BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GEORGE HEIDGERKEN and JACALYN HEIDGERKEN,	)	
Petitioners,	)	
	)	LUBA No. 98-090
vs.	)	
	)	FINAL OPINION
MARION COUNTY	)	AND ORDER
Respondent.	)	

Appeal from Marion County.

M. Chapin Milbank, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief was Gary E. Lockwood.

Jane Ellen Stonecipher, Assistant Marion County Counsel, filed the response brief and argued on behalf of the respondent. With her on the brief was Michael J. Hansen, Marion County Counsel.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

REMANDED 11/13/98

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county's determination that petitioners do not have a vested right to develop a campground permitted under a previously approved conditional use permit, and the county's denial of petitioners' request for an extension of time to implement that permit.

FACTS

On May 22, 1984, petitioners applied for a conditional use permit to develop a campground on a 67-acre parcel zoned Timber Conservation (TC). The proposed campground would include 50 tent campsites, 23 recreational vehicle sites, stables for horseback riding, picnic and play areas, a geothermal swimming pool, bath houses, a waterslide, a snack bar, showers, winter sled runs, nature trails, parking areas, and associated roads, piping, water storage, drainage, septic fields, offices, cabins, staff housing, and maintenance structures.

The county conducted a public hearing and granted the conditional use permit, effective December 21, 1984. Pursuant to Marion County Zoning Ordinance (MCZO) 122.090, the conditional use permit the county granted is

> "effective only when the exercise of the right granted thereunder shall be commenced within 6 months from the effective date of that [permit], unless a longer period is specified or thereafter allowed by the Planning Commission or Hearings Officer. In case such right has not been exercised, or extension obtained, the [permit] shall be void. A written request for an extension of time filed with the Director at least 30 days prior to the expiration of the application shall extend the running of the 6 month period until the Planning Commission or Hearings Officer has acted on said request."

On July 5, 1985, the county planner advised petitioners of a number of items that must be reviewed and approved by the county prior to development of the campground. On August 21, 1985, petitioners requested a one-year extension pursuant to MCZO 122.090, noting delays in obtaining an access easement. The county granted the extension December

20, 1985. Petitioners sought and obtained extensions in 1986, 1987, 1988 and 1989, during which time they resolved the access easement issue, and began the process of clearing land and making some improvements.

In 1990, petitioners sought another extension of time, but also informed the county that, in their opinion, substantial compliance with the conditions of the permit had been achieved and thus it was no longer necessary to seek additional extensions of time. A hearings officer found that the request for an extension was untimely and denied it. On appeal to the county board of commissioners, the commissioners found that petitioners had made a good faith effort to timely file the extension request, and reversed the hearings officer's decision, granting petitioners another one-year extension of time.

In 1991 petitioners requested that the county either grant an additional extension of time or determine that their right to develop under the permit had become "vested." The hearings officer granted the extension of time, noting that "[i]f the plans proposed are carried out this project will be substantially completed by November 1992. If not, an extension may be requested." Record 666.

In the following years, 1992, 1993, and 1994, petitioners again requested that the county either grant an additional extension of time or determine that their permit had vested. Following each request, the hearings officer granted an extension of time without addressing whether petitioners' right to develop under the permit had vested. In November 1995, petitioners again sought an extension or determination of vested rights. The hearings officer determined that the permit had not been implemented nor had the permit vested, but granted another one-year extension, noting that the petitioners were "getting closer to implementing" the permit but that petitioners were required to make a showing of substantial progress toward implementation over the coming year. Record 630. In November 1996, petitioners again requested a determination of vesting or an extension of time. The county again found that the use had not been implemented and had not vested, but granted another one-year

extension, again requiring that "substantial progress" be made toward implementation. Record 624.

In November 1997, petitioners requested that the county make a determination regarding whether the permit had vested. The hearings officer construed the request as both a request for vesting and for an extension of time, and required petitioners to file an Administrative Review Request to determine the status of any rights resulting from the permit. A hearing was conducted February 11, 1998, at which evidence was submitted regarding the extent of progress made on the subject property and the cost of improvements. On April 15, 1998, the hearings officer issued an order determining that petitioners had not exercised the right granted under the 1984 conditional use permit, and that the permit was void unless the petitioners' use had vested or the county granted another extension. The hearings officer determined that the doctrine of vested rights did not apply in the context presented by the disputed conditional use permit and that, even if it did, petitioners had not established under that doctrine sufficient investment in the project to vest their rights under the conditional use permit. The hearings officer also denied the request for an additional extension, finding that in over 14 years petitioners had not demonstrated any ability to commence or complete the project, and that further extensions of time would be futile. Petitioners appealed the hearings officer's decision to the county board of commissioners, which affirmed it, adopting that decision's findings of fact and conclusions of law as its own.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. First and Third Subassignments of Error

Petitioners argue that the county erred (1) in determining that the doctrine of vested rights was inapplicable in this case, and (2) in its alternative determination that, even if that doctrine does apply, petitioners did not demonstrate sufficient progress and investment toward completion to vest their right to develop under the conditional use permit.

