BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

LOYAL LAND, LLC,
and KAMERON DELASHMUTT,
Intervenors-Respondents.

LUBA No. 2012-042

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

No appearance by Deschutes County.

Seth J. King, Portland, filed a response brief and argued on behalf of intervenor-respondent Loyal Land, LLC. With him on the brief were Steven L. Pfeiffer and Perkins Coie, LLC.

David J. Petersen and Peter D. Mohr, Portland, represented intervenor-respondent Kameron DeLashmutt.

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

REMANDED 01/08/2013

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision that the destination resort that was authorized by an April 15, 2008 conceptual master plan approval decision has been "initiated."

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to arguments in the intervenor-respondent's response brief that she failed to preserve one of the issues presented in the petition for review. The motion is granted.

INTRODUCTION

This appeal is the latest in a number of appeals concerning the Thornburgh Destination Resort to be sited on Exclusive Farm Use (EFU)-zoned land in Deschutes County. As proposed, the Thornburgh Destination Resort would occupy approximately 1,970 acres. Thornburgh Resort Company, which is owned by Kameron and Lisa DeLashmutt, was the applicant for conceptual master plan (CMP) approval and for final master plan (FMP) approval for the Thornburgh Destination Resort. Thornburgh Resort Company was the original owner of all but 160 of those 1,970 acres. The other 160 acres were and still are owned by Agnes DeLashmutt (who is Kameron DeLashmutt's mother).[1] The county's initial decision granting CMP approval was remanded by LUBA. The county subsequently issued its second decision granting CMP approval on April 15, 2008. The county issued its first and only decision granting FMP approval on October 8, 2008.

The land use litigation concerning the CMP approval came to an end on December 9, 2009, when the Court of Appeals issued its appellate judgment in *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009). As a result of the Court of Appeals'

[1] The 1,970 acres include eight lots. At the time the land use litigation concerning the CMP approval concluded, Thornburgh Resort Company owned seven of those lots and Agnes DeLashmutt owned the eighth lot.

decision, the county's April 15, 2008 decision granting CMP approval for the Thornburgh Destination Resort was affirmed. The land use litigation concerning the FMP approval came to an end on February 24, 2010, when the Court of Appeals affirmed LUBA's September 9, 2009 decision that remanded the county's FMP decision. The county has taken no further action on the FMP decision following LUBA's remand.

On September 4, 2011, through a foreclosure action, Loyal Land, LLC (Loyal Land) took title to the seven lots formerly owned by Thornburgh Resort Company, but Loyal Land did not take title to the 160 acre lot that is still owned by Agnes DeLashmutt. Under state and local law, a permit like the county's April 15, 2008 CMP decision is "void" two years after the permit decision becomes final unless the use authorized by the permit is "initiated within that * * * period." OAR 660-033-0140(1); Deschutes County Code (DCC) 22.36.010(B)(1). In Deschutes County, a declaratory ruling may be requested for, among other things, "[d]etermining whether an approval has been initiated." DCC 22.40.010(A)(3). In her first assignment of error, petitioner contends the county should not have accepted Loyal Land's application for a declaratory ruling, or rendered a decision on that application, because Loyal Land does not own all of the 1,970 acres that make up the approved Thornburgh Destination Resort site. In her second assignment of error, petitioner contends the county erred in finding the two-year time limit imposed by DCC 22.36.010(B)(1) applies in place of the two-year time limit in OAR 660-033-0140(1).[2] In her third through fifth assignments of error, petitioner contends that even if the county correctly found that the two-year time limit in DCC 22.36.010(B)(1) applies in place of the two-year time limit in OAR 660-033-0140(1), the county erroneously found that the use authorized by the April 15, 2008 CMP was initiated before the DCC 22.36.010(B)(1) two-year time limit expired.

[2] As we explain later in this opinion, while there are similarities in the state and county two-year limitations, there also are differences.

