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**NATURE OF THE DECISION**

Petitioners appeal a city decision approving a tree cutting permit, with conditions.

**MOTION TO DISMISS**

The city moves to dismiss this appeal on two grounds. We address the city’s dispositive argument, which is that during the proceedings before LUBA the challenged permit expired by the terms of a city administrative rule, and therefore this appeal is moot.

We take the following facts from the record and the parties’ pleadings. The subject property is a 76-acre parcel partially developed as a cemetery. In 1995 the city approved a conditional use master plan that in relevant part authorized an expansion of the cemetery onto undeveloped, wooded portions of the property. In 1998, petitioners requested a tree-cutting permit from the city manager pursuant to the city’s tree-cutting ordinance at Eugene Code (EC) 6.305 *et seq.*, proposing to cut 3,166 trees. The city manager issued the permit, but limited the proposed cutting to the northern portion of the property. Petitioners appealed that decision to a hearings officer, who affirmed the city manager’s decision, subject to amended conditions. Petitioners then appealed that decision (the 1999 permit) to LUBA. That decision is the subject of LUBA No. 99-069. The parties stipulated to suspend LUBA’s proceedings in LUBA No. 99-069, to allow the parties to pursue a mediated settlement. In the meantime, petitioners cut down the trees authorized by the 1999 permit.

In 2001, petitioners requested a second tree-cutting permit, to cut trees in the southern portion of the property that the 1999 permit did not approve. The city manager approved that permit, with conditions that prohibited cutting above a certain elevation on the property. Petitioners appealed that decision to the hearings officer, who affirmed the city manager’s decision. The hearings officer’s decision (2002 permit) became final on January 11, 2002. Petitioners filed a timely appeal of the 2002 permit to LUBA, and that decision is the subject of the present appeal.

1           On February 25, 2002, petitioners filed a record objection. Petitioners also advised  
2 LUBA that the parties did not wish LUBA to resolve the record objection, because the  
3 parties were attempting to resolve the objection. On June 26, 2002, petitioners advised  
4 LUBA that the parties had resolved the record objection, and that the objection was  
5 withdrawn. LUBA issued an order on June 28, 2002, settling the record and setting forth a  
6 briefing schedule. However, on July 22, 2002, we issue an order per the parties' stipulation  
7 to suspend the review proceedings until any party notified the Board otherwise. On the same  
8 date, the parties agreed to continue to suspend LUBA No. 99-069. By an earlier stipulation,  
9 the parties agreed to conduct both appeals on the same review schedule, although the two  
10 cases were not consolidated.

11           On December 12, 2002, petitioners advised LUBA that they wished to proceed with  
12 LUBA Nos. 99-069 and 2002-009. On January 2, 2003, petitioners filed a single petition for  
13 review that combines assignments of error directed at both appeals.

14           The city responded on January 13, 2003, with a motion to dismiss LUBA No. 2002-  
15 009. In relevant part, the city argues that the 2002 permit expired on January 11, 2003, one  
16 year after it became final, pursuant to Administrative Order No. 58-00-01-F. That  
17 administrative order, issued March 30, 2000, adopts an administrative rule, R-6.305-F, that  
18 implements EC 6.305. As relevant here, R-6.305-F provides that “[a tree-cutting] permit  
19 shall expire at midnight on the one year anniversary of the effective date of the permit.”<sup>1</sup>

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<sup>1</sup> R-6.305-F provides, in relevant part:

- “1. Except as provided in [R-6.305-F(2)], a permit shall be effective on the date issued or such other date as may be specified in the permit.
- “2. If an application is granted after public notice and an opportunity for comment is provided under R-6.304-D-5, the permit shall not be effective for a period of 15 days from the date of the decision of the City Manager or, in the event an appeal is filed under Section R-6.304-J, seven days from the date of the decision of the hearings officer. \* \* \*

1 Because the 2002 permit has expired, the city argues, LUBA No. 2002-009 is moot, and  
2 therefore this appeal should be dismissed.

3 Petitioners offer three reasons why this appeal is not moot: (1) R-6.305-F never  
4 became “effective” and so cannot be applied to the challenged permit; (2) an appeal to  
5 LUBA tolls the one-year expiration period; and (3) even if the permit is expired, this appeal  
6 is not moot because the Board’s decision on the merits will have a “practical effect” on the  
7 parties. We address these arguments in turn.