Petitioners contend that by their substantial performance they acquired a "vested right" to develop the proposed campground under the rule announced in Clackamas Co. v. Holmes, 265 Or 193, 508 P2d 190 (1973). The court in Holmes held that where a property owner commences construction of a lawful use and that construction reaches a certain stage of good faith investment, the owner acquires a vested right to continue development of the use, notwithstanding subsequent adoption of zoning amendments that restrict or prohibit the development. The court further held that whether a vested right exists to develop a lawfully commenced but uncompleted use depends on

> "the ratio of expenditures incurred to the total cost of the project. * * * 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).

Petitioners acknowledge that neither Holmes nor its progeny have applied the vested rights doctrine in the context presented in this appeal. Nonetheless, petitioners argue that the vested rights doctrine should apply in the present context, where a property owner incurs substantial expenditures in reliance on a lawfully obtained conditional use permit, which the county then refuses to extend.

The county responds that Holmes is inapposite. The county argues that the Holmes factors focus on reasonable investment made in reliance on a particular zoning scheme, and whether, when that zoning scheme changes, the investment has reached such a substantial stage of completion that the right to continue development is deemed vested notwithstanding the subsequent zoning change. The county contends that that rationale does not apply to conditional use permits in general or the present case in particular. Here, the county argues, there was no change in the law; all expenditures were made on the basis of the conditional

use permit, which was subject from the beginning to the requirement, at MCZO 122.090, that exercise of the right granted under the permit must be commenced within six months of the permit's effective date, at the risk that the permit will expire.

We agree with the county that Holmes is distinguishable and that the vested rights doctrine has no application in the present context. In Holmes, when the property owner began development of the disputed use, the use was allowed under county law and, importantly, there was no obligation that the use be constructed or "commenced" before a specified date.

The circumstances in this appeal are quite different. The use at issue in this appeal was specifically authorized by the 1984 conditional use permit. However, under MCZO 122.090, the same conditional use permit that specifically authorized the use also subjected construction of that use to an additional condition that the use be "commenced" within six months or any extension of that time limit the county might grant. Petitioners have known from the beginning that their right to construct the disputed use was subject to their obligation to "commence" the use on or before the stated deadlines. Whether petitioners have right to complete construction of the disputed use is thus determined by MCZO 122.090 and the 1984 conditional use permit, not the general vested rights principles discussed in Holmes.[1]

The first and third subassignments of error are denied.

B. Second subassignment of error

Petitioners challenge the county's interpretation of MCZO 122.090, under which the county found that petitioners' conditional use permit had never become effective.

The county found that under MCZO 122.090, petitioners had one year to commence

[1]Resolution of these subassignments of error on this basis makes it unnecessary to consider the parties' contentions regarding whether petitioners' expenditures and the other circumstances of the case satisfy the vested rights factors set out in Holmes.

the exercise of the right granted under the conditional use permit. The county interpreted MCZO 122.090 as follows:

> "For a conditional use to be fully exercised, a use must be in place and operational. Here, to fully exercise the conditional use, the campground must be in place and occupancy approved. MCZO 122.090 contemplates something less than full exercise of the use for the conditional use permit to be effective. Since commencement of the exercise of the right granted under the permit is not defined in the MCZO or in [the conditional use permit], the term must be interpreted. In a previous case, ADM 96-78, the hearings officer decided that conditions precedent to establishment must be fulfilled, but advisory conditions and conditions pertaining to the maintenance of the conditional use after it is in place need not be fulfilled for exercise of the right to be commenced; that inactivity is the same as discontinuance and cessation of a use, and will void a conditional use permit under MCZO 122.100; and that an applicant must obtain building and construction permits, and keep them active to maintain an effective conditional use permit. That same interpretation is valid as applied to this case.
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> "Here, several conditions precedent were attached to the conditional use permit, and some have been fulfilled, but others have not. There is no supporting documentation showing that necessary building permits have been obtained or maintained for the project. There is no supporting documentation showing that any required Department of Environmental Quality (DEQ) or Marion County septic permits have been obtained, or that any of the other required permits for water, access, etc., have been obtained or maintained. Applicants have had 14 years to obtain the necessary permits. Of the permitted recreational structures, no swimming pool, water slide, support building, maintenance building, completed staff cabins, horse stable, water or septic systems, utility facilities for power and heat, completed parking areas, roads, campsites or RV pads are in place. The exercise of the conditional use has not commenced. The conditional use permit is void unless vesting or an extension is granted." Record 8-9.