FIRST ASSIGNMENT OF ERROR

DCC 22.08.010(B) sets out a general requirement that an application for land use approval must "[b]e submitted by the property owner or a person who has written authorization from the property owner * * *." However, for applications for declaratory rulings, DCC 22.40.020(A) applies in place of DCC 22.08.010(B) and provides:

> "DCC 22.08.010(B) notwithstanding, the following persons may initiate a declaratory ruling under DCC 22.40:
>
> "1. The owner of a property requesting a declaratory ruling relating to the use of the owner's property;
>
> "2. In cases where the request is to interpret a previously issued quasi-judicial plan amendment, zone change or land use permit, the holder of the permit; or
>
> "3. In all cases arising under DCC 22.40.010, the Planning Director.
>
> "No other person shall be entitled to initiate a declaratory ruling."

The hearings officer found that the application was properly submitted under DCC 22.40.020(A)(1). The hearings officer found that although Loyal Land does not own *all* of the Thornburgh Destination Resort property, "where there are multiple owners the application can be submitted by 'a' property owner." Record 69. Petitioners challenge that finding:

> "It is * * * inappropriate for the Hearings Officer to effectively change the Code language from 'the property owner' to 'a property owner[.]'" Petition for Review 9-10.[3]

Because the first assignment of error presents a question regarding interpretation of DCC 22.40.020(A)(1), and the local government decision maker was the county hearings officer,

[3] The parties argue at length regarding whether Loyal Land qualifies as the holder of the CMP permit and therefore is also authorized to submit the declaratory ruling application under 22.40.020(A)(2). The hearings officer found that the declaratory ruling application was authorized by both 22.40.020(A)(1) and (2). Because we agree with the hearings officer's interpretation of 22.40.020(A)(1), we need not and do not consider whether her interpretation of 22.40.020(A)(2) is correct.

not the board of county commissioners, the deferential standard of review set out at ORS 197.829(1) does not apply in this appeal. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994); *Tonquin Holdings, LLC v. Clackamas County*, 247 Or App 719, 722-23, 270 P3d 397 (2012); *Gould v. Deschutes County*, 233 Or App 623, 629, 227 P3d 758 (2010). Therefore, the applicable standard of review is whether the hearings officer "[i]mproperly construed the applicable law," within the meaning of ORS 197.835(9)(a)(D).

Because DCC 22.40.020(A)(1) authorizes applications for declaratory rulings from "*[t]he* owner of a property requesting a declaratory ruling relating to the use of *the* owner's property" (emphasis added), DCC 22.40.020(A)(1) only expressly anticipates an application for a declaratory ruling by one property owner. DCC 22.40.020(A)(1) simply does not anticipate or address the circumstance presented in this appeal—a declaratory ruling "relating to the use of" eight lots, with seven lots owned by Loyal Land and one lot owed by Agnes DeLashmutt. DCC 22.40.020(A)(1) is therefore ambiguous about whether a declaratory ruling is possible where there are multiple property owners and, if so, whether *all* owners must seek the declaratory ruling or whether *any* of the property owners may do so. *See Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012) (statutory silence may result in statutory ambiguity).

The issue of whether DCC 22.40.020(A)(1) is limited to properties where there is a single owner and is simply inapplicable where there is more than one property owner does not appear to have been an issue below, and we do not consider that issue further. The parties' dispute is limited to whether in the circumstance presented in this appeal (where a site is owned by two persons) "any" property owner may seek a declaratory ruling concerning the Thornburgh Destination Resort property (the hearings officer's ruling), or whether "all" property owners must seek the declaratory ruling (petitioner's position). We limit our consideration to that question.

As we have already explained, DCC 22.40.020(A)(1) simply does not anticipate that question and both petitioner's and the hearings officer's answers to that question are equally plausible. Those answers are also both equally somewhat at odds with the actual language of DCC 22.40.020(A)(1), since DCC 22.40.020(A)(1) assumes that there is only one owner (the owner) and therefore does not expressly address whether "any" or "all" property owners must join in the request where there are multiple owners. The hearings officer's interpretation of DCC 22.40.020(A)(1) results in the declaratory ruling process being more broadly available and the petitioner's interpretation narrows the availability of the declaratory ruling process.

