BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT,
Petitioner,

vs.

JEFFERSON COUNTY,
Respondent,

and

JERRY BURK,
Intervenor-Respondent.

LUBA No. 2007-177

FINAL OPINION
AND ORDER

Appeal from Jefferson County.

Richard M. Whitman, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief were Steven E. Shipsey, Assistant Attorney General, Peter M. Shepherd, Deputy Attorney General and Hardy Myers, Attorney General.

No appearance by Jefferson County.

Edward P. Fitch, Redmond, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Bryant, Emerson & Fitch, LLP.

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

REVERSED 01/24/2008

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

Petitioner appeals a decision approving a 60-lot residential subdivision and planned unit development.

MOTION TO INTERVENE

Jerry Burk (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

MOTION TO TAKE OFFICIAL NOTICE

Petitioner Department of Land Conservation and Development (DLCD) moves to take official notice of a Jefferson County Circuit Court order in *William H. Burk v. State of Oregon*, Case No. 07-CV-0035, attached to the petition for review. The circuit court order grants the state's motion to strike a second amended complaint that substitutes intervenor for the plaintiff William H. Burk, in an action filed by the latter against the state under ORS 197.352(6) (2005).[1] In relevant part, the order concludes that William H. Burk's cause of action under ORS 197.352(6) does not survive Burk's death on July 1, 2007.

Intervenor opposes the motion, arguing that it is inappropriate to consider the circuit court order because it is the subject of a motion for reconsideration.[2]

The circuit court order is decisional law that may be subject to official notice under Oregon Evidence Code 202, and the motion to take official notice is allowed.[3]

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[1] ORS 197.352 (2005) codified Ballot Measure 37, adopted by the voters in 2004. As explained below, under certain circumstances ORS 197.352(8) allowed governmental entities to issue a decision that elects not to apply a land use regulation to property that was acquired before the regulation was adopted, a process sometimes referred to as a "waiver." In November 2007, the voters adopted Ballot Measure 49, a measure referred to the voters by the legislature that comprehensively amended ORS 197.352 and for all practical purposes replaced it with a different system for treating claims for compensation, codified at ORS 195.300 et seq. Ballot Measure 49 became effective on December 6, 2007. With limited exceptions discussed below, no party argues that the amendments to ORS 197.352 have any effect on our review in the present appeal, and we do not consider that question.

[2] The parties have not advised the Board of the outcome of that motion for reconsideration.

[3] ORS 40.090 (Oregon Evidence Code 202) provides in relevant part:

MOTION TO TAKE EVIDENCE

Intervenor moves to take evidence not in the record, pursuant to OAR 661-010-0045, specifically an affidavit by intervenor's attorney stating that William H. Burk has expended approximately $25,000 in his effort to develop the subject property, including $15,849.25 in attorney fees and approximately $9,000 in engineering fees. The motion states that these facts are submitted to support intervenor's argument that filing of a land use application with the county vested the right to complete the application process and the proposed development, under ORS 215.427.

With limited exceptions, the Board's review is confined to the local evidentiary record. OAR 661-010-0045(1) provides that the Board may consider evidence outside the record in the case of disputed allegations "concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." Intervenor does not address OAR 661-010-0045(1) or make an attempt to establish why consideration of extra-record evidence is warranted under the rule. Accordingly, the motion to take evidence not in the record is denied.

FACTS

William H. Burk acquired the subject property, a parcel approximately 160 acres in size that is currently zoned for agricultural use, on November 25, 1947. The subject property has 80 acres of irrigation rights and is currently used for hay production. It is surrounded by other properties zoned and used for agricultural use.

"Law judicially noticed is defined as:

> "(1) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States."

On May 23, 2006, the State of Oregon, by and through the Department of Administrative Services and DLCD, issued a final order in response to a written demand for compensation filed by William Burk, pursuant to ORS 197.352 (2005) (hereafter the state waiver). The state waiver provided, in pertinent part:

> "1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to William Burk's division of the 152.74-acre property into approximately 50 parcels or to his development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 033. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on November 25, 1947.
>
> "2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on November 25, 1947.
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> "* * * * *
>
> "4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above * * *." Record 469-71.

On September 30, 2006, Burk obtained a similar "waiver" of local regulations from the county, to allow the subject parcel to be divided into approximately 50 lots.

