BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FLOYD E. BARD, JILL S. BARD,
KEVIN BEAT, KIM BEAT, THOMAS J. BENSON,
JANEY BENSON, CHARLES R. HATCHER,
APRIL HATCHER, CHRISTOPHER L. PAGE, and
DIANE M. PAGE,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

WILLAMETTE COMMUNITY SOLUTIONS, an
Oregon nonprofit corporation, dba
CASCADE HEALTH SOLUTIONS.
Intervenors-Respondents.

LUBA No. 2010-091

FINAL OPINION
AND ORDER

Appeal from Lane County.

Michael E. Farthing, Eugene, filed the petition for review and argued on behalf of petitioners.

Stephen Vorhes, County Counsel, Lane County, filed a response brief and argued on behalf of respondent.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenors-respondents. With him on the brief was the Law Office of Bill Kloos.

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

REMANDED 02/01/2011

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

Opinion by Holstun.

NATURE OF THE DECISION

This appeal concerns county approval of a one-year extension of a previously issued special use permit for a hospice facility.

MOTION TO INTERVENE

Cascade Health Solutions (Cascade), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

Petitioners move for permission to file a reply brief. The motion is granted.

FACTS

On April 28, 2008, Cascade was granted a special use permit for a six-bed hospice facility. That permit was subject to a number of conditions of approval, including the following condition:

> "a. This approval shall be valid for a two year time frame, during which the building and septic system permits for the facility shall be obtained. Extensions may be requested, per Lane Code 14.700(2)." Record 338.

Cascade requested extension of the special use permit, and on April 13, 2010 the county planning director administratively approved the requested extension. On April 23, 2010, petitioners filed a local appeal to challenge the planning director's decision. On April 30, 2010, the county advised petitioners that it had accepted petitioners' appeal and that an appeal hearing was scheduled before the county hearings official on June 3, 2010. Record 321. The hearings official issued a decision on July 30, 2010 that (1) dismissed petitioners' local appeal, based on a finding that the Lane Code (LC) does not authorize local appeal of planning director permit extension decisions, and (2) alternatively affirmed the planning director's decision to grant the requested extension. Record 95-104. Petitioners appealed the hearings official's July 30, 2010 decision to the board of county commissioners. In a

September 21, 2010 decision, the board of county commissioners declined to allow an additional hearing before the board of county commissioners, and adopted the hearings official's decision "as the County's final decision in this matter." Record 9.

While the above was unfolding with regard to the six-bedroom hospice, Cascade was also seeking county approval for a 12-bedroom hospice on the property. The application for the larger hospice facility was submitted to the county on September 16, 2009. On April 8, 2010, 20 days before the special use permit for the six-bedroom hospice was to expire and 15 days before the planning director granted the one-year extension for the 6-bedroom hospice special use permit, a different county hearings official denied the special use permit for the 12-bedroom hospice. Record 236-53. Cascade appealed that denial to the board of county commissioners. While Cascade's local appeal was pending, on April 18, 2010, Cascade filed a petition for writ of mandamus with the Lane County Circuit Court to compel the county to approve its application for approval of a 12-bedroom hospice. Record 254-62. That mandamus proceeding was brought under ORS 215.429.[1] LUBA was advised at oral argument in this matter that the mandamus proceeding concerning the 12-bedroom hospice is currently pending at the Lane County Circuit Court.

In this appeal, petitioners seek review of the board of county commissioners' decision to adopt the hearings official's decision concerning the six-bedroom hospice.

INTRODUCTION

A. Statutory Permits

Under ORS 215.402(4), a "permit" is defined as "discretionary approval of a proposed development of land." For clarity, in this opinion we generally refer to "permits," as ORS 215.402(4) defines that term, as "statutory permits." Except as provided in ORS

[1] Under ORS 215.429, in certain circumstances, the circuit court may compel the county to approve an application for land use permit approval if the county does not take final action on the application within 150 days after the application is submitted.

