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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

ATR SERVICES, INC.,
Intervenor-Respondent.

LUBA No. 2019-128

FINAL OPINION
AND ORDER

Appeal from Lane County.

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

H. Andrew Clark, Assistant County Counsel, Eugene, filed the response brief and argued on behalf of respondent.

Bill Kloos, Eugene, represented intervenor-respondent.

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

ZAMUDIO, Board Member; did not participate in the decision.

REMANDED 04/20/2020

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county ordinance that adopts text amendments to
4 county code provisions governing land use applications and appeals.

5 **MOTION TO INTERVENE**

6 ATR Services, Inc., moves to intervene on the side of respondent. No party
7 opposes the motion, and it is granted.

8 **BACKGROUND**

9 Lane Code (LC) chapter 14 provides the procedures for county land use
10 applications and appeals. In 2018, the board of county commissioners enacted an
11 ordinance that amended various provision in LC chapter 14. Petitioner appealed
12 the decision adopting the ordinance to LUBA, and in *Landwatch Lane County v.*
13 *Lane County*, ___ Or LUBA ___ (LUBA No 2018-093, Jan 31, 2019)
14 (*Landwatch I*), we remanded the decision. In October 2019, the board of county
15 commissioners adopted Ordinance 19-03 (the Ordinance). As relevant here, the
16 Ordinance amended LC 14.090(6) and LC 14.015(2). This appeal followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 The present appeal involves a facial challenge to a legislative decision. In
19 such a context, petitioner must demonstrate that the LC provisions it challenges
20 are facially inconsistent with applicable law and are incapable of being applied
21 consistently with controlling law. *See Rogue Valley Assoc. of Realtors v. City of*
22 *Ashland*, 158 Or App 1, 4, 970 P2d 685, *rev den*, 328 Or 594 (1999) (challenge

1 to legislative zoning ordinance amendments is a facial challenge that, to succeed,
2 must demonstrate that the amendments are categorically incapable of being
3 applied consistent with statutory requirements for clear and objective
4 regulations).

5 An explanation of our decision in *Landwatch I* is necessary in order to
6 understand the county's action in adopting the Ordinance and petitioner's first
7 assignment of error.

8 **A. ORS 215.417 and OAR 660-033-0140**

9 ORS 215.417 (2017) and OAR 660-033-0140(5) provided that permits for
10 residential development on resource land "shall be valid for four years" and "[a]n
11 extension" of such permits "shall be valid for two years."[1] In *Landwatch I*, we

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[1] ORS 215.417 (2017) provided:

> "(1) If a permit is approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit shall be valid for four years.
>
> "(2) An extension of a permit described in subsection (1) of this section shall be valid for two years.
>
> "(3) For the purposes of this section, 'residential development' only includes the dwellings provided for under ORS 215.213 (3) and (4), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3)."

OAR 660-033-0140(5)-(6) provide:

1 concluded that the county's amendments to LC 14.090(7) that were an attempt to
2 codify the county's existing practice of ministerially approving unlimited one-
3 year extensions to permits for residential development on resource land were
4 inconsistent with the statute and rule, which limit discretionary permits approving
5 residential development on resource land to one, two-year extension.

6 In 2019, after our decision in *Landwatch I*, the legislature enacted
7 amendments to ORS 215.417 in House Bill (HB) 2106 (2019) that now allow a
8 county to approve one, two-year extension, and "no more than five additional
9 one-year extensions of a permit" under the circumstances set out in the bill. ORS
10 215.417(2) (2019) now provides as relevant here:

> 11 "An extension of a permit described in subsection (1) of this section
> 12 is valid for two years. A county may approve no more than five
> 13 additional one-year extensions of a permit if:

> "(5)(a) If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years.
>
> "(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.
>
> "(6) For the purposes of section (5) of this rule, 'residential development' only includes the dwellings provided for under ORS 215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3)."

The Land Conservation and Development Commission has not amended the rule to implement HB 2106.

> "(a) The applicant makes a written request for the additional extension prior to the expiration of an extension;
>
> "(b) The applicable residential development statute has not been amended following the approval of the permit, except the amendments to ORS 215.750 by section 1, chapter 433, Oregon Laws 2019; and
>
> "(c) An applicable rule or land use regulation has not been amended following the issuance of the permit, unless allowed by the county, which may require that the applicant comply with the amended rule or land use regulation."

Thus, ORS 215.417 (2019) now provides for an initial four-year period of validity, followed by one, two-year extension, and a maximum of five additional one-year extensions at the discretion of the county.

The county subsequently amended LC 14.090(6)(b)(ii) to provide:

> "Subject to the requirements of subjection (7), an extension of a permit [for a residential dwelling on resource land] is valid for two years, and the Director may approve no more than five (5) additional one-year extensions for permits issued prior to or after June 20, 2019, *provided that the sum of all additional_one-year timeline extensions issued* <u>*prior to*</u> *or after this date does not exceed the five year maximum period*." (Italics and underscoring added).

