Oregon
Theodore R. Kulongoski, Governor

Department of Land Conservation and Development
635 Capitol Street, Suite 150
Salem, OR 97301-2540
(503) 373-0050
Fax (503) 378-5518
www.lcd.state.or.us

NOTICE OF ADOPTED AMENDMENT

11/07/2011

TO: Subscribers to Notice of Adopted Plan
or Land Use Regulation Amendments

FROM: Plan Amendment Program Specialist

SUBJECT: Morrow County Plan Amendment
DLCD File Number 008-09 R

The Department of Land Conservation and Development (DLCD) received the attached notice of adoption. A Copy of the adopted plan amendment is available for review at the DLCD office in Salem and the local government office.

Appeal Procedures*

DLCD ACKNOWLEDGMENT or DEADLINE TO APPEAL: Thursday, November 17, 2011

This amendment was submitted to DLCD for review prior to adoption with less than the required 45-day notice. Pursuant to ORS 197.830(2)(b) only persons who participated in the local government proceedings leading to adoption of the amendment are eligible to appeal this decision to the Land Use Board of Appeals (LUBA).

If you wish to appeal, you must file a notice of intent to appeal with the Land Use Board of Appeals (LUBA) no later than 21 days from the date the decision was mailed to you by the local government. If you have questions, check with the local government to determine the appeal deadline. Copies of the notice of intent to appeal must be served upon the local government and others who received written notice of the final decision from the local government. The notice of intent to appeal must be served and filed in the form and manner prescribed by LUBA, (OAR Chapter 661, Division 10). Please call LUBA at 503-373-1265, if you have questions about appeal procedures.

*NOTE: The Acknowledgment or Appeal Deadline is based upon the date the decision was mailed by local government. A decision may have been mailed to you on a different date than it was mailed to DLCD. As a result, your appeal deadline may be earlier than the above date specified. NO LUBA Notification to the jurisdiction of an appeal by the deadline, this Plan Amendment is acknowledged.

Cc: Carla McLane, Morrow County
Jon Jinings, DLCD Community Services Specialist

Grant Young, DLCD Regional Representative

<paa> Y

FORM 2 DLCD Notice of Adoption

This Form 2 must be mailed to DLCD within **5-Working Days after the Final Ordinance is signed** by the public Official Designated by the jurisdiction and all other requirements of ORS 197.615 and OAR 660-018-000

☐ In person ☐ electronic ☐ mailed

DATE STAMP: DEPT OF OCT 31 2011 LAND CONSERVATION AND DEVELOPMENT

For Office Use Only

Jurisdiction: Morrow County

Local file number: AC-044-11; AZ-045-11 AZ(M)-046-11

Date of Adoption: October 26, 2011

Date Mailed: October 27, 2011

Was a Notice of Proposed Amendment (Form 1) mailed to DLCD? ☒ Yes ☐ No Date: July 21, 2011

☒ Comprehensive Plan Text Amendment ☒ Comprehensive Plan Map Amendment

☒ Land Use Regulation Amendment ☒ Zoning Map Amendment

☐ New Land Use Regulation ☐ Other:

Summarize the adopted amendment. Do not use technical terms. Do not write "See Attached".

On Remand from LUBA addressed three assignments of error. Approved application of a limited use overlay zone and addressed transportation issues.

Does the Adoption differ from proposal? Please select one

NO

Plan Map Changed from: Industrial to: Commercial

Zone Map Changed from: Space Age Industrial to: Tourist Commercial w/ limited use overlay

Location: 4N 24(22) TL 119 (a portion thereof) Acres Involved: 50±

Specify Density: Previous: N/A New: N/A

Applicable statewide planning goals:

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
☒	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☒	☐	☐	☐	☐	☐	☐	☐

Was an Exception Adopted? ☒ YES ☐ NO but only as part of affirming the previous decision

Did DLCD receive a Notice of Proposed Amendment...

45-days prior to first evidentiary hearing?	☒ Yes	☐ No
If no, do the statewide planning goals apply?	☐ Yes	☐ No
If no, did Emergency Circumstances require immediate adoption?	☐ Yes	☐ No

DLCD file No. 008-09 R (17989) [16817]

Please list all affected State or Federal Agencies, Local Governments or Special Districts:

ODOT, DLCD

Local Contact: Carla McLane Phone: (541) 922-4624 Extension:
Address: PO Box 40 Fax Number: 541-922-3274
City: Irrigon OR Zip: 97844 E-mail Address: cmclane@co.morrow.or.us

ADOPTION SUBMITTAL REQUIREMENTS

This Form 2 must be received by DLCD no later than 5 days after the ordinance has been signed by the public official designated by the jurisdiction to sign the approved ordinance(s)
per ORS 197.615 and OAR Chapter 660, Division 18

1. This Form 2 must be submitted by local jurisdictions only (not by applicant).
2. When submitting, please print this **Form 2** on light **green paper if available**.
3. Send this Form 2 and **One (1) Complete Paper Copy and One (1) Electronic Digital CD** (documents and maps) of the Adopted Amendment to the address in number 6:
4. **Electronic Submittals: Form 2 – Notice of Adoption will not be accepted via email or any electronic or digital format at this time.**
5. The Adopted Materials must include the final decision signed by the official designated by the jurisdiction. The Final Decision must include approved signed ordinance(s), finding(s), exhibit(s), and any map(s).
6. **DLCD Notice of Adoption must be submitted in One (1) Complete Paper Copy and One (1) Electronic Digital CD via United States Postal Service, Common Carrier or Hand Carried to the DLCD Salem Office and stamped with the incoming date stamp.** (for submittal instructions, also see # 5)] **MAIL** the **PAPER COPY and CD** of the Adopted Amendment to:

   ATTENTION: PLAN AMENDMENT SPECIALIST
   DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
   635 CAPITOL STREET NE, SUITE 150
   SALEM, OREGON 97301-2540

7. Submittal of this Notice of Adoption must include the signed ordinance(s), finding(s), exhibit(s) and any other supplementary information (see ORS 197.615).
8. Deadline to appeals to LUBA is calculated **twenty-one (21) days** from the receipt (postmark date) of adoption (see ORS 197.830 to 197.845).
9. In addition to sending the Form 2 - Notice of Adoption to DLCD, please notify persons who participated in the local hearing and requested notice of the final decision at the same time the adoption packet is mailed to DLCD (see ORS 197.615).
10. **Need More Copies?** You can now access these forms online at **http://www.lcd.state.or.us/**. You may also call the DLCD Office at (503) 373-0050; or Fax your request to: (503) 378-5518.

Updated December 22, 2009

MORROW COUNTY

PLANNING DEPARTMENT

P. O. Box 40 • Irrigon, Oregon 97844
(541) 922-4624 or (541) 676-9061 x 5503
FAX: (541) 922-3472

NOTICE OF DECISION

October 27, 2011

AC-044-11, AZ-045-11 and AZ(M)-046-11 on Remand
Decisions originally approved under local file numbers: AC-019-10, AC(M)-020-10, AZ-021-10, and AZ(M)-022-10
Adoption Amending the Morrow County Comprehensive Plan, Comprehensive Plan and Zoning Maps, Applying the Tourist Commercial Use Zone and Applying a Limited Use Overlay Zone

This notice is to inform you that on October 26, 2011, the Morrow County Court adopted Order Number OR-17-2011 affirming on remand from the Land Use Board of Appeals Conditional Use Permit CUP-N-274 to allow development of a Love's Travel Stops & Country Stores in the Airport Approach Zone and allow a truck tire repair facility. Additionally the Morrow County Court adopted Ordinance Number MC-4-2011 amending the Morrow County Comprehensive Plan, Comprehensive Plan and Zoning Map, applying the Tourist Commercial Use Zone and applying a Limited Use Overlay Zone.

The requirements for filing an appeal of the decision to the Land Use Board of Appeals (LUBA) are set forth in ORS 197.830 to 197.845. State law and associated administrative rules promulgated by LUBA describe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that a notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after notice of the decision sought to be reviewed becomes final. Notice of this decision was mailed on October 27, 2011. The deadline to appeal is November 17, 2011.

Cordially,

Carla McLane
Planning Director

Encl: County Order OR-17-2011
County Ordinance MC-4-2011

I certify that on October 27, 2011, I mailed a copy of this Notice of Decision by first class mail to all persons entitled to notice of this decision.