On January 17, 2007, Burk filed an application with the county for a 100-lot residential subdivision and planned unit development (PUD), with a community sewer system and public water supply. The county planning director denied the application on the basis that it did not comply with the terms of the state or county waivers.

On April 25, 2007, the county board of commissioners called up the planning director's denial and, on May 2, 2007, adopted an order amending the county's Measure 37 waiver to remove references to 50 lots. Instead, the amended order simply authorized Burk to develop the property for any uses allowed when he acquired the property in 1947. Record

370. The board of commissioners then noticed and held a public hearing on the application on May 23, 2007. The hearing was continued to June 27, 2007.

On May 21, 2007, petitioner DLCD commented on the PUD application, arguing that it is inconsistent with the state waiver, because it appeared to propose urban uses, supported by public facilities, contrary to Statewide Planning Goals 11 (Public Facilities) and 14 (Urbanization), which the state order did not waive.

On June 25, 2007, Burk's consultants submitted two tentative PUD plans, one that proposed a 100-lot PUD and another for a 60-lot PUD, with five common areas. The proposed 60 residential lots cover approximately 80 acres, and each is less than two acres in size. At Burk's request, the June 27, 2007 hearing was cancelled and continued to July 11, 2007.

On July 1, 2007, William Burk died. In a report dated July 3, 2007, county planning staff recommended that both PUD tentative plans be denied, because Burk's death transferred ownership of the parcel to his heirs, who, the county planning staff reasoned, have no rights under the state or county waivers. Staff also recommended denial of the 100-lot PUD as inconsistent with the state waiver, and denial of the 60-lot PUD as inconsistent with Goals 11 and 14, which had not been waived. In a letter to the county dated July 10, 2007, DLCD stated its position that the state waiver was personal to William Burk, is not transferable, and that as a result of the parcel's devise to his heirs the state waivers no longer apply to the proposed PUD.

The board of commissioners held a continued hearing on July 11, 2007, which was continued again until July 25, 2007. On July 13, 2007, Burk's attorney submitted into the county record a portion of the record in *William H. Burk v. State of Oregon*, Jefferson County Circuit Court Case No. 07-CV0035, a claim for compensation that Burk filed under ORS 197.352(6) (2005).

On August 1, 2007, the commissioners deliberated and voted 2-1 to approve the 60-lot PUD.[4] The county's final decision, issued August 22, 2007, allows "the estate of William Burk" to subdivide the property into 60 lots and place a dwelling on each lot. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The central issue in this assignment of error is whether and how ORS 215.427(3)(a), commonly known as the "goal-post" statute, applies in the context of a development application authorized to a particular claimant under an ORS 197.352 waiver, when the claimant dies after the development application is filed.

DLCD argues that a waiver under ORS 197.352 is personal to the claimant or "present owner" who acquired the property prior to adoption of the land use regulations waived in the order. ORS 197.352(8).[5] Consequently, DLCD argues, the state waiver in this

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[4] The county's final decision refers to both a 59-lot PUD and a 60-lot PUD. The source of the discrepancy is not clear. As far as we can tell, the approved tentative plan appears to propose 60 residential lots on 89 acres, along with five common areas covering 61acres, and the remainder in rights of way.

[5] *Former* ORS 197.352 (2005), adopted as Ballot Measure 37 (2004), provided in relevant part:

> "(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.
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> "* * * * *
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> "(4) Just compensation under subsection (1) of this section shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.
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> "* * * * *
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> "(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located, and the present owner of the real property

case provided that the state would "not apply" certain goals, statutes and administrative rules to "William Burk," and then only to the extent necessary to allow "him" to use the property for the use described in the DLCD staff report. Record 252. DLCD argues that the state waiver did not rezone the subject property, and that all applicable goals, statutes and administrative rules continue to apply to the subject property, with respect to uses proposed by anyone other than William Burk, and perhaps even development proposed by William Burk that is different than the uses described in the DLCD staff report. DLCD contends that when William Burk passed away on July 1, 2007, the "present owner" of the property became Mr. Burk's heirs or devisees, pursuant to ORS 114.215.[6] According to DLCD, that

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shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

"* * * * *

"(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

"* * * * *

"(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this section. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this section. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

"(11) Definitions - for purposes of this section:

"* * * * *

"(C) 'Owner' is the present owner of the property, or any interest therein."

