BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES T. CHURCH and
PHILLIP L. GERSTNER,
Petitioners,

vs.

GRANT COUNTY,
Respondent.

LUBA No. 99-031

FINAL OPINION
AND ORDER

Appeal from Grant County.

Robert S. Lovlien, Bend, filed the petition for review. With him on the brief was Bryant, Lovlien and Jarvis.

John M. Junkin and Paul Migchelbrink, Portland, filed the response brief. With them on the brief was Bullivant Houser Bailey PC. John M. Junkin argued on behalf of respondent.

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

REVERSED 02/02/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the county's decision revoking two previously approved partitions.

FACTS

Petitioner Charles T. Church owns tax lot 108, which is zoned Rural Residential 10-acre minimum (RR-10). Prior to November 1997, tax lot 108 consisted of a parcel approximately 22 acres in size. In November 1997, Church sought county approval to partition tax lot 108 into three parcels; parcels 1 and 2 were each five acres in size, while parcel 3, the remainder parcel, was approximately 12 acres in size. In decision PAR 97-24, the county approved the partition in a Type I administrative review decision, under the mistaken belief that tax lot 108 was zoned Rural Residential 5-acre minimum (RR-5), rather than RR-10. In February 1998, Church sought county approval to partition parcel 3 into two parcels, one five acres and the other approximately seven acres in size. In decision PAR 98-06, the county approved that partition, again under the mistaken belief that the property was zoned RR-5. Neither county decision was appealed, either locally or to LUBA.

Sometime in 1998, the county discovered its errors in PAR 97-24 and 98-06. On November 25, 1998, the county court adopted Ordinance 98-03, which added a new section 12.110 to the Grant County Land Development Code (LDC). LDC 12.110(A) provides:

> "In the event it appears that a land use decision has been made by the Planning Director or the Planning Commission that violates the clear and objective standards of this Code and such decision is deemed final, the County Planning Director may, within 18 months from the time the decision became final, initiate the following process:
>
> "1. Present the matter for review by the Grant County Court according to ARTICLE 25 – COUNTY COURT REVIEW PROCEDURE.
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> "* * * * *
>
> "2. At the close of the Public Hearing, the County Court will determine if the subject land use decision violates the clear and objective standards of this Code and upon such finding order an appropriate remedy,

including, but not limited to rescission and/or revocation of the prior subject land use decision.

"* * * * *

"4. The decision of the County Court shall be final unless appealed to the Oregon Land Use Board of Appeals consistent with ORS 197.805 through 197.860."

Ordinance 98-03 declared an emergency, and became effective on the date of its approval.

The county thereafter initiated a proceeding under LDC 12.110 with respect to PAR 97-24 and 98-06. The county court conducted hearings on January 6 and January 20, 1999, and on January 27, 1999, issued a decision revoking both partitions.

This appeal followed.

ASSIGNMENT OF ERROR

Petitioners argue that the county's decision revoking PAR 97-24 and 98-06 is an application of a retroactive ordinance in violation of ORS 92.285. ORS 92.285 is part of ORS chapter 92, which governs subdivisions and partitions, and provides that "[n]o retroactive ordinances shall be adopted under ORS 92.010 to 92.048, 92.060 to 92.095, 92.120, 93.640, 93.710 and 215.110."[1]

The county responds, first, that ORS 92.285 is inapplicable to the county's decision, because the statute prohibits only the *adoption* of retroactive ordinances, not the retroactive *application* of ordinances. The county argues that petitioners do not and cannot challenge the adoption of Ordinance 98-03 in this proceeding. Any such challenge, the county argues, must have been filed pursuant to ORS 197.620 and 197.830 to 197.845 within 21 days of the date the decision to be appealed became final. Because petitioners did not challenge the

[1]*See also* ORS 215.110(6) (prohibiting counties from enacting retroactive ordinances in enacting, amending or repealing land use regulations pursuant to ORS 215.110(1) through (5)). The county's brief assumes, as do we, that ordinance 98-03 was adopted pursuant to ORS 215.110.

adoption of Ordinance 98-03 within 21 days of the date that ordinance became final, the county contends, petitioners cannot challenge the adoption of that ordinance in this proceeding. The county submits that petitioners' arguments based on ORS 92.285 do not provide a legal basis to reverse or remand the county's decision revoking PAR 97-24 and 98-06.

The county also argues that Ordinance 98-03 is not a "retroactive ordinance" within the meaning of ORS 92.285, because it does not amend, delete or add any standards to the approval of subdivisions or partitions. According to the county, Ordinance 98-03 merely establishes a procedure for the review and correction of clearly and objectively erroneous land use decisions. Even if ORS 92.285 is read to prohibit retroactive *application* of ordinances that are not facially retroactive, the county contends, the decision in this case was not retroactive, because it did not take away or impair any rights acquired under existing laws. The county argues that petitioners have acquired no rights to preserve decisions that violate clear and objective zoning regulations.

We agree with the county that petitioners cannot, in this proceeding, attack the facial validity of Ordinance 98-03. However, the present proceeding is not a facial challenge to Ordinance 98-03, but rather a challenge concerning the application of that ordinance to PAR 97-24 and 98-06. It is true that the terms of ORS 92.285, and the similar terms of ORS 215.110(6), prohibit only the *adoption* of retroactive ordinances, and not the retroactive application of ordinances. However, if Ordinance 98-03 is a "retroactive ordinance" within the meaning of ORS 92.285, petitioners are not precluded from challenging its application to them merely because they did not also challenge the adoption of the ordinance. *See Fish and Wildlife Dept. v. LCDC*, 37 Or App 607, 617, 588 P2d 80 (1978) (suggesting that under ORS 215.110(6) a county ordinance expanding local appeal obligations cannot be applied retroactively). A statutory prohibition on adopting retroactive ordinances necessarily entails that if ordinances are adopted that allow retroactive application, such ordinances cannot be

applied consistently with the statute.[2] For the following reasons, we agree with petitioners that Ordinance 98-03 allows retroactive application and is thus a "retroactive ordinance" within the meaning of ORS 92.285.