Diana Rea Thompson 10/27/11
Diana Thompson, Office Manager Date

IN THE COUNTY COURT OF THE STATE OF OREGON
FOR MORROW COUNTY

AN ORDER AFFIRMING ON REMAND FROM THE LAND USE BOARD OF APPEALS CONDITIONAL USE PERMIT CUP-N-274 TO ALLOW DEVELOPMENT OF LOVE'S TRAVEL STOPS AND COUNTRY STORES IN THE AIRPORT APPROACH ZONE AND ALLOW A TRUCK TIRE REPAIR FACILITY

COUNTY ORDER NUMBER

OR-17-2011

The matter coming before the Morrow County Court, sitting as the governing body for Morrow County, Oregon, during its regularly scheduled business meeting on Wednesday, October 26, 2011; and

WHEREAS, ORS 203.035 authorizes Morrow County to exercise authority within the county over matters of County concern; and

WHEREAS, Morrow County adopted a Comprehensive Land Use Plan which was acknowledged by the Land Conservation and Development Commission on January 15, 1986; and

WHEREAS, an application was filed by Love's Travel Stops & Country Stores to site a travel stop in and near the Airport Approach for the Boardman Airport and site a truck tire repair facility, both actions requiring a Conditional Use Permit, which was granted by the Morrow County Planning Commission and affirmed by the Morrow County Court during 2010. Those approvals were subsequently appealed to the Land Use Board of Appeals who provided a Final Opinion and Order dated November 19, 2010; and

WHEREAS, the applicant requested that Morrow County evaluate its application again based upon the Land Use Board of Appeals Final Opinion and Order and additional evidence; and

WHEREAS, a public hearing was scheduled for and held on September 7, 2011, at the Port of Morrow Riverfront Center in Boardman, Oregon, and the public hearing was continued to September 21, 2011, also at the Port of Morrow Riverfront Center in Boardman, Oregon, and the public hearing was further continued to October 12, 2011, at the Morrow County Annex Building CSEPP Safe Room in Irrigon, Oregon; and

WHEREAS, the Morrow County Court determined a hearings process to be followed, limiting testimony and evidence to the issues on remand from the Land Use Board of Appeals; and

WHEREAS, at the October 12, 2001, public hearing the Morrow County Court did deliberate to a final decision in this matter on remand.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Morrow County Court does approve the Conditional Use Permit CUP-N-274 as amended by the application on remand from Love's Travel Stops & Country Stores with the findings of fact and conclusions of law presented below.

Section 1. Decision and Title of Order:

The Morrow County Court approved the zone change, application of a limited use overlay and conditional use approval for the Love's application for a travel center on Tower Road convinced that Love's has met all of the criteria for the development of the travel center and it should be approved based on the findings and conclusions before us, including the conditions to construct a left turn lane and to submit for review of traffic issues before the speedway opens.

This Order shall be known, and may be cited, as the "2011 Love's Travel Stops & Country Stores Conditional Use Permit CUP-N-274 Affirmed on Remand Decision."

Section 2. Procedural Considerations.

During the course of the remand hearings, an opponent to this application, Devin Oil ("Devin") raised several procedural arguments, each of which the County has either acceded to or finds that there is no error. Each of those arguments will be addressed briefly before turning to the limited issues addressed in this remand.

Devin first argued that the County's notice failed to list the applicable criteria and that Devin was substantially prejudiced by that failure. However, as Devin's representative acknowledged at the September 7, 2011, hearing, Devin was aware of the staff report provided by the County on August 26, 2011, well before the hearing. That staff report, which consisted of a staff memorandum and attachments, included an attachment that specifically identified the "applicable criteria" and adequately informed Devin of the criteria that were going to be at issue in the remand proceeding. As LUBA has noted "as a practical matter the staff reports . . . gave more than adequate notice" of what a local government believes are the applicable criteria. *Kingsley v. City of Sutherlin,* 49 Or LUBA 242 (2005); ORS 197.835(4)(a) ("the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government.") In this case, Devin was the party who appealed the County's initial decision and was certainly aware of the basis for the remand. Finally, MCZO 9.050(E)(3) and ORS 197.763(3)(a) address the requirements of the notice to adjacent and nearby property owners. As Devin owns no land either adjacent to, or nearby the Property, Devin was not entitled to the notice and, thus could not have been prejudiced by any infirmity in the notice. Accordingly, the County Court concludes that Devin knew of (and participated in) the hearing, was aware of the applicable approval criteria and therefore, it did not suffer any prejudice.

Devin next argues that, "the Applicant's remand request contains a new zone change application" and, therefore, the County was required to follow all of the MCZO 8.020

requirements, including two Planning Commission hearings and a recommendation from the Planning Commission. However, as LUBA and the Oregon Supreme Court have concluded, a remand proceeding is part of the previous proceeding. *Wetherell v. Douglas County,* 56 Or LUBA 120 (2008); *Beck v. City of Tillamook*, 313 Or 148, 151, 831 P2d 678 (1992). As LUBA has concluded, "a local government [] enjoys considerable discretion in selecting the procedures it will follow on remand." *Siporen v. City of Medford,* 55 Or LUBA 29 (2007). The County Court finds that this review was part of the previous proceeding.

A local government may select the procedures on remand that it believes are most appropriate, provided those procedures do not improperly exclude any parties who are entitled to participate in those remand proceedings. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007). This Court finds that Devin was been given a full and fair opportunity to prepare and to present evidence relating to the limited use issues as well as to respond to arguments presented by the Applicant.

Devin also alleges that the County's "45-day Notice" to the Department of Land Conservation and Development demonstrates that the County staff considered the request for LU designation a "new application." The actual notice (contained in the County file) includes the LUBA decision, demonstrating that the request is a continuation of the original application process rather than a new application. The Court finds that the 45-day Notice does not control the type of proceeding before it. Rather, it is a continuation of this Court's previous review.

Given LUBA's consistent case law providing local governments significant discretion in the procedures used on remand, as well as the limited criteria and identity of issues with the proceedings that led to the remand of this decision, the Court rejects Devin's arguments regarding any requirements for additional hearings.

Finally, during the course of the hearing before the County Court on September 7, 2011, the applicant asked for, and the County granted, a seven day open record period for any party to respond to new written materials in accordance with ORS 197.763(6). Devin objected and requested the opportunity to rebut. Although it was not required, the County acceded to this demand and allowed rebuttal evidence and argument from Devin. Because Devin was provided an opportunity to submit rebuttal evidence and argument, there could be no error or prejudice from allowing the applicant to submit rebuttal evidence and argument.

Similarly, Devin objected to the County allowing the applicant to submit final written argument. The County does not believe any such waiver occurred; moreover, to the extent the record could be read to contain the applicant's waiver of the right to submit written final argument, the underlying procedure changed when Devin was allowed an additional opportunity to submit written evidence and argument and that re-opened the opportunity for written final argument. Finally, because the applicant always has the opportunity to submit final written argument, there is no prejudice to Devin.

Section 3. Supplemental Findings.

The first issue remanded by LUBA involves the interpretation of the term "carrying capacity" in MCZO 3.0290(H). The Court agrees with the applicant's interpretation and adopts

that interpretation found in the applicant's narrative, as supplemented and as further explained below.[1] The court also notes that Devin never raised any issue regarding this interpretation of this term in this remand proceeding.

MCZO 3.090(H) requires:

> "In consideration of an application for a proposed use in an A-A Zone, the [Planning] Commission shall take into account the impact of the proposed use on nearby residential and commercial uses, on resource carrying capacities, on the capacity of transportation and other public facilities and services, and on the appearance of the proposal.
>
> ***
>
> "3. Proposal is in compliance with the intent and provisions of this ordinance and more particularly this section."

MCZO 6.020(C), a conditional use standard relevant to authorizing a travel center in the AA zone, provides:

> "In judging whether or not a conditional use proposal shall be approved or denied, the Commission shall weigh the proposal's appropriateness and desirability, or the public convenience or necessity to be served against any adverse conditions that would result from authorizing the particular development at the location proposed and, to approve such use, shall find that the following criteria are either met or can be met by observance of conditions.
>
> ***
>
> "C. The proposal will not exceed the carrying capacities of natural resources or public facilities."

The MCZO defines the term "carrying capacity" but only as it relates to natural resources. It states:

> "Carrying Capacity. Level of use that can be accommodated and continues without irreversible impairment of natural resources productivity, the ecosystem, and the quality of air, land, and water resources.