B. Assignment of Error

Petitioner argues that LC 14.090(6) is inconsistent with both ORS 215.417(5) and (6) (2019), and with HB 2106. That is so, we understand petitioner to argue, because LC 14.090(6) allows extensions of permits that were granted one-year extensions "prior to" the effective date of HB 2106 and accordingly were granted without statutory or rule authority, under the county's uncodified practice of ministerially issuing unlimited one-year extensions of

1 those permits that we rejected as inconsistent with the statute in *Landwatch I*.
2 Petitioner also argues that nothing in the text of HB 2106 indicates that the
3 legislature intended to retroactively legalize those unlawfully extended permits.
4 Stated differently, petitioner argues that any previously issued permits for
5 residential development on resource land are only eligible for the up to five one-
6 year extensions provided in HB 2106 if, on the effective date of that legislation,
7 those permits were still in their four year initial validity period or the single, two
8 year extension period provided in ORS 215.417 (2017).

9 The county responds that LC 14.090(6) does not revive permits that have
10 expired prior to the effective date of HB 2106 (June 20, 2019) because LC
11 14.090(7)(a)(ii) requires that an application for a one-year extension must be
12 "submitted prior to the expiration of the approval period[.]" The county explains
13 that the language in LC 14.090(6) that limits the sum of all one-year extensions
14 issued "prior to or after this date does not exceed the five year maximum period"
15 is merely intended to recognize the time period between the effective date of the
16 legislation (June 20, 2019) and the effective date of LC 14.090(6) (October 29,
17 2019). However, that response does not really address petitioner's argument,
18 which is that the use of the phrase "prior to" in LC 14.090(6) is inconsistent with
19 ORS 215.417 (2019) because it allows a permit that was extended by the county
20 by one-year extensions granted prior to the enactment of HB 2106 to receive one-
21 year extensions under ORS 215.417(5) (2019).

1 We agree with petitioner that LC 14.090(6)(b)(ii) is facially inconsistent
2 with ORS 215.417(5) (2019) to the extent the phase "provided that the sum of all
3 additional one-year timeline extensions *issued prior to* or after this date does not
4 exceed the five year maximum period" in LC 14.090(6)(b)(ii) purports to either
5 (1) legitimize permits that received one-year extensions under the county's
6 ministerial practice of granting unlimited one-year extensions that we concluded
7 in *Landwatch I* was inconsistent with the statute and rule, or (2) allow such
8 permits to take advantage of the new five one-year extension allowance provided
9 in HB 2106. (Emphasis added.) In other words, any permit for a residential
10 dwelling on resource land that received a "one-year timeline extension[] *issued*
11 *prior to*" the effective date of HB 2106 has expired because no statutory or rule
12 basis existed for the one-year extension prior to the effective date of HB 2106.
13 (Emphasis added.) Additionally, we agree with petitioner nothing in the text,
14 context or legislative history of HB 2106 indicates the legislature intended to
15 retroactively legalize residential dwelling permits whose initial four year period
16 of validity and single, two-year extension period had expired prior to the effective
17 date of the statute.
18 The first assignment of error is sustained.
19 **SECOND ASSIGNMENT OF ERROR**
20 The Ordinance amended the LC definition of "appearance" in LC 14.015.
21 Prior to adopting the Ordinance, LC 14.015 defined "appearance" as used in the
22 LC as "Appearance. Submission of testimony or evidence in the proceeding,

1 either oral or written. Appearance does not include a name or address on a

2 petition." The Ordinance amended the definition to provide:

> 3 "Appearance. Submission of testimony or evidence in the
> 4 proceeding, either oral or written. A person's name appearing on a
> 5 petition filed as a general statement of support or opposition to an
> 6 application without additional substantive content, and that typically
> 7 contains the names of a number of other persons, does not constitute
> 8 an appearance."

9 In its second assignment of error, petitioner argues that the LC definition of

10 "appearance" is inconsistent with ORS 197.830(2). ORS 197.830(2) governs

11 standing to appeal a land use decision or limited land use decision to LUBA and

12 provides in relevant part:

> 13 "Except as provided in ORS 197.620, a person may petition the
> 14 board for review of a land use decision or limited land use decision
> 15 if the person * * * [a]ppeared before the local government, special
> 16 district or state agency orally or in writing." ORS 197.830(2)(b).

17 The statute does not define the term "appeared" as used in ORS 197.830(2).

18 Petitioner does not explain how the LC definition of "appearance" is

19 applied or used in the LC or cite to any LC provision in which it appears, and

20 does not explain why the LC definition of "appearance" has any bearing on

21 whether a person who appeals a land use decision to LUBA has satisfied the

22 requirement in ORS 197.830(2) that a person must have "appeared" before the

23 local government. The county's definition of "appearance" is irrelevant for

24 purposes of determining whether a person appealing a decision to LUBA has

25 "appeared" for purposes of ORS 197.830(2). Absent any developed argument for

1 why the amended definition of "appearance" in LC 14.015 has any bearing on
2 the requirement in ORS 197.830(2) that a person must have "appeared before"
3 the local government, petitioner's arguments provide no basis for reversal or
4 remand of the decision. *Deschutes v. Deschutes Cty.*, 5 Or LUBA 218, 220
5 (1982).

6 The second assignment of error is denied.

7 The county's decision is remanded.