BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

MCDOUGAL FOUNDATION INC.,
Intervenor-Respondent.

LUBA No. 2016-038

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Bill Kloos, Eugene, filed the response brief on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos PC.

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

REMANDED 09/16/2016

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 board of county commissioners' decision concluding that a 2005 permit approving three buildings for a school has not expired.

FACTS

The subject property is a 20-acre parcel zoned for exclusive farm use (E-25), located approximately 2.6 miles from the City of Springfield urban growth boundary. The property is located within a floodplain and the Willamette Greenway. In 2004, intervenor-respondent (intervenor) applied to the county for a Special Use permit to authorize construction of a private school on the parcel. At that time, *former* ORS 215.213(1)(a) and implementing county regulations allowed on EFU lands "[p]ublic or private schools, including all buildings essential to the operation of a school."

Intervenor proposed three school buildings.[1] The first building is a 20-room boys' dormitory, the second building a school/administration building, and the third building a 20-room girls' dormitory. Intervenor proposed to place all three buildings on an existing two-acre concrete pad.

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[1] The parties and the board of commissioners' decision characterize each of the three buildings approved in the 2005 Special Use permit as a discrete "phase," with the boys' dormitory the first phase, the school/administrative building the second phase, and the girls' dormitory the third phase. However, we note that the 2005 Special Use permit itself did not authorize development in phases or refer to phased development. Accordingly, in this opinion we will refer to each building by its function rather than Phase 1, Phase 2, etc.

On May 6, 2005, the county approved the application subject to conditions. The May 5, 2005 decision did not provide or authorize a schedule for development of each building, but included Condition of Approval 1:

> "Approval of PA04-6222 is valid for two years from the date of final approval. Lane County may grant one extension of up to 12 months if:
>
> "a. An applicant makes a written request for an extension of the development approval period;
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> "b. The request is submitted to the county prior to the expiration of the development approval period;
>
> "c. The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period;
>
> "d. The county determines that the applicant was unable to begin or continue development during the approval period for reasons that the applicant was not responsible." Record 557.

The language of Condition 1 reflected the terms of OAR 660-033-0140(1) and (2), an administrative rule that LCDC adopted in 1992 that governs the expiration of discretionary permits issued for development on agricultural lands.[2] Under OAR 660-033-0140(1) and (2), the permit is void two years

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

> "**Permit Expiration Dates**
>
> "(1) * * * [A] discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293

after the final decision, unless the development action is "initiated" within that period. The county may grant one 12-month extension, if four qualifications are met. Additional one-year extensions are allowed if the applicable criteria for the decision have not changed.

On January 10, 2006, intervenor applied for a building permit for the first school building, the boys' dormitory. A building permit was issued

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and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto *is void two years from the date of the final decision if the development action is not initiated in that period*.

"(2) A county may grant one extension period of up to 12 months if:

"(a) An applicant makes a written request for an extension of the development approval period;

"(b) The request is submitted to the county prior to the expiration of the approval period;

"(c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and

"(d) The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.

"* * * * *

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

September 17, 2007, and the boy's dormitory was constructed in 2008. That year, the school opened with a small student body, using a portion of the boys' dormitory as a classroom. Many of the school's students were, and are, international students.

On June 26, 2008, intervenor applied for a building permit to place a modular classroom at the site of the classroom/administrative building approved on the site plan in the 2005 Special Use permit. The building permit for the modular classroom was issued on February 23, 2009, and the module was installed. Due to an economic recession, intervenor reduced school operations and did not seek building permit approval for the girls' dormitory.

In 2009, the Land Conservation and Development Commission (LCDC) amended a different applicable rule, OAR 660-033-0130(2) and Table 1, to provide that no enclosed structure or group of structures, including schools, with a design capacity greater than 100 persons is allowed within three miles of an urban growth boundary. We refer to that rule as the design capacity rule. We understand that the three buildings, combined, have a design capacity that likely exceeds 100 persons.

Effective January 1, 2010, the legislature amended ORS 215.213, moving the authorization for a public or private school on EFU land from ORS 215.213(1)(a) to ORS 215.213(2)(y), and adding a limitation that the school must be "primarily for residents of the rural area in which the school is located." In the same legislation, the legislature adopted ORS 215.135, which

provides that non-conforming schools allowed under *former* ORS 215.213(1)(a) may be expanded subject to certain restrictions.