The County Court, when considering this matter the first time, made no findings related to MCZO 3.090(H) and interpreted the term "carrying capacity," referenced in MCZO 6.020(C), as it related to the County's road system in the context of the above-quoted definition. The

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[1] To the extent there is a conflict between the applicant's narrative, as supplemented in their submissions and these supplemental findings, these supplemental findings control over any contrary provisions of the narrative statement or applicant submissions.

County found that the standard did not require a finding of no impacts but rather that a roadway can suffer significant impacts, "so long as the impacts do not prevent other residents and visitors to the County from enjoying those same public facilities." Therefore, the County found that violation of the "carrying capacity" standard required that the proposed development prevent the use of the road by another user.

In its decision, LUBA stated that interpreting "carrying capacity" as physically prohibiting another vehicle from using a county road was too broad and set too low a bar for the conditional use standard to have any meaning. LUBA noted a similarity between "carrying capacity" as used in MCZO 6.020(C) with the "capacity of transportation facilities" requirement contained in MCZO 3.090(H) and stated that the findings failed to "explain the difference, if any between" these two standards.

Other than the definition rejected by LUBA above, the MCZO does not contain any express guidance of the meaning of public road capacity in the traffic context. MCZO 3.090(J) requires the submittal of a Transportation Impact Analysis (TIA) that includes a "level of services assessment, impacts of the project, and, mitigation of the impacts" requirements. The TIA obligation in MCZO 3.090(J) appears to implement the transportation capacity analysis requirement contained in subsection (H). Therefore, additional capacity for new trip generation exists when the impacts from the proposed project do not exceed the LOS and v/c ratio standards that would trigger mitigation, or mitigation occurs to accommodate potential impacts that exceed the standards.

Turning to MCZO 6.020(C), "carrying capacity" is generally referenced in the biology or environmental context to mean the maximum number that an area can accommodate indefinitely given the limitations on food, water, and other necessities, i.e. the notion of sustainability of a resource. As applied to transportation, rather than applying this concept literally to include the number of cars that could physically be located on a roadway, carrying capacity is interpreted in the context of the Comprehensive Plan that uses standards such as "to minimize traffic hazards, improve traffic movement and roadway conditions efficiently," and providing "safe, convenient access to each parcel." These plan policies are implemented through both the conditional use standards, including MCZO 6.020(C), and the design standards for the AA zone, including MCZO 3.090(H). Therefore, the Court adopts the interpretation of the "carrying capacity" for county roads for both MCZO 6.020(C) and 3.090(H) to be the number of vehicles a road can safely and efficiently carry, as determined by the County's adopted standards. Safety and efficiency is established in the Transportation System Plan at a minimum threshold level of LOS C and ODOT's minimum of v/c ration of 0.75. This conclusion finds further support in the reference to the Transportation Research Board's Highway Capacity Manual and the Institute of Transportation Engineers Traffic Engineering Handbook.

Based on the foregoing, the Court interprets this provision to require the same TIA standards governing capacity for purposes of the AA zone to also apply to the conditional use criteria. This interpretation is supported by the idea that the Conditional Use standards of MCZO 6.020 do not set special impact mitigation standards for traffic and instead suggest that, so long as the overall capacity thresholds are not exceeded, even if the impacts are substantial, the conditional use standard is satisfied.

LUBA also remanded two other transportation related issues in the conditional use approval. Each of those issues is addressed below.

First, LUBA remanded the County's conclusion that a left turn lane was not warranted on Tower Road at the access road. USKH explained why it believes that a left turn lane was not warranted. However, as noted at the hearing on September 7, 2011, the applicant has indicated that it has no issue with providing a left turn lane and a condition has been adopted imposing that requirement.

Not satisfied with prevailing on this issue, Devin's traffic engineer changed his position on this issue, asserting that "without a detailed left turn lane warrant analysis, the traffic analysis should be considered incomplete." Devin's traffic engineer either has forgotten or chooses not to consider that, in fact, he completed an analysis of whether a left turn lane is warranted. On page 119 of the record in the conditional use review (LUBA No. 2010-044), Devin's traffic engineer performed an analysis of left turn lane warrants and concludes that "a left turn lane *will* be warranted on Tower Road at the site access intersection with the proposed development in place." (Emphasis in the original.) The Court notes this lack of consistency and finds that it undermines the credibility of Devin's traffic engineer in the Court's view. Finally, Devin's traffic engineer asserts that the applicant must do a "quantification of the necessary queue storage length as well as necessary taper and deceleration areas." The Court finds that the final engineering design of the left turn lane need not be determined in this manner. There is no argument or indication that the right-of-way is not long enough or wide enough to accommodate the necessary left turn lane,[2] and the applicant will be required to build the left turn lane consistent with County road standards, which will determine the final engineering requirements of the left turn lane.

Finally, Devin's traffic engineer again asserts that the speedway traffic is not adequately addressed. The Court finds that the Applicant has demonstrated that the proposed travel center will not exceed the carrying capacity of the County's transportation system.

In the first instance, the Court interprets MCZO 3.090(H) and 6.020(C) to not require an analysis of planned future uses that may never be built. Although the speedway has been approved, it has not been built and testimony in the record indicates that the developer does not have the funding to actually build the facility. Unlike the Transportation Planning Rule, the County's code does not require consideration to the planning horizon or that it necessarily address all planned uses. The provisions at issue in the County's zoning ordinance require an evaluation of the current capacity of the County's system and, because the speedway has not been built, this application need not consider impacts that do not yet exist and may never actually occur. Devin's traffic engineer cites to the TIA Guidelines to suggest that "planned changes in land use within the study area" must be addressed. However, those guidelines do not control the language of the MCZO, which does not provide any indication that an applicant must anticipate any and all development. Moreover, the speedway has already been required to mitigate its impacts; thus, it is not appropriate to require a new applicant to mitigate problems that are not of

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[2] In fact, given the earlier resolution of the dispute regarding the 150 foot wide strip along Tower Road, it is clear that the right of way is broad enough to accommodate the proposed turn lane.

that applicant's making. Thus, the Court interprets its code to not require analysis of approved, but unbuilt, developments when there is evidence that the approved development may not be built.

To the extent the speedway is required to be considered, the County still finds that the applicant has met its burden to show that the proposed travel center will not exceed the carrying capacity of the County's transportation system. First, the speedway overlay zone, MCZO 3.130, explicitly requires the speedway to construct several capacity enhancing improvements, including widening Tower Road to 5 lanes and widening all of the freeway ramps, as well as a new access interchange for the speedway alone. Moreover, the speedway overlay zone requires the speedway to ensure that "performance standards are not exceeded for any state or county facility." Thus, although, the applicant's engineer may not be able to analyze a traffic management plan that has not been developed, the Court finds that the results of the traffic management plan can be reasonably anticipated – that there will be capacity in the County's transportation system.

With that finding, we can now turn to the traffic generated by the applicant's travel center. The traffic generated by the travel center is only a fraction of the traffic generated by the speedway; moreover, the applicant's traffic engineer makes it clear that, on race days, the travel center simply will not generate a significant amount of traffic:

> "In our engineering judgment, traffic generated specifically by the Travel Stop will be significantly lower on race days because potential customers will not get off I-84 when they see the congestion generated by the speedway event." USKH letter dated September 12, 2011, to Carla McLane.

Devin's traffic engineer's main argument to the County was that, in fact, the travel center would likely be busy on race days:

> "Speedway events attract motorsport enthusiasts, many traveling long distances and likely driving trucks with trailers, recreational vehicles, and passenger vehicles. These are groups that are direct users of the goods and services offered by Love's Travel Stops." September 6, 2011, letter to E. Michael Connors.

This analysis may well be accurate; these motor sports enthusiasts are users of the applicant's travel center, but it does not address the applicant' engineer's argument that the users of the travel center *are not traffic generated by the applicant's travel center* – those trips are attributable to the speedway and do not have any role in determining whether the travel center significantly impacts the capacity of the transportation system. As USKH notes in its September 13, 2011, letter, the applicant's travel center:

> "Would still be quite busy catering to race fans, . . . *but the traffic from those customers would consist almost entirely of pass-by trips generated by the Speedway, not separate trips from I-84 to Love's generated by the travel center.*" (Emphasis added.)

