BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

McDOUGAL FOUNDATION, INC.,
Intervenor-Respondent.

LUBA No. 2017-077

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Daniel Terrell and the Law Office of Bill Kloos, P.C.

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

HOLSTUN, Board Member, concurring.

AFFIRMED 02/26/2018

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners concluding that an applicant has a vested right to construct a girls' dormitory building at an existing school that is a nonconforming use.

FACTS

The challenged decision concludes that intervenor-respondent McDougal Foundation, Inc. (intervenor) has a vested right to construct the third building, a girls' dormitory, in a three-building school that was originally approved by the county in 2005. We set out below the somewhat complicated history of the development and operation of the school after the school was originally approved in 2005, and intervening changes in the law.

A. Development of the School

The subject property is a 20-acre parcel zoned for exclusive farm use (E-25), located approximately 2.6 miles from the City of Springfield urban growth boundary, and approximately one mile from the rural community of Jasper. In 2004, intervenor applied to the county for a Special Use permit to authorize construction of a private school on the parcel. Intervenor proposed three school buildings: a 20-room boys' dormitory, a school/administration building, and a 20-room girls' dormitory. Intervenor proposed to place all three buildings on an existing two-acre concrete pad located on the 20-acre parcel.

In May 2005, the county approved the application subject to conditions.[1] A building permit for the boys' dormitory was issued in September 2007, and the boy's dormitory was constructed in 2008. That year, the school opened with a small student body, using a portion of the boys' dormitory as a

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[1] The May 5, 2005 decision did not provide or authorize a schedule for development of each building, but included Condition of Approval 1:

> "Approval of PA04-6222 is valid for two years from the date of final approval. Lane County may grant one extension of up to 12 months if:
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> "a. An applicant makes a written request for an extension of the development approval period;
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> "b. The request is submitted to the county prior to the expiration of the development approval period;
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> "c. The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period;
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> "d. The county determines that the applicant was unable to begin or continue development during the approval period for reasons that the applicant was not responsible." *Landwatch Lane County v. Lane County*, 74 Or LUBA 299, 301 (2016) (*Landwatch I*).

The language of Condition 1 reflected the terms of OAR 660-033-0140(1) and (2), an administrative rule that the Land Conservation and Development Commission (LCDC) adopted in 1992 that governs the expiration of discretionary permits issued for development on agricultural lands. Under OAR 660-033-0140(1) and (2), a permit is void two years after the final decision, unless the development action is "initiated" within that period. The county may grant one 12-month extension, if four qualifications are met. Additional one-year extensions are allowed if the applicable criteria for the decision have not changed.

classroom. Many of the school's students were, and continue to be, international students.

In 2008, intervenor applied to the county for a building permit to place a modular classroom at the site of the classroom/administrative building approved on the site plan in 2005. In 2009, the modular classroom was installed. Due to an economic recession, intervenor reduced school operations. From 2010 to 2014 intervenor continued to operate the school with varying numbers of students, including many international students. During that time, intervenor continued to seek and obtain state agency and local approvals for septic and floodplain development consistent with developing the property with all three buildings approved in the 2005 permit. *See* n 11.

In December 2014, intervenor applied for a building permit to install a manufactured structure to serve as the girls' dormitory approved in the 2005 permit. Intervenor argued that it had a "vested right" under *Holmes v. Clackamas County*, 265 Or 193, 508 P2d 190 (1973), to complete the three-building development authorized in the 2005 permit, based on expenditures prior to 2009, when LCDC adopted OAR 660-033-0140. *See* n 1.

The county planning director approved installation of the manufactured dwelling under the 2005 permit. After the planning director's decision was appealed to the hearings officer, the hearings officer concluded that the 2005 permit had expired, and that intervenor had failed to provide evidence sufficient to establish a vested right to construct the girls' dormitory building.

Intervenor appealed that decision to the board of county commissioners, who concluded that the 2005 permit had not expired, and that it allowed the county to approve the manufactured dwelling permit for the girls' dormitory. The board of county commissioners did not consider intervenor's argument that it had achieved a vested right to complete the school development. The board of county commissioners' decision was appealed to LUBA in *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016) (*Landwatch I*).