[6] ORS 114.215(1) provides:

"Upon the death of a decedent, title to the property of the decedent vests:

transfer of ownership means that the state waiver ceased to have any effect. Consequently, DLCD argues, the county erred in approving development on land no longer owned by the claimant, development that is prohibited by the applicable goals, statutes and administrative rules.

In its petition for review, DLCD anticipates that intervenor will argue, as he did below, that the goal-post statute at ORS 215.427(3) operates to "vest" the right to have the PUD application evaluated based on the "standards and criteria" that were in effect on the date the PUD application was submitted. ORS 215.427(3)(a) 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."

The problem with that argument, DLCD argues, is that it confuses a change in the *law* with a change in the *facts*. According to DLCD, ORS 215.427(3)(a) is concerned with assuring all parties to the proceedings on a land use application that the application will be reviewed under the standards and criteria in effect on the date the application was filed and, conversely, that legislative changes to standards and criteria that were adopted or become effective *after* the application was submitted will not govern the application. *See Davenport v. City of Tigard*, 121 Or App 135, 854 P2d 483 (1993) (city errs in applying comprehensive plan amendment adopted after date of application). That concern is not implicated, DLCD

> "(a) In the absence of testamentary disposition, in the heirs of the decedent, subject to support of spouse and children, rights of creditors, administration and sale by the personal representative; or
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> "(b) In the persons to whom it is devised by the will of the decedent, subject to support of spouse and children, rights of creditors, right of the surviving spouse to elect against the will, administration and sale by the personal representative."

In a footnote, DLCD states that it does not dispute that the personal representative of the estate of a decedent may have the legal authority to file or proceed with a land use application concerning Burk's property, but it would be as an agent of the new owners, the heirs or devisees, not as agent of the estate.

contends, where through no fault or action of the local government a change in facts occurs after the application is filed, even if that change in facts has the consequence that certain standards that might have governed the decision on the application no longer apply, or vice versa. DLCD cites *Tarjoto v. Lane County*, 36 Or LUBA 646, 664-65 (1999) and *Petree v. Marion County*, 29 Or LUBA 449, 452-53 (1995), for the proposition that the goal-post statute does not apply to changes in factual circumstances, or require local governments to evaluate applications based on the facts that existed on the date the application was filed.

Intervenor responds that ORS 215.427(3)(a) compels the county to base its decision on the "standards and criteria that were applicable at the time the application was first submitted." According to intervenor, at the time the application was submitted William Burk was the present owner of the subject property and, therefore, pursuant to the waivers granted by the state and county the "standards and criteria" that governed the application did not include Goal 3 and the statutes and rules that would otherwise prohibit the proposed residential PUD. Simply put, intervenor contends, the waived goal, statutes and rules were not "applicable" on the date the application was filed, within the meaning of the goal-post statute. Intervenor argues that once an ORS 197.352 waiver is exercised and transformed into a specific land use application, ORS 215.427(3)(a) operates to vest that waiver of standards as of the date the application is filed. Once that right is vested by operation of ORS 215.427(3)(a), intervenor argues, if the property is transferred or sold, the subsequent new owner of the property is entitled to have the application approved and the land developed free of the waived standards.

With respect to *Tarjoto* and *Petree*, intervenor argues that neither case involved a change in facts that resulted in a change in the applicable law, and that DLCD fails to cite any case law that supports its position regarding ORS 215.427(3)(a). Under that statute, intervenor argues, a claimant under ORS 197.352 stands in the same shoes as any other person who files a land use application. Under any applications not involving ORS 197.352,

intervenor argues, if a land use applicant/landowner dies after filing the application, the heir or devisee of the landowner is permitted to continue processing the application based on the standards and criteria in effect on the date the application was filed, pursuant to ORS 215.427(3)(a). Intervenor contends that nothing in ORS 197.352 requires a different result.

Finally, intervenor notes that under Ballot Measure 49 (2007), the legislature provided that land use applications filed by ORS 197.352 claimants that exceed the limits permitted by Measure 49 may nonetheless become "vested" under common law principles and proceed to final approval and development. Oregon Laws 2007, chapter 424, section 5(3), *compiled as a note* after ORS 195.305 (2007). Intervenor argues that the 2007 legislature must have recognized that such a provision was necessary to avoid "vesting" of ORS 197.352 applications pursuant to the goal-post statute.