From 2010 to 2014 intervenor continued to operate the school with varying numbers of students, including many international students. Intervenor continued to seek and obtain state agency and local approvals for septic and floodplain development consistent with developing the property with all three buildings approved in the 2005 Special Use permit.

On December 3, 2014, intervenor applied for a building permit to install a manufactured structure on the site of the girls' dormitory approved in the 2005 Special Use permit, which under the terms of Condition 1 had arguably expired seven years earlier. Intervenor argued that it had a "vested right" under *Holmes v. Clackamas County*, 265 Or 193, 508 P2d 190 (1973), to complete the three-building development authorized in the 2005 Special Use permit, based on expenditures prior to 2009, when DLCD adopted the design capacity rule. The planning director characterized the application as seeking "verification" of a nonconforming use.[3]

[3] We use quotes around the word "verification," because we do not understand the planning director's apparent theory that a non-existent building can be "verified" as part of a nonconforming use. It is possible that the planning director meant that the school use itself could be "verified" as a lawful nonconforming use, and then the girls' dormitory building could be approved as an "alteration" or expansion of that verified nonconforming school use, under ORS 215.130(9) and LC 16.251. However, the planning director's theory is not clear to us.

On May 15, 2015, the planning director issued an administrative decision approving installation of the manufactured dwelling. The planning director first concluded that the 2005 Special Use permit authorizing the girls' dormitory building was not "void" under OAR 660-033-0140(1) because the permit had been "initiated" within the two year period when intervenor filed the building permit application for the boys' dormitory building. Record 458. Second, the planning director "verified" the manufactured dwelling building as part of a lawful nonconforming school use, based on findings that the building would cause no greater adverse impact to the neighborhood. *Id.*

Petitioner appealed the planning director's decision to the hearings officer, who conducted a hearing on the appeal. Intervenor continued to argue that it had a vested right to complete the girls' dormitory building. On August 6, 2015, the hearings officer issued a decision denying the application to construct the girl's dormitory building. The hearings officer first concluded that whether intervenor retained the right to construct the girls' dormitory building depended on the expiration limits imposed under the 2005 Special Use permit and OAR 660-033-0140, not the doctrine of vested rights. Record 48 (citing *Heidgerken v. Marion County*, 35 Or LUBA 313, 318 (1998)). According to the hearings officer, intervenor's failure to request and obtain extensions to the initial two-year period set out in Condition 1 means that the right to seek building permit approval for the girls' dormitory building expired at the end of the two-year period.

In the alternative, the hearings officer concluded that intervenor had failed to provide evidence sufficient to establish a vested right to construct the girls' dormitory building. The hearings officer did not address the planning director's apparent theory that the girls' dormitory building could be approved as a "verification" of a lawful nonconforming use. *See* n 4.

Intervenor appealed the hearings officer's decision to the county board of commissioners, who conducted a hearing on the record. On March 15, 2016, the commissioners issued an order reversing the hearings officer's decision. The commissioners rejected the hearings officer's primary conclusion that the 2005 Special Use permit had expired under OAR 660-033-0140 and no longer authorized issuance of a building permit for the girls' dormitory building. The commissioners concluded that intervenor had "initiated" development of the entire three-building school development by applying for building permit approval for the boy's dormitory within the two-year period. The commissioners interpreted OAR 660-033-0140(1) to provide that, once the development action is "initiated" within the two-year period, the discretionary permit never expires and there is no need thereafter for the applicant to seek permit extensions in order to obtain building permit approvals for other aspects of the development. The commissioners' decision did not address the question of vested rights or, with one possible exception discussed below, whether the girls' dormitory building could be approved as a "verification" or alteration to a nonconforming use.

This appeal followed.

FIRST AND THIRD ASSIGNMENTS OF ERROR

Under the first and third assignments of error, petitioner argues that the county erred to the extent it relied upon the doctrine of vested rights as the basis for the authority to issue building permits to construct the girls' dormitory. According to petitioner, any vested right to construct the girls' dormitory was lost through discontinuance, because intervenor ceased efforts to construct the girls' dormitory for a period in excess of one year after 2009, the year the school use became nonconforming. *See Fountain Village Development Co. v. Multnomah County*, 176 Or App 213, 221-24, 31 P3d 458 (2001) (a vested right is an inchoate nonconforming use, and may be lost through discontinuance or abandonment). In addition, petitioner argues that, as the hearings officer concluded, intervenor failed to establish all of the necessary elements of a vested right, under *Holmes v. Clackamas County*.

