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

CODY JOHNSON and ELYSIA JOHNSON,
Petitioners,

and

THOMAS VOGEL and SHEALENE VOGEL,
Intervenors-Petitioners,

vs.

LANE COUNTY,
Respondent,

and

LANDWATCH LANE COUNTY
and 1000 FRIENDS OF OREGON,
Intervenors-Respondents.

LUBA No. 2022-066

KIMBERLY O'DEA, JOHN O'DEA,
BERNARD PERKINS,
and THERESA IVERSON-PERKINS.
Petitioners,

and

THOMAS VOGEL and SHEALENE VOGEL,
Intervenors-Petitioners,

vs.

LANE COUNTY,
Respondent,

and

LANDWATCH LANE COUNTY
and 1000 FRIENDS OF OREGON,
Intervenors-Respondents.

LUBA No. 2022-067

FINAL OPINION
AND ORDER

Appeal from Lane County.

Zack P. Mittge filed a petition for review and reply brief and argued on behalf of petitioners Cody Johnson and Elysia Johnson. Also on the brief was Hutchinson Cox.

Gregory S. Hathaway filed a petition for review and reply briefs and argued on behalf of petitioners Kimberly O'Dea, John O'Dea, Bernard Perkins, and Theresa Iverson-Perkins. Also on the brief was Hathaway Larson LLP.

T. Beau Ellis filed the intervenors-petitioners' brief and argued on behalf of intervenors-petitioners. Also on the brief was Vial Fotheringham LLP.

Sara Chinske filed the respondent's brief and argued on behalf of respondent.

Sean T. Malone filed the intervenors-respondents' brief and argued on behalf of intervenors-respondents.

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

RYAN, Board Chair; concurring.

REVERSED 02/13/2023

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

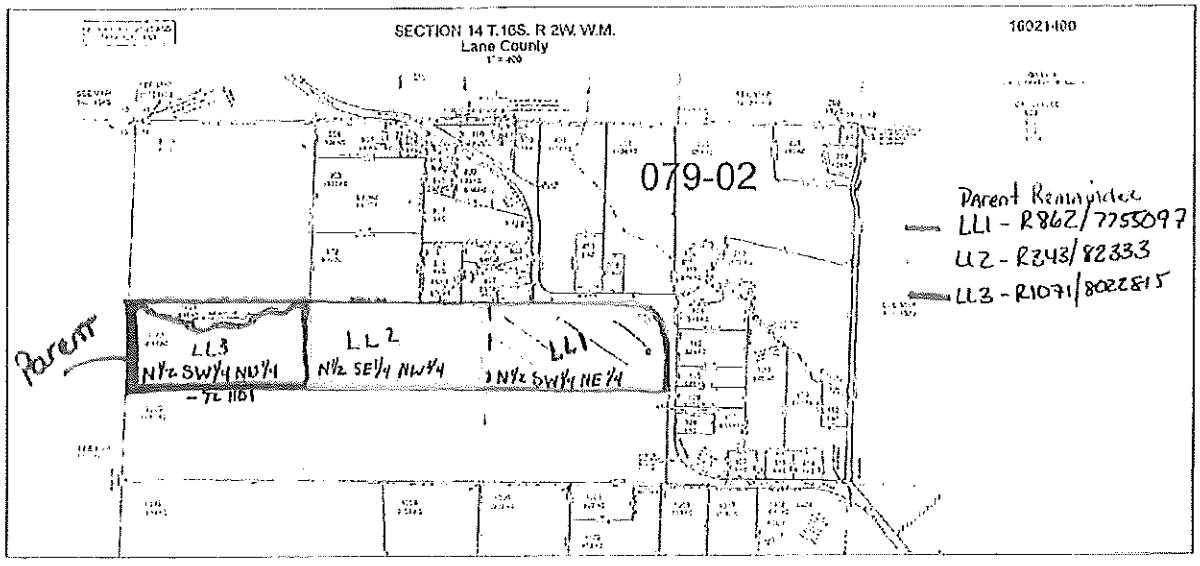
Opinion by Rudd.