The letter concludes that, based on the engineer's judgment there will be "no impact on the capacity of the County's transportation system" from this development. "

Devin's traffic engineer's response to the September 13, 2011, letter from USKH explaining the nature of the issue does two things; first, it says that "it would seem logical to conclude that the number of trips utilizing the travel center's access would increase during events," and, second, that, to the extent the travel center would attract pass-by trips, "it further adds to the potential need for a southbound left-turn lane on Tower Road at the site access."

Turning to the first issue, USKH provides its "engineering judgment" regarding the traffic generation at the site; Devin's traffic engineer relies only on what he believes "seems logical." To the extent this dispute must be resolved on traffic engineering; the only engineering judgment in the record is from the applicant's engineer. To the extent the Court relies on appeals to common-sense, the Court also agrees with the applicant's engineer –the development of the speedway may well increase utilization of the travel center on race days, but utilization is not the same as traffic generation. It makes sense to the Court that a travel center generating traffic from vehicles on the freeway would not attract the typical driver on a race day. A typical driver would see the congestion around the Tower Road interchange and bypass this facility for another facility down the road. Thus, this project's development would not affect the carrying capacity of the road, because the traffic generated by the facility would not add to the congestion on the County's transportation system – that traffic would already be on the County's road system. To the extent there is an issue with congestion, the speedway will be required to address that congestion through its traffic management plans. This Court has already found Devin's traffic engineer to not be credible. His failure to respond to the applicant's engineer's engineering judgment with any analysis or explanation of how, under engineering norms, it is wrong, further leads the Court to accept the applicant's engineer's testimony. In light of that, the Court has little choice but to accept the testimony of the applicant's engineer on this issue.

In short, this Court finds that the development of the speedway makes no difference on whether there is sufficient carrying capacity to support the applicant's development of a travel center. Under MCZO 6.020(C), to the extent there is an exceedance of the carrying capacity of the County's transportation system, it is not the result of this proposal – there is more than sufficient capacity to accommodate the travel center's traffic center. It is only the speedway's traffic that causes an exceedance. Moreover, that exceedance deals with itself because any exceedance of the carrying capacity results in two things – (1) adaptive changes to the speedway's traffic management plan to stay in compliance with its approval and, (2) congestion. The adaptive changes to the speedway's traffic management plan will result in continued improvement of the traffic situation at the site, meaning increased capacity. And, in addition, any residual congestion works to decrease the traffic generated by the travel center, as explained by the applicant's engineer and, therefore, the travel center will not result in an exceedance of the carrying capacity of the County's transportation system.

Under 3.090(H), the Court is required to consider the impact of the use on the capacity of the transportation system. As discussed above, the Court concludes that there is sufficient capacity in the system and that the applicant's proposal complies with both criteria.

Section 4. Effective Date

The Morrow County Court recognizes that this action is part of a larger permitting and development process and recognizes that time is of the essence. Moreover, this Order is necessary to meet the County's needs under Goal 8, and this development was previously appealed to the Oregon Land Use Board of Appeals, the Oregon Court of Appeals and to the Oregon Supreme Court, the County finds that, pursuant to the policy in ORS 197.805 that time is of the essence in reaching final decisions in matters involving land use. Therefore, the Court finds that this Order is necessary for the health, safety and welfare of the citizens of Morrow County and declares an emergency, and makes this Order effective immediately upon its adoption and signature by the Morrow County Court on October 26, 2011.

Date of Reading: October 26, 2011

DONE AND ADOPTED BY THE MORROW COUNTY COURT THIS 26th DAY OF OCTOBER, 2011.

ATTEST:

Bobbi Childers
Morrow County Clerk

APPROVE AS TO FORM:

Ryan Swinburnson
Morrow County Counsel

MORROW COUNTY COURT:

Terry K. Tallman
Judge

Ken Grieb
Commissioner

ABSENT
Leann Rea
Commissioner

IN THE COUNTY COURT OF THE STATE OF OREGON
FOR MORROW COUNTY

AN ORDINANCE ADOPTING A LIMITED USE OVERLAY AND AFFIRMING ON REMAND FROM THE LAND USE BOARD OF APPEALS APPROVALS TO ALLOW DEVELOPMENT OF LOVE'S TRAVEL STOPS AND COUNTRY STORES

COUNTY ORDINANCE NUMBER

MC 4 2011

The matter coming before the Morrow County Court, sitting as the governing body for Morrow County, Oregon, during its regularly scheduled business meeting on Wednesday, October 26, 2011; and

WHEREAS, ORS 203.035 authorizes Morrow County to exercise authority within the county over matters of County concern; and

WHEREAS, Morrow County adopted a Comprehensive Land Use Plan which was acknowledged by the Land Conservation and Development Commission on January 15, 1986; and

WHEREAS, an application was filed by Love's Travel Stops & Country Stores to site a travel stop at the Tower Road Interchange which required a Comprehensive Plan, Comprehensive Plan Map, and Zoning Map change which was recommended by the Morrow County Planning Commission and approved by the Morrow County Court during 2010. Those approvals were subsequently appealed to the Land Use Board of Appeals who provided a Final Opinion and Order dated November 19, 2010; and

WHEREAS, LUBA's decision on remand raised two issues: (1) the need for a Limited Use ("LU") Overlay; and (2) the transportation planning rule; and

WHEREAS, the applicant requested that Morrow County evaluate its application again based upon the Land Use Board of Appeals Final Opinion and Order and additional evidence; and

WHEREAS, a public hearing was scheduled for and held on September 7, 2011, at the Port of Morrow Riverfront Center in Boardman, Oregon, and the public hearing was continued to September 21, 2011, also at the Port of Morrow Riverfront Center in Boardman, Oregon, and the public hearing was further continued to October 12, 2011, at the Morrow County Annex Building CSEPP Safe Room in Irrigon, Oregon; and

WHEREAS, the Morrow County Court determined a hearings process to be followed, limiting testimony and evidence to the issues on remand from the Land Use Board of Appeals; and

WHEREAS, at the October 12, 2001, public hearing the Morrow County Court did deliberate to a final decision in this matter on remand.

NOW, THEREFORE, IT IS HEREBY ORDAINED that the Morrow County Court does approve the Comprehensive Plan, Comprehensive Plan Map and Zoning Map amendments as further amended by the application on remand from Love's Travel Stops & Country Stores with the findings of fact and conclusions of law presented below.

Section 1 Title of Ordinance.

This Ordinance shall be known, and may be cited, as the "2011 Decision on Remand Approving the Love's Comprehensive Plan and Zone Change and Applying a Limited Use Overlay."

Section 2 Decision.

The Morrow County Court readopts its previous decisions adopting a zone change, plan amendment and exception as well as approving a Limited Use overlay. Specifically, this decision approves a Limited Use overlay zone, set forth as Exhibit A to this Ordinance. This decision is based on the findings previously made by this Court in its 2010 decision, and as supplemented by the findings adopted in Exhibit C to this decision.

Section 3 Affected Documents.

1. The decision shall be incorporated into the Morrow County Comprehensive Plan by reference.

2. The Comprehensive Plan Map shall be changed from "Industrial" to "Commercial" with a "Limited Use" overlay based on the decision. (See Exhibit B-1)

3. The Zoning Map shall be changed from "Space Age Industrial" to "Tourist Commercial" with a "Limited Use" overlay based on this decision. (See Exhibit B-2)

Section 4 Effective Date.

The Morrow County Court recognizes that this action is part of a larger permitting and development process and recognizes that time is of the essence. Moreover, this ordinance is necessary to meet the County's needs under Goal 8, and this development was previously appealed to the Oregon Land Use Board of Appeals, the Oregon Court of Appeals and to the Oregon Supreme Court, the County finds that, pursuant to the policy in ORS 197.805 that time is of the essence in reaching final decisions in matters involving land use. Therefore, the Court finds that this ordinance is necessary for the health, safety and welfare of the citizens of Morrow

County and declares an emergency, and makes this ordinance effective immediately upon its adoption and signature by the Morrow County Court on October 26, 2011.

