

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

MANCHESTER SOLAR, LLC,  
*Petitioner,*

vs.

YAMHILL COUNTY,  
*Respondent.*

LUBA No. 2023-016

FINAL OPINION  
AND ORDER

Appeal from Yamhill County.

Damien R. Hall filed the petition for review and reply brief and argued on behalf of petitioner. Also on the briefs was Nikesh J. Patel and Dunn Carney, LLP.

Jodi M. Gollehon filed the respondent's brief and argued on behalf of respondent.

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

RYAN, Board Chair, did not participate in the decision.

AFFIRMED

06/09/2023

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

**NATURE OF THE DECISION**

Petitioner challenges a board of county commissioners' decision that the county code does not provide petitioner a vested right to complete development under a 2018 conditional use permit (CUP) for a 10-acre photovoltaic solar power generating facility (solar facility) on land zoned for exclusive farm use (EFU).

**FACTS**

The subject property is vacant farmland containing predominantly Class I through IV soils. It is zoned Exclusive Farm Use-80 (EF-80) and is not located within any urban growth boundary. On November 29, 2018, the county issued a CUP authorizing petitioner to develop a solar facility on the subject property.

As discussed at length below, under the county code and state regulations, a discretionary permit approving development in an EFU zone is void two years from the date of the final decision if the development action is not initiated in that period. A county may grant extensions of the permit under certain limited circumstances. Petitioner did not obtain any building permits or undertake any physical development of the solar facility under the CUP.<sup>1</sup> The CUP had an

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<sup>1</sup> Petitioner points to evidence that, in late 2020, petitioner submitted applications for a structural building permit and a commercial electrical building permit. Petition for Review 3, 23, 28; Record 955, 959. Petitioner notes that the county denied an electrical building permit application. Petition for Review 3. Petitioner also refers to "pending building permits held by the county." Petition for Review 17.

1 original expiration date of November 29, 2020. On January 21, 2021, the county  
2 approved an extension of the CUP to December 14, 2021. Record 953.

3 On August 1, 2018, after petitioner had applied for their CUP, the county  
4 amended its code to prohibit the development of solar power generation facilities  
5 on EFU land “on a tract that contains predominantly Class I through IV soils.”  
6 Yamhill County Zoning Ordinance (YCZO) 402.04(M); Yamhill County  
7 Ordinance 903.<sup>2</sup> The county explains that those YCZO amendments followed  
8 2018 amendments to OAR 660-033-0130 by the Land Conservation and  
9 Development Commission (LCDC), which were intended to limit the amount of  
10 highly productive farmland used for commercial photovoltaic solar power  
11 facilities and to direct such facilities to lower productive lands.

12 On January 5, 2022, petitioner requested a second extension of the CUP.  
13 On April 12, 2022, the county planning director denied that request because  
14 petitioner requested the second extension after the first extension expired and the  
15 applicable approval criteria had changed. Record 835-37. Petitioner attempted to  
16 appeal the planning director’s denial to the board of commissioners, which  
17 declined review. Petitioner appealed that decision in *Manchester Solar, LLC v.*

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<sup>2</sup> We take official notice of Yamhill County Ordinance 903 under ORS 40.090(7), which authorizes taking notice of “[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state.” See *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692 (2007) (explaining that LUBA may take official notice of documents that (1) constitute officially cognizable law under ORS 40.090 and (2) have some relevance to the issues on appeal).

1 Yamhill County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2022-051, Aug 12, 2022). The  
2 parties stipulated to a voluntary remand. *Id.*

3 Petitioner initiated remand proceedings and asked the board of  
4 commissioners to decide whether petitioner had established a vested right to  
5 complete development under the CUP by initiating development pursuant to  
6 YCZO 402.08(A). Record 175; 758. The board held a public hearing on remand.  
7 Petitioner submitted evidence of its investments related to the solar facility  
8 project, including consulting fees, design and engineering fees, lease payments  
9 to the property owner, and legal fees. The board concluded that petitioner has no  
10 vested right to development under the CUP. This appeal followed.

