpose or underlying policy. ORS 197.829(1); *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). Petitioners' preferred interpretation subsumes UCDC 152.277(E) into the general similar use provision at UCDC 152.009, and gives the specific provision no independent role or meaning. The county's interpretation gives meaning to both provisions, and is therefore more consistent with the terms of both provisions. Certainly, we cannot say that the BCC's interpretation is inconsistent with the express language, purpose or underlying policy. Accordingly, we affirm that interpretation. ORS 197.829(1).

Under the county's interpretation of UCDC 152.009, that provision lends contextual support to the county's view that UCDC 152.277(E) is not intended to preclude authorizing a use similar to a permitted or conditionally permitted use in the TC, simply because the

proposed use is a listed use in a different zone. The above-cited cases that petitioners rely on are all based on our opinion in *Sarti v. City of Lake Oswego*, 20 Or LUBA 387, *rev'd* 106 Or App 594, 597, 809 P2d 701 (1991), which involved a zoning scheme that permitted "dance schools" in some zones but not others. The applicant proposed a dance school in a zone that did not list that use category, but that did permit "cultural facilities." We rejected the county's interpretation that the proposed dance school qualifies as a "cultural facility," applying the inference that the city did not intend to allow a "dance school" in that particular zone, under the broader use category of "cultural facility," because it specifically allowed dance schools in other zones and chose not to in the zone in question. On appeal, however, the Court of Appeals reversed our interpretation, stating that in the absence of any definition, context or extrinsic evidence of contrary legislative intent, the words "cultural facility" should be construed based on their plain and ordinary meaning, which the Court found to be broad enough to encompass the proposed dance school. 106 Or App at 597.

The Court of Appeals' opinion in *Sarti* did not necessarily reject our approach in drawing an inference of legislative intent from the fact that the zoning scheme allows specified uses in one zone but not others. Nonetheless, such an inference is only that, an inference, not a binding rule of interpretation. Such an inference carries little weight when there is available and relevant text, context or other evidence of a different legislative intent.

In the present case, the county's code includes not one but two provisions that authorize the county to approve uses that are not permitted in a particular zone (or listed anywhere in the zoning code for that matter), if the proposed use is "similar" to or of the same general type as uses permitted in that zone. That strongly suggests that the county is not concerned with maintaining bright lines between use categories. In particular it suggests that the county did not intend, by authorizing a particular use category in one zone but not authorizing that use category in a second zone, to preclude the possibility of approving that

particular use category in the second zone, if it is similar to the uses that are listed in the second zone.

In this respect, the county's zoning scheme is very different from the zoning schemes at issue in *Sarti* and the other cases cited by petitioners. None of the cases that petitioners cite involve application of code provisions such as UCDC 152.009 and 152.277(E) that authorize the local government to approve uses not listed in the zone, if the proposed use is "similar" to listed uses. In each of the cited cases, the question was whether a *specific* use allowed in some zones but not allowed in the applicable zone fell within a *broader* use category that was allowed in the applicable zone. *O'Shea*, for example, involved whether a proposed convention center could be approved as a facility customarily in conjunction with a hotel. The question in *Roth* was whether a winery could be approved as agriculture. At issue in *Cotter* was whether a full-service recreational vehicle park could be approved as a park or campsite. In each case, we applied and found dispositive the inference described in *Sarti*. However, that inference seems weaker, to the extent it exists at all, when applied to the kind of zoning scheme at issue in the present case, where the county has expressly authorized approval of uses that are not listed in the applicable zone, when the proposed uses are similar to listed uses.

Finally, petitioners argue that the county's interpretation is inconsistent with a 2001 periodic review report, in which the Department of Land Conservation and Development recommended that the county impose size limits on uses allowed in its rural commercial zones, including the CRC and TC zones, to ensure that those areas remain rural and do not develop at urban-level intensities, and to avoid the necessity for taking an exception to Goal 14. Record 224-25. In 2005, the county adopted UCDC amendments that, among other things, removed "trucks stops" as a permitted use in the CRC zone. Record 191. Petitioners argue that the county removed "truck stops" as a permitted use in the CRC zone in order to comply with that DLCD recommendation, and therefore the county's interpretation is

inconsistent with that intent, because it effectively permits "truck stops" in all rural commercial zones as "similar uses."