Date of First Reading: October 26, 2011
Date of Second Reading: October 26, 2011

DONE AND ADOPTED BY THE MORROW COUNTY COURT THIS 26th DAY OF OCTOBER, 2011

ATTEST:

Bobbi Childers
Morrow County Clerk

APPROVE AS TO FORM:

Ryan Swinburnson
Morrow County Counsel

MORROW COUNTY COURT:

Terry K. Tallman
Judge

Ken Grieb
Commissioner

ABSENT
Leann Rea
Commissioner

PDX_DOCS:471197.3

EXHIBIT A
LIMITED USE OVERLAY
FOR TRAVEL CENTER DEVELOPMENT

1. Purpose. The purpose of this Limited Use Overlay Zone is to set out the requirements for the development of a travel center as previously allowed by Ordinance No. MC-03-2010 and to limit the uses on the property that was re-zoned in a manner that complies with state law, the Morrow County Zoning Ordinance and the reasons exception that was adopted to allow the development of this facility.

2. Previous Approval. On May 5, 2010, the Morrow County Court adopted Ordinance No. MC-03-2010, which amended the Morrow County Comprehensive Plan, Morrow County Comprehensive Plan Map, and the Morrow County Zoning Map by applying the Tourist Commercial zone to the property identified in Exhibit B to this Ordinance. The intent of the adoption of this Limited Use overlay zone is to impose the same conditions as were imposed through Ordinance No. MC-03-2010 as well as any other necessary conditions, but to do so through the Limited Use Overlay Zone, rather than through the conditional zoning process that was done in MC-03-2010. Those limitations are as follows:

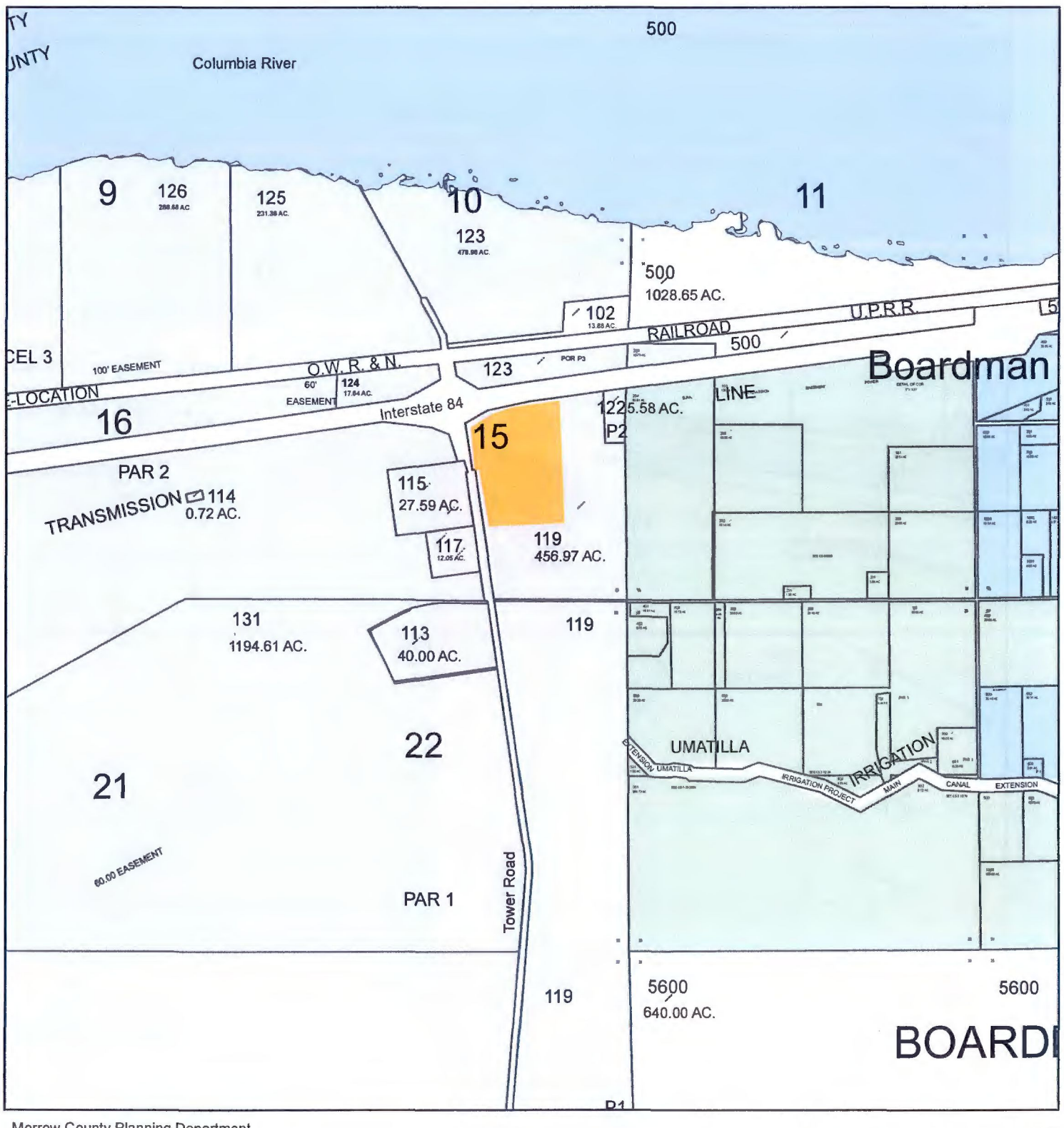
1. Construct improvements to meet ODOT standards for truck movements on freeway ramps.
2. Construct frontage improvements on Tower Road for the frontage of the proposed facility.
3. Dedicate land for and construct a new public street on the south property line as established by the partition.
4. Construct a point of access for in and out movements no closer than 1320 feet from the interchange; a right-out only access may be located closer to the interchange a distance no closer than 990 feet.
5. Access to the facility shall be fully resolved prior to occupancy of the facility.
6. This Limited Use overlay authorizes only the construction of a travel center or other use of similar density, configuration and type.