#### 11 **ASSIGNMENT OF ERROR**

12 We start by setting out the applicable law. OAR 660-033-0140 is the  
13 LCDC rule governing extensions of discretionary permits for development on  
14 resource land outside of urban growth boundaries. It provides, in part:

15 “(1) Except as provided for in section (5) of this rule, a discretionary  
16 decision, except for a land division, made after the effective date of  
17 this division approving a proposed development on agricultural or  
18 forest land outside an urban growth boundary under ORS 215.010  
19 to 215.293 and 215.317 to 215.438 or under county legislation or  
20 regulation adopted pursuant thereto *is void two years from the date*  
21 *of the final decision if the development action is not initiated in that*  
22 *period.*

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

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

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

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

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

9 “(3) Approval of an extension granted under this rule is an  
10 administrative decision, is not a land use decision as described in  
11 ORS 197.015 and is not subject to appeal as a land use decision.

12 “(4) Except for ‘residential development’ as defined in section (6),  
13 additional one-year extensions may be authorized where applicable  
14 criteria for the decision have not changed.” (Emphasis added.)

15 YCZO 402.08(A) implements OAR 660-033-0140(1) and provides, in

16 part:

17 “Notwithstanding other provisions of this Ordinance \* \* \*, a  
18 discretionary decision, except for a land division, approving a  
19 proposed development in the Exclusive Farm Use district *is void two*  
20 *years from the date of the final decision if the development action is*  
21 *not initiated in that period.* An extension period of up to 12 months  
22 may be granted if:

23 “1. An applicant makes a written request for an extension prior to  
24 expiration of the development approval period, stating the  
25 reasons that prevented the applicant from beginning or  
26 continuing development within the approval period; and

27 “2. The Planning Director determines that the applicant was  
28 unable to begin or continue development during the approval  
29 period for reasons for which the applicant was not  
30 responsible.” (Emphasis added.)

1 YCZO 402.08(C) implements OAR 660-033-0140(4), quoted above, and  
2 provides that “[a]dditional one-year extensions may be authorized by the  
3 Planning Director where applicable criteria for the decision have not changed.”

4 In a single assignment of error, petitioner argues that the board of  
5 commissioners misconstrued the YCZO 402.08(A) terms “initiated” and  
6 “development action” “which led to improper findings and a decision  
7 unsupported by substantial evidence.” Petition for Review 2.

8 **A. The decision properly construes the applicable law.**

9 The YCZO 402.08 provisions governing permit extensions implement and  
10 must be interpreted consistently with OAR 660-033-0140. We will not affirm a  
11 local code interpretation that is inconsistent with the state law that it implements.  
12 ORS 197.829(1)(d); *Johnson v. Jefferson County*, 56 Or LUBA 72, 91, *aff’d*, 221  
13 Or App 156, 189 P3d 30 (2008), *rev dismissed*, 247 Or 259 (2009). Petitioner’s  
14 argument requires us to review the meaning of “initiated” and “development  
15 action” without any deference to the county’s construction. *See Kenagy v. Benton*  
16 *County*, 115 Or App 131, 838 P2d 1076, *rev den*, 315 Or 271 (1992) (LUBA does  
17 not defer to the governing body’s interpretation of a local provision that  
18 implements and adopts state statutory language).

19 “When interpreting an administrative rule, we seek to divine the intent of  
20 the rule’s drafters, employing essentially the same framework that we employ  
21 when interpreting a statute. Under that analytical framework, we consider the text  
22 of the rule in its regulatory and statutory context.” *Noble v. Dept. of Fish and*

1 *Wildlife*, 355 Or 435, 448, 326 P3d 589 (2014) (internal citation omitted) (citing  
2 *State v. Hogevoll*, 348 Or 104, 109, 228 P3d 569 (2010)). “In construing statutes  
3 and administrative rules, we are obliged to determine the correct interpretation,  
4 regardless of the nature of the parties’ arguments or the quality of the information  
5 that they supply to the court.” *Gunderson, LLC v. City of Portland*, 352 Or 648,  
6 662, 290 P3d 803 (2012) (citing *Dept. of Human Services v. J. R. F.*, 351 Or 570,  
7 579, 273 P3d 87 (2012), and *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997)).