NATURE OF THE DECISION

Petitioners appeal a hearings official decision affirming a planning director revocation of a legal lot verification (LLV) and seven subsequent land use decisions.

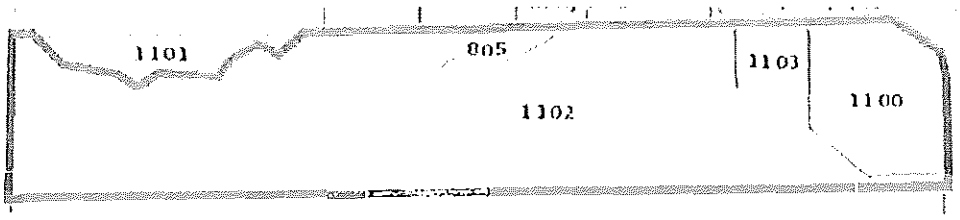
FACTS

The subject property is located at 37212, 37222, 37228, and 37316 Parsons Creek Road, Springfield, Oregon. "Prior to 2012, the subject property was all combined as a single property[.]" Record 72. "On December 21, 2011, the O'Deas submitted an application to the County for [an LLV], seeking to obtain approval for three legal lots * * *." *Id.* at 72-73. "The County approved the [LLV] request on January 30, 2012." *Id.* at 73. We refer to this as the 2012 LLV. The lots identified in the 2012 LLV are depicted below.



Record 95.

Subsequent to approval of the 2012 LLV, the county approved a series of property line adjustments and two forest template dwelling applications on the subject property.[1] The subject property is currently identified as tax lots 1100, 1102, 1103, and 805.[2] The forest template dwellings are located on tax lots 1102 and 1103. We describe the parties' relationship to the tax lots below.



Record 3223.

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[1] The subsequent approvals are described as follows:

> "**509-PA11-05854 – Legal Lot Verification with Notice**
>
> "**509-PA13-05566 – Administrative Property Line Adjustment**
>
> "**509-PA14-05756 – Forest Template Dwelling**
>
> "**509-PAl5-05298 – Administrative Property Line Adjustment**
>
> "**509-PA15-05481 – Verification of Conditions**
>
> "**509-PAl5-05758 – Type I Property Line Adjustment**
>
> "**509-PA17-05196 – Forest Template Dwelling**
>
> "**509-PAlS-05812 – Verification of Conditions.**" Record 17 (boldface and underscoring in original).

[2] We recognize that, although the 2012 LLV verified three lots on the subject property, this appeal involves four tax lots and four sets of property owners. The parties do not discuss this difference, and we do not address it further.

Sometime before January 24, 2022, the county's planning staff

> "became aware that the four deeds * * * that were relied upon for the 2012 [LLV], were not the same as the deeds with the recording numbers that were on file with Lane County Deeds and Records. The County hired a forensics expert, [Green], to examine the four deeds and the property description card that was the source document for those deeds. [Green] was provided the deeds that had been submitted with the LLV application as well as copies of the deeds from Deeds and Records, for purposes of comparison. [Green] submitted two letters dated January 24, 2022 and March 23, 2022, providing his expert opinion that all four deeds and the property description card that were submitted with the LLV application [were fabricated]."[3] Record 74 (footnotes omitted).

Lane Code (LC) 14.090 is titled "Limitations on Approved and Denied Applications" and provides, in part:

> "(1) An application reviewed in accordance with the provisions of this chapter is subject to the limitations at subsection (1) through (9) below.
>
> "* * * * *
>
> "(8) Revocation or Suspension of a Decision
>
> "(a) The Director may suspend or revoke a decision issued in accordance with this chapter for any reason listed in

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[3] Green opined that,

> "[b]ased upon the logical analysis of the evidence present on the documents examined, each of the four deeds in question (Q-1 through Q-4), were fabricated by methods including common 'cut and paste' transfers, obliterations and text replacements. The amount of evidence, without reasonable alternate theories to explain the anomalies noted, compelled the opinion stated." Record 3005.

subsection (8)(a)(i) through (iv) below. When taking such action, the Director will notify the owner and/or applicant of the reason for the suspension or revocation and what steps, if any the applicant must take to remedy the reason for the Director's decision.