Petitioners argue that the county misinterprets MCZO 122.090 in several ways. First, petitioners argue that the "right" granted under the conditional use permit is not, as the county found, to operate a campground. According to petitioners, the right granted under the conditional use permit was to "develop" a campground. Thus, according to petitioners, once petitioners had begun developing the project, they had exercised the right granted under the permit and that right had become effective or "vested." Second, petitioners argue that nothing in MCZO 122.090 suggests that a right granted under a permit is commenced and

becomes effective only when conditions precedent are complied with and any required permits are obtained and actively maintained. We understand petitioners to contend that the county's interpretation of MCZO 122.090 is inconsistent with the text of that provision,

because it essentially adds terms to MCZO 122.090 rather than interpreting the terms contained within.

The county board of commissioners adopted the interpretations of the hearings officer as its own. Thus, the county's interpretation of MCZO 122.090 must be affirmed unless it is "clearly wrong" or inconsistent with the text, purpose or policy of the county's plan or land use regulations. ORS 197.829(1); Gage v. City of Portland; 319 Or 308, 317, 877 P2d 1187 (1994); Clark v. Jackson County, 313 Or 508, 515, 836 P2d 710 (1992).

The county's interpretation of MCZO 122.090 falls within the range of discretion afforded it by ORS 197.829(1) and Clark. Based on its previous decisions, the county interpreted MCZO 122.090 to provide that the exercise of a right granted under a permit is "commenced" and thus becomes effective, i.e. "vested," when all conditions precedent have been fulfilled, and the applicant has obtained and maintains all required building and construction permits. That interpretation is not contrary to the text of MCZO 122.090 or any other provision brought to our attention, nor have petitioners established that the county's interpretation is outside the range of plausible constructions of MCZO 122.090 and thus "clearly wrong." The county could plausibly have construed MCZO 122.090 to require that the exercise of the use granted in the permit, i.e. an operational campground, commence within six months of the permit approval. The county might also have construed MCZO 122.090 as petitioners urged, as requiring only that the applicant commence some construction in order to effect the conditional use granted. Either view is supported by the text of MCZO 122.090. The county's interpretation essentially chooses an intermediate view, requiring the applicant to substantially complete certain steps necessary to "commence" the right the conditional use permit granted. We do not agree with petitioners that the county's interpretation "adds" words to MCZO 122.090 or otherwise amends it in the guise of interpretation.

The second subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners contend the county erred in several respects in denying their request for an additional extension of time pursuant to MCZO 122.090. Petitioners argue that (1) the county erred in reviewing the prior extensions to determine the merits of petitioners' request for an additional extension; (2) by virtue of reliance on those prior extensions, the county is estopped from denying petitioners' request for an additional extension; and (3) the county's refusal to grant petitioners an additional extension of time was arbitrary and without benefit of objective legal standards, as required by ORS 215.416(8) and (9).

The challenged decision states:

> "Over the years, [petitioners] continually requested extensions of time to exercise the subject permit. Individually, each request for extension made it appear that progress was being made toward the ultimate goal of opening the recreation site. On closer examination, the progress is less certain. [I]n 14 years, the site has been cleared, some roads have been roughed in, and a drainage system and 30 percent of the fire protection water system are in place. Over the last several years [petitioners] stated that the project will open up 'this year,' and this year passes with the project still in development. No finished roads, no finished camp sites, no finished water systems, no finished (or even started) septic system, no maintenance building, no support building, no staff cabins (except for two hulls with no roofs or floors, and one cabin with a roof and floor, but no windows, no water, septic or electricity hook up and no furnishings), no pool, no water slide, no bath houses, no fire fighting equipment, no proof of current permits. [Petitioners] have shown little ability to commence the project, let alone complete it. Even with short building seasons of this mountainous area, more progress should have been made. An extension at this point appears a futile gesture." Record 12-13.

Petitioners first argue that the county erred in reviewing the prior extensions because such review amounts to an untimely appeal of those prior decisions. The county responds that in order to resolve petitioners' current request for its latest extension, the county had to inquire into and resolve whether petitioners had made substantial progress in previous years, as previous extensions had ordered them to. We agree with the county that such review does not constitute an untimely appeal of those prior decisions. Petitioners have not established

that the county's review of prior extensions provides a basis to reverse or remand the challenged decision.