8 As noted above, on April 12, 2022, the county planning director denied  
9 petitioner’s request for a second extension of the CUP because petitioner  
10 requested the second extension *after* the first extension had expired, which the  
11 planning director found fails to satisfy the requirement in YCZO 402.08(A)(1)  
12 and 1202.05(D) that such request be received by the county prior to the expiration  
13 of the approval period.<sup>3</sup> The planning director also found that the applicable

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<sup>3</sup> YCZO 1202.05(D) provides:

“A conditional use approval involving construction shall be null and void two (2) years from the date of final approval unless completion or substantial construction has taken place. In any case where a conditional use approval does not involve construction, the approval shall be null and void one (1) year from the date of final approval unless the approval has been implemented. The Director may extend the conditional use permit for an additional period not to exceed one (1) year upon receipt of a written request from the applicant demonstrating good cause for the delay and provided that the request to extend the permit is received by the Director prior to expiration of the original conditional use approval.”

1 approval criteria had changed, so that approving a second extension would violate  
2 YCZO 402.08(C). Petitioner does not challenge the county's denial of  
3 petitioner's request for a second extension of the CUP. It is undisputed that  
4 petitioner requested a second extension after the expiration of the approval under  
5 the first extension and that the applicable criteria for the decision had changed.

6 Petitioner asserts it has a vested right to continue the development without  
7 a CUP extension pursuant to YCZO 402.08(A). Under YCZO 402.08(A) and  
8 OAR 660-033-0140(1) a discretionary decision approving a proposed  
9 development in the EFU district "is void two years from the date of the final  
10 decision if the development action is not initiated in that period." Petitioner's  
11 position before the county and before us is that the CUP did not expire or become  
12 "void" under YCZO 402.08(A) because petitioner "initiated" "development  
13 action" prior to December 14, 2021, and, thus, has vested a right to complete the  
14 development. Petitioner argues that the terms "initiated" and "development  
15 action" require only that a CUP holder perform within the permit effective period,  
16 "the first steps of developing the facility approved by the CUP." Petition for  
17 Review 15.

18 A vested right to continue a development that does not conform to current  
19 land use regulation is an "inchoate nonconforming use." *Fountain Village*  
20 *Development Co. v. Multnomah Cnty.*, 176 Or App 213, 221, 31 P3d 458 (2001),  
21 *rev den*, 334 Or 411 (2002). "Generally, '[a] lawful nonconforming use of land  
22 is one that is contrary to a land use ordinance but that nonetheless is allowed to



1 continue because the use lawfully existed prior to the enactment of the  
2 ordinance.” *Morgan v. Jackson County*, 290 Or App 111, 114, 414 P3d 917  
3 (2018) (*quoting Rogue Advocates v. Board of Comm. of Jackson County*, 277 Or  
4 App 651, 654, 372 P3d 587 (2016), *rev dismissed*, 362 Or 269, 407 P3d 795  
5 (2017) (internal quotation marks omitted)).

6 “The allowance of nonconforming uses applies not only to those  
7 actually in existence but also to uses which are in various stages of  
8 development when the zoning ordinance is enacted.

9 “\* \* \* \* \*

10 “The question of whether the landowner has proceeded far enough  
11 with the proposed construction to have acquired a vested right is an  
12 issue of fact to be decided on a case-by-case basis.” *Clackamas*  
13 *County v. Holmes*, 265 Or 193, 197, 508 P2d 90 (1973).