Petitioner acknowledges that the board of commissioners' order adopted no findings regarding the vested rights or nonconforming use status of the decision, and whether any right to construct the girls' dormitory building had been lost through discontinuance. Nonetheless, petitioner argues that the issues raised in the first and third assignments of error were raised below, and therefore the commissioners were required to adopt findings addressing the issue.

We disagree with petitioner. The board of commissioners approved the application under only one theory, that the 2005 Special Use permit was still valid and authorized the county to issue a building permit for the girls' dormitory building.[4] The commissioners might have chosen to address alternative theories under which the county might have also approved the application, but did not choose to, and petitioner cites no authority that would have required the county to address such alternative theories. Petitioner's arguments that the county could not have approved the application solely under the vested rights doctrine challenges a theory that the county commissioners did not address or adopt as a basis for the decision. Accordingly, petitioner's arguments under the first and third assignments of error provide no basis for reversal or remand. *See DLCD v. Josephine County*, 18 Or LUBA 798, 801-

[4] The findings adopted in support of the commissioners' decision rely exclusively on the 2005 Special Use permit to approve intervenor's application. However, as the parties note, in the "Therefore" section of the order the commissioners' decision states that "the Hearings Official's decision denying a request for the verification of a non-conforming use is reversed *and the request for verification of the non-conforming use is approved*." Record 6 (emphasis added). Despite that language, it is reasonably clear that the commissioners' decision does not "verify" the girls' dormitory building as part of a non-conforming use or approve the building as an expansion or alteration. The findings supporting the order do not even mention non-conforming uses, much less attempt to verify or approve the girls' dormitory building as part of a non-conforming use. It is reasonably clear that the statement "the request for verification of the non-conforming use is approved[]" simply reflects the label that the planning director applied to the application.

802 (1990) (an assignment of error that does not challenge the legal theory that the decision maker relies on must be rejected).

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioner argues that the commissioners misconstrued OAR 660-033-0140(1) and (2) in concluding that the 2005 Special Use permit is still valid and authorizes the county to issue a building permit for the girls' dormitory building.

As noted, OAR 660-033-0140(1) provides that a discretionary permit approval is "void two years from the date of the final decision if the development action is not initiated in that period." *See* n 2. By reverse implication, a discretionary permit that is "initiated" within the two-year period does not automatically become "void" at the conclusion of that two-year period.

The 2005 Special Use permit became final April 25, 2005, and thus became void under both Condition 1 and OAR 660-033-0140(1) unless the development action was "initiated" prior to April 25, 2007. The administrative rules do not define or describe what constitutes an "initiated" "development action." The commissioners concluded that the three-building school use was a unitary use, and that the entire development was "initiated" on January 10, 2006, on the date intervenor applied for a building permit for the first building, the boys' dormitory building. Because the development action had been "initiated" within the two-year period, the commissioners concluded that the

2005 Special Use permit was not void, and still operated to authorize the county to issue a building permit for the girls' dormitory building. According to the commissioners, because the development action had been initiated prior to the two-year expiration period, there was no need for intervenor to apply for any extensions of the 2005 Special Use permit in order to be entitled to continued issuance of building and other permits required for all three phases of the development.

Petitioner argues that the commissioners' view of OAR 660-033-0140(1) ignores the context provided by OAR 660-033-0140(2). As noted, OAR 660-033-0140(2) allows a county to grant a one-year permit extension if the applicant demonstrates, among other things, that the "applicant was unable to begin *or continue development during the approval period* for reasons for which the applicant was not responsible." OAR 660-033-0140(2)(d) (emphasis added); *see* n 2. According to petitioner, OAR 660-033-0140(2) makes it clear that a permit extension may be needed to "continue development" after expiration of the two-year period, even if the development action was begun or "initiated" within the two-year period.