8 **A. ORS 197.625(3)(a)**

9 According to petitioners, R-6.305-F is an implementing regulation for EC 6.305,  
10 which petitioners characterizes as a “land use regulation.”<sup>2</sup> Petitioners argue that R-6.305-F  
11 is therefore itself a “land use regulation.” As a new land use regulation, petitioners contend,  
12 R-6.305-F must be adopted pursuant to the procedures set out at ORS 197.610 and 197.615.<sup>3</sup>  
13 Petitioners argue that, pursuant to ORS 197.625(3)(a), if a new land use regulation is adopted  
14 without complying with ORS 197.610 and 197.615, it is not effective.<sup>4</sup> Petitioners contend

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“3. A permit shall expire at midnight on the one year anniversary of the effective date of the permit.

“4. At the written request of the applicant, the City Manager may grant time extensions to complete the work under a permit [not to exceed 12 months and two extensions].”

<sup>2</sup> ORS 197.015(11) defines “land use regulation” as follows:

“‘Land use regulation’ means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.”

<sup>3</sup> In relevant part, ORS 197.610 and 197.615 require local governments to forward a proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation to the Department of Land Conservation and Development (DLCD), and to submit the amended comprehensive plan or land use regulation or new land use regulation to DLCD upon adoption.

<sup>4</sup> ORS 197.625(1) and (2) set forth the two ways in which an amendment to the acknowledged comprehensive plan or land use regulation or a new land use regulation submitted to DLCD pursuant to ORS 197.610 and 197.615 becomes acknowledged. ORS 197.625(3)(a) provides:

“Prior to its acknowledgment, the adoption of a new comprehensive plan provision or land use regulation or an amendment to a comprehensive plan or land use regulation is effective at

1 that the city did not adopt R-6.305-F “in accordance with ORS 197.610 and 197.615”  
2 because it did not provide either the pre-adoption or post-adoption notice to DLCD required  
3 by those statutes. Therefore, petitioners conclude, R-6.305-F never became effective,  
4 pursuant to ORS 197.625(3)(a), and it cannot be applied to the challenged permit.

5 Petitioners do not argue that R-6.305-F is an ordinance that “establishes standards for  
6 implementing” the city’s comprehensive plan. ORS 197.015(11). Therefore, R-6.305-F is  
7 not a “land use regulation” as that term is defined at ORS 197.015(11) and as used in  
8 ORS 197.610, 197.615 and 197.625(3)(a). ORS 197.625(3)(a) concerns the “adoption of a  
9 new comprehensive plan provision or land use regulation or an amendment to a  
10 comprehensive plan or land use regulation. Because R-6.305-F is none of these things,  
11 ORS 197.625(3)(a) has no bearing on its effectiveness. Petitioners offer no other reason to  
12 conclude that R-6.305-F does not impose a one-year expiration period on the challenged  
13 permit.

14 **B. Tolling**

15 Citing *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160 (1996), petitioners  
16 argue that even if R-6.305-F applies to the challenged permit, the filing of the notice of intent  
17 to appeal with LUBA necessarily tolls the rule’s one-year period. In *Friends of Metolius*,  
18 LUBA interpreted a local provision that, like R-305-F, imposed a one-year permit expiration  
19 date. The local provision also stated that “[t]he one year period shall run from the date a land  
20 use approval is no longer appealable.” *Id.* at 162. We rejected as “absurd” an argument that  
21 the “date a land use approval is no longer appealable” referred to *local* appeals, and instead  
22 interpreted the provision to refer to the date no further appeal at any level was possible.<sup>5</sup>

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the time specified by local government charter or ordinance and is applicable to land use decisions, expedited land divisions and limited land use decisions if the amendment was adopted in accordance with ORS 197.610 and 197.615 unless a stay is granted under ORS 197.845.”

<sup>5</sup> We reasoned as follows:

1           Petitioners in the present case argue that the same reasoning applies to R-305-F, and  
2 that an equally absurd result flows from its application to the challenged permit. According  
3 to petitioner, under the city’s argument petitioners are “doomed to an endless cycle of getting  
4 one-year tree-cutting permits that it does not like, then appealing them to LUBA, only to  
5 have the permits expire while the appeal is pending,” a result that petitioners characterize as  
6 “a theory that only attorneys could love.” Response to Motion to Dismiss 10.