"(i) The site has been developed in a manner not authorized by the approval of the application;

"(ii) The approval has not been complied with;

"(iii) The conditions of approval have not been completed; or

"(iv) *The approval was secured with false or misleading information.*" (Emphasis added.)

On January 21, 2022, county counsel sent petitioner Kimberly O'Dea an email message stating that the county intended to revoke the 2012 LLV and subsequent approvals. Record 74. On January 26, 2022, the county issued a notice of revocation of the 2012 LLV and seven subsequent land use decisions that relied on that 2012 LLV pursuant to LC 14.090(8)(a)(iv), stating that the revocation decision would become final unless appealed by February 7, 2022. Record 3221-22. On February 7, 2022, an appeal of the revocation decision was filed by petitioners Kimberly O'Dea and John O'Dea (the O'Deas), owners of the subject property at the time of the 2012 LLV and current owners of tax lot 1102; petitioners Cody Johnson and Elysia Johnson (the Johnsons), current owners of tax lot 1103; intervenors-petitioners Thomas Vogel and Shealene Vogel (the Vogels), current owners of tax lot 1100; and petitioners Bernard

Perkins and Theresa Iverson-Perkins, current owners of tax lot 805. We sometimes refer to these parties collectively as petitioners.

On March 31, 2022, the hearings official held a hearing on the appeal. On June 7, 2022, the hearings official issued their decision affirming the revocation of the 2012 LLV and subsequent land use decisions that relied on the 2012 LLV. On June 21, 2022, the Johnsons and Vogels each applied for reconsideration of the hearings official's decision. On June 28 2022, the county mailed the hearings official's decision on reconsideration, affirming the planning director's decision revoking the approvals. These appeals followed.

FIRST ASSIGNMENT OF ERROR (THE JOHNSONS)

FIRST ASSIGNMENT OF ERROR (THE VOGELS)

FIFTH ASSIGNMENT OF ERROR (THE O'DEAS, PERKINS, AND IVERSON-PERKINS)

The Johnsons' and the Vogels' first assignments of error and the O'Deas', Perkins', and Iverson-Perkins' fifth assignment of error are that the revocation decision misconstrued the law or exceeded the county's jurisdiction because the decision is an impermissible collateral attack on the 2012 LLV and the seven land use decisions that relied on the 2012 LLV and because the decision is inconsistent with the statutory preference for finality of land use decisions. The county responds that LC 14.090(8)(a)(iv) provides authority for the county to revoke the land use decisions directly, that that authority is not limited by the doctrine of collateral attack or any other limits, and that petitioners' argument renders LC

14.090(8)(a)(iv) meaningless. Respondent's Brief 33-34. Intervenors-respondents argue that petitioners fail to reconcile their assignments of error with prior LUBA cases addressing permit revocations and that the revocation is a direct rather than collateral attack. *See, e.g.*, Intervenors-Respondents' Brief in Response to the O'Deas, Perkins, and Iverson-Perkins 31-36. Intervenors-respondents also argue that the statute of ultimate repose at ORS 197.830(6) is inapplicable since the revocation does not concern an appeal of the original decisions and that, if the state wished to place a limitation on local revocation of permit decisions, it could have done so. Intervenors-Respondents' Brief in Response to the Johnsons 6-8.

A. Finality of Land Use Decisions

The legislature has adopted a policy favoring finality of land use decisions. *See* ORS 197.805 ("It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review."). The Supreme Court has explained that, "[t]hough this statute is found among those concerning [LUBA], the policy statement there set forth applies to land use matters generally." *1000 Friends of Oregon v. LCDC (Clatsop Co.)*, 301 Or 622, 628 n 4, 724 P2d 805 (1986). Short deadlines for decision-making and appeal throughout the process, including expedited review of land use matters by local governments, LUBA, and the Court of Appeals, implement the policy. ORS 215.427; ORS 227.178; ORS 197.830; ORS 197.850; ORS 197.855.

