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

PAUL E. FOLAND and CONSTANCE J. FOLAND,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

DOM PROVOST and JOYCE PROVOST,
Intervenor-Respondents.

LUBA No. 2006-206

CHRIS N. SKREPETOS and CYNTHIA LORD,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

DOM PROVOST and JOYCE PROVOST,
Intervenor-Respondents.

LUBA No. 2006-211

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Paul E. Foland and Constance J. Foland, Ashland, filed a petition for review.
Constance J. Foland argued on her own behalf.

Chris N. Skrepetos and Cynthia Lord, Ashland, filed a petition for review. Chris N.
Skrepetos argued on his own behalf.

No appearance by Jackson County.

1 E. Michael Connors, Portland, filed the response brief and argued on behalf of
2 intervenor-respondents. With him on the brief were Gregory S. Hathaway and Davis Wright
3 Tremaine, LLP.

4
5 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,
6 participated in the decision.

7
8 REVERSED

05/21/2007

9
10 You are entitled to judicial review of this Order. Judicial review is governed by the
11 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a preliminary development plan for a destination resort.

FACTS

This case has a long history that stretches back nearly twenty years. An in-depth recount of that factual and procedural history is not necessary for the disposition of this appeal, and we limit our discussion accordingly.

The county’s destination resort approval process has three stages. The first stage of approval is the conceptual site plan (CSP), which provides a broad outline of the proposed resort. The second stage of approval is the preliminary development plan (PDP), which must be consistent with the CSP, but provides greater detail. The third stage of approval is the final development plan (FDP).

In 1989, the county approved intervenors’ proposed CSP. Petitioners appealed that decision to LUBA, and we remanded the county’s decision. *Foland v. Jackson County*, 18 Or LUBA 731 (1990). Our decision was then affirmed by the Court of Appeals and the Supreme Court. *Foland v. Jackson County*, 101 Or App 632, 792 P2d 1228 (1990), *aff’d* 311 Or 167, 807 P2d 801 (1991). In 1992, the county approved intervenors’ CSP on remand. Petitioners appealed that decision to LUBA, and we affirmed the county’s decision. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992). In 1994, intervenors submitted and the county approved their PDP. Petitioners appealed the PDP approval to LUBA, and we remanded the county’s decision. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995). The case was on remand with county for over 10 years. In 2006, the county approved intervenors’ modified PDP proposing development of Clear Springs Destination Resort, which would include a 9-

1 hole golf course with driving range and clubhouse, a hotel/conference center, and housing
2 consisting of golf villas, private residences, and condominiums.¹ This appeal followed.

3 **MOTION TO FILE REPLY BREIF**

4 Petitioners Foland move to file a reply brief. There is no opposition to the motion,
5 and it is granted.

6 **FIRST ASSIGNMENTS OF ERROR**

7 Both petitioners Foland and petitioners Skrepetos and Lord (collectively petitioners)
8 raise the same issue in their first assignment of error, arguing that the county’s CSP and PDP
9 approvals expired before the county approved the PDP that is at issue in this appeal.
10 Petitioners contend that a new CSP and PDP must be submitted and approved in order to go
11 forward with a FDP. According to petitioners, the county misinterpreted its ordinances to
12 approve the PDP in 2006. Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759
13 (2003) and ORS 197.829(1), LUBA will overturn a local government’s interpretation of its
14 own land use legislation if it is inconsistent with the express language, purpose, or policy of
15 the land use legislation.²

¹ The primary differences between the original PDP and the modified PDP at issue are that the Oregon Department of Transportation acquired approximately 15 acres of the property which resulted in intervenors reducing the golf course from eighteen holes to nine holes. Intervenors also discovered additional wetlands on the property. Intervenors further proposed to develop approximately 30 acres that were slated for open space in the original PDP. Finally, intervenors obtained a permit form the Oregon Water Resources Department to use groundwater for the destination resort.

² ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 Jackson County Land Development Ordinance (LDO) 246.040(6)(B), 246.070(9),
2 and 246.080(3), collectively, establish deadlines with the apparent purpose of ensuring that
3 PDP approval decisions follow CSP approvals without excessive delays and that FDP
4 approvals follow PDP approvals without excessive delays. We set out the text of those three
5 LDO provisions below:

6 LDO 246.040(6)(B) provides:

7 “Pursuant to Sections 246.070(9) and 246.080(2), a [FDP] for the destination
8 resort shall be submitted for Planning Commission review and approval
9 within three years from the date of approval of the [PDP]. The [FDP] shall
10 only be approved if the applicant has fully implemented the [PDP] or phase of
11 it, and such plan is found to be in compliance with all requirements specified
12 in prior approval, of this chapter, the Land Development Ordinance, the
13 Comprehensive Plan and any relevant state law. [FDPs and PDPs] shall be
14 consistent with the [CSP].”

15 LDO 246.070(9) provides:

16 “[PDP] approval shall be valid for a period of three years from the date of
17 approval by the Board of Commissioners. Within that time period, the
18 applicant shall submit a [FDP]. Prior to the expiration of a [PDP], the
19 property owner may initiate a request for a one year extension of time for
20 submitting a [FDP]. A time extension may only be approved upon a finding
21 that circumstances have not changed sufficiently since the initial approval to
22 render the [PDP] inappropriate or not in compliance with the existing
23 regulations and the [CSP].”

24 LDO 246.080(3) provides:

25 “If a [FDP] is not submitted within three years of approval of the [PDP], the
26 latter shall expire and a new [CSP] and [PDP] shall be required, unless prior
27 to the end of the three year period, the applicant submits a request for a one-
28 year extension, pursuant to Sections 246.040(6) and 246.070(9), which has
29 been approved by the Planning Commission based upon a finding that
30 circumstances have not changed sufficiently since prior approval to render the
31 [CSP] and [PDP] inconsistent with existing land use regulations.”

32 The LDO sets up a process in which the PDP is valid for three years, during which
33 the FDP must be submitted. The LDO also allows for a one-year extension that would allow
34 an applicant a total of four years from the approval of the PDP to submit the FDP. In the
35 present case, the PDP was approved by the county in 1994 and a FDP had not been submitted

1 by 2006. According to petitioners, because a FDP was not submitted before the three or
2 possibly four-year deadline for submitting the FDP had passed, under the terms of the LDO,
3 the CSP and PDP have expired. The county’s findings addressing this issue state:

4 “[Petitioners] claim that it is too late to approve a Revised [PDP] because the
5 *original* [PDP] approved in 1994 has expired pursuant to LDO 246.040(6)(B),
6 246.070(9) and 246.080(3) in that it has been more than three years since the
7 *original* [PDP] approval.

8 “The Board of County Commissioners disagree with [petitioners’] argument.
9 The [PDP] has not expired pursuant to LDO 246.040(6)(B), 246.070(9) and
10 246.080(3) because the County’s *initial* approval of the [PDP] was suspended
11 pending resolution of the LUBA Remand. LDO 246.040(6)(B), 246.070(9)
12 and 246.080(3) provide that if a final development plan is not submitted
13 within three years of approval of the [PDP], the [PDP] shall expire.

14 “The Board of County Commissioners interpret the time limitations set forth
15 in these code provisions as being triggered only after the County provides
16 *final* approval of the [PDP]. Although the Board of County Commissioners
17 *initially* approved the [PDP] in 1994, LUBA’s remand suspended that
18 approval pending resolution of the issues identified by LUBA. The
19 Applicants could not even file for approval of the [FDP] until LUBA’s
20 Remand issues are resolved. If the Board of County Commissioners did not
21 interpret these code provisions in this manner, opponents could make it
22 virtually impossible to comply with the timing requirements by continuously
23 appealing the decisions. Therefore, the Board of County Commissioners
24 conclude that the [PDP] has not expired pursuant to LDO 246.040(6)(B),
25 246.070(9) and 246.080(3).” Record 10 (emphases added).

26 We note at the outset that the fundamental problem is that the drafters of the above
27 LDO provisions did not expressly address whether or how appeals to LUBA and beyond
28 might affect the deadlines established in these sections. To address that potential delay and
29 the problems that delay might cause under these sections of the LDO, the county introduces
30 the concept of *initial* PDP approval and *final* PDP approval. As we understand the county, it
31 uses the term *initial* PDP approval to describe the initial or first decision that the county
32 adopts that approves a PDP. That *initial* approval could also be the *final* PDP approval, but
33 only if the initial PDP approval decision is not appealed to LUBA or, if the *initial* PDP
34 approval decision is appealed to LUBA, the *initial* PDP approval decision would not become

1 the *final* PDP until LUBA and any appellate court affirmed the appealed *initial* PDP
2 approval.