EXHIBIT B-1
Comprehensive Plan Map

Loves Remand
AC-044-11
AC(M)-045-11
AZ(M)-046-11

Commercial
Industrial
Industrial
Agricultural
Residential

PUB
Industrial
Agricultural

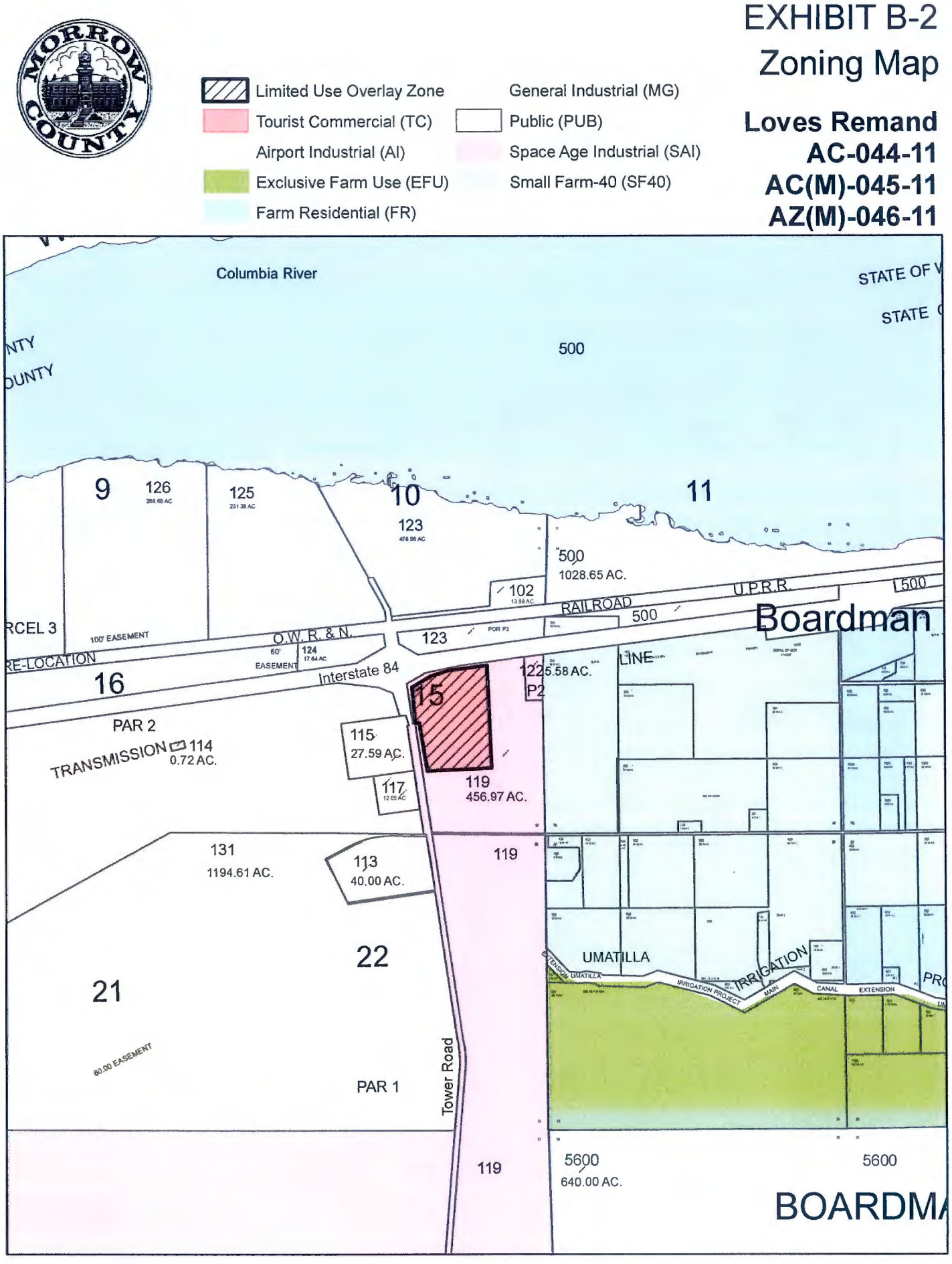


Morrow County Planning Department
October 2011
Map for Reference Purposes Only

0 0.1 0.2 0.4 0.6 Miles

EXHIBIT B-2
Zoning Map

Loves Remand
AC-044-11
AC(M)-045-11
AZ(M)-046-11



Morrow County Planning Department
October 2011
Map for Reference Purposes Only

0 0.1 0.2 0.4 0.6 Miles

EXHIBIT C
FINDINGS TO SUPPORT APPLICATION OF LIMITED USE OVERLAY ZONE AND RESOLVE THE REMANDED TRANSPORTATION ISSUE

1. Notice and Procedures in Continued Proceeding were Sufficient.

During the course of the remand hearings, an opponent to this application, Devin Oil ("Devin") raised several procedural arguments, each of which the County has either acceded to or finds that there is no error. Each of those arguments will be addressed briefly before turning to the limited issues addressed in this remand.

Devin first argued that the County's notice failed to list the applicable criteria and that Devin was substantially prejudiced by that failure. However, as Devin's representative acknowledged at the September 7, 2011, hearing, Devin was aware of the staff report provided by the County on August 26, 2011, well before the hearing. That staff report, which consisted of a staff memorandum and attachments, included an attachment that specifically identified the "applicable criteria" and adequately informed Devin of the criteria that were going to be at issue in the remand proceeding. As LUBA has noted "as a practical matter the staff reports . . . gave more than adequate notice" of what a local government believes are the applicable criteria. *Kingsley v. City of Sutherlin,* 49 Or LUBA 242 (2005); ORS 197.835(4)(a) ("the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government.") In this case, Devin was the party who appealed the County's initial decision and made the argument that the LU overlay zone must be applied and was certainly aware of the provisions of that zone as well as the transportation issue to be addressed on remand. Finally, MCZO 9.050(E)(3) and ORS 197.763(3)(a) address the requirements of the notice to adjacent and nearby property owners. As Devin owns no land either adjacent to, or nearby the Property, Devin was not entitled to the notice and, thus could not have been prejudiced by any infirmity in the notice. Accordingly, the County Court concludes that Devin knew of (and participated in) the hearing, was aware of the applicable approval criteria and therefore, it did not suffer any prejudice.

Devin next argues that, "the Applicant's remand request contains a new zone change application" and, therefore, the County was required to follow all of the MCZO 8.020 requirements, including two Planning Commission hearings and a recommendation from the Planning Commission. However, as LUBA and the Oregon Supreme Court have concluded, a remand proceeding is part of the previous proceeding. *Wetherell v. Douglas County,* 56 Or LUBA 120 (2008); *Beck v. City of Tillamook*, 313 Or 148, 151, 831 P2d 678 (1992). As LUBA has concluded, "a local government [] enjoys considerable discretion in selecting the procedures it will follow on remand." *Siporen v. City of Medford,* 55 Or LUBA 29 (2007). The County Court finds that this review was part of the previous proceeding.

A local government may select the procedures on remand that it believes are most appropriate, provided those procedures do not improperly exclude any parties who are entitled to participate in those remand proceedings. *Siporen v. City of Medford*. 55 Or LUBA 29 (2007). This Court finds that Devin was been given a full and fair opportunity to prepare and to present evidence relating to the limited use issues as well as to respond to arguments presented by the Applicant.

Devin also alleges that the County's "45-day Notice" to the Department of Land Conservation and Development demonstrates that the County staff considered the request for LU designation a "new application." The actual notice (contained in the County file) includes the LUBA decision, demonstrating that the request is a continuation of the original application process rather than a new application. The Court finds that the 45-day Notice does not control the type of proceeding before it. Rather, it is a continuation of this Court's previous review.

Although the Court acknowledges that there are additional criteria that come into play with the addition of the LU Overlay Zone, those criteria are limited and, in fact, are the result of Devin's own arguments. Given LUBA's consistent case law providing local governments significant discretion in the procedures used on remand, as well as the limited criteria and similarity of issues with the proceedings that led to the remand, the Court rejects Devin's arguments regarding any requirements for additional hearings.

Finally, during the course of the hearing before the County Court on September 7, 2011, the applicant asked for, and the County granted, a seven day open record period for any party to respond to new written materials in accordance with ORS 197.763(6). Devin objected and requested the opportunity to rebut. Although it was not required, the County acceded to this demand and allowed rebuttal evidence and argument from Devin. Because Devin was provided an opportunity to submit rebuttal evidence and argument, there could be no error or prejudice from allowing the applicant to submit rebuttal evidence and argument.

Similarly, Devin objected to the County allowing the applicant to submit final written argument. The County does not believe any such waiver occurred; moreover, to the extent the record could be read to contain the applicant's waiver of the right to submit written final argument, the underlying procedure changed when Devin was allowed an additional opportunity to submit written evidence and argument and that re-opened the opportunity for written final argument. Finally, because the applicant always has the opportunity to submit final written argument, there is no prejudice to Devin.

2. The Application More than Adequately Addressed the LU Overlay Zone Criteria.

Turning to the substantive issues, Devin first argues that the remand request failed to adequately address the applicable criteria in the LU Overlay Zone.[1] This Court believes that

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[1] MCZO 3.110(A) provides the following criteria for applying the LU Overlay Zone:

"The Limited Use Overlay Zone is to be applied through the plan amendment and rezoning process at the time the primary plan and zone designation is being changed. The ordinance adopting the overlay zone shall include findings showing that

"1. No other zoning district currently provided in the zoning ordinance can be applied consistent with the requirements of the 'reasons' exception statement because the zoning would allow uses beyond those justified by the exception;

"2 The proposed zone is the best suited to accommodate the desired uses(s); and

"3. It is required under the exception rule (OAR 660, Division 4) to limit the uses permitted in the proposed zone."

Devin's arguments demonstrate a fundamental misunderstanding of the criteria at issue. The first problem is that Devin assumes that the zone discussed in the criteria apply to the underlying zone – in this case the Tourist Commercial ("TC") zone. However, a careful reading of the provisions demonstrates that the criteria are not addressed to the underlying TC zone, but the overlay zone and we so interpret MCZO 3.110(A)(1), (2) and (3) and find that they have been met for the reasons explained in the applicant's narrative, as supplemented by the applicant and by these findings.[2]

> For example, the first criterion imposes the following requirement
>
> "The ordinance adopting the overlay zone shall include findings showing that . . . no other zoning district currently provided in the zoning ordinance can be applied consistent with the requirements of the 'reasons' exception statement because the zoning would allow uses beyond those justified by the exception."