215.416(11), when ruling on an application for a statutory permit, the county must "hold at least one public hearing." ORS 215.416(3). The exception in ORS 215.416(11) authorizes the county to make decisions concerning statutory permits without first providing a public hearing. However, to take advantage of ORS 215.416(11), the county must give "notice of the [statutory permit] decision and provide[] an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice * * *," to file a local appeal. ORS 215.416(11)(a)(A). Under ORS 215.416(11), "the appeal shall be to a *de novo* hearing." ORS 215.416(11)(a)(D). To summarize, under these statutes, when rendering a statutory permit decision, the county must provide a prior public hearing on the application, or provide notice and an opportunity for an appeal that includes a *de novo* public hearing, after the statutory permit is approved without a prior hearing. Counties are free to adopt their own procedures for reviewing applications for statutory permits, but those local procedures must be consistent with the statutory procedures.

B. LC Permits

LC Chapter 14 sets out "Application Review and Appeal Procedures." LC 14.100 apparently was adopted by the county in part to implement ORS 215.416(11). LC 14.100(3) authorizes the planning director to rule on an application for county land use approval without scheduling the application for a public hearing. LC 14.100(4) requires that the planning director give notice of such a permit decision. LC 14.070 sets out detailed requirements for that notice and for the hearing that must be held if an appeal is filed.

In this case, apparently relying on LC 14.700(2), which is discussed in more detail later in this opinion, the planning director held no hearing on Cascade's requested special use permit extension for the six-bedroom hospice and sent no notice of his April 13, 2010 decision granting that requested extension. However, petitioners learned of the planning director's April 13, 2010 decision, and on April 23, 2010 petitioners filed a local appeal of that decision. As noted earlier, the county planning department accepted that appeal, and

while the hearings official and board of county commissioners ultimately concluded an appeal was not authorized by the LC, the hearings official nevertheless provided a *de novo* appeal of the planning director's April 13, 2010 decision. One issue presented in this appeal is whether petitioners' appeal is untimely because they pursued their local appeal of the planning director's April 13, 2010 decision, a local appeal that the county ultimately determined was not available, rather than appeal that April 13, 2010 planning director decision directly to LUBA before the 21-day deadline for filing an appeal of the planning director's April 13, 2010 decision to LUBA expired.[2] We turn first to that question.

C. Petitioners' Appeal was Timely Filed

Cascade argues that if petitioners objected to the planning director's April 23, 2010 decision, they could have and should have appealed that decision to LUBA rather than pursuing an appeal before the county that was not available under the LC.[3] According to Cascade, the ORS 197.830(3) 21-day deadline for petitioners to appeal the planning director's April 23, 2010 decision to LUBA expired while petitioners sought a local appeal they had no right to under the LC. Cascade argues that petitioners' belated appeal to LUBA of the board of county commissioners' September 21, 2010 decision must be dismissed, and that petitioners' appeal is an improper collateral attack on the planning director's April 23, 2010 decision. In making this argument Cascade relies on *Smith v. Douglas County*, 98 Or App 379, 382, 780 P2d 232, *rev den* 308 Or 608, 784 P2d 1101 (1989); *Warf v. Coos County*, 42 Or LUBA 84 (2002); *No Casino Association v. City of Lincoln City*, 30 Or LUBA 79, 84 (1995); *Forest Park Neigh. Assoc. v. City of Portland*, 26 Or LUBA 636, 640 (1994). In

[2] Under ORS 197.830(3), where a local government renders a land use decision without providing a hearing, persons who are adversely affected may appeal the decision directly to LUBA within 21 days of actual notice, where notice is required, or the date the person knew or should have known of the decision, where notice is not required.

[3] As we explain in more detail below, while petitioners were entitled to a local appeal under relevant statutes, we agree with Cascade and the county that the LC does not provide a right of appeal to challenge planning director permit extension decisions.

those cases petitioners' sought local appeals of land use decisions, without also at the same time seeking to appeal those decisions directly to LUBA. However, it was determined in each case that no local appeal was available, and because the statutory deadline for filing an appeal of the city and county decisions directly to LUBA expired while petitioners pursued local appeals that were not available under local law, LUBA dismissed the LUBA appeals because they were not timely filed. The county joins in Cascade's argument, and argues that because the board of commissioners adopted the hearings officer's interpretation that the LC does not provide a right of local appeal to challenge planning director permit extension decisions, that interpretation is entitled to deference under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). Under *Siporen*, LUBA must defer to the board of county commissioners' interpretation of the LC if that interpretation is "plausible." *Id* at 266.