Second, petitioners argue that the county is estopped from denying their request for an extension, because petitioners have relied on the county's prior extensions to expend substantial sums of money and effort on developing the campground. Petitioners argue that they provided the same type and amount of evidence to support their current request for an extension as they had provided, and the county had accepted, in earlier years, and that they had every right to expect that such evidence would be accepted again. Petitioners contend that the county "suddenly and without prior notice or warning found that building permit documentation was inadequate or that there was no 'supporting documentation.'" Petition for Review 17. Further, petitioners contend the county is barred by the doctrine of laches, because it failed to require petitioners to make substantial progress on the campground. Petitioners argue that the county "continuously and repeatedly over a period of 14 years, annually led [petitioners] into believing that they could go ahead with their project at the pace selected by [petitioners] * * *." Petition for Review 18.

It is not clear that LUBA has authority to reverse or remand a local government decision based on equitable estoppel or other equitable doctrines. Sparks v. City of Bandon, 30 Or LUBA 69, 73 (1995). In Sparks, we declined to resolve whether our authority extended to equitable doctrines because the facts of that case did not support a claim of equitable estoppel. We noted that to constitute estoppel by conduct

> "there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it."

Id. at 73 (citations omitted), quoting Coos County v. State of Oregon, 303 Or 173, 180-81, 734 P2d 1348 (1987). In the present case petitioners make no effort to establish or cite to facts supporting any of the elements of equitable estoppel. As in Sparks, we decline to

decide whether LUBA has authority to reverse or remand a local government's decision based on equitable estoppel, where petitioners have not attempted to establish that the elements of that doctrine are met.

Petitioners' invocation of the doctrine of laches is equally unpersuasive. For laches to apply, "there must be (1) unreasonable delay by a party with knowledge of all relevant facts under which it could have acted earlier, (2) resulting in substantial prejudice to an opposing party to the extent that it would be inequitable to afford the relief sought against the party asserting laches." Dack v. City of Canby, 17 Or LUBA 265, 274 (1988), citing Ellis v. Roberts, 302 Or 6, 10, 725 P2d 886 (1986) and Stephan v. Equitable S & L Assn., 268 Or 544, 569, 522 P2d 478 (1974). We understand petitioners to argue that the county has known for years that petitioners were proceeding slowly on the proposed campground and yet year after year the county extended the permit without requiring petitioners to make substantial progress toward completion, and that that delay caused petitioners to expend substantial sums to their ultimate prejudice.

However, assuming, without deciding, that we have authority to apply the doctrine of laches, petitioners have not demonstrated that the elements of that doctrine are met in the present case. The record indicates that in 1994, 1995 and 1996 the county granted extensions based on petitioners' representations that they were making progress toward completion. In each case the county warned petitioners that they must make "substantial progress," or words to that effect, within the year. The county found in the challenged decision that petitioners had misrepresented the extent of their progress in previous extension requests. Petitioners do not explain, given the county's finding, how the county could be deemed to have knowledge of all the relevant facts, or why petitioners continued to rely on the county's forbearance, given its warnings that petitioners must begin showing more progress.

Finally, petitioners argue that MCZO 122.090 contains no objective standards guiding the county's exercise of discretion in considering extension requests, and thus that

the county's denial of their request for an additional extension was arbitrary. Petitioners argue that the county's decision violates ORS 215.416(8) and (9), which require that

> "(8) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.
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> "(9) Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

Petitioners reason that because MCZO 122.090 contains no "criteria and standards" governing approvals or denials of requests for an extension, the county could not and did not comply with the requirements of ORS 215.416(8) and (9), and thus the county arbitrarily denied petitioners' extension request.

In Lee v. City of Portland, 57 Or App 798, 646 P2d 662 (1982), the court of appeals held that ORS 227.173(1), the statutory analogue of ORS 215.416(8) applicable to cities, is not violated as long as the local standards "are clear enough for an applicant to know what he must show during the application process," and those standards "inform interested parties of the basis on which applications would be granted or denied." Id. at 802-803; see also Oswego Properties, Inc. v. City of Lake Oswego, 108 Or App 113, 814 P2d 539 (1991) (reiterating the principle). We agree with petitioners that MCZO 122.090 contains no criteria or standards informing either the county or applicants on what basis applications for an extension under that provision should be granted or denied. Therefore, to the extent MCZO 122.090 is subject to the requirements of ORS 215.416(8) and (9), MCZO 122.090 is inconsistent with those statutory requirements.