B. Relevant Standards and Changes in the Law

At the time intervenor applied for its permit in 2004, former ORS 215.213(1)(a)(2003) and implementing county regulations allowed on EFU lands "[p]ublic or private schools, including all buildings essential to the operation of a school."[2] Subsequent to 2004, two changes occurred in the laws

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[2] Two categories of uses in the EFU zone are set out at ORS 215.213(1) and 215.283(1) (hereafter subsection (1) uses) and ORS 215.213(2) and 215.283(2) (hereafter subsection (2) uses). The Oregon Supreme Court has drawn a distinction between subsection (1) and subsection (2) uses. The court described subsection (1) uses as uses that are allowed by right, which may not be subject to additional local criteria. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). But subsection (2) uses may be subject to additional local criteria and are subject to additional statutory criteria as well. In a subsequent decision, the court further clarified that the prohibition against applying additional local government criteria to subsection (1) uses did not apply to LCDC. *Lane County v. LCDC*, 325 Or 569, 583, 942 P2d 278 (1997). LCDC is therefore free to enact administrative rules that regulate both subsection (1) and (2) uses more stringently than the EFU statutes, even if the rules "have the effect of prohibiting uses otherwise permissible under the applicable statue." *Id.*

that meant that intervenor's school was no longer a use permitted without restriction on land zoned EFU. First, in 2009, LCDC adopted amendments to OAR 660-033-0130(2) and Table 1 that provide that no enclosed structure or group of structures, including schools, with a design capacity greater than 100 persons is allowed on EFU land within three miles of an urban growth boundary (UGB). We refer to that rule as the design capacity rule.

Second, effective January 1, 2010, the legislature amended ORS 215.213, moving the authorization for a public or private school on EFU land from ORS 215.213(1)(a) to ORS 215.213(2)(y), and adding a limitation that the school must be "primarily for residents of the rural area in which the school is located." *See* n 2. It is undisputed that the school fails to comply with the ORS 215.283(2)(y) limitation that the school be primarily for residents of the surrounding rural area.

C. The Challenged Decision

The challenged decision is the board of county commissioners' decision on remand from *Landwatch I*. In *Landwatch I*, we agreed with petitioner that the board of county commissioners erred in concluding that intervenor could rely upon the 2005 permit to authorize continued development of the school, because, we concluded, the 2005 permit had expired. We remanded the decision for the board of county commissioners to address other theories for approving a building permit for the girls' dormitory that were advanced by intervenor, including intervenor's vested rights theory.

On remand, the county applied the provisions of the Lane County Code (LC) governing nonconforming uses and concluded that (1) intervenor has a vested right to complete the school as proposed and approved in 2005, and that (2) intervenor's vested right had not been discontinued. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In its first assignment of error, petitioner argues that the board of county commissioners improperly construed the applicable law in concluding that intervenor's vested right to complete and use the girls' dormitory was not lost through discontinuance. ORS 197.835(9)(a)(B). We briefly describe the doctrine of vested rights in Oregon and its relationship to statutes and local ordinances governing the verification, alteration, and abandonment or discontinuance of nonconforming uses.

A. Vested Rights are Inchoate Nonconforming Uses

The doctrine of vested rights in Oregon derives from *Clackamas Co. v. Holmes*, 265 Or 193, 508 P2d 190 (1973). At issue in *Holmes* was a proposed chicken processing plant. The applicants had acquired the property in order to site the plant, and expended substantial sums in preparing the site at a time when it was unzoned rural land. The county then enacted zoning regulations zoning the land in a manner that prohibited the proposed plant. The applicants tried twice, unsuccessfully, to change the zoning, using the land in the meantime for grazing. Four years after the county zoned the land, the applicants resumed construction of the proposed plant. The county brought

suit, seeking to enjoin construction. The applicants argued to the Oregon Supreme Court that they had a valid nonconforming use prior to application of the zoning ordinance. The court agreed:

> "The allowance of nonconforming uses applies not only to those actually in existence but also to uses which are in various stages of development when the zoning ordinance is enacted." 265 Or at 197.