14 Petitioner did not assert to the county a common law vested right to  
15 develop the solar facility. Instead, petitioner relied solely on YCZO 402.08(A)  
16 and argued that the CUP was not void. The county did not decide whether  
17 petitioner’s actions were sufficient to “initiate” the “development action.”  
18 Instead, the county concluded that, even assuming that petitioner had *initiated*  
19 development action under the CUP, YCZO 402.08(A) does not create a vested  
20 right to *continue* the development. Record 6-8. In so concluding, the county relied  
21 on *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016). We agree  
22 that case is instructive and we describe and quote from it at length here.

23 In *Landwatch*, the county issued the intervenor a discretionary permit  
24 authorizing construction of three buildings on EFU zoned land on an existing

1 two-acre concrete pad to be used as a private school. The first building was  
2 described as a boys' dormitory, the second building was described as a  
3 school/administration building, and the third building was described as a girls'  
4 dormitory. The county issued the permit on May 6, 2005. On January 10, 2006,  
5 the intervenor applied for a building permit for the first building. The county  
6 issued that building permit on September 17, 2007, and the building was  
7 constructed in 2008. That same year, the school opened and began operating  
8 within the first building. Due to an economic recession, the intervenor reduced  
9 school operations and did not seek building permits for the second or third  
10 buildings.

11 In 2009 and 2010, state law changed in ways that would limit the capacity  
12 of the school and limit the school to serving primarily local residents. From 2010  
13 to 2014 the intervenor continued to operate the school with varying numbers of  
14 students, including many international students. The intervenor continued to seek  
15 and obtain state agency and local approvals for septic and floodplain  
16 development consistent with developing all three buildings approved in the 2005  
17 permit.

18 On December 3, 2014, the intervenor applied for a building permit to  
19 construct the third building under the argument that it had a common law vested  
20 right to complete the project authorized under the 2005 permit. The board of  
21 county commissioners concluded that the 2005 permit was not void as to the

1 second and third buildings under OAR 660-033-0140(1) because the intervenor  
2 had “initiated” development under the 2005 permit within the two-year period.

3 Landwatch Lane County appealed. We remanded. We reasoned:

4 “OAR 660-033-0140(1) must be read in context with OAR 660-033-  
5 0140(2). If initiation of the development action within the two-year  
6 period is sufficient in itself to authorize continued development after  
7 expiration of the two-year period, then the ‘continue development’  
8 element of OAR 660-033-0140(2) is meaningless language. If  
9 LCDC had intended the meaning that the commissioners’ ascribe to  
10 OAR 660-033-0140—that ‘initiating’ the development action is  
11 sufficient to render the discretionary permit valid indefinitely  
12 thereafter without the need for any extensions—then OAR 660-033-  
13 0140(2)(d) would not require the applicant to demonstrate that it was  
14 unable to ‘continue development during the approval period’ as a  
15 condition for obtaining an extension beyond the initial two-year  
16 period. Instead, it would simply require the applicant to demonstrate  
17 that it was ‘unable to begin development during the approval  
18 period.’ The commissioners’ interpretation effectively ‘omit[s] what  
19 has been inserted[,]’ contrary to ORS 174.010.

20 “Further, the commissioners’ interpretation that the discretionary  
21 permit, once initiated, remains valid indefinitely as the source of  
22 authority to issue secondary permits needed to complete  
23 development is inconsistent with OAR 661-033-0140(4). As noted,  
24 OAR 660-033-0140(4) provides that, in addition to the one-year  
25 extension authorized by OAR 660-033-00140(2), ‘[a]dditional one-  
26 year extensions may be authorized where applicable criteria for the  
27 decision have not changed.’ Read in context with OAR 660-033-  
28 0140(2), it is reasonably clear that even once a development action  
29 is initiated, the ability to obtain additional extensions to ‘continue  
30 development’ is a limited one. The apparent intent of OAR 660-033-  
31 0140(4), and the rule as a whole, is to encourage applicants to  
32 proceed expeditiously to complete development authorized by the  
33 discretionary permit, and to limit the potential lifespan of  
34 discretionary permit approvals in EFU zones in order to avoid

1 circumstances such as those presented in this appeal, where non-  
2 farm development is delayed for years or requires re-approval under  
3 new criteria. The commissioners' interpretation completely  
4 sidesteps that important limitation, and allows a development action,  
5 once initiated, to cease construction for an indefinite period, then  
6 resume again after a lapse of years even if the approval criteria have  
7 changed, and even if the use has since become prohibited. That  
8 interpretation seems flatly inconsistent with the presumed intent of  
9 OAR 660-033-0140(4)." *Landwatch*, 74 Or LUBA at 307-08  
10 (internal citations and footnotes omitted, brackets in original).