ORS 197.830(6) provides for finality by limiting the time in which an appeal of a land use decision to LUBA may be brought:

> "The appeal periods described in subsections (3), (4) and (5) of this section:
>
> "(a) May not exceed three years after the date of the decision, except as provided in paragraph (b) of this subsection.
>
> "(b) May not exceed 10 years after the date of the decision if notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.797 is required but has not been provided."[4]

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[4] ORS 197.830(3), (4), and (5) provide:

> "(3) If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416(11) or 227.175(10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.
>
> "(4) If a local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175 (10):
>
> "(a) A person who was not provided notice of the decision as required under ORS 215.416(11)(c) or

227.175(10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision.

"(b) A person who is not entitled to notice under ORS 215.416(11)(c) or 227.175(10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416(11)(a) or 227.175(10)(a).

"(c) A person who receives notice of a decision made without a hearing under ORS 215.416(11) or 227.175(10) may appeal the decision to the board under this section within 21 days of receiving actual notice of the nature of the decision, if the notice of the decision did not reasonably describe the nature of the decision.

"(d) Except as provided in paragraph (c) of this subsection, a person who receives notice of a decision made without a hearing under ORS 215.416(11) or 227.175(10) may not appeal the decision to the board under this section.

"(5) If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

"(a) Within 21 days of actual notice where notice is required; or

The purpose of this statute is to provide certainty in matters involving land use for local governments, developers, opponents, and those who hold an interest in land. The extended appeal periods in ORS 197.830(3), (4), and (5) provide a limited remedy when a local government makes a procedural error by failing to provide required notice or by inaccurately describing the decision in the notice.[5] ORS 197.830(4)(b) extends the normal 21-day appeal period to 42 days for people who are not entitled to notice but who are adversely affected or aggrieved by a permit decision issued without a hearing. The legislature thereby provided very limited exceptions to the expedited timeline for challenging a land use decision. Even in the circumstances where the local government made a notice error, the window of opportunity to challenge the arguably wrong decision closes either three or 10 years later. ORS 197.830(6) balances the right to appeal a land use decision to LUBA with the right of property owners to be certain that a land use decision is no longer subject to challenge. A person who receives notice of a decision and who wishes to challenge the decision must either participate in the local proceeding or appeal a decision made without a hearing within the timeframes prescribed by statute.

> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

[5] As we understand it, all of the revoked decisions were properly noticed.

This appeal does not involve an appeal under ORS 197.830(3), (4), or (5), and, thus, the periods of ultimate repose in ORS 197.830(6) do not apply. However, we agree with petitioners that ORS 197.830(6) provides important context for our conclusion, explained below, that the LC provision that the county relied on to revoke the 2012 LLV and the land use decisions that relied on the 2012 LLV is inconsistent with the legislative policy calling for finality of land use decisions.

The doctrine of collateral attack is similarly based on the policy preferring finality of land use decisions. As we explained in *Gansen v. Lane County*, "in challenging a development approval that depends upon a prior, unappealed land use decision, LUBA will not review arguments that the prior, unappealed decision was procedurally flawed or substantively incorrect, because such a challenge would constitute an impermissible collateral attack on a decision not before LUBA." ___ Or LUBA ___, ___ (LUBA No 2020-074, Feb 22, 2021) (slip op at 11).

