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May 20, 2019

Via Email

Senate Committee on Environment and Natural Resources
900 Court Street NE
Salem, OR 97301
senr.exhibits@oregonlegislature.gov

Re: Testimony in Opposition to HB 2106 (extensions for residential development on resource land)

Chair Dembrow, Vice-Chair Olsen, and Members of the Senate Committee on Environment and Natural Resources,

On behalf of LandWatch Lane County, I respectfully request that you reject the -7 amendments for HB 2106. As the attorney in *LandWatch Lane County v. Lane County*, LUBA No. 2018-093, Jan. 31 2019 (slip op attached), LUBA found that Lane County's amendments of their land use ordinance had violated the statute and administrative rule governing extensions under ORS 215.417(2) and OAR 660-033-0140(5)(b). Specifically, the legal provisions allowed for an initial approval of four years, followed by a two-year extension, but no subsequent one-year approvals were authorized by statute or rule. In that case, LUBA relied on the plain text of statute and rule. LUBA also noted that the legislative history shows that the existing timeframe was implemented at the time to reject a similar type of proposal set forth here:

> "After concerns were expressed by the Department of Land Conservation and Development regarding the length of time such permits would remain valid and the application of SB 724 retroactively to revive expired permits, SB 724 was amended to shorten the time such permits would remain valid to four years with a possible extension of two years and to eliminate the section of SB 724 that would have revived permits that had already expired."

LandWatch Lane County, slip op at 20. The legislature would be turning an about-face from SB 724 and eroding the protections for resource land.

Development of resource land was not intended to be a speculative matter, but that is exactly what has occurred in Lane County. Numerous "land use consultants" have tempted individuals into investing money into the development of Oregon's resource land for residential purposes when it was intended to be used for resource purposes. These "land use consultants" are engaged in real estate development schemes to maximize their own private interests above and beyond the public interest in the farm and forest economy that represents the backbone of Oregon's economy. Every bill that punches a hole in those protections aims to reduce the ability of Oregon to achieve its highest potential.

Lane County's historical misuse of the resource permit extension laws has not been without consequence. The perpetual extensions of permit approvals require no evidence of an applicant having met any conditions of approval or evidence of forest management, but the property tax deferral program continues to apply. It makes little sense to incentivize the development of resource land while, at the same time, giving such individuals tax deferrals. **Therefore, I would propose amendments that would eliminate the tax deferral for any relevant application requesting an extension and require that the applicant has met all conditions of approval prior to requesting an extension.** I cannot lend my approval to anything less.

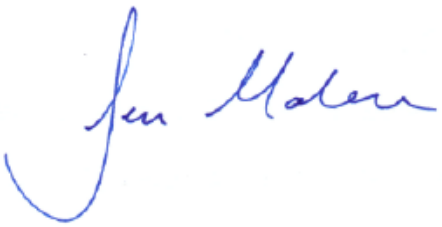
Moreover, in many cases the old approvals that continue to be extended did not attempt to comply with setbacks, driveway grades, and even fire siting safety design standards that require the establishment of primary and secondary fuel breaks, taking slopes into consideration. This is just another issue that should be remedied prior to giving away further extensions.

Some "land use consultants" in Lane County have been enabled by this practice to use productive property tax deferred forest land for speculative real estate deals. This was on full display before the Committee on May 9, 2019, wherein individuals providing testimony explained that the market was not ready to sell the development rights. This is, unequivocally, a speculative land use scheme, which occurs at the expense of the public interest. This is not the goal of Oregon's forestland. With dozes of "land use consultants" each having handfuls or more of vacant forest-zoned lots with forest dwelling permit approvals, one can imagine why these properties sit on the market for years. Real estate speculation may be appropriate within the UGB or rural residential areas, but it is unconscionable on resource land because it removes these areas from resource production. Allowing for a greater number of extensions simply enables these

real estate development schemes at the expense of Oregon's land use system and resource land economy.

In light of the public interest and what has been set forth above, please vote no on the HB 2106 -7 amendments that allow for five additional one-year extensions, over and above the four-year approval and two-year extension already provided by law.

Sincerely,



Sean T. Malone
Attorney for LandWatch Lane County

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

ATR SERVICES,
Intervenor-Respondent.

LUBA No. 2018-093

FINAL OPINION
AND ORDER

Appeal from Lane County.

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

No appearance by Lane County.

Bill Kloos, Eugene represented intervenor-respondent.

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

REMANDED 01/31/2019

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

Opinion by Zamudio.