11 We remanded for the county to consider other potential bases for approval,  
12 including whether the girls' dormitory building could be approved as an  
13 alteration of a nonconforming use. *Id.* at 310-11.

14 Returning to this appeal, the board of commissioners found as follows:

15 "Per *Landwatch*, YCZO 402.08(A) must be read in context with  
16 YCZO 402.08(A)(1). YCZO 402.08(A)(1) allows the County to  
17 grant a one-year conditional use permit extension if the applicant  
18 states, 'the reasons that prevented the applicant from beginning or  
19 continuing development within the approval period.' This additional  
20 language provides a limitation on YCZO 402.08(A) in that it makes  
21 clear that a permit extension may be required to 'continue  
22 development' after expiration of the two-year period, even if the  
23 development action was begun or 'initiated' within the two-year  
24 period.

25 "Additionally, the argument that a conditional use permit authorized  
26 under YCZO 402.08(A), once initiated, remains valid, indefinitely  
27 is inconsistent with provisions of YCZO 402.08(C), which provides  
28 that, '[a]dditional one-year extensions may be authorized by the  
29 Planning Director where applicable criteria for the decision have not  
30 changed.' Read in context with YCZO 402.08(A), it can be  
31 interpreted that, even if a development action has been initiated,  
32 YCZO 402.08(C) places additional limitations on an applicant's  
33 ability to continue with that development after the permit has  
34 expired. As best stated by LUBA, '[t]he apparent intent of [YCZO

1 402.08(C)], and the rule as a whole, is to encourage applicants to  
2 proceed expeditiously to complete development authorized by the  
3 discretionary permit, and to limit the potential lifespan of  
4 discretionary permit approvals in EFU zones in order to avoid  
5 circumstances such as those presented in this appeal, where non-  
6 farm development is delayed for years or requires reapproval under  
7 new criteria.’

8 “\* \* \* \* \*

9 “When viewed in context with YCZO 402.08(A)(1) and YCZO  
10 402.08(C), it is clear that YCZO 402.08(A) does not render the  
11 Applicant’s conditional use permit valid indefinitely simply by  
12 initiating a development action before the permit’s expiration date.  
13 Rather, the Applicant was required to apply for an extension in order  
14 to continue development pursuant to the provisions of YCZO  
15 402.08(C), which they failed to do before the permit expired.”  
16 Record 7-8 (internal citation omitted).

17 Thus, the county concluded that petitioner had no vested right based on  
18 YCZO 402.08(A).

19 Petitioner argues that the county erred by relying on our reasoning in  
20 *Landwatch* in interpreting YCZO 402.08(A). Petitioner argues that “[n]o  
21 provision of law renders OAR 660-033-0140(1), or its terms, relevant to the  
22 Decision.” Petition for Review 16. However, as we explain above, YCZO  
23 402.08(A) implements and adopts verbatim OAR 660-033-0140(1) and must be  
24 interpreted and applied consistently with that rule. The county did not err in  
25 relying on *Landwatch* in interpreting YCZO 402.08(A).