Gansen concerned an appeal of a hearings official decision determining that the petitioner's property was not a lawfully established unit of land. In 2001, the county engineer verified that the property was a "'legal lot,' that is, a lawfully created, legally separate unit of land for development purposes that may be conveyed without county approval of a subdivision." *Id.* at ___ (slip op at 2). A 2002 building permit for a home constructed on the property included a section entitled "Land Use Review." Next to "Legal Lot Status," staff wrote the letter

"Y" with the additional language "PA 01-5412," the number associated with the 2001 verification. In 2020, the petitioner, in advance of a property line adjustment application, applied for a legal lot verification under the county's now-formal, codified process. The hearings official affirmed the planning director's decision concluding that the subject property was not a lawful parcel. The petitioner challenged the "hearings officer's conclusion that the 2002 Building Permit is not a land use decision that is binding on the county and, therefore, that the county is not precluded by the 2002 Building Permit from determining that the subject parcel is not a Lawful Parcel." *Id.* at ___ (slip op at 6). We explained:

> "In *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004), we reversed the city's denial of an application for parking lot improvements that were intended to implement a previous site plan approval for a gas station and associated parking. The city council denied the parking lot improvement application after agreeing with the intervenor that the city had miscalculated the lot area in the previous site plan review and, as a result, miscalculated the required number of parking spaces to be constructed. We concluded that the city's attempt to correct that miscalculation by denying the subsequent application for construction of the improvements was 'nothing short of a collateral attack on the correctness of the [prior] decision.' *Safeway*, 47 Or LUBA at 501. Similarly, here, the county's attempt to correct what the county has essentially concluded was a mistake in the 2002 Building Permit is nothing short of a collateral attack on the correctness of that decision." *Id.* at ___ (slip op at 12-13).

We discussed the legislative policy underlying ORS 197.830(6) in reversing the hearings official's decision in *Gansen*, explaining that

> "[t]he legislature's intent in amending the statute to provide a truly final period of repose for land use decisions informs our conclusion

that allowing an indirect challenge to a final land use decision that the legislature has prohibited from direct challenge by appeal to LUBA would be inconsistent with the legislative policy embodied in the statute of ultimate repose that favors finality in land use decisions." *Id.* at ___ (slip op at 18).

B. LC 14.090(8)(a)(iv)

In the present appeal, the hearings official concluded that LC 14.090(8)(a)(iv) provides independent authority for the county to revoke the previously final land use decisions and that that authority is not limited by the doctrine of collateral attack:

> "The collateral attack theory, as set forth in previous Hearings Official decisions and caselaw, does not apply to preclude a revocation. [Petitioners'] theory would render LC 14.090(8)(a)(iv) meaningless because, under [petitioners'] theory, a revocation of a prior decision would always be a collateral attack of that previously issued approval. LC 14.090(8)(a)(iv) allows the Planning Director to revoke a decision where it determines the previous approval was obtained through submittal of false information. Either the collateral attack doctrine does not apply, or the revocation provision is an exception to the collateral attack line of cases." Record 91.

The county maintains that

> "[a] revocation is not a collateral attack on a previous judgment or decision, it is a direct attack. A direct attack on a prior decision is an attempt to avoid or correct it in some manner provided by law, as provided here by LC 14.090(8)(a)(iv). A direct attack is successful upon a showing of error[.]" Respondent's Brief 34.

The county also argues that, even if the revocation is a collateral attack, revocation is allowed in instances of fraud because Oregon Rules of Civil

Procedure (ORCP) 71 C "allows a collateral attack on a judgment by an independent action on the grounds of fraud." *Id.*

We reject both of the county's arguments. First, this is not a civil proceeding, and ORCP 71 C is not applicable.[6] *Pfeifer v. City of Silverton*, 146 Or App 191, 195, 931 P2d 833 (1997) (explaining that, although the ORCP may be instructive, "the [ORCP] do not 'bind' LUBA in the same sense that they bind the circuit and district courts of the state").