A simple grammatical reading indicates that when the provision says "no other zoning district," it must be referring to the "the overlay zone," under the rule of the last antecedent. *See Tonquin Holdings, LLC v. Clackamas County,* ___ Or LUBA ___, (Aug. 2011, LUBA No. 2011-026). This Court finds that this interpretation makes sense because the County could adopt an exception that allowed multiple uses. For example, in adopting the exception to encourage space industrial uses in Morrow County, the County recognized that multiple uses would fit within the exception and, instead of using the LU overlay zone, the County adopted the Space Age Industrial ("SAI") zone, which was another "zoning district that could be applied consistent with the requirements of the 'reasons' exception." In other words, the SAI zone was an "exception" zone that did not require the limitation of any use. If an exception authorizes multiple uses, then there might well be a zoning district already in the code that could accommodate all of those uses, without allowing uses beyond those justified by the exception. The SAI zone is a perfect example of when a limited use overlay zone would not be appropriate to apply to property subject to an exception because another zoning district already provided for in the zoning ordinance is consistent with the requirements of the reasons exception, but would not allow uses beyond those justified by the exception.

In this case, the Court finds that there is no existing zoning district that could be applied consistent with the requirements of the reasons exception that wouldn't also allow uses beyond those justified by the exception. For example, Devin suggests three particular zones that it believes could be applied – the M-G, PI and RSC zones. However, each of those zones would allow uses beyond the uses justified by the exception.[3]

Devin provides an argument regarding the first two criteria, but does not address the third.

[2] To the extent there is a conflict between the applicant's narrative and these supplemental findings, these supplemental findings control over any contrary provisions of the narrative statement or applicant submissions.

[3] For example, the M-G District allows residences, cold storage plants, veterinary clinics and other uses that go beyond the uses justified by the exception. MCZO 3.070. The PI district allows chemical and primary metal industrial uses, manufacturing, refining, processing or assembling products and other uses that go beyond the uses justified by the exception. MCZO 3.073. Finally, the RSC District allows residences, churches, animal hospital and other uses that go beyond the uses justified by the exception. MCZO 3.030.

Devin also argues that "the M-G zone and PI zones would not require a reasons exception because like the existing Space Age Industrial ('SAI') zone on the site, they are industrial zones." That argument can be addressed quickly; those zones would not be consistent with the requirements of the 'reasons' exception, because the reasons exception is to satisfy the County's obligations under Goal 8 and the reasons statement explicitly requires the use of the TC base zone. Additionally, Devin fails to realize that the SAI industrial zoning was the result of a previous reasons exception to allow industrial uses on resource land. OAR 660-004-0018(4)(b) requires that "[w]hen a local government changes the types or intensities of uses or public facilities and services within an area approved as a 'Reasons' exception, a new 'Reasons' exception is required." Because the SAI zone was applied pursuant to an exception, changing from the SAI zone to either the M-G or the PI zone would change the types and intensities of uses and, therefore, require a new reasons exception. Similarly, Devin argues that "the RSC zone would not require a Goal 3 reasons exception in this case." Again, Devin is simply wrong. First, the RSC zone runs into the same issue identified above that it changes the uses and intensities and, thus, would require a new exception. Moreover, the RSC implements the "Unincorporated Communities" rule, found in OAR Division 660-022 and application of that zone must meet the requirements of that administrative rule, which requires that, to be an "unincorporated community, it must have been "identified in a county's acknowledged comprehensive plan as a 'rural community,' 'service center,' 'rural center,' 'resort community,' or similar term before this division was adopted (October 28, 1994), or [have been] listed in the Department of Land Conservation and Development's January 30, 1997 'Survey of Oregon's Unincorporated Communities.'" Because this area does not meet this requirement, it could not be considered for designation through the RSC zone.

Even if Devin were correct and the MCZO 3.110(A)(1) requires an evaluation of the underlying TC zone instead of the LU zone, the Court concludes that the applicant has carried its burden. As discussed further below, the exception was justified explicitly by the need for tourist commercial uses in the County. Accepting for purposes of argument that the other zones identified by Devin could allow for the development of the travel center proposed by the applicant, those zones also allow uses beyond those that would be justified by that exception and, therefore, could not comply with MCZO 3.110(A)(1).[4]

Accordingly, the County Court finds the LU Overlay zoning district is the only zoning district that can be applied consistent with the requirements of the 'reasons' exception statement, because any other zoning district in the MCZO would allow uses beyond those justified by the exception.

Similarly, the second criterion required under MCZO 3.110(A) provides as follows:

> "The ordinance adopting the overlay zone shall include findings showing that . . . the proposed zone is the best suited to accommodate the desired use."

Again, the grammatical construction of the criterion suggests that it is looking not at the underlying base zone as Devin argues, but at the overlay zone that is being applied and we so interpret this provision. As such, the LUBA opinion (as well as Devin's own arguments) make it

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[4] See footnote 3 for some of the uses that go beyond those justified by the exception.

clear that, not only is the LU overlay zone "best suited to accommodate the use," it is the *only* zone suited to accommodate the use. As noted elsewhere in these findings, there is no other zone that can accommodate the use and, at the same time, limit the uses consistently with the requirements of the reasons exception. The County attempted to avoid applying a LU overlay zone in its original decision by using conditional zoning, but that approach was rejected by LUBA. Because the LU zone is the *only* zone that can apply, this Court finds that it must also be "best suited" to accommodate the desired use.

Even if Devin is correct and the proper zone to analyze is the underlying base zone, i.e., the TC zone, the already affirmed 'reasons' exception requires the application of the TC zone. The reasons exception required an examination of the "public need" for the exception and that reasons statement explicitly relied on the need for tourist commercial uses:

> "The County's acknowledged Comprehensive Plan identifies the need for tourist commercial uses, such as the proposed travel center, in its Recreation Element. In the section entitled "needs and potentials," the County specifically identifies that ""tourist commercial activity is significant along I-84, particularly near Boardman." This statement identifies a need under Goal 8 to serve that tourist commercial activity through services such as the one proposed. This is confirmed by the policies adopted to implement the Recreation element of the County's Plan. Policy 7 specifically states that "Morrow County should seek to provide adequate tourist commercial land along freeways where it doesn't conflict with agriculture requirements." The proposed travel center fits squarely within the uses allowed by the Tourist Commercial zone and satisfies the need identified in the plan and is done in conformance with the policy adopted by the County."

In other words, the reasons exception itself required the application of the TC zone. The M-G, PI or RSC zones could not be applied consistent with the requirement of the reasons exception statement.

The TC zone is best suited to accommodate the desired use because the exception statement justified the development of the proposed travel center based specifically on the need for tourist commercial uses, such as the proposed travel center. After all, as Devin noted in its September 28, 2011, letter, the provision calls for a comparative analysis of what zone best suits the "desired use(s)." The desired use is a travel center. Because that use is not allowed in the SAI zone, a re-zoning is required and, therefore, a new exception. As noted in the exception statement, the County needs land to satisfy its obligations under Goal 8 and the TC zone allows the County to satisfy its obligations. No other zone is consistent with the reasons that justify the exception. Each of the other zones suggested by Devin are not justified under that exception. Thus, to the extent MCZO 3.110(A)(2) requires consideration of the base zone, the TC zone is "best suited" to accommodate the desired use because it is the only zone justified by the exception.

Devin argues that MCZO 3.110(A)(3), which requires findings showing that "[the overlay zone] is required under the exception rule (OAR 660, Division 4) to limit the uses permitted in the proposed zone" is not met because the overlay was imposed as a result of transportation inadequacies, not by the uses proposed. The Court concludes that Devin misses the point. As

discussed above, the exception, which is not at issue in this remand, was taken to implement Goal 8. It did not take an exception to Goal 12, which is implemented through the Transportation Planning Rule ("TPR;" OAR Division 660-012). OAR 660-004-0018(1) states that "an exception to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception." As discussed in the initial decision and at some length later in these findings, a re-zoning to TC, without the LU overlay, would violate the TPR, and thus Goal 12. Because there was no exception to Goal 12, the County is required by OAR 660-004-0018(4)(a) to "limit the uses, density, public facilities and services, and activities to only those that are justified in the exception." In other words, it is the exception rule that requires the County to limit the uses because of transportation issues and, therefore, this Court finds that MCZO 3.110(A)(3) is also satisfied.

Moreover, LUBA's decision explains that it is both ORS Division 660-004, as well as MCZO 3.110 that requires application of the LU overlay in cases where the primary zone does not already limit uses to the ones already proposed. Therefore, the Court finds that the overlay is required by the exception rule (OAR Division 660-004).

3. <u>There is no Requirement to Impose a Site Plan Requirement</u>.