The issue of the relationship between ORS 197.352 and the goal-post rule is an issue of first impression, as far as we are aware. In our view, it is difficult if not impossible to give full effect to both statutes in circumstances where ownership of the property is transferred, voluntarily or by operation of law, after the claimant filed a land use application to develop the property pursuant to an ORS 197.352 waiver.

Both parties appear to agree that a waiver pursuant to ORS 197.352 is personal to the claimant, that is, it authorizes only the claimant and no other person to seek and obtain approval to develop land notwithstanding inconsistency with applicable land use regulations that the state or local government has chosen not to apply under ORS 197.352(8). To obtain a waiver, the claimant must establish a number of things, including that the claimant is the "present owner" of the property, and that the claimant acquired the property prior to adoption of the land use regulations on the basis of which the claimant seeks compensation or waiver. If that ownership relationship is lost, for example if the claimant's property interest is transferred by sale or by operation of law to another person, the apparent consequence under

ORS 197.352 is that any entitlement to development approval based on waivers of regulations granted to that claimant is lost, because the rights under ORS 197.352 may be claimed only by the "present owner." *See* February 24, 2005 letter from the Special Counsel to the Oregon Attorney General to Lane Shetterly, Director of DLCD, attached as Appendix 1 to intervenor's response brief (concluding that if the claimant conveys the property "before the new use allowed by the public entity is established, then the entitlement to relief [under ORS 197.352] is lost").[7]

We do not understand intervenor to dispute the foregoing. However, intervenor argues that in circumstances where transfer of ownership occurs *after* the ORS 197.352 claimant has filed a land use application based on the state and county waivers, ORS 215.427(3)(a) operates to require a different result. Once ORS 215.427(3)(a) applies, we understand intervenor to argue, property subject to a ORS 197.352 waiver may be transferred to a new owner, and the new owner has the right to continue to seek development approval based on the waivers granted to the former landowner.

Intervenor recognizes that ORS 197.352 and ORS 215.427(3)(a) appear to conflict in this regard, but argues based on citations to arguments in favor of Ballot Measure 37 that the voters must have intended that the ORS 197.352 claimant have the same rights as any other land use applicant to "lock in" the applicable approval criteria under the goal-post statute. In other words, intervenor would appear to resolve any tension or conflict between ORS 197.352 and ORS 215.427(3)(a) by giving full effect to the latter, and giving less effect to those provisions of ORS 197.352 that appear to limit the right to develop property under a state and local waiver of post-acquisition regulations to the ORS 197.352 claimant.

[7] The February 24, 2005 opinion letter does not specify what constitutes "establishing" the new use, but we do not understand intervenor to assert that a right to complete the proposed development under the state and county waivers has been "established" in any sense under ORS 197.352 itself. Instead, intervenor relies on operation of ORS 215.427(3)(a).

DLCD, on the other hand, appears to resolve any conflict between ORS 197.352 and ORS 215.427(3)(a) by arguing that the legislature intended the goal-post statute to apply only in circumstances where legislative land use regulation amendments are adopted *after* the date the land use application was filed, and those amendments change the "standards and criteria" that govern the application before the local government. DLCD argues that the legislature did not intend the goal-post statute to apply in circumstances where there is a change in facts (ownership of the subject property, for example), even if that change in facts results in the application being reviewed under different standards than it would otherwise. In other words, DLCD would apparently resolve any tension between the two statutes by giving full effect to ORS 197.352, and giving less effect to the goal-post statute.

We generally agree with DLCD that the legislature's probable concern in adopting ORS 215.247(3)(a) and its cognate applicable to cities in 1983 was to prevent local governments from "changing the goal-posts" by reviewing permit applications under standards and criteria that were adopted after the application was filed. Prior to 1983, the prevailing rule was precisely the opposite: applications were reviewed under the applicable standards and criteria in the most recently adopted legislation, even if that legislation post-dated the application. *See Gearhard v. Klamath County*, 7 Or LUBA 27, 30-31 (1982) (citing Anderson, American Law of Zoning for that proposition). The legislature was probably not concerned with circumstances where, through no action of the local government, a change in facts occurs that has the effect of changing the standards and criteria that initially applied on the date of application to a different set of standards and criteria.[8]