The court then articulated what is now referred to as the *Holmes* test for determining whether a landowner had acquired a vested right to complete development of a nonconforming use.[3] The court then applied that test to determine that the applicants had a vested right to construct and use their processing plant.

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[3] In *Holmes*, the Oregon Supreme Court held:

> "The test of whether a landowner has developed his land to the extent that he has acquired a vested right to continue the development should not be based solely on the ratio of expenditures incurred to the total cost of the project. We believe the ratio test should be only one of the factors to be considered. Other factors which should be taken into consideration are the good faith of the landowner, whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements, the type of expenditures, i.e., whether the expenditures have any relation to the completed project or could apply to various other uses of the land, the kind of project, the location and ultimate cost. Also, the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects." 265 Or at 198-99 (citations omitted).

Finally, the court addressed and rejected an argument that the applicants had abandoned the proposed processing plant after the zoning amendment because a four year period without construction activity occurred:

> "Defendants, upon the advice of some member of the planning commission, applied for a zone change and did so unsuccessfully on two different occasions during that period. The only reason they placed cattle on the property was to be able to make some economical use of it. Otherwise, the land would have been completely idle." *Id.* at 201.

In *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207, 221 (2000), *aff'd* 176 Or App 213, 220-24, 31 P3d 458 (2001), we and the Court of Appeals relied on *Holmes* to characterize uses for which there are vested rights to develop or complete as "inchoate nonconforming uses." We held that because uses for which there are vested rights to develop or complete are a species of nonconforming use, the statute at ORS 215.130 that protects, regulates, and limits nonconforming uses, and local code provisions governing nonconforming uses, also apply to vested rights, including a determination of whether a vested right has been discontinued. 39 Or LUBA at 224.

ORS 215.130(5) protects nonconforming uses and provides that any "lawful use of any building, structure or land at the time of enactment or amendment of any zoning ordinance or regulation may be continued." ORS 215.130(7)(a) provides that a lawful nonconforming use under subsection (5) "may not be resumed after a period of interruption or abandonment * * *." ORS 215.130(10) in turn provides that:

"A local government may adopt standards and procedures to implement the provisions of [ORS 215.130]. The standards and procedures may include but are not limited to the following:

"* * * * *

"(b) Establishing criteria to determine when a use has been interrupted or abandoned under subsection (7) of this section[.]"

The language that is now codified at subsection (7)(a) was part of ORS 215.130 for many years and was in effect when the Oregon Supreme Court decided *Holmes*. The language that is now included in subsection (10) was first added to ORS 215.130 in 1997.

B. The County's Decision

The county has adopted provisions into the LC that govern nonconforming uses. LC 16.251(5) provides:

"Discontinuance of Nonconforming Use. When a non-conforming use of a structure or property is discontinued for a period in excess of one year, the structure or property shall not thereafter be used, except in conformance with the zone in which it is located."[4] (underlining in original).

The board of county commissioners interpreted LC 16.251(5) and the LC definition of "Use" at LC 16.090, and concluded that the "use" of the "property" for a school has been established and has not been discontinued for

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[4] LC 16.251(5) uses the word "discontinued," which for purposes of this opinion we understand to be synonymous with the word "interruption" in ORS 215.130(7)(a).

any period in excess of one year.[5] The board of county commissioners concluded that the inquiry under LC 16.251(5), in order to determine whether a nonconforming use of property has been discontinued, is not whether construction activity has occurred and is continuing, but whether the *use* that was approved has been established and then discontinued for more than a year. The board of county commissioners concluded that once a use of property begins pursuant to a valid approval, continued development of that use to the level of activity previously approved by the approval is allowed, provided the use that has been started does not discontinue.[6]

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[5] LC 16.090 defines "Use" as "[t]he purpose for which land, submerged or submersible lands, the water surface or a building is arranged, designed or intended, or for which either land or building is or may be occupied or maintained."