NATURE OF THE DECISION

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

FACTS

Lane Code (LC) Chapter 14 provides the procedures for county land use applications and appeals. On July 10, 2018, the Board of Commissioners of Lane County enacted Ordinance No. 18-02, revising LC Chapter 14 and related cross-references and definitions in other code chapters.[1] Petitioner challenges some of those amendments in this appeal.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner argues that the county code is inconsistent with state law because it requires appellants to specify appeal issues as a jurisdictional prerequisite to obtaining an initial evidentiary hearing. We previously summarized the relevant statutory framework in *Bard v. Lane County*, 63 Or LUBA 1, 5, *aff'd*, 243 Or App 245, 256 P3d 205 (2011):

> "Under ORS 215.402(4), a 'permit' is defined as 'discretionary approval of a proposed development of land.' For clarity, in this opinion we generally refer to 'permits,' as ORS 215.402(4) defines that term, as 'statutory permits.' Except as provided in ORS 215.416(11), when ruling on an application for a statutory permit, the county must 'hold at least one public hearing.' ORS 215.416(3).

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[1] All citations to the LC are to the current version that was amended by the challenged Ordinance No. 18-02.

> The exception in ORS 215.416(11) authorizes the county to make decisions concerning statutory permits without first providing a public hearing. However, to take advantage of ORS 215.416(11), the county must give 'notice of the [statutory permit] decision and provide[] an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice * * *,' to file a local appeal. ORS 215.416(11)(a)(A). Under ORS 215.416(11), 'the appeal shall be to a *de novo* hearing.' ORS 215.416(11)(a)(D). To summarize, under these statutes, when rendering a statutory permit decision, the county must provide a prior public hearing on the application, or provide notice and an opportunity for an appeal that includes a *de novo* public hearing, after the statutory permit is approved without a prior hearing. Counties are free to adopt their own procedures for reviewing applications for statutory permits, but those local procedures must be consistent with the statutory procedures."

LC 14.030(1)(b)(i) governs county decisions, made without a hearing, by the county planning director, or the director's designated representative (collectively, director), for Type II procedures, which include statutory permit decisions.[2] Those decisions may be appealed, and as explained in *Bard*, the local

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[2] LC 14.030(1)(b)(i) provides:

> "**(b) Type II Procedure**
>
> > "**(i) Overview.** The Type II procedure involves the Director's interpretation and exercise of discretion when evaluating approval standards and criteria. Uses or development evaluated through this process are uses that are conditionally permitted or allowed after Director review that may require the imposition of conditions of approval to ensure compliance with development standards and approval criteria. Type II decisions are made by the Director, in some cases after

appeal procedures must be consistent with the statutory procedures. LC 14.030(1)(b)(ii)(ee) ("Appeals of Type II decisions may be made in accordance with the procedures at LC 14.080.").

Under LC Chapter 14, local appeals are submitted to the director, who serves as a gatekeeper and decides whether to accept the local appeal, and thus allow it to proceed to a hearing. The director must reject an appeal that does not satisfy LC 14.080(1). LC 14.080(2)(b). In addition, even if the director accepts an appeal, the hearings official or board of commissioners may dismiss an appeal that does not comply with LC 14.080(1)(c). LC 14.080(2)(e). As pertinent here, a notice of local appeal must specify the error in the director's decision. LC 14.080(1)(c)(vi), (vii).[3]

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notice of application and opportunity to comment. Type II decisions may be appealed.

"The Type II procedure applies to a variety of applications including, but not limited to review of applications for: permitted uses subject to standards, conditional use permits, and tentative partition and subdivision applications made pursuant to LC Chapter 13." (Boldface in original.)

[3] LC 14.080(1)(c) provides, in part:

"**Content of Notice of Appeal.** A notice of appeal must:

"* * * * *

"**(vi)** Include a statement explaining the specific issues being raised on appeal with sufficient specificity to afford the

Petitioner argues that LC 14.080(1) and (2) are inconsistent with ORS 215.416(11) because those subsections make raising and identifying appeal issues prior to an initial hearing a jurisdictional requirement, while ORS 215.416 contains no such limitation.

