BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOOD RIVER VALLEY RESIDENTS' COMMITTEE,
Petitioner,

vs.

HOOD RIVER COUNTY,
Respondent,

and

APOLLO LAND HOLDINGS, LLC,
Intervenor-Respondent.

LUBA No. 2018-081

FINAL OPINION
AND ORDER

Appeal from Hood River County.

Andrew Mulkey, Eugene, filed the petition for review and argued on behalf of petitioner.

Diana L. McDougle, Hood River, filed a response brief on behalf of respondent. With her on the brief was Annala Carey Baker Thompson, LLP.

Michael C. Robinson, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Schwabe, Williamson & Wyatt, P.C.

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

AFFIRMED 12/03/2018

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 approving an extension of a permit.

MOTION TO INTERVENE

Apollo Land Holdings, LLC (intervenor), the applicant below, moves to intervene on the side of the county. No party opposes the motion and it is granted.

FACTS

In 2014, the county approved an application from intervenor to construct an amphitheater on its 33-acre property and use the property for concerts and weddings. In March 2016, the county approved intervenor's application for a one-year extension of the permit, and in July 2017, intervenor applied for another one-year extension.[1]

The county planning department approved the extension, and petitioner appealed that decision to the planning commission. The planning commission denied petitioner's appeal and approved the application. Petitioner appealed the planning commission's decision to the board of county commissioners. The board of county commissioner denied the appeal and approved intervenor's application. This appeal followed.

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[1] No development authorized under the permit or any extensions has occurred on the property.

FIRST ASSIGNMENT OF ERROR

Hood River County Zoning Ordinance (HRCZO) 1.140.A provides the criteria for granting a permit extension.[2] As relevant here, HRCZO 1.140.A.4 provides that an extension may be granted if "[t]he approval criteria for the original decision found in a state goal, policy, statute or administrative rule, the Comprehensive Plan or this Ordinance have not changed." The board of county commissioners concluded that HRCZO 1.140.A.4 was met because that the approval criteria for the original 2014 decision approving the amphitheater have not changed.

In its first subassignment of error under the first assignment of error, petitioner argues that the board of county commissioners improperly construed HRCZO 1.140.A.4. ORS 197.835(9)(a)(D). According to petitioner, LUBA's decision in *Hood River Valley Residents Committee v. Hood River County*, 75 Or LUBA 452 (2017) (*HRVRC*) "changed the approval criteria that apply to the subject property." Petition for Review 7. A brief synopsis of our decision in *HRVRC* is necessary to understand petitioner's first and second subassignments of error.

In *HRVRC*, LUBA remanded a county decision to approve a 50-room hotel on the same 33-acre property that is the subject of the challenged extension

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[2] HRCZO 1.140 was amended in May, 2018. All citations in this opinion are to the version of HRCZO 1.140 that was in effect prior to May 2018.

decision. The property is zoned Industrial, and was initially zoned Industrial after the county adopted an exception to Statewide Planning Goal 4 (Forest Lands) for a larger 93-acre property that included an existing mill, the Dee Mill. In *HRVRC*, we concluded that in determining whether a 50-room hotel is an allowed use of the property under the Industrial zoning, the county was required to consider OAR 660-004-0018, a Land Conservation and Development Commission (LCDC) rule that limit future changes to the use of exception land without taking a new exception. We also concluded that when the county adopted the exception to Goal 4 for the Dee Mill, it did not also take an exception to Statewide Planning Goal 14 (Urbanization), and accordingly the county was required to consider whether the proposed hotel use was an urban use of rural lands that required an exception to Goal 14. Simply put, in its first assignment of error petitioner argues that LUBA's decision in *HRVRC* is a change in "the approval criteria for the original decision found in a state goal, policy, statute or administrative rule, the Comprehensive Plan or this Ordinance[.]"

In determining whether the local governing body "[i]mproperly construed the applicable law" within the meaning of ORS 197.835(9)(a)(D), we review a governing body's interpretations of ambiguous ordinance provisions under the deferential standard of review in ORS 197.829(1)(a) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) (LUBA is required to accept a local government's interpretation of its land development code that is plausible and not inconsistent with the express language of provisions at issue or purposes or

policies underpinning them). The board of county commissioners interpreted the phrase "approval criteria" in HRCZO 1.140.A.4 in context with the list of sources of "approval criteria" also in HRCZO 1.140.A.4 – "a state goal, policy, statute or administrative rule, the Comprehensive Plan or [the HRCZO]" — all of which are administratively enacted by a state agency, or codified by the legislature or the county governing body. The board of county commissioners interpreted the phrase "have not changed" as referring to an administrative or legislative amendment to the administratively enacted or codified law described in the same provision. The board of commissioners interpreted HRCZO 1.140.A.4 as not including decisional law that is not administratively enacted or codified.

Petitioner's argument is that our decision in *HRVRC* "changed" the approval criteria that should have applied to intervenor's original application for the amphitheater use and that now apply to the requested extension. Petitioner's arguments really amount to a disagreement with the board of county commissioners' interpretation, and an argument that petitioner has the better interpretation. However, the question is not whether petitioner's interpretation is a permissible or even a better interpretation of HRCZO 1.140.A.4. The question is whether the board of county commissioners' interpretation is "inconsistent with the express language" of the relevant code provisions, or whether that interpretation is not "plausible." *Siporen v. City of Medford*, 349 Or 247, 255-59. We cannot say that the board of county commissioners' understanding of the relevant terms in HRCZO 1.140.A.4 is implausible, and accordingly affirm it.

Further, we note, as intervenor notes, that to the extent it is relevant here, our decision in *HRVRC* merely "ascertain[ed] and declare[d]" what the laws at issue in *HRVRC* had provided from the time of their enactment. ORS 174.010 ("[i]n 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[.]"). Accordingly, it is difficult to see how that exercise could constitute a change in the law.

In its second subassignment of error, petitioner argues that the county was required to apply OAR 660-004-0018 to the extension application, and that OAR 660-004-0018 prohibits approval of the extension. The county and intervenor (respondents) respond that petitioner failed to raise an issue below that the extension application was required to demonstrate compliance with OAR 660-004-0018, and it is precluded from raising the issue for the first time on appeal to LUBA. ORS 197.835(3); ORS 197.763(1). Petitioner has not responded to respondents' waiver argument, and accordingly, LUBA may not consider it for the first time on appeal.

In addition, even if the issue was not waived, we agree with respondents' additional argument that, although phrased in terms of a challenge to the permit extension, the second subassignment of error is most clearly a collateral attack on the county's approval of the 2014 permit. Assignments of error that collaterally attack a decision other than the decision on appeal do not provide a basis for reversal or remand. *See Robson v. City of La Grande*, 40 Or LUBA 250, 254 (2001) (assignments of error directed at decisions other than the decision on

appeal do not provide a basis for reversal or remand); *Bauer v. City of Portland*, 38 Or LUBA 715, 721 (2000) (petitioner may not collaterally attack a tentative plan approval decision by appealing a final plat approval decision).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Although it is not entirely clear, in its second assignment of error we understand petitioner to argue that the county planning department committed a procedural error in processing intervenor's application without complying with some procedures in the HRCZO that petitioner does not identify. However, in the second assignment of error, petitioner acknowledges that the county "correctly accepted petitioner's local appeal and held a hearing on the matter." Petition for Review 14. Petitioner's second assignment of error does not articulate an assignment of error, and petitioner's arguments in the second assignment of error do not provide a basis for reversal or remand of the decision. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

The second assignment of error is denied.

The county's decision is affirmed.