[8] Such circumstances are presumably rare. In fact, it is somewhat difficult to identify analogous circumstances where a change in facts could have the arguable result of changing the applicable law. One conceivable example is where an applicant obtains a variance to certain standards, but that variance expires under its terms unless final development approval is obtained within two years. The applicant files for final development approval shortly before the two year period expires, and the variance permit expires by its terms before final development approval. Although the underlying standards that were varied may not have been "applicable" when the final development application was filed, we would understand DLCD to argue that those

Nonetheless, the legislature did not expressly limit the scope of ORS 215.427(3)(a) to post-application legislative amendments. Further, the Court of Appeals has construed the term "standards and criteria" to include any "substantive factors" that "have a meaningful impact on the decision permitting or denying an application[.]" *Davenport*, 121 Or App at 141. The state waiver of Goal 3 and otherwise applicable statutes and administrative rules would appear to be "substantive factors" that have a meaningful, indeed critical, impact on any development based on those waivers. *See also Holland v. City of Cannon Beach*, 154 Or App 450, 459, 962 P2d 701 (1998) (a land use regulation is not an applicable "approval standard or criterion" upon which a subdivision application could be rejected, where the city council and planning staff had treated the regulation as being impliedly repealed before, during and after the filing of the application). Consequently, DLCD has not persuaded us that the tension or conflict between ORS 197.352 and the goal-post statute can be resolved by understanding the goal-post statute to be concerned only with preventing the decision maker from applying legislative *amendments* that post-date the application.

Similarly, intervenor has not persuaded us that the voters intended, in adopting ORS 197.352 in 2004, that the goal-post statute operate to effectively allow persons who are not ORS 197.352 claimants to obtain development approvals based on state and local waivers, contrary to provisions in ORS 197.352 that appear to limit to the claimant development or use rights granted under the statute. Nothing in the materials cited to us suggests that the voters were aware of the goal-post statute or gave the slightest consideration to the interaction between the two statutes. For whatever reason, the drafters of Ballot Measure 37 limited development or use rights granted under the statute to the claimant, and that limitation is a central feature of the measure. We cannot assume that the voters intended those limits to be easily avoided.

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standards became "applicable" when the variance permit expired, and therefore the unvaried standards would govern the final development application.

With respect to intervenor's arguments based on Measure 49, we doubt that any meaningful inference can be drawn from the "common law vesting" provisions of Measure 49 regarding the intent of the 2004 voters with respect to the interaction between ORS 197.352 and ORS 215.427(3)(a). The actions of a later (and different) legislative body in seeking to amend a law earlier adopted by the voters is a poor basis on which to infer the intent of the voters in adopting the original legislation.

Accordingly, we conclude that in those circumstances where ORS 197.352 and ORS 215.427(3)(a) operate together, those statutes come into conflict and cannot both be given full effect.[9] We perceive no way to reconcile them in any way that gives full effect to both. To resolve conflicts between statutes, courts apply the legislative presumption, at ORS 174.020(2) that the more specific statute prevails over the more general statute.[10] *Kambury v. DaimlerChrysler Corp.*, 334 Or 367, 50 P3d 1163 (2002) (applying ORS 174.020(2) at the first step of the analysis under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993)). Sometimes that statutory presumption is applied in conjunction with a similar maxim of statutory construction, that where a conflict between two statutes cannot be reconciled, the later adopted statutes prevail over the earlier statute, by implied repeal or amendment. *See Bobo v. Kulongoski*, 338 Or 111, 116, 107 P3d

[9] The conflict is not total and giving full effect to one statute would not result in the implied repeal of the other statute. Under intervenor's view, the limitations in ORS 197.352 to the "present owner" or claimant would continue to govern up until the date that a development application is filed based on state and local waivers under ORS 197.352(8), after which those limitations would no longer have any practical effect. Under DLCD's view, we understand, the goal-post statute would continue to apply as it normally would to circumstances involving a land use application, with the exception of regulations waived under ORS 197.352(8), the continued non-applicability of which would depend not on the goal-post statute but on the claimant's continued ownership of the subject property.

[10] ORS 174.020(2) provides:

> "When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."

18 (2005) (when statutes conflict, the later, more specific statute controls); *State v. Vedder*, 206 Or App 424, 430, 136 P3d 1128 (2006) (later adopted statute controls).

