BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

THRIVE HOOD RIVER,
Petitioner,

vs.

HOOD RIVER COUNTY,
Respondent,

and

APOLLO LAND HOLDING, LLC,
Intervenor-Respondent.

LUBA No. 2020-081

FINAL OPINION
AND ORDER

Appeal from Hood River County.

Andrew Mulkey filed the petition for review and argued on behalf of petitioner.

David F. Doughman filed a response brief and argued on behalf of respondent.

Michael C. Robinson filed a response brief on behalf of intervenor-respondent. Also on the brief were Garrett Stephenson and Schwabe, Williamson & Wyatt, P.C. Garrett Stephenson argued on behalf of intervenor-respondent.

RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board Member, participated in the decision.

REVERSED 04/09/2021

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a board of commissioners decision granting a fourth one-year extension of a permit for an amphitheater for outdoor concerts and other commercial events.

FACTS

The subject property is 33 acres, zoned Industrial (M-1), and located in the former Dee Mill exception area of the county. In 2014, the county approved intervenor's application to construct an amphitheater on the property and use the property for concerts and weddings. Intervenor proposed, and the county required in a condition of approval, 437 parking spaces based on a transportation study submitted by intervenor that estimated the number of trips to be generated at 500. Record 8, 456. In March 2016, the county approved intervenor's application for a one-year extension of the permit and, in January 2018, the county approved a second extension of the amphitheater permit. The county approved a third extension of the amphitheater permit in September 2018.

In September 2019, intervenor applied for a fourth extension of the amphitheater permit. The planning director approved the extension, and petitioner appealed the planning director's decision to the planning commission. The planning commission held a public hearing on the application and affirmed the planning director's decision. Petitioner appealed the planning commission's decision to the board of commissioners. The board of commissioners held a

public hearing and, at the conclusion, voted to affirm the planning commission's decision and reject the appeal.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Hood River County Zoning Ordinance (HRCZO) 1.130(A) provides, in relevant part:

> "Except as provided for land use permits in EFU and forest zones, any permit issued by the Planning Department shall automatically become null and void two-years after the date on which it was granted unless a building permit has been issued or construction has commenced except as otherwise allowed by State statute, State Administrative Rule or a separate section of the [HRCZO]. If a building permit is not required all applicable conditions of approval shall have been met within two-years after approval of the permit.
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> "A two-year extension may be granted by the Planning Director where all of the following standards are met:
>
> "* * * * *
>
> "4. The approval criteria for the original decision found in a state goal, policy, statute or administrative rule, the Comprehensive Plan or this Ordinance have not changed; and
>
> "Additional one (1) year extensions may be authorized where the applicable standards for an extension set out in (1) through (4) above are met and are subject to double fees. Authority to grant extensions of time will rest with the Director and is a Type I decision. Such decisions are not subject to appeal and are not land use decisions." (Underscoring in original.)

In May 2018, the board of commissioners amended HRCZO article 51, which governs off-street loading and parking, by adding HRCZO 50.10(H). Prior

to those amendments, HRCZO 51.10(A) to (G) provided off-street parking requirements for specifically listed residential, commercial residential, institutional, place of public assembly, commercial amusement, commercial, and industrial uses. As noted, a condition of approval of the 2014 permit required intervenor to provide 437 parking spaces. Record 456.

HRCZO 51.10(H) provides:

> "For uses not specifically listed under Section 51.10(A) through (G) above, the number of required parking spaces shall be based on either of the following:
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> "1. A comparable use from the above list, as determined by the Planning Director; or
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> "2. A recommendation from the County Engineer, a qualified traffic engineer, or other similar professional based on the Institution of Transportation Engineer' (ITE) Parking Generation Manual or other similar publication."

As noted, in September 2019, intervenor sought an extension of the 2014 permit. The parties do not dispute that, if intervenor's application were filed today, HRCZO 51.10(H) would apply as an approval criterion and require the amphitheater to provide a specified number of parking spaces based on either HRCZO 51.10(H)(1) or (2).

In concluding that it could approve the fourth extension, the board of commissioners interpreted the phrase "approval criteria for the original decision found in * * * [the HRCZO]" in HRCZO 1.130(A)(4) to mean

> "any [approval] criteria actually applied to the 2014 [permit]. The Board makes this interpretation because HRCZO 1.130.A.1-4 is

> concerned only with [approval] criteria actually applied to the decision being extended. Considering other criteria not applied to the decision is irrelevant to HRCZO 1.130.A.4." Record 8.

In the first assignment of error, petitioner argues that the board of commissioners improperly construed HRCZO 1.130(A)(4) in concluding that it could approve the fourth extension. ORS 197.835(9)(a)(D). Petitioner argues that "[t]he approval criteria for the original decision found in * * * [the HRCZO] have * * * changed" within the meaning of HRCZO 1.130(A)(4) because HRCZO 51.10(H) was adopted in May 2018 and there is no dispute that that provision would apply to the 2014 application if it were considered today.