We generally agree with petitioner. OAR 660-033-0140(1) must be read in context with OAR 660-033-0140(2). If initiation of the development action within the two-year period is sufficient in itself to authorize continued development after expiration of the two-year period, then the "continue development" element of OAR 660-033-0140(2) is meaningless language. If

LCDC had intended the meaning that the commissioners' ascribe to OAR 660-033-0140—that "initiating" the development action is sufficient to render the discretionary permit valid indefinitely thereafter without the need for any extensions—then OAR 660-033-0140(2)(d) would not require the applicant to demonstrate that it was unable to "continue development during the approval period" as a condition for obtaining an extension beyond the initial two-year period. Instead, it would simply require the applicant to demonstrate that it was "unable to begin development during the approval period." The commissioners' interpretation effectively "omit[s] what has been inserted[,]" contrary to ORS 174.010.[5]

Further, the commissioners' interpretation that the discretionary permit, once initiated, remains valid indefinitely as the source of authority to issue secondary permits needed to complete development is inconsistent with OAR 661-033-0140(4). As noted, OAR 660-033-0140(4) provides that, in addition

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[5] ORS 174.010 states a general rule of statutory construction, which is also applicable to construction of an administrative rule. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993) (the same interpretative method is used for statutes and administrative rules). ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

to the one-year extension authorized by OAR 660-033-00140(2), "[a]dditional one-year extensions may be authorized where applicable criteria for the decision have not changed." *See* n 2. Read in context with OAR 660-033-0140(2), it is reasonably clear that even once a development action is initiated, the ability to obtain additional extensions to "continue development" is a limited one. The apparent intent of OAR 660-033-0140(4), and the rule as a whole, is to encourage applicants to proceed expeditiously to complete development authorized by the discretionary permit, and to limit the potential lifespan of discretionary permit approvals in EFU zones in order to avoid circumstances such as those presented in this appeal, where non-farm development is delayed for years or requires re-approval under new criteria.[6] The commissioners' interpretation completely sidesteps that important limitation, and allows a development action, once initiated, to cease construction for an indefinite period, then resume again after a lapse of years

[6] OAR 660-033-0140(4)'s prohibition on additional extensions where the applicable criteria have changed should also be read in context with OAR 660-033-0140(3), which provides that "[a]pproval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision." Thus, a decision to extend a discretionary permit is an administrative decision that is not subject to LUBA's jurisdiction. However, where the approval criteria have changed, additional extensions under OAR 660-033-00140(4) are not available, and the applicant must instead seek re-approval under the changed criteria. The resulting decision would be a new discretionary land use decision subject to LUBA's jurisdiction. Under this scheme, the availability or unavailability of extensions plays a significant role both at the local level and on review.

even if the approval criteria have changed, and even if the use has since become prohibited. That interpretation seems flatly inconsistent with the presumed intent of OAR 660-033-0140(4).

Intervenor argues that petitioner's view of OAR 660-033-0140, that it requires the applicant to *complete* development and fully implement the use within the initial two-year period, or within any approved extension period, inserts terms into the language of OAR 660-033-0140(1), which merely requires that the applicant "initiate" the development action within the initial two-year approval period. We generally agree with intervenor on this point, and decline to read OAR 660-033-0140(1) to provide that the discretionary permit necessarily becomes void if the development action is not "completed" or fully implemented within the initial two-year period, or within an approved extension period. Nonetheless, as discussed above, OAR 660-033-0140(1) cannot be read in isolation, and some effect must be given to the "continue development" language in OAR 660-033-0140(2). Viewed in context with OAR 660-033-0140(2) and (4), it is clear that simply initiating the development action within the two-year period is not sufficient to render the permit valid indefinitely, and that in many circumstances an extension will be necessary in order to "continue development" beyond the approval period even when the action has been initiated within the approval period.

OAR 660-033-0140 is ambiguous regarding in what circumstances an applicant can "continue development" beyond the initial two-year approval

period, without the need to obtain an extension. One possibility is that no extension is necessary where the applicant initiates the development action within the two-year period by obtaining a building permit or similar secondary permit that is subject to its own expiration period. If the building permit expiration period extends beyond the discretionary permit's two-year approval period, the applicant might be able to rely upon the building permit alone to authorize continued development beyond the discretionary permit's two-year period, and within the building permit's expiration period, without needing to either complete development within the two-year period, or obtain an extension to the discretionary permit.