However, the DLCD report petitioners cite to does not specifically discuss truck stops or recommend that the county not allow truck stops in its rural commercial zones. In relevant part it simply recommends that the county apply size limits to uses allowed in the rural commercial zones. Moreover, petitioners have not established that the county's intent in removing truck stops from the CRC zone was to respond to that DLCD recommendation. Even if we assume that was the county's intent, as the parties point out the 2005 ordinance was adopted two days after intervenor filed its application. The 2005 ordinance therefore does not govern the application. ORS 215.427(3)(a). Petitioners do not explain why the county's presumed intent with respect to legislation that was adopted after the application was filed and is therefore inapplicable compels the county to interpret the applicable text and context of UCDC 152.277(E) in a manner consistent with the presumed intent motivating the subsequent legislation.

In sum, we disagree with petitioners that the county erred in concluding that the proposed truck service station and truck wash, which appear to be at least elements of a "truck stop" as defined at UCDC 152.003, are permitted as a use similar to an automobile service station under UCDC 152.277(E). Because we affirm the county's conclusion under UCDC 152.277(E), we need not address petitioners' challenges to the county's alternative or non-dispositive findings.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the county's findings of compliance with the conditional use transportation impact standards at UCDC 152.017, and a requirement at UCDC 152.616(BBB)(2) that a proposed truck stop "not create a traffic hazard."[1]

A. Traffic Impact Study

Intervenor submitted a traffic impact study (TIA) from Lancaster Engineering that estimated trip generation for the project as a whole based on figures from the Institute of Transportation Engineers (ITE) manual, a standard reference document. Specifically, the Lancaster TIA used trip generation figures from category 945 "Gasoline/Service Station with Convenience Market." The ITE manual does not include a category for "truck stops."

Petitioners first argue that because the ITE manual includes no category for truck stops, the TIA must take the same approach adopted in a recent similar application in the immediate area that derived trip generation figures from traffic counts at comparable truck stop facilities.[2] According to petitioners, that approach yields considerably higher trip generation figures than using category 945. Petitioners submitted into the record the TIA from that recent application (the Kittleson TIA), along with a letter from its traffic engineer

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[1] UCDC 152.017 provides, in relevant part:

> "(A) The proposed use shall not impose an undue burden on the public transportation system. Any increase meeting the definition of significant change in trip generation constitutes an undue burden.
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> "(B) For developments likely to generate a significant increase in trip generation, applicant shall be required to provide adequate information, such as a traffic impact study or traffic counts, to demonstrate the level of impact to the surrounding system. * * *
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> "(C) The applicant or developer may be required to mitigate impacts attributable to the project. Types of mitigation may include such improvements as paving, curbing, bridge improvements, drainage, installation or contribution to traffic signals, construction of sidewalks, bikeways, accessways or paths. * * *"

[2] *See Western Express v. Umatilla County*, 54 Or LUBA 571, 584-94, *aff'd* 215 Or App 703, 170 P3d 1137 (2007).

criticizing the approach taken by the Lancaster TIA to rely on category 945 rather than the empirical approach taken in the Kittleson TIA. Petitioners argue that intervenor's traffic engineer submitted no response to that criticism, nor proffered any explanation for why it is reasonable to rely solely on category 945.[3]

Relatedly, petitioners argue that the Lancaster TIA failed to account for traffic from the proposed restaurant. According to petitioners, its engineer noted that the ITE manual includes appropriate categories for a restaurant and criticized the Lancaster TIA for failing to account for traffic generated by the restaurant. Petitioners contend that the county failed to address this issue or explain why it need not resolve the issue.

Third, petitioners note that the county's findings in fact conclude that the appropriate ITE category is not category 945, but instead category 946, which is a "Gasoline/Service Station with Convenience Market and Car Wash."[4] Because the project includes a truck wash, petitioners argue that category 946 is clearly more appropriate than category 945, but the Lancaster TIA instead relied solely on category 945, without accounting for traffic generated by the truck wash.

Intervenor responds that the reference to ITE category 946 in the findings is a simple typographic error. With respect to the proposed restaurant, intervenor argues that the Lancaster TIA properly accounts for any trips generated by the restaurant as "internal" trips, by presuming that all restaurant patrons would also stop for fuel or to shop at the convenience market and therefore the restaurant would not generate any new trips. In any case, intervenor argues, the Lancaster TIA considered trip generation for all of the proposed fueling stations, resulting in a conservatively high number of trips, which would render

[3] Petitioners note that intervenor attempted to submit a response from its traffic engineer after the record had closed, but the county rejected it.