The ORS 197.825(2) jurisdictional requirement that a petitioner at LUBA must first locally exhaust all "remedies available by right" before appealing a decision to LUBA, the frequent lack of clarity concerning whether a remedy is available by right, and the OAR 661-010-0015(1)(a) requirement that an appeal to LUBA must be dismissed if it is not timely filed can combine to cause confusion and uncertainty in land use appeals. Had the planning director refused petitioners' April 23, 2010 appeal of the planning director's April 13, 2010 decision, and if the petitioners continued to seek a local appeal that was not available under the LC while allowing the deadline to appeal that April 13, 2010 decision directly to LUBA expired, this appeal would have to be dismissed under the holdings in the cases cited by Cascade. But in an April 30, 2010 letter, petitioners were advised that the planning director "accepted" their local appeal and scheduled an appeal hearing before the hearings official for June 3, 2010. Record 321. Because the planning director accepted petitioners' local appeal, this case is unlike the cases cited by Cascade. In none of those cases did the city or county accept the local appeal. While the hearings official and the board of commissioners were certainly free to disagree with the planning director concerning whether a local appeal is

available under the LC to challenge a permit extension decision, petitioners were simply exhausting the remedy that the planning director expressly made available, and therefore the ORS 197.830(3) 21 day deadline to appeal to LUBA did not expire while petitioners exhausted the appeal that the planning director made available to petitioners.[4]

In *Tarjoto v. Lane County*, 137 Or App 305, 904 P2d 641 (1995), there was some question whether a local appeal was available to the petitioner, but the county in fact provided a local appeal. While the petitioner in *Tarjoto* separately pursued that local appeal, the petitioner also appealed the decision directly to LUBA. LUBA concluded that the petitioner in *Tarjoto* was exhausting an available local remedy and dismissed the petitioner's direct appeal to LUBA of the same decision that was the subject of the local appeal. The Court of Appeals affirmed LUBA's decision. The present case is different in that the county accepted the appeal but ultimately decided, in part, that no appeal is available under the LC. However that difference is not important. The important principle we extract from *Tarjoto* is as follows: where there is uncertainty about whether a local appeal is available, but the local government advises a petitioner that it will provide a local appeal, a petitioner may safely exhaust that local appeal without fear of being advised later the deadline for appealing the decision directly to LUBA has expired while the petitioner exhausted the appeal that the local government provided but later determined should not have been provided. As the Court of Appeals explained:

> "Whatever their precise relationship may be, ORS 197.830(3) and ORS 215.416(11) are not designed to foster gamesmanship on the part of parties or decision makers, of the kind that petitioner hypothesizes, *e.g.*, in which 'local remedies' are artificially fabricated or interpreted as being 'unavailable' in an effort to defeat the possibility of timely LUBA appeals. * * *" *Tarjoto*, 137 Or App at 310.

We turn to petitioners' assignments of error.

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[4] Under LC 14.520, the planning director makes the initial decision concerning whether to accept or reject an appeal.

FIRST ASSIGNMENT OF ERROR

In resolving the first assignment of error, we first consider whether the county's decision to extend Cascade's special use permit for one year is a statutory permit. We conclude that it is. Next, we consider whether the county erred in determining that the LC does not provide a right of local appeal to challenge a planning director decision that extends a permit decision. We conclude that the county correctly interpreted the LC not to provide for such an appeal. Next, we consider Cascade's cross assignment of error, which alleges that the hearings official erred by nevertheless considering petitioners' appeal on the merits. We reject the cross assignment of error and conclude that the hearings official's decision to provide a public hearing and reach the merits of the appeal was required, because the permit extension decision is a statutory permit and the appeal and public hearing the county provided was required by statute even though it was not required by the LC.