Devin also argues that the County "must impose site plan requirements to ensure that the development proposed as part of the site plan application is consistent with the proposal relied on for purposes of the zone change." Devin fails to acknowledge that the potential for a site plan requirement is not mandatory; MCZO 3.110(C) only acknowledges that

> "it *may be necessary* to require County approval of the location of the buildings . . . This requirement *may be added* by specific reference in the adopting ordinance."

This Court interprets the term "may" to be discretionary and finds there is no requirement or obligation to impose a site plan requirement; it is an option for the County. Devin points to the context and use of the phrases "may be necessary" and "in order to ensure the compatibility of the permitted uses with the area" elsewhere in the provision. This Court is aware of that context and finds that the context cited by Devin does not change the court's conclusion that a site plan requirement is an option for the court, not a mandatory provision based on the use of the term "may," which the Court interprets as permissive and not mandatory.

Devin suggests that the Applicant "relies on the specific location of the buildings, access and parking, screening, stormwater, wastewater and other design features to demonstrate compliance with the relevant standards." This Court has reviewed the various documents in the record and is satisfied that a site plan process is not required to be imposed as part of this limited use overlay review. To the extent the applicant deviates from the requirements of this approval, the County has other mechanisms to enforce the requirements of the MCZO.

4. The Application More than Adequately Addresses the Transportation Issues.

Finally, Devin argued that the information provided by the applicant's traffic engineer does not fully respond to the traffic issues remanded by LUBA in the sixth assignment of error.[5] For the reasons explained below, the Court rejects that assertion.

Devin's traffic engineer looked to the Transportation Planning Rule ("TPR") and argued that the applicant had not adequately analyzed the need for additional improvements to accommodate the increase in traffic that comes from a limited re-zoning to TC. Devin's engineer states the issue as follows:

> "Specifically, USKH's previous analyses recognized that improvements would be needed if the site were to be developed under the existing SAI zoning designation. Since the trip generation and of the limited TC zoning development is still greater than the underlying SAI zone during both the peak hour *and* for a weekday, presumably improvements would be required for development under the limited TC zoning as well." September 6, 2011, memorandum from Lancaster Engineering to E. Michael Connors.

The Court has reviewed the various documents in the record and concludes that it finds the applicant's traffic engineer ("USKH") more credible on this issue and concludes that USKH has demonstrated that no improvements would be needed for the limited use of the applicant's proposed travel center.

In its initial submittal, dated December 28, 2009, USKH provided an estimate for traffic generated from the SAI zone of 2,904 vehicles per day, with peak hour trips of 564. Under that analysis, traffic improvements would be needed to accommodate the traffic from the worst case scenario under the SAI zone.

However, that initial analysis was submitted prior to the realization that the AA overlay zone applied to the property. When the AA overlay was considered, that overlay would not allow buildout of the worst case scenario under a non-limited SAI zone.[6] With the realization of

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[5] LUBA also addressed several traffic issues in the seventh assignment of error. However, the seventh assignment of error involved the conditional use review. Those issues are addressed in the order approving the conditional use application on remand.

[6] As USKH noted in its March 31, 2010, traffic letter:

> "For our estimate of full potential development under the current Space Age Industrial (SAI) zoning, we assumed a research and development park could be built on the site, as this is specifically allowed in an SAI district. A concern was raised that this site is actually in an Airport Approach overlay zone, which has restrictions above and beyond the SAI zone. Specifically, a research and development park is not a permitted use. The highest trip generating use in SAI under the Airport Approach overlay is manufacturing facility. This is conditionally allowed in an Airport Approach zone and would be allowed as development for space age technology. *These trip generation rates are about half of what we had previously forecast for the site. Full development under SAI zoning with the Airport Approach overlay would result in 1,420 trips per day and 305 trips during the PM peak hour.*" (Emphasis added.)

the limitations imposed by the AA overlay zone, the SAI traffic generation was recalculated to estimate a traffic generation of 1,420 vehicles per day and 305 in the peak hour. As stated by USKH in its September 13, 2011, letter to the Court:

> "Under our initial assumption (with no overlay restrictions), road improvements would be necessary to meet level of service (LOS) or volume to capacity (v/c) requirements. No improvements would be necessary to accommodate the reduced traffic volumes under the SAI zoning with the AA overlay."

In other words, USKH explained that Devin's traffic engineer's basic assumption is flawed – no improvements are required under the existing SAI, with an AA overlay, zoning.[7]

The Court also finds persuasive USKH's explanation regarding the difference in peak hour trips. As noted in their July 13, 2011, letter, the limited TC zone may generate significantly more daily trips than the SAI zone (with AA overlay), but it generates only 17 more "peak hour" trips because of the different characteristics of the uses. This explanation, shown graphically in Table 2 for the year 2025, adequately explains why no mitigation is needed, even if daily trips are significantly higher for the limited TC overlay.

The Court finds that USKH's explanation and analysis on this issue is reasonable and credible. USKH found that improvements would be needed in its original evaluation of the SAI zone without consideration of the AA overlay zone.[8] In that situation, the worst case scenario had a peak hour traffic generation of 564 trips; almost double the worst case scenario with the AA overlay zone. In truth, when the actual zoning is used - SAI, with an AA overlay - the worst case scenario peak hour trips are only 305, which is only 17 trips less than the traffic generation of the limited TC zone trip generation. As noted in Table 1 of USKH's July 13, 2011, traffic letter, both the SAI (with AA overlay), and the limited TC scenario result in all intersections meeting all LOS and v/c criteria at the end of the planning horizon and no additional mitigation is needed.

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[7] Devin asserts in its September 28, 2011, submittal that "for the first time in this process, the applicant now claims that no improvements are required under the SAI zoning with the AA overlay zone." That contention is belied by the applicant's March 31, 2010, traffic letter in which it explained why no improvements would be required under the SAI zoning with AA overlay. This failure to recognize this difference casts doubt on Devin's traffic engineer who, in his September 6, 2011, letter appears to assert that USKH's analysis indicated that improvements would be required under the existing SAI zoning designation. This misunderstanding, whether deliberate or inadvertent, provides further support for the Court's decision to find the applicant's traffic engineer more credible.

In his final September 28, 2011, submission, Devin's attorney argues that "the applicant is attempting to change its position from the initial proceeding in a manner that is not allowed on remand." First, the Court does not see any "change of position;" to the Court it appears that the applicant's engineer is clarifying its position that it held all along. LUBA expressly noted that "there may be substantial evidence in the record that would support a finding that Condition 6 by itself is sufficient, but if so, no party cites it." The applicant appears to be taking LUBA invitation. In any event, even if there were a change in position, Devin provides no authority for its position that no change in position can occur on remand.

[8] USKH also found that improvements would be required in a full TC buildout and no one has disagreed with that conclusion. Because no exception was taken to Goal 12, OAR 660-004-0018 required the exception to limit the uses to those that would not require further improvements.

In their final September 28, 2011, memorandum, Devin's traffic engineer asserts that

> "The operational analysis for the 564-trip scenario was never revised when the trip generation was reduced to 305 trips. There is no analysis conducted specifically for the reduced trip generation to support the finding that no improvements would be necessary for the reduced SAI scenario."

However, USKH's July 13, 2011, submission demonstrates that, in fact, the operational analysis was revised when the trip generation was reduced to 305 trips and that USKH found that no mitigation was required with a 305 trip scenario. USKH explained its methodology and identified the resultant LOS levels and v/c for each affected intersection. To the extent Devin's traffic engineer disagreed, he was free to submit an alternative analysis that the Court could consider; however, he never did so. The only analysis in the record of worst case scenario trip generation with the SAI with AA overlay zone demonstrates that none of the studied intersections would require mitigation.

In any event, the Court notes that this issue is something of a red herring; the critical issue is not trip generation under the worst case scenario under the SAI zoning with an AA overlay. The critical issue is whether or not the trip generation under the worst case scenario for the TC zoning with an LU overlay is enough to require mitigation. Devin never challenges USKH's analysis of that issue, so whatever the resolution of the dispute between USKH and Devin's traffic engineer about trip generation under the SAI zone might be, the Court is satisfied, based on the analysis of the applicant's traffic engineer, who the Court finds credible, that the development of a travel center on this property will not violate the TPR and there will be sufficient capacity in the County's transportation system under the TPR.

OW COUNTY PLANNING DEPT.
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IRRIGON, OR 97844

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  Salem, OR 97301-2540