[4] The county found, in relevant part, that "the appropriate use category for the project is ITE Category 946, as described in the Lancaster TIA and addendum." Record 11.

harmless any error in failing to account for trips generated by the restaurant. Finally, with respect to reliance on ITE category 945 rather than comparable studies, intervenor argues that the county is entitled to choose between conflicting expert testimony, as long as the evidence it relies on is substantial evidence, *i.e.*, evidence a reasonable person would rely on, considering the evidence in the whole record. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251, 268 (2002).

Intervenor is probably correct that the findings' reference to ITE category 946 rather than 945 was unintentional, but petitioners' larger point also seems correct, that it is not clear why ITE category 945 applies rather than or in addition to other apparently appropriate categories. Category 945 does not take into account trips generated by either the proposed truck wash or the proposed restaurant. It may be true, as intervenor argues, that some or all of the trips associated with the truck wash or restaurant can be offset by or subsumed into the trip generation figures supplied by category 945, under the assumption that restaurant or wash patrons would likely also stop for fuel, and therefore those uses would generate only new "internal" trips.[5] However, nothing cited to us in the Lancaster TIA or elsewhere in the record provides that analysis or supports that conclusion. We also cannot verify from the record intervenor's assertion that the Lancaster TIA's figures are sufficiently conservative that any error in failing to account for traffic generated by the restaurant or truck wash is harmless. We conclude that remand is necessary for the county to address the issue of which ITE categories are appropriate.

Whether the TIA cannot rely on the ITE manual at all, because the ITE manual has no category for truck stops, is a closer question. As noted, petitioners' traffic expert offered

[5] However, the fact that the ITE manual has separate categories for "Gasoline/Service Station with Convenience Market" with and without a car wash suggests that the car wash generates additional traffic, above and beyond that generated by the service station and market. Whether a truck wash would have the same effect is not clear.

detailed testimony critiquing reliance on the ITE manual and arguing that the only reliable source of information for the proposed facility is an empirical study of comparable facilities, the same approach the county approved in a recent decision involving a similar facility. Intervenor's traffic engineer submitted no response to that critique, and the findings do not clearly address the issue. Because remand is necessary in any event, we deem it appropriate to remand for reconsideration of this issue as well.

This subassignment of error is sustained.

B. Safety of Lamb/Walker/Westland Road intersection

As noted UCDC 152.017(A) requires a finding that the proposed use shall not impose an "undue burden on the public transportation system," and UCDC 152.616(BBB)(2) requires a finding that a proposed truck stop "not create a traffic hazard." Lamb/Walker/Westland Road is a three-way intersection near the subject property. The TIA found, and petitioners do not dispute, that the traffic generated by the proposed facility will not exceed the capacity of the intersection. With respect to safety, the TIA found that the five–year crash history for the intersections is 1.01 crashes per million entering vehicles, which is slightly higher than the threshold of 1.0 crashes per million entering vehicles used to trigger evaluation for potential safety measures. The TIA concluded that the intersection "shows marginal support for near-term mitigation," discussed possible safety improvements at the intersection, and proposed that intervenor pay a proportionate share of any future improvements. The BCC found that the intersection will function safely with the proposed development, but as discussed below required intervenor to pay a proportionate share of future improvements to the intersection.[6]

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[6] The county found:

> "Opponents also contend that the intersections are hazardous today. The Lancaster TIA expressly examined the intersections' crash history. In an analysis of a five-year crash study, the TIA found only eight (8) accidents over five (5) years and three (3) of those occurred during winter conditions. Based on the small number of crashes, the fact that three (3) of

Petitioners argue, however, that the TIA failed to account for the nearly 1,000 additional daily trips the proposed facility would send through the intersection, many of which will be large trucks, in evaluating the safety of the intersection and the need for safety improvements. Petitioners contend that, given the significant increase in traffic the proposed facility will send through the intersection, an analysis of the history of crashes at the intersection is insufficient to evaluate the impact of the proposed development with respect to safety.

Intervenor does not dispute that the TIA did not consider the safety impacts of the nearly 1,000 daily trips the facility will send through the intersection, but argues that the intersection currently presents only a "marginal" safety concern and that the county's findings that the facility will function safely with the proposed development is supported by substantial evidence. However, we do not see how the county can reach a sustainable conclusion to that effect when the TIA it relies upon does not take into account the additional traffic the proposed facility will send through the intersection. It may be that the additional traffic will not significantly decrease the safety of the intersection or significantly increase the crash rate. However, we are not cited to any evidence to that effect.

This subassignment of error is sustained.