A. The Permit Extension Decision is a Statutory Permit Decision

As we previously noted, a statutory permit is defined as "discretionary approval of a proposed development of land." ORS 215.402(4). To determine whether the permit extension decision in this case is a statutory permit, two questions must be answered.

The first question is whether the permit extension decision requires the exercise of discretion. As we discuss in more detail below, one of the requirements that must be met to grant a permit extension under the LC is that the planning director must determine that "the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible." The parties to land use proceedings and this Board have struggled to determine after-the-fact whether applicable land use standards require the exercise of discretion. *See Jebousek v. City of Newport*, 51 Or LUBA 93, 102 (2006) (determining whether "there is a reason to believe that a potential geologic hazard does exist" requires the exercise of discretion); *Demlow v. City of Hillsboro*, 39 Or LUBA 307, 311 (2001) (applying statute that requires local government to remove historic property

designation if it was "imposed," requires the exercise of discretion); *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515, 522 (1991) (determining whether a commercial waste incinerator is similar to other uses allowed in a zone requires the exercise of discretion); *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651, 663 (1990) (deciding whether a proposal qualifies as a "private school" requires the exercise of discretion); *Kunkel v. Washington County*, 16 Or LUBA 407, 413 (1988) (deciding whether a proposed emergency disposal site for up to 27,000 lamb carcasses qualifies as a "farm use" requires the exercise of discretion). In this case the county had to determine whether "the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible." That is an extremely discretionary inquiry, and we reject the county's interpretation to the contrary.

The second question that must be answered is whether a request to approve a permit extension is a request for "approval of a development of land." We do not understand anyone to seriously question that the original April 28, 2008 permit was discretionary approval of a proposed development of land. The relevant question becomes whether a decision that merely extends that prior permit approval is also "approval of a development of land."

Under LC 14.700(4), a special use permit "shall become null and void after two years from the date of approval, unless extended through the provisions for extensions contained in other applicable chapters of Lane Code." *See* n 7. Under regulatory schemes where initial permit approval becomes void at the end of the term of the permit if the approval is not acted on or extended, LUBA has held that a permit extension is tantamount to reapproval of the permit. *Thalman v. Marion County*, 58 Or LUBA 23, 28 (2008); *Wilhoft v. City of Gold Beach*, 38 Or LUBA 375, 384 (2000); *Heidgerken v. Marion County*, 35 Or LUBA 313, 326 (1998). The April 28, 2008 special use permit in this case was only valid for two years unless an extension was granted under discretionary approval standards. In that

circumstance, we continue to believe that a decision to extend a statutory permit decision is itself a statutory permit decision, and the statutory procedures that govern statutory permit decisions must be followed.[5]

B. The LC Does Not Authorize Appeals of Permit Extension Decisions

As we explain above, the LC generally authorizes the planning director to make decisions on land use applications without a hearing, so long as the planning director provides notice of such decisions and an opportunity for a local appeal. The planning director arguably could have followed that procedure in this case, but did not. The reason he did not do so is likely because LC 14.700(2)(d), which specifically governs permit extension decisions, provides that "[a]pproval of an extension decision shall be done by the Director and is not subject to appeal." That language is unambiguous. Given that the section of the LC that directly governs permit extensions expressly states that the planning director permit extension decisions are not subject to appeal, the hearings officer correctly determined that petitioners were not entitled to a local appeal under the LC. The fact that the county might have provided such an appeal under LC 14.100 if that language did not exist in LC 14.700(2)(d) is of no import. Where general and particular provisions of a law are inconsistent, the particular is paramount. *Jordan v. SAIF Corp.*, 343 Or. 208, 218, 167 P3d 431 (2007); ORS 174.020(2).

C. The Hearings Officer Did Not Err by Providing an Appeal and Adopting a Decision on the Merits

Cascade includes a contingent cross assignment of error in its response brief in which it challenges the hearings official's alternative disposition to proceed with the appeal and reach a decision on the merits. Cascade alleges it was error for the hearings official to do so when the LC clearly provides no right of local appeal.