The difficulty with petitioners' argument is that it assumes that a decision on an application for an extension of a permit itself constitutes the "approval or denial of a permit application" within the meaning of ORS 215.416(8) and (9). ORS 215.402(4) defines "permit" as the

> "discretionary approval of a proposed development of land under ORS 215.010 to 215.293, 215.317 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. * * * "

The two essential elements of a "permit" as defined at ORS 215.402(4) are (1) that resolving the application involves the exercise of discretion; and (2) that the application involves the "proposed development of land." Where a county lacks any standards governing applications for an extension of a permit, decisions on those applications will almost certainly involve the exercise of discretion, as the present case demonstrates. The county's application of MCZO 122.090 in the present case involved the weighing and analysis of evidence and the application of judgment and thus the exercise of discretion. See Pienovi v. City of Canby, 16 Or LUBA 604, 606-607 (1988) (a determination whether a nonconforming use exists requires consideration of the history and character of the use and thus the exercise of discretion and is thus a permit decision under the analogue to ORS 215.402(4) applicable to cities). We conclude that, at least where decisions on an extension of a permit are not governed by clear and objective criteria and standards, such decisions involve the exercise of discretion and hence satisfy the discretionary element of the permit definition at ORS 215.402(4).

Whether an application for an extension of a permit involves a "proposed development of land" is more problematic. However, we conclude that under the terms and effect of MCZO 122.090, an application for an extension involves the approval or denial of a "proposed development of land" and "permit application" as those terms are used in ORS 215.402(4) and 215.416(8), respectively. MCZO 122.090 provides that a permit "shall be void" unless exercise of the right granted under that permit is commenced within six

months from the effective date of the permit or an extension is obtained. Thus, under MCZO 122.090, a permit that has not commenced within a six month period has expired unless an extension is obtained. Given the complete lack of standards in MCZO 122.090 and the county's unfettered discretion under that provision to approve or deny an extension request, the legal status of a permit during the pendency of the county's consideration of an extension request is fraught with uncertainty. We conclude that, under these circumstances, the county's exercise of discretion under MCZO 122.090 is tantamount to a decision reapproving or denying the underlying permit, and thus constitutes approval or denial of a "permit application."

The county does not respond directly to petitioners' arguments under ORS 215.416(8) and (9). Instead, the county argues, first, that a decision approving an extension of time under MCZO 122.090 is a nondiscretionary administrative decision, not a land use decision subject to LUBA's jurisdiction, citing OAR 660-033-0140.[2] We disagree that we lack jurisdiction over the county's denial of petitioners' extension request. The county concedes that OAR 660-033-0140 was not in effect when the county approved the conditional use permit and thus does not control the present issue. More to the point, the county conducted the present case as a quasi-judicial evidentiary proceeding in which, we determined above,

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[2]OAR 660-033-0140 provides in relevant part:

> "(1) A discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.
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> "(2) A county may grant one extension period of up to 12 months * * *
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> "* * * * *
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> "(3) Approval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision." (Emphasis added).

the county exercised judgment and discretion in applying its land use regulations. We conclude that the county's decision is a land use decision. ORS 197.015(10)(a).

Second, the county argues that there is substantial evidence in the record demonstrating that petitioners were not entitled to another extension. The county's response begs the question: what does MCZO 122.090 require petitioners to show in order to demonstrate entitlement to another extension? As discussed above, nothing in the county's legislation directed to our attention informs applicants for an extension under MCZO 122.090 what standards govern the county's decision to approve or deny the requested extension. We conclude that the county's application of MCZO 122.090 in the present case was inconsistent with the requirements of ORS 215.416(8) and (9).

The second assignment of error is sustained, in part.

The county's decision is remanded.[3]

[3]Our conclusion that the county's decision in this matter violates ORS 215.416(8) and (9) requires that the county's decision be remanded. However, the county's options on remand are somewhat uncertain in view of ORS 215.428(3), which requires that applications for permits be approved or denied based on the standards and criteria that were applicable at the time the application was first submitted. It may be that, in the somewhat unusual circumstances presented by this case, new discretionary criteria or new clear and objective criteria could be adopted and applied to the disputed request to extend petitioners' conditional use permit, consistent with or notwithstanding ORS 215.428(3). Further, it may be that, while MCZO 122.090 lacks explicit standards for approval or denial of extension requests, adequate standards are contained in other sections of the MCZO that have not been brought to our attention. See BCT Partnership v. City of Portland, 130 Or App 271, 277, 881 P2d 176 (1994) (where the local code required compliance with a "short-term parking strategy" and no document labeled as such exists, the statutory analogue to ORS 215.416(8) and (9) is satisfied where the city examines general provisions in its comprehensive plan and other sources and identifies the basis for the short-term parking strategy from those general provisions). Neither of the parties address these issues, and we express no opinion regarding any of the options identified above.