As far as we can tell, petitioner's argument raises an issue that has not previously been decided by LUBA or the appellate courts—*viz.*, whether local legislation that allows a county to dismiss an appeal for failure to submit a

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> approval authority the opportunity to resolve each issue raised;
>
> "**(vii)** Provide an explanation with detailed support specifying one or more of the following as assignments of error or reasons for reconsideration;
>
> "**(aa)** The Director or Hearings Official exceeded their jurisdiction;
>
> "**(bb)** The Director or Hearings Official failed to follow the procedure applicable to the matter;
>
> "**(cc)** The Director or Hearings Official rendered a decision that is unconstitutional;
>
> "**(dd)** The Director or Hearings Official misinterpreted the Lane Code or Lane Manual, state law or federal law, or other applicable standards and criteria; or
>
> "**(ee)** Reconsideration of the decision is requested in order to submit additional evidence not available in the record at the hearing and addressing compliance with relevant standards and criteria." (Boldface in original.)

specific appeal statement is inconsistent with ORS 215.416. We recently identified but did not decide that issue.

In *Rogue Advocates v. Josephine County*, ___ Or LUBA ___ (LUBA Nos 2017-065/092, Aug 3, 2018), the petitioner argued that the board of county commissioners "exceeded its jurisdiction" by considering a local appeal of a planning director's decision made without a hearing because the local appellant did not submit an appeal statement specifying the grounds for appeal as required by the county code, which provides that failure to submit such an appeal statement "shall be considered a jurisdictional defect, and the appeal shall be dismissed." *Rogue Advocates*, ___ Or LUBA at ___ (slip op at 5–6). We remanded the county's decision for the county to interpret the county code in the first instance. *Id.* (slip op at 10–11). We observed that ORS 215.416(11)(a)(E) requires a *de novo* hearing and explained the history of that provision:[4]

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[4] ORS 215.416(11)(a)(E) provides:

> "(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:
>
> "(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;

> "ORS 215.416(11)(a)(E) was adopted as an amendment to ORS 215.416(11)(a) by the legislature in 2001 in order to overturn the Court of Appeals' holding in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997). Or Laws 2001, ch 397, §1. *Johns* concerned a permit decision that had been rendered initially without a hearing under ORS 227.175(10)(a) (the city counterpart to ORS 215.416(11)(a)), then appealed to the planning commission for a hearing and ultimately to the city council. Lincoln City Code provisions required that persons attempting to appeal such a permit decision specify 'the basis for the appeal.' 146 Or App at 596. Based on that code requirement, the Court of Appeals held that the issues the local appellant raised before the local appellate body were limited to the issues specified in appellant's notice of local appeal. 146 Or App at 602–03. ORS 215.416(11)(a)(E) has the effect of legislatively overruling the Court of Appeals' holding in *Johns*, that the issues the local appellant raised on appeal were limited to the issues specified in the notice of appeal. Pursuant to ORS 215.416(11)(a)(E), the issues that may be raised at the hearing are unlimited. * * *" *Rogue Advocates*, ___ Or LUBA at ___ (slip op at 8).

Here, consistently with ORS 215.416(11)(a)(E), LC 14.080(3)(b) provides that the county may not limit the scope of the appeal *hearing* to issues raised in the notice of appeal.[5] However, the question presented is whether LC 14.080,

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> "(ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and
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> "(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing."

[5] ORS 215.416(11)(E)(ii) provides that "[t]he presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal."

which makes the failure to submit a statement of appeal that includes the information in LC 14.080(1)(c)(vi) and (vii) a jurisdictional defect, is inconsistent with ORS 215.416(11). That question is not answered by the fact that the code provides for a *de novo* hearing.

Under the statutory scheme of which ORS 215.416(11) is a part, the default process for a permit application is to provide an evidentiary hearing. ORS 215.416(3).[6] ORS 215.416(11) provides for an alternative process for making an initial decision without a hearing, subject to providing notice of the decision and an opportunity to request an initial *de novo* evidentiary hearing that would otherwise have been required under ORS 215.416(3). *See Johns*, 146 Or App at

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LC 14.080(3)(b) provides:

> "**De Novo Hearing.** Appeal of a Type II decision made by the Director will result in a de novo hearing before the Hearings Official. A hearing on an appeal of Type II decision will follow the same procedure used for a hearing on a Type III review in accordance with the applicable procedures at LC 14.070 with notice in accordance with the Type III hearing notice requirements of LC 14.060. The Hearings Official's review will not be limited to the application materials, evidence and other documentation, and specific issues raised in the review leading up to the Type II Decision. The Hearings Official's review may include consideration of additional evidence, testimony or argument concerning any relevant standard, criterion, condition, or issue submitted or raised during the open record period." (Boldface in original.)

[6] ORS 215.416(3) provides that "[e]xcept as provided in subsection (11) of this section, the hearings officer shall hold at least one public hearing on the application."