Second, while the county may be correct, as far as it goes, in characterizing the county's action as a "direct" attack on a previously final land use decision pursuant to LC 14.090(8)(a)(iv), as explained above, the legislature has adopted a policy providing that time is of the essence in reaching final decisions in matters involving land use and that decisions involving land use should be made

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[6] ORS 197.805 requires that LUBA make decisions "consistently with sound principles governing judicial review." However even if the policy of overturning a civil judgment based on fraud was considered a general judicial principle, we still would not be required to apply it. In *Just v. City of Lebanon*, the court explained that ORS 197.805 "does not require LUBA to apply all of the judicial review principles in exactly the same way that a court would apply them." 193 Or App 132, 144, 88 P3d 312 (2004), *rev dismissed*, 342 Or 117 (2006). Instead, "LUBA may modify sound principles of judicial review or choose not to apply certain principles to ensure that its decision is compatible with the specific statutes and principles governing LUBA's review." *Id.*

consistently with sound principles governing judicial review. That policy applies to all land use matters and requires timely and final land use decisions.[7]

The court has recognized the importance of finality of land use decisions and limited subsequent appeals that are inconsistent with that principle through the collateral attack doctrine, even absent a specific statute expressly providing therefor. Whether a revocation proceeding constitutes a direct or a collateral attack is a distinction without a difference with respect to the policy of finality of land use decisions. The county has cited no express or implied authority that would allow it to adopt a local code provision that allows the county to take actions that are inconsistent with the legislative policy of finality. We are aware of none.

Intervenors-respondents argue that the county properly applied its local code to revoke the approvals. Intervenors-respondents direct our attention to cases involving local revocation provisions, but those cases do not help their cause. Intervenors-respondents cite *Stewart v. Coos County*, 45 Or LUBA 525 (2003). Intervenors-Respondents' Brief in Response to the O'Deas, Perkins, and Iverson-Perkins 33. In *Stewart*, the county issued a zoning compliance letter authorizing a home occupation. Neighbors complained about the use, and the

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[7] The raise-it-or-waive-it principle codified in ORS 197.835(3), ORS 197.195, and ORS 197.797 is another example of the legislature's intent that even a potentially flawed land use decision will become final if not timely and adequately challenged.

county initiated a revocation hearing to determine "whether the home occupation permit had been properly issued." *Stewart*, 45 Or LUBA at 527. Approximately nine months later, the board of commissioners determined that the home occupation *could continue*. The relevant code provision allowed the county to "revoke any permit or verification letter (also referred to as a zoning compliance letter or zoning clearance letter) if it is determined that the permit was issued on erroneous information or issued in error." *Id.* at 528. We observed, in a footnote, that the question of whether the revocation hearing should have been held in the first case was not before us. *Id.* at 529 n 5.

Howard v. City of Madras, 41 Or LUBA 122 (2001), concerned the city's revocation of a site plan based, in part, on failure to comply with paving and landscaping *conditions of approval*. We affirmed. *Hurst v. City of Rogue River*, ___ Or LUBA ___ (LUBA No 2021-115, Sept 1, 2022), concerned the city's 2021 revocation of a 2016 conditional use permit based upon its findings that the owner was not in compliance with certain *conditions of approval*. We remanded based upon a procedural assignment of error and addressed challenges related to specific *conditions of approval* to assist in the review following remand.

In *Morton v. City of Jefferson*, 53 Or LUBA 559 (2007), the city revoked a conditional use permit in part because it concluded that a manufactured dwelling was not being used in compliance with the *conditions of approval*. The city later dismissed the local appeal because the property had been sold, and we remanded for further proceedings.

Intervenors-respondents also cite *Woods v. Grant County*, 36 Or LUBA 456, *aff'd*, 164 Or App 177, 991 P2d 65 (1999), as an example of a revocation case. In *Woods*, the county issued the petitioner a zoning permit, which authorized a 984-square-foot guest house as an accessory use on tax lot 211, which was already improved with a residence. Instead, the petitioner impermissibly constructed a 2,000-square-foot primary residence on adjoining tax lot 216. Roughly a year after approving the zoning permit, and after providing notice to the petitioner, the county conducted a hearing and revoked the zoning permit. *Woods*, 36 Or LUBA at 458-61. We concluded that

> "[t]he challenged decision revoked petitioner's zoning permit because petitioner used that permit to construct a structure that violates conditions of approval that were included in the permit to ensure that the structure complied with [Grant County Land Development Code (GCLDC)] limitations on guest houses. We believe the county's decision to revoke petitioner's zoning permit is within the authority granted by GCLDC 12.100(C) to address violations of the GCLDC through 'other appropriate proceedings.'" *Id.* at 463.