[6] The county found:

> "**No loss of nonconforming use due to break in construction activity**.
>
> "Having determined that the school had a vested right to complete is development, the question has been raised, by the Hearing Official and LandWatch Lane County, whether the nonconforming use was discontinued due to a break in the construction activity of more than a year.
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> "Lane Code 16.251(5) provides:
>
> "(5) Discontinuance of Nonconforming Use. When a non-conforming use of a structure or property is discontinued for a period in excess of one year, the structure or property shall

not thereafter be used, except in conformance with the zone in which it is located.

"The Lane Code defines 'Use' at LC []16.090:

"'Use. The purpose for which land, submerged or submersible lands, the water surface or a building is arranged, designed or *intended*, or for which either land or building is or may be occupied or maintained. [*emphasis added*]'

"The Hearing Official found that there is evidence in the record to support there being continued, uninterrupted use of the school through the years.* * * However, he also found there was a break in construction activity of more than a year. Based on the break in construction activity, the Hearing Official found that the 'Discontinuance of Nonconforming Use' language in LC [16.251(5)] was triggered. LandWatch Lane County pressed this same reading of the code in its argument to the County Board.

"The issue, therefore, is whether the Discontinuance of Nonconforming Use language in LC [16.251(5)] applies to the nonconforming use (which is a school), or to the construction of the nonconforming use, or to both. This is a question of code interpretation.

"The answer to the code interpretation question is found in the code definition of 'use' quoted above. This definition narrows the scope of the inquiry to the 'purpose' for which the land and buildings are arranged, designed or intended. This definition does not encompass construction activity.

"In this situation, the use is a school. The letter in the record from school Principal S. Henton to Planner R. Sebba (April 8, 2015) supports a finding that the school use has continued without a discontinuance of a year or more. * * * Therefore, the County Board concludes that the vested right to the nonconforming use has not been lost in whole or in part due to any break in the construction activity." Supplemental Record 10-11 (emphases in original).

C. Assignment of Error

Petitioner argues that the county improperly construed ORS 215.130(7) in interpreting LC 16.251(5) to conclude that intervenor's vested right to complete the development was not lost through discontinuance.[7] According to petitioner, the county's interpretation of LC 16.251(5) is "contrary to ORS 215.130(7)(a)." Petition for Review 23. Petitioner also argues that the county's decision is contrary to "case law regarding vested rights and nonconforming uses." Petition for Review 19-22.

1. Standard of Review

ORS 197.835(9)(a)(D) requires LUBA to reverse or remand a land use decision if the local government "improperly construed the applicable law." Petitioner and intervenor disagree about the standard of review that applies to LUBA's review of the county's interpretation of LC 16.251(5). According to petitioner, LC 16.251(5) "implements state law at ORS 215.130(7)(a), and, therefore, the deferential standard of review under *Siporen* [*v. City of Medford*, 349 Or 247, 262, 243 P2d 776 (2010)] does not apply." Petition for Review 15.

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[7] The county adopted findings that conclude that intervenor has satisfied the *Holmes* test. Record 7-10; *see* n 3. Petitioner does not challenge those findings or argue that intervenor did not acquire a vested right to complete the development of the nonconforming school use. We understand petitioner only to argue that intervenor's vested right to complete the development was lost through discontinuance of construction activity.

We have addressed in previous decisions the standard of review that applies to local code implementations of ORS 215.130(5), which provides in relevant part:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. * * * Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted."

In *Crosley v. Columbia County*, 65 Or LUBA 164, *aff'd* 251 Or App 653, 286 P3d 911 (2012), we reviewed our decision in *Fountain Village* and concluded that Multnomah County's interpretation of a provision of the Multnomah County Code that was adopted to implement the ORS 215.130(5) requirement that "a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to * * * maintain in good repair the existing structures associated with the use" was not entitled to any special deference under ORS 197.829(1). *Crosley*, 65 Or LUBA at 173-75. That was so because the Multnomah County code provision at issue was adopted to directly implement standards in ORS 215.130(5) that restrict the county's ability to condition the continuation or alteration of a nonconforming use. That conclusion, however, is not directly relevant to the present appeal, because the present appeal involves the county's implementation of ORS

215.130(7)(a). ORS 215.130(7)(a) is a different type of provision from ORS 215.130(5).