599 (concluding that the term "*de novo*" and the overall statutory scheme require the local government to provide a plenary hearing). Under that scheme, any jurisdictional barriers a local government places on an appellant's right to obtain that initial evidentiary hearing must be consistent with the text and purpose of that statutory scheme.

In our view, the statutory rights to obtain an initial evidentiary hearing, and to present a potentially unlimited array of issues at that initial evidentiary hearing, are considerably undermined if the request for an initial evidentiary hearing can be rejected at the outset for what is deemed a jurisdictional failure to present issues in the notice of appeal, as required by LC 14.080(1). LC 14.080(1) and (2) do more than simply require an appellant to specify one or more issues and, instead, make the specification of at least one issue jurisdictional.[7] The appellant

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[7] The presumed purpose of requiring an appellant to specify issues in the notice of appeal is to give the county and other participants advance notice of the issues that will be presented at the initial evidentiary hearing. *See Johns*, 146 Or App at 602 ("[R]equiring issues to be defined in advance would serve no clear purpose if the issues that may later be considered were not correspondingly limited, such a requirement without such a limitation would *dis*serve the objective of providing the other parties to the proceeding with notice of the issues that they must *actually* be prepared to meet." (Emphases in original.)). But that purpose is poorly served by a code provision that is satisfied even if only a single issue is specified in the notice of appeal. Because the initial evidentiary hearing is *de novo* and, pursuant to ORS 215.416(11)(a)(E)(ii), open to an unlimited array of new issues that may be raised at the hearing, a requirement to specify issues in the notice of appeal that can be nominally satisfied by listing a single issue does little to give advance notice of the issues that the decision-maker will have to address. Under that scheme, there is nothing that would prevent an appellant from

must specify issues from an exclusive list of five types of issues. LC 14.080(1)(c)(vii). Further, the appellant must explain "the specific issues being raised on appeal with sufficient specificity to afford the approval authority the opportunity to resolve each issue raised," and provide an "explanation with detailed support[.]" LC 14.080(1)(c)(vi), (vii). Moreover, the code empowers the director, and later the hearings official and county commissioners, to dismiss a local appeal based on a subjective, qualitative assessment of how well the appellant has explained and supported the issues raised.

A local government may require the appellant to specify issues in the notice of appeal to flush out issues early in the process. *See Johns*, 146 Or App at 600 ("the statute does not proscribe local legislation requiring a notice of appeal that sets forth with reasonable particularity the issues that the appealing party will raise at the hearing"). However, a local government cannot make that requirement a *jurisdictional* bar to obtaining the initial evidentiary hearing required by ORS 215.416(3) and (11). Similarly, we do not believe it can, consistent with the statute, limit the issues specified to five types of issues, or approve or reject requests for an initial evidentiary hearing based on a qualitative assessment of how well the appellant has explained the issues specified. Thus,

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specifying a single issue in the notice of appeal, then abandoning that nominal issue at the hearing and instead raising a host of new issues that the decision-maker must resolve.

we agree with petitioner that LC 14.080 is inconsistent with ORS 215.416(3) and (11).

Petitioner also argues, obliquely, that LC 14.080(1)(c)(vi) and (vii) impermissibly require an appellant to have participated in the proceeding before the director. Petition for Review 8–9. Petitioner's argument is not developed sufficiently for our review and we do not understand LC 14.080 to require a party to participate in the director's decision in order to appeal that decision.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that the county code is inconsistent with state law because it requires applicants and appellants to submit electronic copies of materials that were submitted to the county in hard copy. LC 14.020(3).[8]

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[8] LC 14.020(3) provides:

"**Submission of Materials**

"**(a) General.** The submission of any materials by any party including application materials, supplemental information, written comments, testimony, evidence, exhibits, or other documents that are entered into the record of any land use application must be submitted either at the offices of the Director or at a public hearing, unless specified otherwise by the hearing notice or hearing authority prior to the close of the record. Materials are considered submitted when

received, or in the case of materials submitted at a public hearing, placed before the hearing authority.

"**(b) Electronic Materials.**

"**(i)** When application or appeal materials submitted in hard copy format are over five pages in length, an applicant or appellant must provide an identical electronic version of the submitted materials in addition to a hard copy. Any other party submitting written materials into the record that are over five pages is also encouraged to submit an identical electronic copy. Any electronic materials must be in a format acceptable to the Director. This provision should not be interpreted to prohibit electronic submittals of materials less than five pages in length. The County will scan submitted materials upon request for [a] fee. The County cannot be held responsible for electronic submittals that are not received by the Director or not confirmed by the Director to have been received.