ORS 92.285 does not elaborate on what is meant by a "retroactive ordinance." *Black's Law Dictionary*, 1184 (5th ed 1979) defines "retroactive laws" as laws that "take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past." In *Schoonover v. Klamath County*, 16 Or LUBA 846 (1988), we addressed whether a county ordinance violated ORS 92.285 and ORS 215.110(6) in applying zoning that restricted future residential development on forest land that had been subdivided into residential lots prior to adoption of the statewide planning goals. We concluded that "statutory prohibitions against retroactive land use regulations protect uses that exist on the date the regulations are adopted, not uses that could have been, but were not, initiated." *Id.* at 849. Accordingly, we held that the county's ordinance restricting residential development was not a "retroactive ordinance," because it restricted only future residential development, and did not affect existing development or the subdivisions themselves. *Id.*; *see also Alexiou v. Curry County*, 22 Or LUBA 639, 647 (1992) (ORS 92.285 prohibits retroactive ordinances that change plat requirements affecting existing platted subdivisions, but does not prohibit local regulation of land uses within platted subdivisions). In *Schoonover*, we specifically noted that "[t]he legal existence of the recorded subdivisions is protected by ORS 92.285,

[2]The county conceded at oral argument that, if the challenged decision revoking PAR 97-24 and 98-06 had been styled an "ordinance" rather than a "decision," it would constitute a "retroactive ordinance" within the meaning of ORS 92.285. As discussed below, we conclude that Ordinance 98-03 is a "retroactive ordinance" because it expressly allows the county to make retroactive decisions affecting rights acquired under existing law. If it is inconsistent with ORS 92.285 for the county to adopt a specific ordinance invalidating otherwise final partitions, it is equally inconsistent to adopt a general process for invalidating such decisions, and then apply that process to invalidate otherwise final partitions.

and we find nothing in the plan and zone designations applied by the county which affects that existence." 16 Or LUBA at 851.

The present case represents the circumstances that we distinguished in *Schoonover*: an ordinance that allows the county to affect the legal existence of previously approved partitions. The terms of Ordinance 98-03 authorize the county to reconsider land use decisions that had become final within the preceding 18 months under the county's code and for purposes of statutes governing LUBA's review. Once the appeal period in which to challenge PAR 97-24 and 98-06 under the county's code and state land use review statutes expired, the applicant acquired a legitimate expectation under existing laws that any flaws in those decisions were immune from challenge and reconsideration. Under this circumstance, we believe an ordinance that allows the county to reconsider and revoke partition approvals that became final and unreviewable long before the effective date of the ordinance "takes away or impairs" vested rights acquired under existing laws, and thus is a retroactive ordinance within the meaning of ORS 92.285.[3] It follows that the county is prohibited from applying Ordinance 98-03 to petitioners under the circumstances of this case.[4]

We are not persuaded by the county's argument that Ordinance 98-03 is not a retroactive ordinance because it does not alter, delete or add any standards regarding partition plats or land use decisions in general. ORS 215.428(3) requires that the county

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[3]The present case does not require us to decide whether the county could, without violating ORS 92.285, apply Ordinance 98-03 to invalidate partitions or subdivisions that were created after the effective date of the ordinance.

[4]Although the parties' briefs do not raise the issue, and we do not resolve it here, we note the potential inconsistency between Ordinance 98-03 and ORS 197.825(1), which provides LUBA with exclusive jurisdiction to review any land use decisions or limited land use decisions. Ordinance 98-03 allows the county to review, modify and revoke land use decisions that have been deemed "final" for purposes of local and appellate review. It is not clear whether Ordinance 98-03 would apply only where decisions had not been appealed to LUBA, or whether it would also apply to decisions that are currently before LUBA or the Court of Appeals, or that had been affirmed by one of those review bodies. In any of those circumstances, it is unclear that such a review process is consistent with the statutory scheme for review of land use decisions. *See Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 660, *rev'd on other grounds* 97 Or App 687, 776 P2d 1315 (1989) (county has no jurisdiction to amend decision currently before the Court of Appeals).

approve or deny a permit based on the standards and criteria applicable at the time the application for a permit was first submitted.[5] Stated differently, ORS 215.428(3) prohibits approving or denying a permit based on standards or criteria that were adopted subsequent to the time the application for a permit was first submitted. The prohibition on retroactive ordinances in ORS 92.285 would be redundant if that prohibition were confined to the circumstances controlled by ORS 215.428(3), as the county's argument suggests. In our view, ORS 92.285 prohibits the county from retroactively revoking otherwise final and unreviewable partition approvals, even if the county does not apply new standards or criteria in doing so.

Petitioners seek either reversal or remand of the challenged decision, but do not explain which resolution is appropriate. The county contends that because petitioners have not established a basis for reversal, remand is the appropriate resolution. Whether an erroneous land use decision is reversed or remanded is determined by OAR 661-010-0071. As relevant here, OAR 661-010-0071 requires that we remand a land use decision when the decision violates a provision of applicable law but is not prohibited as a matter of law; while we must reverse a decision that is prohibited as a matter of law. OAR 661-010-0071(1)(c); 661-010-0071(2)(d). Because we concluded above that the county cannot apply Ordinance 98-03 to revoke PAR 97-24 and 98-06, the county's decision is prohibited as a matter of law.

The county's decision is reversed.

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[5]ORS 215.428(3) provides:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."