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[5] As petitioners correctly note, if a county does not want its permit extension decisions to qualify as statutory permits so that they may be issued ministerally and without hearings or local appeals, it may make those extensions automatic or subject only to nondiscretionary approval standards.

Under amendments to OAR 661-010-0030(7) and 661-010-0035, which took effect on July 1, 2010, contingent cross assignment of error must be included in a cross-petition for review rather than in a respondent's brief.[6] Because we deny the cross-assignment of error, we need not decide whether the cross-assignment of error should also be denied because it is not included in a cross petition for review.

We understand petitioners to argue the county's decision to proceed with the appeal and adopt a decision on the merits was required by ORS 215.416(11), notwithstanding the LC. We agree with petitioners, and reject Cascade's cross assignment of error. As explained above, the permit extension decision was a statutory permit rendered without a prior public hearing, and by statute the county was required to provide notice and a local right of appeal. In cases where local law is at odds with state law, state law must prevail. *Kenagy v Benton County*, 115 Or App 131, 134, 838 P2d 1076 (1992); *Newcomer v. Clackamas County*, 92 Or App 174, 186, 758 P2d 369, *modified* 94 Or App 33, 764 P2d 927 (1988). As we pointed out earlier, the county is free to render initial decisions on statutory permits without first providing a public hearing, but it must provide a local appeal if one is requested. ORS 215.416(11). The county's decision to grant petitioners a local appeal was consistent with

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[6] OAR 661-010-0030(7) provides:

> "Cross Petition: Any respondent or intervenor-respondent who desires reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. *The cross petition for review may also include contingent cross-assignments of error, clearly labeled as such, that the Board will address only if the decision on appeal is reversed or remanded under the petition for review.* The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party." (Emphasis added).

OAR 661-010-0035(3)(c) provides:

> "A response brief shall not include an assignment of error or cross-assignment of error."

and required by ORS 215.416(11), and we reject Cascade's argument that the county erred by providing petitioners a local appeal and a decision on the merits of that appeal.

D. Conclusion

For the reasons explained above, the hearings official erred in finding that petitioners' appeal should be dismissed. Petitioners' first assignment of error is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR

In petitioners' second and third assignments of error, petitioners challenge the hearings official's alternative disposition of their appeal on the merits. In both of these assignments of error, petitioners assign error to the county's interpretation and application of LC 14.700(2), which governs "Compliance with Conditions of Approval." We set out the text of LC 14.700(2) below:

> "Compliance With Conditions of Approval. Compliance with conditions of approval and adherence to submitted plans as approved is required. Any substantial departure from these conditions of approval and approved plans constitutes a violation of the applicable sections of Lane Code and may constitute grounds for revocation or suspension of the application unless modifications are approved as provided in LC 14.700(2)(a) through (d) below. Conditions of approval may be modified by the same type of Approval Authority that issued the final land use decision for the application subject to compliance with the following requirements:
>
> "(a) The application for modification of conditions meets the following completion requirements:
>
> "(i) The application is in writing and on the form provided by the Department;
>
> "(ii) The application is accompanied by the fee charged by the Department to defray the costs of processing the application;
>
> "(iii) The request is submitted to the Department prior to the expiration of the approval period or any approved extension;
>
> "(iv) The application states the reasons that prevented the applicant from complying with the conditions for which the modification is requested;

"(v) The application identifies any standards or criteria that the original conditions addressed; and

"(vi) The application addresses the compliance of the requested modifications with any applicable standards or criteria.

"(b) The applicable criteria for the final land use decision have not changed.

"(c) The Approval Authority who reviews the application for the modification of conditions shall be the same Approval Authority who made the final land use decision.

"(d) *An exception to subsections (b) and (c) in this paragraph is an application for an extension of the development period. Approval of an extension shall be done by the Director and is not subject to appeal. The Director may grant an extension subject to compliance with the following requirements:*

"(i) The Director determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible;

"(ii) One extension period may be granted for up to twelve months; and

"(iii) Additional one-year extensions may be authorized where applicable criteria for the decision have not changed." (Emphasis added).