While it is sometimes difficult to determine which of two conflicting statutes is the general and which the specific, in the present case it seems more accurate to characterize the goal-post statute as the more general, in that it applies widely to a number of land use contexts, while ORS 197.352 applies more narrowly to a specific type of land use matter. A statute that applies to nearly every type of quasi-judicial land use application is more general than a statute that provides a limited set of relief measures to a limited set of landowners. To the extent ORS 174.020(2) does not resolve the conflict, it seems appropriate to apply the "later controls the earlier" maxim of statutory construction. Consequently, we conclude that where the goal-post statute conflicts with ORS 197.352, the latter, more specific and later-adopted statute controls. It follows that DLCD is correct that the county erred in approving development on land no longer owned by the ORS 197.352 claimant, under waivers that grant only to the claimant the right to develop the property free of the goals, statutes and administrative rules specified in the state waiver.

The first assignment of error is sustained. Because there is no dispute that the PUD approved by the county is inconsistent with Goal 3, and applicable provisions of ORS 215 and OAR chapter 660, division 033, the county's decision is "prohibited as a matter of law" and therefore must be reversed. Because we reverse the decision under the first assignment of error, it is not necessary to address the second assignment of error which, if sustained, would require only remand to adopt additional findings. Typically, under these circumstances, LUBA would not address the second assignment of error. However, the legal issue resolved in the first assignment of error is one of first impression and is a relatively close question. Because there may well be an appeal challenging our disposition of the first assignment of error, it is appropriate to resolve all issues.

SECOND ASSIGNMENT OF ERROR

The primary issue under the second assignment of error is whether the county erred in failing to apply Statewide Planning Goals 7 (Natural Hazards), 11 (Public Facilities) and 14 (Urbanization) to the proposed PUD development.[11]

DLCD argues that because the county, in its waiver, chose not to apply its own acknowledged land use regulations to the proposed development, the statewide planning goals come into play as approval criteria, unless waived in the state order. ORS 197.835(5). According to DLCD, section 1 of the state order explicitly waives only the provisions of Goal 3, ORS 215 and OAR chapter 660, division 033, and then "only to the extent necessary to allow [William Burk] to use the property for the use described" in the DLCD report.[12] Section 4 of the order clarifies that any use of the property by the claimant remains subject to all laws not specified in section 1 of the order. DLCD notes that the proposed use of the property the state considered was a subdivision of the 160-acre property into "approximately

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[11] As relevant here, Goal 11 generally prohibits the establishment or extension of sewer systems on lands outside urban growth boundaries, and limits the extension of public water systems. Goal 14 has been interpreted generally to prohibit urban uses outside urban growth boundaries without an exception. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 724 P2d 268 (1986).

[12] We repeat the relevant provisions of the state waiver:

> "1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to William Burk's division of the 152.74-acre property into approximately 50 parcels or to his development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 033. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on November 25, 1947.
>
> "2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on November 25, 1947.
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> "* * * * *
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> "4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above * * *." Record 470-71.

50 lots." DLCD argues that Burk's written demand for compensation mentioned nothing about establishing a community sewer system or extending a public water system. Further, the written demand for compensation did not specify lot sizes, or suggest that Burk intended to develop the property as a PUD, with 60 lots between one and two acres. Finally, DLCD notes that the tentative plan submitted during the proceedings before the county proposes development on or near a steep area of rimrock along the northern boundary of the parcel. Because the county has waived its regulations protecting development from natural hazards, DLCD argues that the county is required to apply Goal 7 directly to the proposed development to ensure safety from natural hazards. The county failed to adopt findings concerning Goals 7, 11 and 14, DLCD argues, and therefore the decision must be remanded.

Intervenor responds, first, that section 2 of the state waiver purports to authorize William Burk to use the property subject only to the standards in effect on November 25, 1947, the date he acquired the property. Intervenor contends that section 2 can only be understood as an unqualified waiver of all state regulations that post-date November 25, 1947. According to intervenor, that understanding of section 2 is consistent with the voters' intent in adopting Ballot Measure 37, which was to allow landowners to develop property subject to the regulations in effect on the date of acquisition.