"**(ii)** When electronic materials over five pages in length are submitted by any party for inclusion in an application record, an identical hard copy of the materials must also be submitted unless this requirement is waived by the Director.

"**(c) Deadline.** Where any materials including both hard and electronic copies are submitted to the offices of the Director and are subject to a date-certain deadline, the materials must be received by the Director by the end of business." (Boldface in original.)

As discussed above, prior to issuing a final decision on an application for a statutory permit, the county must provide a public hearing. That hearing must be conducted in accordance with the provisions of ORS 197.763, including requirements for submission of "written evidence, arguments or testimony." ORS 197.763(6); ORS 215.416(5); ORS 215.416(11)(a)(E). According to petitioner, the electronic submission requirement is inconsistent with ORS 197.763, which does not expressly mention electronic materials.

We disagree with petitioner's premise that the term "written" in ORS 197.763 imposes a limitation on local proceedings such that the county can only require submission of paper materials and cannot require submission of electronic materials. To be sure, as petitioner emphasizes, ORS 197.763 was enacted in 1989 and last amended in 1999, before electronic communication was commonplace. However, nothing in the text of ORS 197.763 limits the county's authority to require electronic submission of "written evidence, arguments or testimony."

Petitioner next argues that the county code impermissibly *requires* applicants and appellants to submit electronic materials, while other parties are merely *encouraged* to submit electronic materials. Petitioner relies on ORS 215.416(11)(a)(E)(i), which provides, in part: "At the de novo hearing[, t]he applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision[.]" ORS 215.416(11)(a)(E)(i) requires

parties be provided the same opportunity to present as they would have had at an initial evidentiary hearing. ORS 215.416 and ORS 197.763 do not require that all parties be treated exactly the same.[9]

ORS 215.416 and ORS 197.763 do not prohibit a county from requiring certain parties to submit electronic copies of submitted hard-copy materials, so long as all parties are provided an opportunity to present testimony, arguments, and evidence consistently with those statutes. We note that LC 14.020(3) does not specify any consequences for a violation, for example, if an appellant submits 10 pages of hard copy but fails to also provide an electronic copy of those same 10 pages, or a party submits electronic materials but fails to also provide a hard copy. Nothing in LC 14.020(3), or elsewhere cited to our attention, authorizes the county to ignore or reject properly submitted written or electronic materials simply because the submitting party failed to also submit *copies* of that material in a different format. If the county ignored or rejected otherwise properly submitted testimony or evidence, it is arguable that such conduct, or a code provision authorizing such conduct, would not be consistent with ORS 197.763. However, because LC 14.020(3) does not specify any consequences for violation of the requirement to submit copies in a different format, we need not resolve that question.

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[9] For example, an applicant has a unique opportunity to submit final argument. ORS 197.763(6)(e).

In sum, petitioner has not persuaded us that the electronic materials submission requirements are inconsistent with state law.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, petitioner argues that the county code impermissibly allows unlimited, successive one-year extensions of permits for residential development on resource land in violation of state law, which provides that such permits "shall be valid for four years" and "[a]n extension" of such permits "shall be valid for two years." ORS 215.417; OAR 660-033-0140.

LC 14.090 provides, in part:

"**(6) Expiration of Approvals**

> "**(a)** A permit for a discretionary approval is valid for two years from the date of the final decision, unless otherwise specified in the approval or by other provisions of Lane Code, and except as provided for in subsection (7) below.
>
> "**(b)** A permit for a discretionary approval of residential development on agricultural or forest zoned land is valid for four years, unless otherwise specified in the approval of an application or by another provision of Lane Code, and except as provided in subsection (7) below. For the purpose of this section '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) as implemented through Lane Code Chapter 16.
>
> "**(c)** A land division decision is valid subject to Lane Code Chapter 13 except as provided in subsection (7) below.

"**(7) Extension of Approval Period**. Unless otherwise specified in the approval or by other provisions of Lane Code the Director may grant an extension subject to the following requirements:

"* * * * *

"**(d)** An initial one year extension period will be granted unless otherwise provided in the decision and except as provided in (7)(e) below;

"**(e)** An initial extension of a permit described in subsection (6)(b) above is valid for two years;

"**(f)** Except as limited below, additional one year extensions, beyond the initial extension, will be authorized by the Director;

"**(g)** Additional one year extensions, beyond the initial extension, will be authorized where applicable criteria for the decision have not changed[.]" (Boldface in original.)