A. Applicability of LC 14.700(2)(a)

1. Introduction

The central dispute under the second assignment of error appears to be whether LC 14.700(2)(a) is an applicable approval standard for the disputed special use permit extension. Of particular interest to the parties is LC 14.700(2)(a)(vi), which requires that an applicant for modification of a condition of approval address "compliance of the requested modifications with any applicable standards or criteria." The hearings official and all parties to this appeal appear to understand LC 14.700(2)(a)(vi) to require that an applicant for modification of a condition of approval must reestablish that the proposal complies with all of the same standards or criteria that the permit applicant had to demonstrate were satisfied at

the time the permit was initially approved. Record 15; Petition for Review 18, Intervenor-Respondent's Brief 16; Respondent's Brief 5. We are not sure what LC 14.700(2)(a)(vi) would require of an applicant for a permit extension, if LC 14.700(2)(a)(vi) is an applicable approval standard for such decisions. And because we remand under the second and third assignments of error for the county to more clearly interpret LC 14.700(2), and that interpretation may or may not lead to a finding that LC 14.700(2)(a)(vi) is an applicable approval standard for permit extension decisions, we do not consider the meaning of LC 14.700(2)(a)(vi) further here.

2. The County's Interpretation

Under the hearings official's interpretation of LC 14.700(2), LC 14.700(2)(a) does not apply to permit extension decisions. The hearings official's explanation of that interpretation, which the board of county commissioners adopted, is set out below:

> "* * * [T]he criteria in LC 14.700(2)(a) apply only to a modification of conditions of approval, which requires that the original standards or criteria must be considered. * * *
>
> "The fact that subsection (2)(a) applies only to requests for modification of conditions, means there is no conflict between subsections (2)(a) and (d). The application for a request for a modification of a condition of approval must include matters related to compliance with standards or criteria that the original conditions addressed and must be reviewed by the same Approval Authority (or same type of Approval Authority) that made the original land use decision. In contrast, none of the original standards or criteria apply to a request for a time extension. Only the Planning Director decides whether or not to approve a request for a time extension. * * *"
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> "* * * Subsection (d) applies exclusively to requests for time extensions and is a 'stand alone' provision. This is clear for two reasons: first, subsection (2)(a), by its terms, governs only an 'application for modification of conditions;' and second, the first sentence of subsection (d) specifically exempts time extension requests from subsections (2)(b) and (c) regarding the Approval Authority and the applicable criteria." Record 14.

We are mindful of the deference LUBA is required to accord the hearings official's interpretation under ORS 197.829(1), since it was adopted by the board of county

commissioners. *Derry v. Douglas County*, 132 Or App 386, 391, 888 P2d 588 (1995). Under *Siporen*, that interpretation must be affirmed if it is "plausible." The question here is whether the disputed interpretation of LC 14.700(2) is plausible, given the text of LC 14.700(2), or whether the interpretation is implausible because it "inconsistent with the express language of [LC 14.700(2)]."

One of the many confusing aspects of this appeal is that the challenged special use permit appears to be subject to *two* two-year time limits, and the relationship of those time limits is unclear and unaddressed by the decision or the parties in their briefs. One of those two year limits is imposed by LC 14.700(4).[7] The other is imposed by condition of approval a, which was quoted earlier in this opinion.[8] The challenged decision never makes it clear whether the approved extension applies to condition a, to LC 14.700(4), or to both. Indeed the challenged decision never expressly refers to either condition a or LC 14.700(4). In the interpretation quoted above, the hearings official and board of county commissioners appear to conclude that because LC 14.700(2)(a) applies *only* to modifications of conditions of approval it could not apply to the application for time extension in this case. It may be obvious to the hearings official and board of commissioners why the requested extension is not also a *modification* of condition a, or that condition a is for some reason something other than a *condition of approval*. However, it is not obvious to us.

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[7] LC 14.700(4) provides:

> "Expiration of Approvals. Unless provided otherwise in the approval of an application or by other Chapters of Lane Code, conditional or tentative approval of an application shall be valid for a two-year period during which all conditions of tentative approval or the development authorized by the conditional approval must be completed. Such approval shall become null and void after two years from the date of approval, unless extended through the provisions for extensions contained in other applicable chapters of Lane Code. Not all applications have extension provisions in Lane Code and therefore, cannot be extended."