3 Where an initial PDP approval decision is appealed to LUBA, and LUBA remands
4 the *initial* PDP approval, we understand the county to take the position that there can be no
5 *final* PDP approval decision until the county adopts a subsequent decision or decisions that
6 approve the PDP in response to the LUBA remand and any subsequent LUBA remands, and
7 that subsequent PDP decision is not appealed to LUBA or is affirmed by LUBA. That
8 affirmed or unappealed subsequent PDP decision would be the county's *final* PDP approval.

9 There is a fatal problem with the county's purported "interpretation" of the above-
10 quoted LDO sections. The county has not *interpreted* the quoted LDO sections, it has
11 attempted to rewrite them to address a problem that the drafters apparently did not expressly
12 anticipate. It has inserted the concepts of *initial* PDP approval and *final* PDP approval, when
13 the LDO sections themselves do not employ those concepts. The county is certainly free to
14 amend these sections to address any concerns it may have about whether LUBA appeals
15 might make complying with the deadlines established by those sections difficult or
16 impossible. But the county is not free to insert new terms or concepts into those LDO
17 sections without amending those LDO sections. *See* ORS 174.010 (in interpreting a
18 provision, a reviewing body is not to insert language that is not there).

19 We also note that the rationale or reason that the county cites for departing from the
20 plain wording of the LDO sections ("opponents could make it virtually impossible to comply
21 with the timing requirements by continuously appealing the decisions") is dubious at best.
22 Under LDO 246.040(6), following PDP approval it appears that an applicant can be assured
23 of at least three years to resolve any appeals and receive approval of an FDP. If LUBA or
24 further appeals cause delays, the applicant can seek a one-year extension to make the original
25 three-year deadline a four-year deadline. Four years to defend approval of a PDP and/or

1 make any necessary changes to secure approval of a modified PDP would seem to be an
2 adequate amount of time to accomplish such approvals.

3 Furthermore, in the present case, even in the face of persistent challenges from long
4 term opponents, it does not appear that it would have been “virtually impossible” to file a
5 FDP within the time limits of the LDO. The PDP was approved on August 24, 1994. We
6 remanded that PDP approval on April 15, 1995. Intervenors had over two years, until at least
7 August 23, 1997, to secure new PDP approval on remand. Over two years to secure approval
8 of a new PDP from the county hardly seems “virtually impossible.”³ The delay was actually
9 over ten years and does not appear to have been caused by any delaying tactics by opponents.
10 To the contrary, the delay appears to have been entirely intervenors’ choice.

11 The county’s interpretation of LDO 246.040(6)(B), 246.070(9), and 246.080(3) is
12 inconsistent with the express language of the LDO. Under LDO 246.080(3), both the CSP
13 and PDP expire if a FDP is not submitted within three or potentially four years of the PDP
14 approval. The PDP was approved in 1994, and no FDP was submitted as of 2006.
15 Therefore, the CSP and PDP have expired and the county misconstrued the applicable law by
16 approving the modified PDP.

17 Petitioners’ first assignments of error are sustained.⁴

³ As explained above, the three-year deadlines set out in LDO 246.040(6)(B), 246.070(9), and 246.080(3) begin from the “date of approval by the Board of Commissioners” without distinguishing between initial or final approvals or providing for suspension of that three-year deadline. However, under those code provisions, the date of a decision on remand to approve the PDP would be the relevant “date of approval by the Board of Commissioners.” In other words, a decision on remand to approve the PDP would have the effect of resetting the three-year deadline for filing the FDP, giving a diligent applicant even more time if necessary to submit a FDP.

⁴ Petitioners made additional arguments under their first assignments of error. Because our decision on the county’s interpretation of 246.040(6)(B), 246.070(9), and 246.080(3) is dispositive, we do not reach the remaining portions of the first assignments of error or the remaining assignments of error.

1 **CONCLUSION**

2 The county misconstrued the applicable provisions of law by approving the PDP
3 when under the terms of the LDO the PDP and CSP had expired. Because the CSP and PDP
4 have expired, the PDP cannot be approved as a matter of law, and reversal rather than
5 remand is the proper outcome. OAR 661-010-0073(1)(c).

6 The county's decision is reversed.