LUBA must affirm a governing body's interpretation of its own land use regulation if the interpretation is not inconsistent with the regulation's express language, purpose, or policy. ORS 197.829(1).[1] The test under ORS 197.829(1)

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[1] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

is not whether the interpretation is correct, or the best or superior interpretation, but whether the governing body's interpretation is "plausible," given its text and context. *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). The standard of review under ORS 197.829(1) and *Siporen* is "highly deferential" to the county, and the "existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible.'" *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012) (citing *Siegert v. Crook County*, 246 Or App 500, 509, 266 P3d 170 (2011)). In *Crowley v. City of Hood River*, 308 Or App 44, 54, 480 P3d 1007 (2020), the court explained that a local governing body's interpretation of the text of a particular provision is not plausible when it is inconsistent with context provided in the purpose of the provision at issue.

Petitioner argues that the board of commissioners' interpretation is inconsistent with the express language of HRCZO 1.130(A)(4) because it adds language to the provision in order to reach its preferred interpretation and fails to address other language in HRCZO 1.130(A)(4) which undercuts its preferred interpretation. Petitioner also argues that the board of commissioners' interpretation is inconsistent with the purpose of HRCZO 1.130(A)(4), which petitioner argues is to allow extensions when the development previously

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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

approved is consistent with the law existing at the time the extension is sought. Accordingly, petitioner argues, the board of commissioners' interpretation is implausible, and LUBA is not required to affirm it. The county and intervenor respond that LUBA is required to affirm the board of commissioners' interpretation because it is plausible, even if it is not the stronger or more logical interpretation.

We agree with petitioner that the board of commissioners' interpretation of HRCZO 1.130(A)(4) is expressly inconsistent with the language of that provision. First, nothing in the express language of HRCZO 1.130(A)(4) supports an interpretation that limits its application to the approval criteria that the county "actually applied" in rendering the original decision.[2] Rather, HRCZO 1.130(A)(4) prohibits an extension where "[t]he approval criteria for the original decision *found in* * * * [*the HRCZO*] have * * * changed." (Emphasis added.) The *original decision* is approval of an amphitheater, and an extension is not allowed if the approval criteria for an amphitheater have changed.

The board of commissioners' interpretation of HRCZO 1.130(A)(4) inserts the words "actually applied" into the phrase "approval criteria for the original decision found in * * * [the HRCZO]." Record 8. ORS 174.010 prohibits

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[2] Petitioner does not challenge the county's finding that the 2014 permit decision did not apply HRCZO 51.10.

interpretations that insert words that have been omitted.[3] *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202, 210, 214 P3d 68 (2009). Consequently, the board of commissioners' interpretation of HRCZO 1.130(A)(4) is inconsistent with that provision's express language. It is not a "weaker or less logical" interpretation. *Mark Latham*, 250 Or App at 555. Rather, it is not a logical interpretation at all.

In addition, and more critically, the board of commissioners' interpretation fails to address at all, or give any meaning to, the phrase "found in a state goal, policy, statute or administrative rule, the Comprehensive Plan or this Ordinance," which modifies the phrase "approval criteria." The board of commissioners' interpretation limits the applicable approval criteria to those criteria that the county actually applied and does not link the phrase "approval criteria" to the criteria that are "found in" the HRCZO, or in a statute or administrative rule. The county's interpretation of the phrase "approval criteria," which improperly

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[3] 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."

inserts the phrase "actually applied," is inconsistent with the context provided by the phrase "found in [other laws]."[4]

We also agree with petitioner that the board of commissioners' interpretation of HRCZO 1.130(A)(4) is inconsistent with the purpose underlying HRCZO 1.130(A). HRCZO 1.030 explains that some of the purposes of the HRCZO are to

> "(A) Provide a guide for the growth and development of the County of Hood River in accordance with the Comprehensive Plan[;]
>
> "(B) Insure that the development of property within the County is commensurate with the character and physical limitation of the land, and, in general to promote the public health, safety, convenience and welfare[; and]
>
> "* * * * *
>
> "(H) *Ensure that adequate off-street parking and loading facilities will be installed and maintained.*" (Emphasis added.)

HRCZO 1.130(A) presumably furthers the purposes of the code. It provides generally that development pursuant to an approved permit must commence within two years of approval—*i.e.*, an approved permit "shall automatically become null and void two-years after the date on which it was granted unless a building permit has been issued or construction has

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[4] One can envision a circumstance in which such an interpretation could result in a multi-year, perhaps multi-decade, extension of an original, flawed permit decision that failed to apply *any* approval criteria at all.

commenced." The alternative to automatic expiration is that an extension can be granted, but only if the approved development is consistent with the law existing at the time of the extension, including law "found in" the statewide planning goals, policies, state statutes, or state administrative rules, as well as in the HRCZO or the county's comprehensive plan. HRCZO 1.130(A)(4). For these reasons, we conclude that the board of commissioners' interpretation is expressly inconsistent with the purposes underlying HRCZO 1.130(A)(4), which, in light of the purposes of HRCZO 1.030, are to provide for automatic expiration of a permit where development has not commenced within two years and to only allow extensions of development that are consistent with existing law.