As we noted at the beginning of our discussion of this assignment of error, DCC 22.40.020(A) applies specifically to applications for declaratory rulings and expands somewhat on the universe of persons who may generally seek land use approvals under DCC 22.08.010(B), to include permit holders in some circumstances and the planning director in all the circumstances set out in DCC 22.40.010. In concluding under DCC 22.40.020(A)(1) that Loyal Land could initiate this declaratory ruling request and that Agnes DeLashmutt need not join in that request, the hearings officer cited DCC 22.40.020(A)'s broadening of the potential universe of applicants as some contextual support for allowing *any* property owner to do so, at least with respect to the property it owns, rather than requiring that *all* property owners join in the application. That is not a great deal of contextual support, but it is some support. Where the competing interpretations are equally plausible, as we find them to be here, we believe that context is sufficient to allow us to conclude that the hearings officer did not "[i]mproperly construe[] the applicable law," within the meaning of ORS

197.835(9)(a)(D) and that DCC 22.040.020(A) allows Loyal Land to seek a declaratory ruling regarding the use of its property.[4]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

OAR 660-033-0140 provides that a "discretionary decision * * * on agricultural or forest land outside an urban growth boundary" is void two years from the date of the final decision if the development action is not initiated in that period."[5] The county's 2008 CMP decision qualifies as a "discretionary decision * * * on agricultural * * * land[.]" In her second assignment of error, petitioner argues the county should have applied OAR 660-033-0140 rather than the similar, but different, permit expiration standards set out at DCC 22.36.010.[6] A key difference between the rule and the county permit expiration standards is that the county permit expiration standards expressly toll the running of the two year period while there are pending land use appeals; OAR 660-033-0140 does not expressly do so.

The hearings officer found that because the county's comprehensive plan and land use regulations have been acknowledged, DCC 22.36.010 applies in this case and OAR 660-033-0140, which is part of the Land Conservation and Development Commission's (LCDC's) administrative rule implementing Goal 3 (Agricultural Lands), does not apply. *Byrd v. Stringer*, 295 Or 311, 318-19, 666 P2d 1332 (1983) ("[O]nce acknowledgment has been achieved, land use decisions must be measured not against the goals but against the acknowledged plan and implementing ordinances."); *Friends of Neabeck Hill v. City of*

[4] Kameron DeLashmutt and Thornburgh Resort Company requested that the hearings officer include a finding that the declaratory ruling in this case is not binding on them. The hearings officer declined to include such a finding, explaining that the effect if any of the declaratory ruling on the DeLashmutts and Thornburgh Resort Company could be decided in the future, if necessary. Record 66.

[5] The complete text of OAR 660-033-0140 is set out at Appendix A of this opinion.

[6] The relevant text of DCC 22.36.010 is set out at Appendix B of this opinion.

Philomath, 139 Or App 39, 46, 911 P2d 350 (1996) (same). Petitioner contends *Byrd* is not controlling here because OAR 660-033-0140 applies specifically to permits on agricultural and forest land and DCC 22.36.010 is a generally applicable permit expiration provision that is not specific to agricultural land.

OAR 660-033-0140 and DCC 22.36.010 while similar are also different, and in some respects they are arguably inconsistent.[7] We reject petitioner's suggestion that there must be something in the legislative record that specifically establishes that DCC 22.36.010 was adopted to replace and fully implement OAR 660-033-0140. That kind of specificity is rarely present in the legislative record. However, for purposes of this appeal, we accept petitioner's apparent working premise that if there is no reason to believe that the county adopted DCC 22.36.010 to elaborate on the permit expiration standards set out at OAR 660-033-0140 and apply the county's more elaborate version of OAR 660-033-0140 in the county's EFU zone and its other zoning districts as well, DCC 22.36.010 would not apply in the EFU zone and OAR 660-033-0140 would continue to apply directly to EFU zoned lands despite the fact that DCC Chapter 22 is acknowledged.