26 The county did not misconstrue YCZO 402.08(A). Even assuming  
27 *arguendo* that petitioner had initiated development action during the CUP  
28 effective period, petitioner was required to “continue development”—that is to

1 “proceed expeditiously to complete development authorized by the discretionary  
2 permit.” *Landwatch*, 74 Or LUBA at 308. The county did not err in rejecting  
3 petitioner’s argument that YCZO 402.08(A) requires only that the CUP holder  
4 take the first steps of development to avoid the CUP becoming void. The CUP  
5 initially was set to expire on November 29, 2020. The county issued a CUP  
6 extension that expired in December 2021. Petitioner needed a further extension  
7 of the CUP in order to obtain the secondary permits needed to complete the solar  
8 facility development. “[E]ven once a development action is initiated, the ability  
9 to obtain additional extensions to ‘continue development’ is a limited one.”  
10 *Landwatch*, 74 Or LUBA at 308. If petitioner’s actions constituted “continue[d]  
11 development,” that action would bear on petitioner’s ability to obtain an  
12 extension under YCZO 402.08(A)(1). However, it is undisputed that petitioner  
13 could not qualify for a second CUP extension because petitioner failed to request  
14 a second extension prior to the expiration of the first extension. YCZO  
15 402.08(A)(1); OAR 660-033-0140(2)(b). Further, petitioner could not qualify for  
16 a second CUP extension because the applicable criteria for the decision had  
17 changed. YCZO 402.08(C); OAR 660-033-0140(4).

18       Petitioner did not assert to the county a common law vested right to  
19 continue development or request a common law vested rights determination. The  
20 county nevertheless analyzed that issue and concluded that petitioner has no  
21 common law vested right because petitioner had not demonstrated that petitioner

1 had incurred substantial expenditures toward completion of the development, one  
2 of the multiple factors identified in *Holmes*.

3 Petitioner argues that the board misconstrued YCZO 402.08(A) by relying  
4 on common law vesting factors.<sup>4</sup> The county responds and we agree that the  
5 board's common law vesting analysis and conclusion is additional and  
6 independent from its conclusion that YCZO 402.08(A) provides no vested right.  
7 Accordingly, any error in the county's common law vesting analysis provides no  
8 basis for remand under petitioner's sole assignment of error.

9 **B. The county's findings that petitioner does not have a vested**  
10 **right under YCZO 402.08(A) are adequate and supported by**  
11 **substantial evidence.**

12 Petitioner argues that even if the county did not err in interpreting YCZO  
13 402.08(A), the county's findings that petitioner does not have a vested right under  
14 YCZO 402.08(A) are inadequate and not supported by substantial evidence.  
15 Petitioner argues that the board failed to find whether development action has  
16 been "initiated." Petitioner argues that the findings fail to address evidence that  
17 petitioner obtained a one-year extension of the CUP and made investments and  
18 took actions to advance development of the project prior to the CUP expiration,  
19 including applying for building and electrical permits for the project and  
20 electrical substation interconnection upgrades. Petitioner points to evidence that,

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<sup>4</sup> Petitioner does not assign error to the county's conclusion that petitioner has no common law vested right. Instead, petitioner asserts that the CUP is not void under YCZO 402.08(A) because petitioner "initiated" "development action."

1 in late 2020, petitioner submitted applications for a structural building permit and  
2 a commercial electrical building permit. Record 955, 959. Petitioner also points  
3 to an application and permit issued in August 2021 to PGE to “install  
4 underground service in customer provided and installed conduit.” Record 168.  
5 Petitioner describes that application as for “a building permit for the design and  
6 construction improvements of the interconnection.” Petition for Review 28. We  
7 understand petitioner to argue that evidence demonstrates that petitioner initiated  
8 development action under the CUP and thus has a vested right to continue the  
9 development action because the CUP is not void under YCZO 402.08(A).

10 The county responds, and we agree, that the board’s findings are sufficient  
11 to support denial of a vested right based on the provisions of YCZO 402.08(A).  
12 The county assumed that petitioner had initiated development. The county  
13 adopted sufficient findings to support its conclusion that a right to continue  
14 development under a CUP does not vest simply because development is initiated  
15 under YCZO 402.08(A). Consistent with *Landwatch*, the county concluded that  
16 initiating development is not sufficient to vest a right to continue development.  
17 The county was not required to make specific findings on whether development  
18 had been initiated.

19 Petitioner’s assignment of error is denied.

20 The county’s decision is affirmed.