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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JAN28'10 PM 2:20 LUBA

DENNIS SCOVEL,
Petitioner,

vs.

CITY OF ASTORIA,
Respondent.

LUBA No. 2009-116

FINAL OPINION
AND ORDER

Appeal from City of Astoria.

Andrew H. Stamp, Lake Oswego, filed the petition for review and argued on behalf of the petitioner.

No appearance by the City of Astoria.

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

REVERSED 01/28/2010

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

NATURE OF THE DECISION

Petitioner appeals a city decision that grants a one-year extension for a previously issued variance.

FACTS

Riverview Partners LLC (Riverview) sought a variance from the 20-foot front yard setback requirement in the city’s R-2 Medium Density Residential Zone to allow four single family dwellings to be constructed with a zero front yard setback. After local appeals were rejected, the variance was approved on July 2, 2007. Under Astoria Development Code (ADC) 9.100, permit decisions are “void after one year unless substantial construction or use pursuant thereto has taken place.”¹ Pursuant to a request by Riverview, the city granted a one-year extension to the July 2, 2007 variance decision in 2008, making the variance effective until July 2, 2009. At Riverview’s request, the city granted a second extension on July 28, 2009, making the variance effective until July 2, 2010. Petitioner appeals the second variance extension in this appeal.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner argues that ADC 9.100 “allows only one extension to be granted, and such extension may not be for a period exceeding one year.” Petition for Review 5. Petitioner argues the city erred by interpreting ADC 9.100 to allow multiple one-year extensions. ADC 9.100 provides as follows:

“TIME LIMIT ON A PERMIT.

“Authorization of a permit shall be void after one year unless substantial construction or use pursuant thereto has taken place. However, the Commission may, at its discretion, extend authorization for an additional period up to one year on request.”

¹ The complete text of ADC 9.100 is set out later in this opinion.

1 Under ADC 9.100, a permit comes with a one-year “authorization.” That
2 “authorization” is “void” at the end of one year unless one of two things happens. First, if
3 construction or use proceeds so that there is “substantial construction or use” under the
4 permit, then the authorization is not void at the end of one year and presumably the
5 authorization continues for as long as the construction or use continues. Second, if there is a
6 “request” by the permit holder, “the Commission” “at its discretion” may “extend
7 authorization for an additional period up to one year.”

8 The permit at issue in this appeal was approved on July 2, 2007. As we have already
9 explained, under ADC 9.100, the one-year authorization of that permit would have expired
10 on July 2, 2008 without substantial construction or a request for an extension. The planning
11 commission granted a one-year extension to July 2, 2009. The issue presented under the first
12 assignment of error is whether the city erroneously interpreted ADC 9.100 to permit it to
13 approve a second one-year extension, to July 2, 2010.

14 The city’s interpretation of ADC 9.100, under which it concluded that the city may
15 grant multiple one-year extensions is set out below:

16 “The Development Code does not prohibit the granting of multiple extensions.
17 * * *

18 “The Planning Commission and the City Council have continuously
19 interpreted the Code to mean that extension may be for a ‘period of one year’
20 but that each permit and/or extension is a separate issue. They have
21 determined that [the Code] does allow for a one year extension on the permit
22 from the previous expiration date whether that is the original permit or
23 approval of an extension. Each extension is processed as a land use decision
24 with notification to the public, public hearing, adopted Findings of Fact, and
25 right of appeal. Therefore each request is a separate decision.” Record 4-5.

26 There appear to be two city interpretations of ADC 9.100. First, the city appears to
27 adopt an implied interpretation of ADC 9.100 to permit multiple extensions, because the
28 ADC does not expressly prohibit multiple extensions. Second, the city interprets ADC 9.100

1 to allow the authorization granted by each extension decision, like the authorization granted
2 by the original permit decision, to be extended for one year.