Like the GCLDC, the LC includes a provision for the revocation of permits based on noncompliance with conditions of approval. LC 14.090(4). Here, however, the revocation was based not on a failure to comply with conditions of approval but, rather, on the county's conclusion that it had, in effect, made a mistake in approving the 2012 LLV because the deeds submitted with the LLV application had been altered. Violations of conditions of approval that occur after the application is approved are distinguishable from the county's action here,

where the altered deeds were in the record during the 2012 LLV proceeding and where the issue of their authenticity could have been decided in the 2012 LLV proceeding. The revocation was not based on a violation of an ongoing condition of approval, and, therefore, intervenors-respondents' citations to cases that involved revocations based on violations of conditions of approval are inapposite.

In the appealed decision, the county seeks to correct its error in approving the 2012 LLV. Whether the county's error in approving that application was based on mistake or fraud is not material. The county may not use LC 14.090(8)(a)(iv) to provide an unlimited time period in which a land use decision may be revoked and, thus, is not "final."

In so concluding, we do not conclude or imply that the three- or 10-year periods of ultimate repose in ORS 197.830(6) apply to these appeals. These appeals do not involve a notice failure that occurred when the county approved the 2012 LLV. However, if a neighboring property owner discovered that the 2012 LLV was based on false or misleading information after the local proceeding and appeal period had ended, and wished to challenge the approval by appealing it to LUBA, ORS 197.830(6) would prevent that neighbor from pursuing any recourse later than three years after the decision was made unless a notice failure occurred, and in no event could the approval be appealed later than 10 years after the decision was made. Similarly, we conclude that the county may not use its revocation procedure to grant itself a "second bite at the apple" and undo its error in approving the 2012 LLV.

The 2012 LLV was approved on January 30, 2012. Property line adjustments were approved in 2013 and 2015. A forest template dwelling was approved in 2014, and a verification of conditions related to the forest template dwelling was issued in 2015. A second forest template dwelling was approved in 2017, and a verification of conditions related to the second forest template dwelling was issued in 2018. The county used its revocation process to undo these final approvals after between four and almost 10 years had elapsed. Under those circumstances, the county may not rely on LC 14.090(8)(a)(iv) to revoke its previously final decisions.

The Johnsons' and the Vogels' first assignments of error and the O'Deas', Perkins', and Iverson-Perkins' fifth assignment of error are sustained.

REMAINING ASSIGNMENTS OF ERROR

Because our resolution of the Johnsons' and the Vogels' first assignments of error and the O'Deas', Perkins', and Iverson-Perkins' fifth assignment of error is dispositive, we do not address the remaining assignments of error. However, we summarize them generally below.

The Johnsons' second assignment of error is that the county improperly construed applicable law and made a decision that is not supported by adequate findings or substantial evidence by failing to apply the presumption that the decision is barred by laches. The Johnsons' third assignment of error is that the county improperly construed applicable law and made a decision that is not supported by adequate findings by failing to apply relevant state and local land

use law as context. The Johnsons' fourth assignment of error is that the county violated state law and the United States Constitution by summarily revoking the Johnsons' property rights without a pre-revocation notice or hearing.

The O'Deas', Perkins', and Iverson-Perkins' first assignment of error is that the hearings official misconstrued LC 14.090(8)(a)(iv) by concluding that an intent to submit false or misleading information was not required. Their second assignment of error is that the hearings official erred in determining the applicable standard of proof. Their third assignment of error is that the hearings official erred in concluding that the county met its burden of proof to demonstrate that the O'Deas intended to submit false or misleading information. Their fourth assignment of error is that the hearings official erred in concluding that the statute of limitations applicable to civil actions alleging fraud did not apply. Their sixth assignment of error is that the hearings official erred in revoking the other land use decisions based upon their revocation of the 2012 LLV.