Petitioner first argues that applicable state law limits extension of a permit for residential development on resource land to a single two-year extension. Petitioner argues that the singular "[a]n extension" in ORS 215.417(2) and OAR 660-033-0140(5)(b) means that only a single extension of two years is permitted. Petitioner argues that the county code impermissibly allows unlimited successive one-year extensions for permits for residential development on resource land.

Petitioner's argument requires us to interpret OAR 660-033-0140 and ORS 215.417. In interpreting statutes and administrative rules, our objective is to determine the intent of the body that promulgated the rule. We examine text, context, and legislative history with the goal of discerning the intent of the governing body that enacted the law. *State v. Gaines*, 346 Or 160, 171–72, 206

P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). "Context includes other provisions of the same rule, other related rules, the statute pursuant to which the rule was created, and other related statutes." *Abu–Adas v. Employment Dept.*, 325 Or 480, 485, 940 P2d 1219 (1997). We are mindful that, in construing a statute, we are responsible for identifying the correct interpretation, "whether or not asserted by the parties." *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997).

We start with text. ORS 215.417 provides:

> "(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 implements and incorporates ORS 215.417 and provides:

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

period.

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

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

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

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

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

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

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

"(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)."

Petitioner emphasizes that the use of the singular "an extension" in ORS 215.417 and OAR 660-033-0140 means that permits for residential development in resource zones are limited to a single permit extension of two years. We agree with petitioner that use of the singular, as opposed to plural, is significant evidence of intent. *Schuette v. Dept. of Revenue*, 326 Or 213, 217–18, 951 P2d 690 (1997); *State v. Molver*, 233 Or App 239, 245, 225 P3d 136, *rev den*, 348 Or 291 (2010). We conclude that, based on text and context, ORS 215.417 and OAR 660-033-0140 limit discretionary permits approving residential development on resource land to one, two-year extension.

That conclusion is supported by legislative history. *See Cassidy v. City of Glendale*, 66 Or LUBA 314, 320 (2012) (LUBA is free to consider any legislative history that it considers useful). The Land Conservation and Development Commission (LCDC) adopted OAR 660-033-0140 in 1993 as part of the administrative rule implementing Statewide Planning Goal 3 (Agricultural Land). *See Jones v. Douglas County*, 63 Or LUBA 261, 266, *rem'd*, 247 Or App 56, 270 P3d 264, *and aff'd*, 247 Or App 81, 270 P3d 278 (2011) (so stating). We explained the relationship between ORS 215.417 and OAR 660-033-0140 in *Butori v. Clatsop County*, 45 Or LUBA 553, 556–57 (2003):

> "ORS 215.417 (Senate Bill (SB) 724) was adopted by the legislature in 2001. It was adopted in response to legislative concerns that the two-year term for permits for residential development on farm and forest lands, which was required under LCDC rules at that time, was too short. As originally introduced, SB 724 provided that such residential development permits would be effective for eight years

> and the eight-year term could be extended for an additional four years. * * * After concerns were expressed by the Department of Land Conservation and Development regarding the length of time such permits would remain valid and the application of SB 724 retroactively to revive expired permits, SB 724 was amended to shorten the time such permits would remain valid to four years with a possible extension of two years and to eliminate the section of SB 724 that would have revived permits that had already expired." *Id.*

LCDC adopted OAR 660-033-0140(5) to implement ORS 215.417, and essentially duplicated the statutory language in the administrative rule. Based on the legislative history, it appears that ORS 215.417 was the product of a compromise that resulted in permits for residential development on resource land that expire after four years with a possible two-year extension. Nothing in the legislative history suggests an intent to allow more than one extension. We agree with petitioner that state law allows the county to issue a single, two-year extension of a permit for residential development on resource land. We also agree that LC 14.090(7) impermissibly allows unlimited one-year extensions for such permits.

The third assignment of error is sustained.

DISPOSITION

Petitioner requests that "LUBA reverse or remand" the county's decision if we agree that the challenged legislative amendments are inconsistent with state law. Petition for Review 17. While we have concluded above that the challenged decision violates certain provisions of applicable state law, the code amendments are not prohibited as a matter of law because petitioner's assignment of error and

our conclusions are limited to hearing procedures for statutory permits and discretionary approval of residential development on agricultural or forest zoned land, as provided in state law. Accordingly, the proper disposition is remand.

The county's decision is remanded.