In conclusion, the board of commissioners' interpretation is inconsistent with the express language and purpose of HRCZO 1.130(A)(4) and improperly construes that provision. ORS 197.835(9)(a)(D).

In the first assignment of error, petitioner also argues that the board of commissioners' decision is not supported by substantial evidence. However, petitioner's argument in this portion of the assignment of error is derivative of its argument that the board of commissioners improperly construed HRCZO 1.130(A)(4). Because we conclude that the board of commissioners misconstrued HRCZO 1.130(A)(4), we need not address petitioner's other arguments under the first assignment of error.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

HRCZO 1.130(A)(4) allows an extension of a permit where "a state goal, policy, statute or administrative rule, the Comprehensive Plan or this Ordinance have not changed." In the second assignment of error, petitioner argues that HRCZO 1.130(A)(4) prohibits the county from approving the extension because, according to petitioner, a *county* policy changed in 2019 when the county began requiring a demonstration of compliance with OAR 660-004-0018 for development of properties zoned M-1 in the former Dee Mill exception area, such as the subject property.

In considering petitioner's argument during the proceedings below, the board of commissioners interpreted the word "policy" in HRCZO 1.130(A)(4) as referring to "state" policy. Record 8. The board of commissioners noted that the text of HRCZO 1.130(A)(4) divides state law (*i.e.*, state goals, statutes, administrative rules) and county law (*i.e.*, "the Comprehensive Plan or this Ordinance") and concluded that, because the term "policy" is grouped together with the list of *state* law, permit extensions are not barred by changes in *county* policy. *Id.*

Petitioner argues that the county's interpretation is inconsistent with the express language of HRCZO 1.130(A)(4) because, according to petitioner, the term "state" modifies only the term "goal" and does not modify any other terms in the list, including "policy." Petition for Review 21. Petitioner argues that, in order for the term "state" to modify the term "policy," "[c]orrect grammar and

punctuation require" that the purported instances of state law in HRCZO 1.130(A)(4) be separated from the instances of county law by a semicolon. *Id.*

The county and intervenor argue that the board of commissioners' interpretation is consistent with the express language of HRCZO 1.130(A)(4) because it is consistent with *noscitur a sociis*, "[a] canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." *Black's Law Dictionary* 1160-61 (9th ed 2009). Intervenor also cites *The Chicago Manual of Style* section 6.60 (17th ed 2017) for the proposition that a semicolon is not necessary for complex lists "[i]f ambiguity seems unlikely."

We agree with the county and intervenor that the board of commissioners could interpret the term "policy" in HRCZO 1.130(A)(4) to refer only to state policy. The board of commissioners' interpretation notes a clear linguistic distinction in the provision between "a state goal, policy, statute or administrative rule" on the one hand and the County's own "Comprehensive Plan or * * * Ordinance" on the other. That interpretation is not expressly inconsistent with the text of the code provision, and it "plausibly accounts for the text and context" of HRCZO 1.130(A)(4). *Siporen*, 349 Or at 262.

Because we conclude that the board of commissioners did not err by interpreting the term "policy" in HRCZO 1.130(A)(4) to refer to state policy, we need not address the county and intervenor's contention that petitioner's argument is barred by the law of the case doctrine, or petitioner's derivative

argument that the board of commissioners' decision is not supported by substantial evidence.

The second assignment of error is denied.

DISPOSITION

Petitioner requests that LUBA reverse the decision. Petition for Review 17. We will reverse a land use decision when "[t]he decision violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). We will remand a decision when "[t]he decision improperly construes the applicable law, but is not prohibited as a matter of law." OAR 661-010-0071(2)(d).

In our resolution of the first assignment of error, we concluded that the board of commissioners improperly construed HRCZO 1.130(A)(4) when it approved the extension on the basis that HRCZO 51.10(H) was not "actually applied" when the county approved the 2014 permit. HRCZO 1.130(A)(4) authorizes an extension of a permit only when the approval criteria for the original decision—in this case, the approval criteria for an amphitheater—found in other laws have not changed. The county adopted HRCZO 51.10(H) in 2018, after the 2014 permit approval, and, because that provision would apply to the permit application if it were considered today, the approval criteria for the original decision "found in * * * [the HRCZO]" have changed. Accordingly, the county's decision to grant a fourth extension violates HRCZO 1.130(A)(4) "and is prohibited as a matter of law." OAR 661-010-0071(1)(c).

The county's decision is reversed.