[8] Condition of approval a provides:

> "This approval shall be valid for a two year time frame, during which the building and septic system permits for the facility shall be obtained. Extensions may be requested, per Lane Code 14.700(2)." Record 338.

The disputed interpretation has an additional problem, which also is not addressed in the interpretation. The text of LC 14.700(2)(d) expressly states that a permit extension decision is exempt from LC 14.700(2)(b), which requires that approval standards and criteria must not have changed, and LC 14.700(2)(c), which requires that the same Approval Authority that granted the permit in the first place be the Approval Authority that approves the extension. But LC 14.700(2)(d) says nothing about exempting LC 14.700(2)(a). The express exemption of LC 14.700(2)(b) and (c), without also exempting all or part of LC 14.700(2)(a), at least suggests that LC 14.700(2)(a) does apply to "an extension of the development period."

Finally, we think it is certainly possible that the county may have intended that applicants for permit extensions not be required to carry the same burden they carried to secure permit approval in the first place. As Cascade points out, one could infer from the language in LC 14.700(2)(d) that provides extension decisions are unappealable that the county did not intend that the original discretionary approval standards should apply to such decisions. But even if that inference is possible, that does not give the county or LUBA license to ignore the text of LC 14.700(2) that the county actually adopted. We also do not agree with Cascade or the county that interpreting LC 14.700(2) to require that an applicant for extension of a permit comply with LC 14.700(2)(a) produces an absurd or unworkable result. It may impose a more onerous burden on applicants for permit extensions than the authors of LC 14.700(2) intended. If so, the county is free to amend LC 14.700(2) to remove that burden. But there is nothing absurd or unworkable about making a permit applicant who was granted a permit that was effective for two years comply with LC 14.700(2)(a) if the applicant later wishes to extend the effective date of that permit beyond two years.

Given the highly deferential standard of review required under *Siporen*, we do not determine here whether the county *could* plausibly interpret LC 14.700(2)(a) not to apply to the extension decision at issue in this appeal. But given the inadequacies in the county's

interpretation that are noted above, the interpretation the county adopted in this case is implausible and is not affirmable, even under the deferential standard of review that is required under ORS 197.829(1) and *Siporen*.

The second assignment of error is sustained.

B. The County's Interpretation and Application of LC 14.700(2)(d)(i)

Under LC 14.700(2)(d)(i), a permit extension is subject to the following requirement:

> "The Director determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible[.]"

In addressing this requirement, the challenged decision includes the following findings:

> "[Cascade] provided the following explanation for their request for an extension:
>
> > "'Cascade * * * is financing the proposed project with proceeds from its annual Festival of Trees and other donations. With the unprecedented decline in the economy in the past 1 – 1 ½ years, fundraising has lagged behind original projections. [Cascade] is still on track to construct the planned Hospice House, but needs an additional time period to raise sufficient funds to do so. Thus, [Cascade] respectfully requests this time extension.'
>
> "The Director is not required by subsection (2)(d) to look beyond the explanation provided by the applicant unless the applicant's statement is substantively inadequate. That is not the case here. The 'unprecedented decline in the economy' is a matter of national, in fact, international, attention and concern. The funding for medical services is also an issue that receives widespread attention. Regarding the specific nuances of funding for Cascade * * *, an examination of the financial decisions triggered by the 'unprecedented decline in the economy,' which the applicant stated have impacted both their operational funding and special projects funding is not required.
>
> "Appellants would have the Director examine the financial health of the Applicant, its Board's decisions, and the more obvious actions of Cascade * * * in applying for a 12-bed hospice facility at the same site where the 6-bed facility has already been approved. Those matters are beyond the consideration needed to approve the request for a time extension. To require such an examination assumes the requirement for a statement that describes the reasons for the delay and who or what is responsible for those reasons

must be supported by substantial evidence. It does not. It is sufficient if the explanation is complete, and adequate to clearly support an approval. As explained above, the Director's approval of a request for a time extension is a ministerial act.