ORS 215.130(7)(a) provides that a lawful nonconforming use "may not be resumed after a period of interruption or abandonment[]." ORS 215.130(10), first enacted in 1997, in turn authorizes the county to adopt standards and procedures to implement ORS 215.130(7)(a), "includ[ing] *but not limited* to * * * (b) [e]stablishing criteria to determine when a use has been interrupted or abandoned under subsection (7)[.]" (Emphasis added.) Like ORS 215.130(5), ORS 215.130(7)(a) imposes statutory standards regarding "interruption or abandonment" of a nonconforming use. But unlike ORS 215.130(5), ORS 215.130(10)(b) expressly delegates to counties the authority to "[e]stablish[] criteria to determine when a use has been interrupted or abandoned under" ORS 215.130(7). Applying LC 16.251(5) is the county's method, pursuant to the authority in ORS 215.130(10)(b), of determining when and how a nonconforming use may be interrupted or abandoned. Accordingly, the adopted local criteria provide the applicable standards for determining whether a nonconforming use has been "interrupt[ed] or abandon[ed]" as those words are used ORS 215.130(7)(a).[8] As long as those adopted local standards are not

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[8] Petitioner does not argue that the county has interpreted the word "interruption" in a manner that is inconsistent with the plain, ordinary meaning of that word as used in ORS 215.130(7)(a). Petitioner also does not argue that the county has interpreted the word "use" in a manner that is inconsistent with the plain, ordinary meaning of that word as it is used in ORS 215.130(7)(a).

inconsistent with ORS 215.130(7)(a), then pursuant to ORS 197.829(1)(a), (b) and (c), we are required to affirm the governing body's interpretation of those standards unless that interpretation is inconsistent with the express language of the code provision, with the purpose for the code provision, or with the underlying policy that provides the basis for the code provision. In addition, we are not required to affirm the governing body's interpretation of its code if the interpretation is "contrary to a state statute, land use goal or rule that the * * * land use regulation implements."[9] ORS 197.829(1)(d).

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[9] In *Fountain Village*, we explained:

> "Even if the county were not required to do so by statute, the challenged decision takes the position that the county has authority under ORS 215.130(10) to establish criteria governing abandonment and interruption of nonconforming uses and apply those criteria to vested rights. To the extent that interpretation of MCC 11.15.8805 merely 'amplifies' ORS 215.130 and is not inconsistent with that statute or clearly wrong under its own terms, it is presumably entitled to deference under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). For the reasons discussed above, the county's interpretation of MCC 11.15.8805 is not inconsistent with ORS 215.130. Petitioner does not explain why application of MCC 11.15.8805 to a substantially constructed building is inconsistent with the express language, purpose or policy underlying that code provision. ORS 197.829(1)(a)-(c). Petitioner does argue that such an interpretation would be inconsistent with *Holmes*. However, as noted above, *Holmes* expressly contemplated application of the principle of abandonment to vested rights. We see nothing in *Holmes* that would prohibit the county from adopting criteria prescribing the circumstances under which vested rights, like any other nonconforming use, can be lost." 39 Or LUBA at 226 n 15.

2. Petitioner's Arguments

At the outset, we note that petitioner's arguments regarding the county's interpretation of LC 16.251(5) depend heavily on its characterization of the use that the county approved in 2005 as a "phased" development, with each building constituting a separate "phase." As we explained above, in 2005 the county approved intervenor's application for a school with three buildings and intervenor subsequently constructed the boys' dormitory and the classroom building between 2008 and 2009. In *Landwatch I*, we rejected petitioner's characterization of the 2005 approval as approving discrete "phases" because the 2005 permit did not authorize development in phases or refer to "phased" development. *Landwatch I*, 74 Or LUBA at 301 n 1.