The Vogels' second assignment of error is that the revocation decision violates ORS chapter 92 and the statewide planning goals.

DISPOSITION

We will reverse or remand a land use decision under review if we find that the local government exceeded its jurisdiction or improperly construed the applicable law. ORS 197.835(9)(a)(A), (D). We will reverse a land use decision when the decision violates a provision of applicable law and is prohibited as a matter of law. OAR 661-010-0071(1)(c). The hearing official's decision is

prohibited as a matter of law because it is an impermissible attack on the 2012 LLV and subsequent land use decisions that relied on the 2012 LLV.

The county's decision is reversed.

RYAN, Board Chair, concurring.

I agree with the majority's resolution and reasoning, and I write separately because, although no party raises it, and, therefore, the majority correctly should not address the issue, in my view, LC 14.090(8)(a)(iv) is a "retroactive ordinance" that is prohibited by ORS 92.285 and ORS 215.110(6). ORS 92.285 is part of ORS chapter 92, which governs subdivisions and partitions, and provides that "[n]o retroactive ordinances shall be adopted under ORS 92.010 to 92.048, 92.060 to 92.095, 92.120, 93.640, 93.710 and 215.110." ORS 215.110(6) similarly prohibits counties from enacting retroactive ordinances in enacting, amending, or repealing land use regulations pursuant to ORS 215.110(1) to (5).

In *Church v. Grant County*, 39 Or LUBA 646 (2000), the county approved two separate partitions that, it turned out, did not comply with the minimum parcel size for the applicable zone. Sometime after approving the partitions, the county adopted an ordinance that amended the county's zoning code to add a new section that allowed the county's planning director to initiate a procedure to revoke a previous land use decision. The county then used that procedure to revoke the partition approvals, and the petitioners appealed to LUBA.

We concluded that the newly adopted ordinance was a "retroactive ordinance," within the meaning of ORS 92.285, because it was an ordinance that

allowed the county to affect the legal existence of the previously approved partitions. We rejected the county's argument that the petitioners were precluded from challenging the ordinance's application to their approved partitions:

> "[I]f Ordinance 98-03 is a 'retroactive ordinance' within the meaning of ORS 92.285, petitioners are not precluded from challenging its application to them merely because they did not also challenge the adoption of the ordinance. *See Fish and Wildlife Dept. v. LCDC*, 37 Or App 607, 617, 588 P2d 80 (1978) (suggesting that under ORS 215.110(6) a county ordinance expanding local appeal obligations cannot be applied retroactively). A statutory prohibition on adopting retroactive ordinances necessarily entails that if ordinances are adopted that allow retroactive application, such ordinances cannot be applied consistently with the statute." *Church*, 39 Or LUBA at 649-50.

We concluded that the county's decision to revoke the two partition approvals was prohibited as a matter of law, and we reversed the decision.

The circumstances that occurred in this appeal are nearly identical to the circumstances in *Church*. After the 2012 LLV and the seven additional land use decisions became final, the county amended the LC to include a provision that allows it to revoke a previous approval if "[t]he approval was secured with false or misleading information." LC 14.090(8)(a)(iv).[8] The county relied on that provision to revoke the 2012 LLV and the seven other land use decisions that

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[8] Similar provisions were included in the LC as far back as 2014, which allowed the county to revoke a previously issued permit if "[t]he application was approved in error." *See* LC 14.700(3)(a)(iv) (Dec 16, 2014). LC 14.090(8)(a)(iv), allowing the county to revoke a previously issued permit if "[t]he approval was secured with false or misleading information," was enacted in 2020.

relied on the 2012 LLV. In my view, LC 14.090(8)(a)(iv) is a prohibited "retroactive ordinance," and the county is prohibited, as a matter of law, from using that provision to revoke previously final land use decisions.