C. Mitigation

The county imposed a condition requiring intervenor to execute a development agreement with the county outlining improvements and responsibilities to mitigate impacts of the proposed development on adjacent roads, including the Lamb/Walker/Westland Road intersection, and to pay for a proportionate share of the improvements. Petitioners argue that UCDC 152.017(C) requires actual improvements, and does not contemplate allowing an

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them occurred during winter conditions, the TIA concluded that all studied intersections are expected to operate at acceptable levels of service with the development. Based on the TIA, the Board finds that the intersections will function safely with the travel plaza in place." Record 11.

applicant to "mitigate impacts" by simply agreeing to pay a proportionate share of the cost of installing improvements, at some undetermined time in the future.

UCDC 152.017(C) provides in relevant part that "[t]ypes of mitigation may include such improvements as paving, curbing, bridge improvements, drainage, installation or *contribution to traffic signals*, construction of sidewalks, bikeways, accessways or paths." (Emphasis added.) *See* n 1. According to petitioners, the only type of mitigation that can be satisfied by contribution of money toward an improvement project is with respect to "traffic signals." Petitioners argue that all other types of mitigation authorized by UCDC 152.017(C) require the applicant to construct actual improvements.

Intervenor responds that UCDC 152.017(C) provides a broad and representative list of mitigation types, and is not intended to preclude funding contributions to transportation improvement projects other than traffic signals. We agree with intervenor. UCDC 152.017(C) provides that "[t]ypes of mitigation may include" the listed projects, and that language does not suggest that it is an exclusive list.

Petitioners also argue that the condition requiring a proportionate financial contribution to future improvement of Lamb/Walker/Westland Road intersection is inadequate, because the intersection is currently unsafe, and there is no guarantee that the contemplated improvements will be constructed within any foreseeable timeframe. Petitioners argue that under the draft development agreement, intervenor will pay only 7.6 percent of the cost of improving the intersection, leaving the county with 92.4 percent of the cost. According to petitioners, there is a significant funding deficit with respect to the county's transportation improvement projects, and it is reasonable to assume that the intersection will not be improved, if ever, until long after the proposed travel plaza is operational and contributing a significant amount of traffic to the intersection.

However, UCDC 152.017(C) does not explicitly require mitigation prior to development or within any particular timeframe, and in fact appears to contemplate

contributions toward future improvements, which suggests that the code provision does not impose an implicit concurrency requirement. Petitioners' arguments based on UCDC 152.017(C) do not provide a basis for reversal or remand. This subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioners challenge the county's findings regarding the water supply for the proposed travel plaza.

Intervenor obtained water rights to withdraw up to 50 gallons of groundwater per minute, with a total annual volume of approximately 13 million gallons. Intervenor's engineer testified that, based on his experience with 214 Flying J travel plazas around the country, maximum water use at the proposed facility would be less than 12 million gallons per year. Record 490. In addition, intervenor proposed to install two 40,000-gallon tanks on site to satisfy fire department requirements. The opponents submitted testimony from a water expert critiquing the engineer's estimates of water need, and a detailed analysis of two Flying J travel plazas that are similarly sized and located in a similar climate, indicating that maximum water use at those plazas to be nearly twice what is available from the applicant's water rights. Record 121-48.

The county chose to rely on intervenor's engineer, and found that intervenor has demonstrated that it is feasible to provide an adequate water supply for the proposed use. Perhaps in response to the opposing expert testimony, the county also imposed a condition requiring intervenor to provide documentation that an adequate water supply has been obtained. Record 17.

Petitioners argue that the county's choice between conflicting expert evidence is not reasonable, noting that the one-page letter from intervenor's expert includes no analysis, explanation or documentation to support the conclusion that the proposed facility would use

less than 12 million gallons per year. In contrast, petitioners note, their expert demonstrated in detail that two similar facilities use considerably more water than provided under the water right, which undermines the undocumented assertions of intervenor's expert that the water right is more than adequate to meet the projected needs of the proposed facility. Petitioners contend that the county failed to address the conflicting evidence, or explain why it chose to rely on intervenor's expert in light of the overwhelming contrary evidence. Further, with respect to the condition of approval, petitioners argue that the condition improperly defers a finding that the water source is adequate to a future proceeding that does not provide for public notice or opportunity to request a hearing. *Rhyne v. Multnomah County*, 23 OR LUBA 442, 447 (1992).