In its first assignment of error, petitioner challenges the county's interpretation of LC 16.251(5) and the word "Use":

> "The findings appear to interpret the word 'use' to mean that the use of a completed phase of the school but not the entire school entitles the applicant to a vested right to continue to construct the school. The limited use of an earlier, completed phase of the school does not change that the subsequent phases are not yet complete and the third phase has not yet begun construction. The County's interpretation of the word 'use' is contrary to vested rights law because it is simply impossible to use something that has not yet been constructed or come into existence, and a vested right is the right to continue *construction* of an inchoate nonconforming use. The mere use of a portion of the school that was completed does not overcome the cessation of construction on the entire school for more than one year." Petition for Review 18-19 (emphasis in original).

According to petitioner, each "phase" of the school use must independently achieve nonconforming use status, and the nonconforming use status of the previous two "phases" of the school does not mean that intervenor has a vested right to build and use what petitioner characterizes as "phase III." Petition for Review 21. According to petitioner, because intervenor delayed more than one year before seeking a building permit to start construction of the girls' dormitory, the vested right to construct the girls' dormitory has been interrupted and therefore lost.

We reject petitioner's argument. First, we concluded in *Landwatch I* that the approved school was not a phased development at all. Petitioner's arguments that take the position that construction of "phase III" should be evaluated in isolation from the existing school use are simply inconsistent with that settled conclusion. *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992). Second, petitioner does not point to anything in the express language of LC 16.251(5) or the definition of "use" at LC 16.090 that supports its argument that those provisions require the county to base its determinations regarding interruption of use solely on construction activities and, because no construction of the girls' dormitory has occurred, the county must determine that the vested right to construct the girls' dormitory was discontinued. As intervenor points out, there is no reference in either LC 16.251(5) or LC 16.090 to "construction." The county's interpretation of its code provisions to mean the "use" that was approved is a unitary school, and its conclusion that because

the unitary school use has been in operation since 2008, the use has not been discontinued, is not inconsistent with the express language of LC 16.251(5) or LC 16.090.

Petitioner also argues that the county's interpretation of LC 16.251(5) is "contrary to ORS 215.130(7)(a)." ORS 197.829(1)(d). However, as we explain above, ORS 215.130(7)(a) contains only a general prohibition on resumption of an interrupted nonconforming use, and ORS 215.130(10)(b) leaves it to counties, if they choose, to adopt and apply the criteria and standards for determining whether a nonconforming use has been interrupted. The county's interpretation of its local code provision is not "contrary to" ORS 215.130(7)(a).

Petitioner also argues that the county's decision is contrary to "case law regarding vested rights[.]" Petition for Review 19-22. In particular, petitioner argues that the county's decision is contrary to *Fountain Village* and *Crosley*, and *WalMart v. City of Hood River*, 72 Or LUBA 1, *aff'd* 274 Or App 261, 363 P3d 522 (2015).[10] Intervenor responds, and we agree, that the cases cited by petitioner are not particularly apposite in reviewing the county's interpretation of its local code provision. As discussed above, LC 16.251(5) derives from the broad grant of authority given by the legislature to counties to adopt standards and criteria for determining, among other things, when a nonconforming use

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[10] ORS 215.130 does not apply to cities. *City of Mosier v. Hood River Sand, Gravel and Ready-Mix, Inc.*, 206 Or App 292, 306, 136 P3d 1160 (2006).

has been interrupted, and it provides the only applicable criteria for evaluating whether intervenor's use has been interrupted.

However, there are a few other factual circumstances that distinguish the present appeal from the circumstances that occurred in *Fountain Village*, *Crosley* and *WalMart*. In both *Fountain Village* and *Crosley*, the nonconforming residential use that the property owner sought to complete was never actually established, and in each case more than ten years had elapsed between any activity towards initially establishing the residential use and the time when the property owner sought to resume construction in order to initially establish that use. In *Fountain Village*, a cabin was partially constructed prior to a change in the zoning, and then abandoned without residential occupancy ever occurring for twelve years until a vested rights determination was sought. In *Crosley*, only the foundation of a residence and a septic system were constructed prior to a change in the zoning, and then no other progress towards establishing residential use of the property occurred for approximately 30 years. In both cases, no residential use was ever established, and it is easy to see why both local governments concluded that any use of the property that existed as an inchoate nonconforming use was discontinued over a lengthy period of inactivity.