However, we need not speculate further on this point, because even if that circumstance is sufficient to avoid the need for obtaining an extension under OAR 660-033-0140(2), intervenor did not apply for any building permit for the girls' dormitory building until 2014, long after the end of the initial two-year approval period in May 2007, and long after the school use became a conditional use in the EFU zone, and subject to additional criteria. If intervenor wished to rely upon the 2005 Special Use permit to authorize "continued development" of the approved school to allow construction of the girls' dormitory beyond the two-year period set out in Condition 1 and OAR 660-033-0140(1), then it was incumbent on intervenor to obtain one or more extensions or, perhaps, apply for a building permit for the girls' dormitory building within the two-year approval period and complete development within

the expiration period of that building permit. Having failed to do either, intervenor can no longer rely upon the 2005 Special Use permit to authorize continued development of the school. The commissioners erred in concluding to the contrary.

The second assignment of error is sustained.

DISPOSITION

Petitioner argues that if LUBA sustains the second assignment of error the county's decision must be reversed. OAR 661-010-0071(1) provides that LUBA shall reverse a land use decision where the "decision violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(2) provides that LUBA shall remand a land use decision where the "decision improperly construes the applicable law, but is not prohibited as a matter of law."

As discussed, the board of commissioners misconstrued OAR 660-033-0140(1), but it is not clear to us that the decision "is prohibited as a matter of law." The commissioners' decision addresses only one of several theories for approving a building permit for the girls' dormitory building that were advanced below. We note that the initial planning director's decision approved the girls' dormitory building based in part on findings that the building complies with the criteria for alteration of a nonconforming use, at Lane Code 16.251(12). Record 458. Specifically, the planning director found that the girls' dormitory building will cause "no greater adverse impact to the

neighborhood," reflecting the standard at LC 16.251(12)(a) that implements the similar statutory standards for altering a nonconforming use at ORS 215.130(9). *Id.* For whatever reason, that theory of approval apparently was not considered in the hearings officer's or board of commissioners' decisions. Given that the commissioners' decision before us is confined to a single theory of approval, we cannot say that a decision to approve the girls' dormitory building is "prohibited as a matter of law." Remand seems a more appropriate disposition than reversal.

In addition, we note the existence of statutory and rule provisions that appear to speak directly to the present circumstances.

As explained, until 2009 schools were authorized in the county's EFU zone under ORS 215.213(1)(a), and since then have been authorized, with limitations, only under ORS 215.213(2)(y). Intervenor's school was authorized prior to 2009 under local regulations implementing *former* ORS 215.213(1)(a). Under ORS 215.135 and OAR 660-033-0130(18)(b) and (c), a county may approve expansion of a school approved under *former* ORS 215.213(1)(a), subject to specified standards.[7] Although intervenor's application seeking

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[7] OAR 660-033-0130(18) provides, in relevant part:

> "(b) In addition to and not in lieu of the authority in ORS 215.130 to continue, alter, restore or replace a use that has been disallowed by the enactment or amendment of a zoning ordinance or regulation, *schools as formerly allowed pursuant to ORS 215.213(1)(a)* or 215.283(1)(a), as in effect

approval of the girls' dormitory building can be characterized in different ways,[8] it seems relatively straightforward to characterize it as seeking the expansion of an existing nonconforming school use. The applicability of ORS 215.135 and OAR 660-033-0130(18) was raised in the appeal to the hearings officer, Record 342, but for whatever reason the statute and rule were never addressed in the hearings officer's or commissioners' decisions.

> before January 1, 2010, the effective date of 2009 Oregon Laws, chapter 850, section 14, may be expanded subject to:
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> "(A) The requirements of subsection (c) of this section; and
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> "(B) Conditional approval of the county in the manner provided in ORS 215.296.
>
> "(c) A nonconforming use described in subsection (b) of this section may be expanded under this section if:
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> "(A) The use was established on or before January 1, 2009; and
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> "(B) The expansion occurs on:
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> "(i) The tax lot on which the use was established on or before January 1, 2009; or
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> "(ii) A tax lot that is contiguous to the tax lot described in subparagraph (i) of this paragraph and that was owned by the applicant on January 1, 2009." (Emphasis added).

[8] As noted, intervenor initially characterized the application as seeking a vested rights determination. The planning director recharacterized it as seeking "verification" of a nonconforming use.

On remand, the county may consider other potential bases for approval offered below, including whether the girls' dormitory building can be approved under the criteria at LC 16.251 for altering a nonconforming use. We note that, if the county considers that theory, ORS 215.135 and OAR 660-033-0130(18)(b) and (c) would likely apply.

The county's decision is remanded.