"The Applicant explained the reason for the delay as lack of funds and adequately explained that they were impacted by, but not responsible for, the decline in the economy. That is enough to make a determination. Subsection (2)(d)(i) requires a determination only, not findings of fact that lead to a conclusion." Record 19.

Petitioners argue the above findings misconstrue the county's obligations under LC 14.700(2)(d)(i) and are not supported by substantial evidence.

To the extent the above interpretation finds that under LC 14.700(2)(d)(i) the county may not question an applicant's reasons for requesting a permit extension and that the county's findings concerning LC 14.700(2)(d)(i) need not be supported by substantial evidence, the interpretation is legally erroneous. There is nothing in the text of LC 14.700(2)(d)(i) that would allow the county to completely abdicate to an applicant the county's obligation under LC 14.700(2)(d)(i) to find that the failure to comply with the two-year time limit was for "reasons for which the applicant was not responsible." And of course, under ORS 197.835(9)(a)(C), LUBA must reverse or remand the county's decision if it is not supported by substantial evidence. However, as we explain below, the county's decision can be read to adopt a less radical view of the county's obligations under LC 14.700(2)(d)(i).

The county's interpretation can be read simply to reject any contention that LC 14.700(2)(d)(i) requires that Cascade must open its financial records and prove that it was impossible for Cascade to proceed with construction or prove that Cascade could not have reallocated funds from other planned activities to construct the six-bedroom hospice facility. It is well within the county's interpretive discretion to interpret LC 14.700(2)(d)(i) to be satisfied in this case if a prudent developer faced with the funding shortfall Cascade faced would have delayed construction of the six-bed hospice facility. The county's decision can

be read simply to interpret LC 14.700(2)(d)(i) to allow Cascade to determine the sources of income that it will rely on to finance construction of the six-bed hospice, without having to explain why it could not as an organization have altered that decision or reallocated funds from other planned activities. While other interpretations of LC 14.700(2)(d)(i) are certainly possible, that interpretation is not inconsistent with the text of LC 14.700(2)(d)(i) and is plausible. We defer to that interpretation.

However, the above-quoted language that suggests the county's decision need not be supported by substantial evidence is simply wrong. We have just concluded that the county does not err by interpreting LC 14.700(2)(d)(i) to permit Cascade the unilateral right to decide the source of funding for construction of the six-bed hospice without having to explain that corporate decision. The selected source of funding was "the annual Festival of Trees and other donations." As interpreted by the county, LC 14.700(2)(d)(i) permits Cascade to make that choice. Below Cascade took the position that the reason a special permit extension is needed is that "proceeds from [the] annual Festival of Trees and other donations [have] lagged behind original projections," and that the economy not Cascade is responsible for that shortage of funds. Record 331. Petitioners claim there is no evidence to support that claim and that the real reason Cascade needs the extension is that it elected instead to seek approval for the 12-bed hospice.

In finding that the county's decision under LC 14.700(2)(d)(i) need not be supported by substantial evidence, the county appears to have accepted Cascade's claim that inadequate funds from "the annual Festival of Trees and other donations" is the reason the extension is needed and concluded that the county need not consider petitioners' evidence that the real reason the extension is needed is that Cascade chose to pursue approval of a 12-bed hospice instead. The county erred in that regard. Cascade's unsubstantiated claim that the downturn in the economy has resulted in declining donations, which in turn explains why the extension is needed, might survive an evidentiary challenge if that were the only evidence concerning

the reason for the requested extension. However, petitioners presented evidence that Cascade's decision to seek approval of the 12-bed hospice is the real reason the extension is needed. The hearings official erred in concluding that it need not consider that evidence along with whatever evidence Cascade presents to support its claim that the downturn in fundraising is the real reason the extension is needed. The county must consider all of that evidence and then determine, based on all of that evidence, whether the reason the extension is needed is the downturn in donations or Cascade's decision to seek approval of the 12-bed hospice facility. Based on the current record, the county's finding that the requested extension is "for reasons for which the applicant was not responsible" is not supported by substantial evidence.

The third assignment of error is sustained.

The county's decision is remanded.