The facts in *WalMart* bear some resemblance to the facts here because the use of the property as a WalMart store was indisputably established, but a lengthy period of fourteen years occurred between the time the store use

became nonconforming and the time that WalMart sought a vested rights determination to construct an expansion of the store. That period of inactivity in Walmart closely resembles the lengthy periods of inactivity in *Fountain Village* and *Crosley*. In *WalMart*, the city approved a site plan in 1991 that approved a 72,000 square foot WalMart store. The site plan included a notation indicating a 30,000 square foot "future expansion" area. *WalMart*, 72 Or LUBA at 5 n 2. The 72,000-square foot store was constructed and used for a number of years. The zoning of the property changed in 1997 and the store use became a nonconforming use. Fourteen years after the store use became nonconforming, WalMart sought to verify that it held a vested right to construct the 30,000 square foot "future expansion" labeled on the site plan. The city council applied the city's nonconforming use discontinuance provisions, and concluded that any vested right to construct the expansion was discontinued due to a lapse between 1997 and 2011 during which no steps were taken towards completion of the "future expansion" area.

In the present case, the school use that was approved in 2005 was established by 2008, and has been in continuous operation since 2010, when the use no longer conformed to all of the applicable statutes and rules governing schools in the EFU zone and within three miles of a UGB. The county concluded that, pursuant to LC 16.251(5) intervenor had used the school continuously without interruption until it sought to complete construction of the third building in the school as it was originally approved in

2005, with a separate girls' dormitory, and had not discontinued the school use merely by not constructing the girls' dormitory.[11] To the extent the cases cited by petitioner are relevant to the vested rights inquiry, we do not think the county's interpretation of its local code provisions regarding discontinuance is inconsistent with those cases, given the lengthy periods of inactivity in those cases.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In its second assignment of error, petitioner challenges findings adopted by the board of county commissioners that determined that petitioner did not appear at the hearing on remand, and argues that those findings are not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C).

Intervenor concedes that the findings are not correct and that evidence in the record supports a conclusion that petitioner appeared at the remand hearing. However, intervenor argues, and we agree, that petitioner has failed to establish that the county's factual error requires reversal or remand of the decision, because the erroneous finding led to no denial of rights to petitioner. *Wetherell v. Douglas County*, 51 Or LUBA 699, 728-29 (2006).

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[11] Evidence in the record supports that intervenor had taken steps between 2010 and 2014 to continue to seek and obtain state agency and local approvals for septic and floodplain development consistent with the full unitary school with all three buildings as approved in the 2005 permit. *Landwatch I*, 74 Or LUBA at 303.

The second assignment of error is denied.

The county's decision is affirmed.

Holstun, Board Member, concurring.

ORS 215.130(5) provides in part: "[t]he lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued." Under ORS 215.130(5), a use such as the school at issue in this appeal may be able to continue to operate under ORS 215.130(5), even though aspects of that school may have been rendered unlawful by changes in law after school construction has begun. However, ORS 215.130(7)(a) provides that a use that might otherwise be entitled to continue under ORS 215.130(5) may not continue "after a period of interruption or abandonment[.]" ORS 215.130(10) delegates to counties the authority to "adopt standards and procedures to implement" ORS 215.130. Those "standards and procedures may include but are not limited to * * * criteria to determine when a use has been interrupted or abandoned under" ORS 215.130(7). ORS 215.130(10)(b).

For me, the issue presented in the first assignment of error is whether the ORS 215.130(10) delegation of authority is broad enough to allow Lane County to implement the ORS 215.130(7)(a) interruption standard so that it applies to fully constructed nonconforming uses but does not apply to the incomplete part of an existing nonconforming use that has not yet been fully constructed.