7           We do not agree. First, as *Friends of Metolius* suggests, appeal to LUBA affects the  
8 expiration date of a permit only if some applicable law says so. The only provision we are  
9 cited to that bears on the expiration date of the 2002 permit is R-6.305-F. However, unlike  
10 the code provision at issue in *Friends of Metolius*, R-6.305-F has no language that can be  
11 interpreted to toll expiration when a permit is appealed to LUBA. To the contrary, R-6.305-  
12 F(2) and (3) make it plain that a tree-cutting permit becomes “effective” and the one-year  
13 period commences upon the expiration of local proceedings on the permit. *See* n 1. Third,  
14 petitioners have not established that application of R-6.305-F in the present case dooms  
15 petitioners to a Sisyphean cycle of futile appeals. The reason the one-year period expired  
16 during LUBA’s proceedings in this case is entirely due to the stipulations of the parties to  
17 suspend those proceedings for most of 2002. Finally, we note that R-6.305-F(4) allows

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“Petitioners’ proposed interpretations of [the local expiration provisions] are untenable. To require the applicant to commence construction within one year of *local* approval, notwithstanding subsequent appeals of that approval, would require applicants for conditional use approvals to either start construction without knowing whether their application would be approved on appeal, or risk loss of the approval if appeals extend beyond one year following the local approval. If an appeal is ultimately successful, and the local approval is overturned, an applicant who commences construction to comply with the one-year requirement would have commenced, and possibly completed, illegal development. Conversely, if ultimately unsuccessful appeals take more than one year, but the applicant does not take the risk of building without final approval on appeal, when the approval is final following the appeals, the approval is void for failure to timely commence construction. Each of these results is absurd. The only logical interpretation of these provisions is that they require commencement of construction within one year of *final* approval, *i.e.*, when an approval can no longer be appealed to any local or appellate tribunal.” 31 Or LUBA at 163-64 (emphasis in original).

1 petitioners to seek up to two extensions, of 12 months apiece. Petitioners offer no reason to  
2 believe the city would not have granted an extension, if sought.

3 **C. Practical Effect**

4 Finally, petitioners argue an appeal is moot only where the Board concludes that  
5 review of the merits would have no practical effect. *Davis v. City of Bandon*, 19 Or LUBA  
6 526, 529 (1990). According to petitioners, even assuming that the challenged permit has  
7 expired, a decision by LUBA on the merits would have “practical effect” on the parties,  
8 because the underlying dispute will remain and will arise again. Petitioners argue that a  
9 primary issue in this appeal is whether the 1995 CUP resolved which trees would be cut, or  
10 whether that issue was left to the tree-cutting permit process. If the present appeal is  
11 dismissed, petitioners argue, they will apply again for a tree-cutting permit and again assert  
12 their position that the 1995 CUP resolved the issue of which trees may be cut. Petitioners  
13 argue that the city will presumably adopt the same contrary position it took in the challenged  
14 permit, and the parties will soon be back in front of LUBA with a new one-year clock  
15 ticking. Under these circumstances, petitioners submit, LUBA’s decision on the merits  
16 would have a very real practical effect on the parties, and therefore this appeal should not be  
17 dismissed as moot.

18 If the challenged permit has expired, then LUBA’s decision will have no effect on the  
19 rights and obligations of the parties under that permit. At best, LUBA’s decision would  
20 render an advisory opinion that the city may or may not heed in the course of future permit  
21 proceedings under EC 6.305. LUBA does not have jurisdiction to render advisory opinions.  
22 *Hayes v. Clackamas County*, 6 Or LUBA 80, 80 (1982).<sup>6</sup>

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<sup>6</sup> Petitioner’s citation to *Davis v. City of Bandon* may be intended to invoke the “capable of repetition yet evading review” exception to the mootness doctrine, which LUBA discussed and applied in that case. 19 Or LUBA at 530-31. However, for the reasons discussed above, petitioners has not established that the underlying dispute between the parties, even if capable of repetition, will evade review.

1 **CONCLUSION**

2 For the foregoing reasons, we agree with the city that the permit challenged in this  
3 decision expired in January 2003. Therefore, this appeal is moot.

4 LUBA No. 2002-009 is dismissed.