3 The city has not appeared at LUBA to defend the above interpretations. Under ORS
4 197.829(1)(a), LUBA must affirm the city’s interpretations unless those interpretations are
5 “inconsistent with the express language of” ADC 9.100, viewed in context.² *Siporen v. City*
6 *of Medford*, 231 Or App 585, 598, 220 P3d 427, 434 (2009). “Whether a local government’s
7 interpretation of its ordinance is ‘inconsistent’ with the language of the ordinance depends on
8 whether the interpretation is plausible, given the interpretive principles that ordinarily apply
9 to the construction of ordinances under the rules of *PGE[v. Bureau of Labor and Industries,*
10 *317 Or 606, 859 P2d 1143 (1993)]*.” *Foland v. Jackson County*, 215 Or App 157, 164, 168
11 P3d 1238, *rev den* 343 Or 690, 174 P3d 1016 (2007). In determining whether the city’s
12 interpretation is inconsistent with the “express language” of ADC 9.100, we also apply the
13 statutory construction principles in ORS 174.010, which preclude interpretations that insert
14 or delete words.³ *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202, 210, 214
15 P3d 68 (2009).

² ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

³ ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, *not to insert what has been omitted, or to omit*

1 ADC 9.100 appears in Article 9 of the ADC, which is entitled “Administrative
2 Procedures.” There is nothing in text of the other sections of ADC Article 9 that either lends
3 support to or detracts from the city’s interpretation. We therefore turn directly to the text of
4 ADC 9.100.

5 Contrary to the first of the city’s interpretations, ADC 9.100 effectively does prohibit
6 multiple extensions, by making the original permit authorization void at the end of one year
7 unless the planning commission elects to “extend authorization for an additional period up to
8 one year on request.” The use of the indefinite article “an” suggests a single extension
9 period, as does the choice of the singular noun “period.” The effect of the city’s first
10 interpretation is to rewrite the last sentence of ADC 9.100 so that it reads as follows:

11 “Authorization of a permit shall be void after one year unless substantial
12 construction or use pursuant thereto has taken place. However, the
13 Commission may, at its discretion, extend authorization for [~~an~~] **one or more**
14 additional periods **of** up to one year on request.”

15 The city’s first interpretation has the effect of inserting language into ADC 9.100, and for that
16 reason cannot be sustained. *See* n 3.

17 The city’s second interpretation attempts to avoid the problem it has in interpreting
18 ADC 9.100 to allow multiple one-year extensions by attempting to interpret the last sentence
19 of ADC 9.100 to authorize one-year extension decisions that may in turn be extended for an
20 additional year. That interpretation also reads words into ADC 9.100 that are simply not
21 there. The effect of that interpretation is to rewrite the last sentence of ADC 9.100 to read as
22 follows:

23 “Authorization of a permit shall be void after one year unless substantial
24 construction or use pursuant thereto has taken place. However, the
25 Commission may, at its discretion, extend **that permit** authorization **or any**
26 **one-year extension of permit authorization** for an additional period up to
27 one year on request.”

what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.” (Emphasis added.)

1 ADC 9.100 presumably was adopted to limit the life of a permit decision that is not acted on.
2 The city's second interpretation of ADC 9.100 to grant the planning commission complete
3 discretion to grant an unlimited number of one-year extensions defeats that purpose; and, like
4 the city's first interpretation, requires that the city read language into ADC 9.100 that is not
5 there.

6 The city is free to amend the ADC to make ADC 9.100 authorize more than one
7 extension period or to allow extension decisions themselves to be extended.⁴ However, it
8 may not do so by interpreting the last sentence of ADC 9.100 to say something that it does
9 not say. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 218, 843 P2d
10 992 (1992).

11 The first assignment of error is sustained.

12 ADC 9.100 authorizes only one one-year extension period and that extension has
13 already been granted and has expired. The city's decision to grant a second extension
14 violates ADC 9.100 "and is prohibited as a matter of law." OAR 661-010-0071(1)(c).⁵
15 Accordingly, the city's decision is reversed.⁶

⁴ We have some question whether the city could grant the planning commission absolute discretion to deny extensions or grant as many as it wishes, without any standards to limit that discretion. However, we need not and do not address that question here.

⁵ OAR 661-010-0071(1)(c) provides that LUBA shall reverse a land use decision if that decision "violates a provision of applicable law and is prohibited as a matter of law."

⁶ Our resolution of the first assignment of error makes it unnecessary to address petitioner's remaining assignments of error.