Intervenor responds, initially, that there is no applicable approval criterion that requires an "adequate water supply," and therefore any inadequacy in the findings or lack of evidentiary support on that point is not a basis for remanding the challenged decision. Petitioners argued below (and on appeal) that UCDC 152.615(K) is an applicable approval criterion. UCDC 152.615(K) is part of a list of "additional conditional use permit restrictions" that the county may choose to impose, in order to protect and preserve "water resources," among other things. The county agreed with intervenor that that UCDC 152.615(K) is not a "mandatory approval standard," but concluded, nonetheless, that the applicant must show that there is a sufficient water supply and adopted the findings of feasibility and the condition of approval that petitioners challenge.[7]

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[7] The BCC found, in relevant part:

> "Opponents contend that the applicant has failed to establish that it can provide an adequate water supply for the proposed travel plaza, in violation of UCDC 152.615(K). The Board notes that the code section cited by opponents does not create a mandatory approval standard regarding the availability of water. UCDC 152.615 provides for a list of 'additional conditional use permit restrictions' which the County '*may* impose * * * upon a finding that circumstances warrant such additional restrictions.' Under the subsection relied upon by opponents, the County 'may impose' such an additional restriction 'protecting and preserving

Petitioners argue that while UCDC 152.615(K) may not be a traditional "mandatory" approval criterion, it nonetheless authorizes the county to impose conditions of approval to protect water resources, and the county made findings and imposed conditions intended to ensure that there is an adequate water supply. Petitioners note that the subject property is located in a critical groundwater area, and the planning commission and the BCC were both concerned that the applicant demonstrate that a sufficient supply of water is available, to protect the groundwater resource and to ensure compliance with fire department requirements. Under these circumstances, petitioners argue, UCDC 152.615(K) effectively functions as an "approval standard." Petitioners cite *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993), for the proposition that approval standards include not only regulations the local government must apply, but also substantive code or comprehensive plan provisions that the local government applies and that have a meaningful impact on the decision.

We agree with petitioners that UCDC 152.615(K) functions like an approval standard, in the sense that it authorizes the county to impose additional conditions of approval if necessary to address development impacts on protected resources, and the county could, presumably, deny the application if it concluded that no feasible conditions could be crafted that the county deems are necessary to protect the identified resources. Intervenor is

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existing trees, vegetation, water resources, wildlife habitat, or other significant natural resources.' UCDC 152.615(K).

"Nevertheless, based on the Oregon Water Resources Department's Final Order approving a water right transfer to the applicant, dated March 25, 2008, and on evidence submitted by the applicant * * * the Board finds that there is substantial evidence in the record to support a finding that it is feasible for the applicant to obtain sufficient water for its proposed use. Specifically, evidence submitted indicates that the applicant can obtain up to 50 gallons per minute (gpm) of water and that the proposed development anticipated needing only thirty-five (35) gpm. In addition, the applicant will have two (2) 40,000-gallon tanks on-site providing 80,000 gallons of stored water, which the Hermiston Fire and Emergency Services District has stated is sufficient to meet the Fire District's on-site water requirements.

"The Board finds that the applicant has demonstrated that it has obtained a water right transfer and that it is feasible to provide an adequate water supply for the proposed use." Record 12 (emphasis in original).

correct, however, that UCDC 152.615(K) is only obliquely concerned, if at all, with whether the applicant has obtained water rights to a sufficient supply of water. Intervenor can withdraw only 13 million gallons per year under its existing water right. If that quantity turns out to be insufficient, intervenor will have no choice but to either use less water in its operation or acquire additional water rights. Under these circumstances, it seems less critical for the county to determine whether the proposed facility will use less than 13 million gallons per year, as intervenor's expert claims, or more than that amount, as petitioners' expert claims. To the extent it is necessary to resolve the evidentiary dispute on that point, we cannot say that the more detailed evidence petitioners submitted so undermines the testimony of intervenor's engineer that no reasonable decision maker could rely on that testimony, to conclude the water right is sufficient to supply the proposed development. Because the county reached that conclusion in this decision, and that conclusion is supported by findings and substantial evidence, the fact that the county imposed a condition of approval under UCDC 152.615(K) to ensure that the applicant has a sufficient water right is not a "deferral" of findings addressing that code provision.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners challenge the county's findings regarding the proposed septic wastewater systems. According to petitioners, intervenor's site plan proposed placing the wastewater system in the southwest corner of the site, but that proposal was undermined by a subsequent letter from the Department of Environmental Quality (DEQ), concluding that the proposed site is not suitable for an on-site wastewater treatment system. Record 545. Therefore, petitioners argue, the county's finding that the proposed wastewater system is feasible is not supported by substantial evidence.