Viewed in isolation, section 2 might be read as intervenor urges. However, we note that section 2 does not state that Burk's use of the property is subject "only" to the standards in effect on November 25, 1947. A statement that property is subject to certain standards carries at most a weak inference that the property is not subject to other standards not mentioned. In any case, any such inference dissipates when the state waiver is read in its entirety. Read together, sections 1 and 4 make it clear that the state waived only the applicable provisions of Goal 3, ORS 215, and OAR chapter 660, division 033. As far as the state is concerned, the property remains subject to all other state laws not specified in section

1. To the extent intervenor argues that the state erred in providing only a limited waiver of state regulations under section 1, that argument must be asserted in a different forum.

As further evidence that the state waiver was limited only to the goal, statues and rules specified in section 1, we note that the DLCD report that accompanies the state waiver states, in relevant part:

> "This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use that the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use." Record 478.

The report also cautions that "[t]he claimant should be aware that the less information he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject property." Record 480.

DLCD asserted at oral argument that ORS 197.352 allows the state to waive only non-exempt regulations that restrict the use of private real property and have the effect of reducing the fair market value of the property. DLCD argued that the state has no authority to issue blanket waivers of regulations adopted after the acquisition date. *See* February 24, 2005 Letter of Advice, Appendix 1 to the intervenor's brief, page 7 (opining that Measure 37 does not authorize blanket waivers). Instead, to determine whether and which regulations to waive, DLCD argues that as a practical and legal necessity the claimant must identify specific regulations or provide a reasonably specific proposal to evaluate. Here, it appears that William Burk proposed to divide the 160-acre parcel into "approximately 50 lots." DLCD asserts that Burk did not request waiver of Goals 7, 11 and 14, and nothing in that proposal gave reasonable notice to the state that the proposed subdivision would be subject to or inconsistent with those goals. Specifically, the proposal before the state apparently did

not indicate that Burk would apply for a 60 or 100-lot planned unit development with community sewer and public water serving lots between one and two acres in size, and thereby implicate Goals 11 and 14.

We express no opinion regarding whether the state properly limited the scope of its waiver to the goals, statutes and rules specified in section 1. That issue can only be resolved in a different forum. For present purposes, however, we agree with DLCD that the state waiver in fact waived only the goals, statutes and rules specified in section 1. We disagree with intervenor that section 2 of the state waiver purports to waive Goals 7, 11 or 14.

Intervenor argues in the alternative that, pursuant to ORS 197.352(10), William Burk had the right to develop the property free of any constraints imposed by Goals 7, 11 or 14, regardless of whether the state order in fact waived those goals.

ORS 197.352(10) provides:

> "*Claims made under this section shall be paid from funds*, if any, specifically allocated by the legislature, city, county, or metropolitan service district for payment of claims under this section. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this section. *If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property*." (Emphases added).

Intervenor notes that William Burk filed his claim for compensation with the state on July 13, 2005. According to intervenor, because the "claim for compensation" was not paid within two years of that date, Burk has the right under the emphasized language above to "use the property as permitted at the time the owner acquired the property," that is, subject only to the regulations that existed in 1947, and thus free of any constraints imposed by Goals 7, 11 or 14. Intervenor argues that the county's decision cites ORS 197.352(10) as additional authority for approving the proposed PUD.

While it is not clear to us how ORS 197.352(10) is intended to work, ORS 197.352(10) appears to apply in situations where a governing body has elected to pay a claim for compensation under ORS 197.352(1), rather than where a governing body has elected to "modify, remove, or not * * * apply" the offending regulations under ORS 197.352(8). ORS 197.352(10) appears to function as an incentive for governing bodies to pays claims under ORS 197.352 within 2 years "from the date on which it accrues," with the result of a failure to pay the claim within that time period being that the "owner [may] use the property as permitted at the time the owner acquired the property," possibly for a broader array of purposes than might be allowed under a waiver.

We do not think that ORS 197.352(10) applies in the situation presented here, where the state and the county have chosen to waive regulations rather than pay compensation. However, even if ORS 197.352(10) is applicable, the last sentence of ORS 197.352(10) provides only that "the *owner* shall be allowed to use the property as permitted at the time the *owner* acquired the property." It seems relatively clear that any rights granted under that sub-section apply only to the "owner," that is, the ORS 197.352 claimant. For the reasons set out in our discussion of the first assignment of error, the death of William Burk and the consequent transfer of the subject property means that any potential right to relief under ORS 197.352(10) is lost.

The second assignment of error is sustained.

For the reasons set out under the first assignment of error, the county's decision is reversed.