Under the Oregon Supreme Court's decision in *Holmes*, a property owner may have a right to construct or complete construction of a use that has been rendered unlawful by a change in land use laws. 265 Or at 193. In *Fountain Village*, 176 Or App at 224, the Court of Appeals agreed with LUBA that Multnomah County acted within its delegated authority under ORS 215.130(10) in applying the ORS 215.130(7)(a) prohibition against resuming a nonconforming use after a period of interruption to both existing nonconforming uses and inchoate nonconforming uses (uses for which there is a vested right under *Holmes* to construct a use or complete construction of a partially constructed use). In the terminology of *Fountain Village*, the existing modular classroom and boys' dormitory are existing nonconforming uses. The proposed girls' dorm is an inchoate nonconforming use.

Under LC 16.251(5), the period of interruption that will result in the loss of a right to continue a nonconforming use is one year. What the board of commissioners' findings effectively do is interpret the LC 16.090 definition of "use" to make the ORS 215.130(7)(a) and LC 16.251(5) discontinuance standards apply *only* to the existing nonconforming use (the modular classroom and the boys' dormitory) and not apply to the inchoate nonconforming use (the girls' dormitory). We know from *Fountain Village* that the ORS 215.130(10) delegation of authority to adopt "standards and procedures to implement" ORS 215.130 is broad enough to allow Multnomah County to apply the ORS 215.130(7)(a) discontinuance standard and its local implementation of the

statutory discontinuance standard to inchoate nonconforming uses. 176 Or App at 220-24. The question presented in this appeal is whether the ORS 215.130(10) delegation of authority to adopt "standards and procedures to implement" ORS 215.130 is also broad enough to allow Lane County to adopt the opposite position, *i.e.,* to adopt "standards and procedures to implement" ORS 215.130 so that the LC 16.251(5) and ORS 215.130(7)(a) discontinuance standard does not apply to inchoate nonconforming uses. Although I agree the ORS 215.130(10) delegation is broad enough to allow Lane County to do so, it is an exceedingly close question for me whether that approach goes beyond merely *implementing* ORS 215.130(7)(a) and is therefore *inconsistent* with the statute. Moreover, interpreting ORS 215.130(10) to allow what Lane County has done here is not without potentially concerning consequences.

First, while the length of interruption of the school's construction as authorized was not lengthy in this case, under the county's interpretation and application of ORS 215.130(7)(a) and LC 16.215(7), there is no reason the interruption of construction, after the boys' dormitory and modular classroom were completed, might not have been many years, with potentially additional significant changes in the law. Secondly, in affirming LUBA's decision that affirmed Multnomah's County's opposite approach in *Fountain Village*, the Court of Appeals observed that not applying the discontinuance standard to inchoate nonconforming uses would "afford the 'inchoate' entitlement to a use greater protection from loss than the actual use would ultimately enjoy." 176

Or App at 224. Here, Lane County's approach treats inchoate nonconforming uses more favorably than existing nonconforming uses.

Finally, no challenge was raised in this appeal to the board of county commissioners' finding that intervenor qualifies for a vested right to construct the girls' dormitory. Petitioner's challenge was limited to whether that vested right was lost due to interruption. I question whether a property owner who allows a land use permit to construct a school with a girls' dormitory to expire according to its terms, as happened in this case, can nevertheless assert a vested right to construct the girls' dormitory that was authorized by the expired permit. One of the *Holmes* factors for acquiring a vested right is "whether or not [the land owner] had notice of any proposed zoning or amendatory zoning before starting his improvements." 265 Or at 198. Intervenor certainly had notice the permit to construct the girls' dormitory would expire two years after it was issued if it failed to initiate or continue construction of the girls' dormitory before that permit expired. Having failed to do so, I question whether intervenor may, in "good faith," assert a vested right to construct the girls' dormitory.[12] *Id.*

Notwithstanding the above concerns with Lane County's implementation of ORS 215.130, I believe Lane County's implementation of ORS 215.130 is within the authority it was delegated by ORS 215.130(10).

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[12] Good faith is another of the *Holmes* factors. 265 Or at 198.