Intervenor responds in part that following the DEQ letter it submitted a revised site plan proposing that the wastewater treatment system be located on the eastern portion of the

property, a location DEQ had suggested based on soils conditions. Record 280, 545. Intervenor argues that the county approved the revised site plan, and therefore petitioners' arguments based on the original site plan do not provide a basis for reversal or remand. We agree with intervenor.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

UCDC 152.304(A) provides that all activities in the LI zone "shall be conducted wholly within a building or shall be screened from view from adjacent public roads or surrounding properties in farm, residential or commercial zones, unless the entire activity is conducted more than 500 feet from said property or road." Intervenor proposed locating truck scales and accessory uses within the LI-zoned portion of the property.

The county found that all of the proposed activities are more than 500 feet from adjacent properties, and that compliance with UCDC 152.304(A) would be assured through a condition of approval requiring a "screening fence where appropriate in the LI and TC zoning districts." Record 6.

Petitioners argue that the finding of compliance with UCDC 152.304(A) is inadequate, because it fails to address whether proposed activities are conducted more than 500 feet from a public road. According to petitioners, the proposed truck scale area in the LI-zoned portion is within 500 feet of Lamb Road. In addition, petitioners object that the county in fact imposed no condition of approval requiring a "screening fence." The closest the county comes, petitioners argue, is subsequent condition C, which requires that "[o]utside storage areas shall be screened with a site-obscuring fence," which addresses a different approval criterion. Record 18.

Intervenor responds that the county's failure to address whether the proposed truck scale is 500 feet from Lamb Road is harmless error, because the county required intervenor to submit a final site plan that includes a proposed "perimeter fence," and the county

imposed a condition to that effect. Intervenor argues that the required perimeter fence will ensure that the truck scales are "screened from view" from the public road, for purposes of UCDC 152.304(A).

Neither the decision nor the conditions require that the perimeter fence be a screening or sight-obscuring fence, and we cannot agree with intervenor that the county's failure to address whether the truck scales are within 500 feet of Lamb Road and whether a condition requiring a "screening fence" or other method of screening the truck scales is required by UCDC 152.304(A) is mere harmless error. Remand is warranted for the county to address the issue and impose any necessary conditions of approval to satisfy UCDC 152.304(A).

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

During its deliberations, one commissioner moved to approve the application "with the understanding that the Board wanted [petitioners'] review and input on the language for the condition precedent under #12" in the draft findings submitted by intervenor. Record 37. The motion was seconded and approved.

Thereafter, petitioners submitted two e-mail messages to the county counsel with comments on the disputed condition precedent, which involves proposed mitigation to offset impacts on the Lamb/Walker/Westland Road intersection. Although county counsel discussed the content of the messages with the commissioners, he did not submit copies of the messages to the BCC for review, and those e-mail messages are not present in the record. Petitioners first learned that the BCC did not review the e-mail messages when resolving objections to the record in this appeal. *Western Land & Cattle v. Umatilla County*, __ Or LUBA __ (LUBA No. 2008-144, Order Clarifying Record, November 7, 2008), slip op 1.

Under the sixth assignment of error, petitioners argue that the county committed procedural error in failing to submit the e-mail messages to the BCC for review, as contemplated in the motion tentatively approving the application. Petitioners argue that the

county counsel's discussion with the BCC is not reflected in the record, and there is no way to determine if that discussion accurately conveyed the substance of petitioners' e-mails.

Intervenor observes that petitioners had no right under the county's code or any other authority to comment on the proposed findings and conditions. Further, intervenor argues that the motion that led to the BCC's tentative approval did not require that the BCC itself (as opposed to county counsel) review any e-mail messages petitioners submitted to the county regarding the terms of the disputed condition. Therefore, intervenor argues, the county committed no procedural error, much less error that prejudiced petitioners' substantial rights. ORS 197.835(9)(a)(B).

We agree with intervenor that petitioners have not established that the county committed procedural error. Petitioners had no right under the county's code to comment on the proposed findings or conditions, and any opportunity to comment that existed was a result of the BCC's expressed desires on that point. As intervenor notes, the motion that led to the tentative approval did not specify that the BCC wanted to review petitioners' comments. Arguably, the BCC's wishes in that regard were met by county counsel review of those comments, followed by discussion with the BCC. Even if the BCC initially wanted to directly review petitioners' comments, petitioners do not explain why the BCC cannot change its mind on that point, and adopt the proposed findings without considering petitioners' comments.

The sixth assignment of error is denied.

The county's decision is remanded.