Despite the differences between OAR 660-033-0140 and DCC 22.36.010, if the text of OAR 660-033-0140 and DCC 22.36.010 set out at Appendix A and Appendix B is compared, there can be no doubt that OAR 660-033-0140 was the model for DCC 22.36.010. For example, OAR 660-033-0140(2) and DCC 22.36.010(C), which authorize one-year extensions, are nearly identical. OAR 660-033-0140(3), like DCC 22.36.010(D)(2), purports to make a permit extension decision something other than a land use decision. OAR 660-033-0140(4) and DCC 22.36.010(C)(2), which authorize additional one-year extensions, are

[7] As discussed later in this opinion, OAR 660-033-0140 simply requires that the use authorized by a permit on EFU land must be "initiated" within two years; whereas DCC 22.36.020 elaborates considerably on what it means to "initiate." And, as noted above, DCC 22.36.010(E) includes an express tolling provision for land use appeals whereas OAR 660-033-0140 does not.

very similar. Intervenor-respondent argues '[g]iven the near verbatim incorporation of OAR 660-033-0140(2), (3) and (4) within DCC 22.36.010, it is reasonable to conclude the County adopted these provisions to implement the state rule." Intervenor-Respondent's Brief 13. We agree with intervenor-respondent.

Finally, DCC 22.36.010(A)(1) makes it sufficiently clear that the county adopted DCC 22.36.010 to apply in *all* its zoning districts, including those that apply to agricultural and forest lands.[8] If LCDC or any other party believed the inconsistencies between DCC 22.36.010 and OAR 660-033-0140 are such that agricultural and forest lands should be excluded from application of DCC 22.36.010, and something closer to the wording of OAR 660-033-0140 substituted for agricultural and forest lands, the time to have required that change was prior to acknowledgment.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

DCC 22.36.010(E) provides that "[t]he [two-year] time period set forth in DCC 22.36.010(B) shall be tolled upon filing of an appeal to LUBA until all appeals are resolved." As previously noted, OAR 660-033-0140 includes no such tolling language. Petitioner first contends the hearings officer should have applied OAR 660-033-0140 instead of DCC 22.36.010 and therefore should not have tolled the running of the two-year time period when the April 15, 2008 CMP decision was appealed to LUBA on May 6, 2008. We concluded in our discussion of the second assignment of error above that the hearings officer correctly

[8] DCC 22.36.010(A)(1) provides:

> "Except as otherwise provided herein, DCC 22.36.010 shall apply to and describe the duration of all approvals of land use permits provided for under the Deschutes County Land Use Procedures Ordinance, the various zoning ordinances administered by Deschutes County and the subdivision/partition ordinance."

determined that the acknowledged DCC 22.36.010 time limit applies. We therefore reject this part of the third assignment of error.

Petitioner also argues that if the hearings officer was correct in applying DCC 22.36.010 she nevertheless erred by tolling the running of the DCC 22.36.010(B)(1) two year deadline for the 21 days between April 15, 2008, when the CMP decision became final, and May 6, 2008, when the LUBA appeal was filed. Petitioner further contends the two-year deadline should not have been tolled during the 21 days following LUBA's September 11, 2008 decision, before the appeal of LUBA's decision to the Court of Appeals was filed. Petitioner contends that if the DCC 22.36.010(B)(1) two year deadline and the DCC 22.36.010(E)(1) tolling provision had been correctly applied, "[s]ubtracting the 42 days from December 7, 2011, the two-year period with tolling ended on October 26, 2011." Petition for Review 17.

The hearings officer first concluded, and we agree, that the tolling required by DCC 22.36.010(E) began on May 6, 2008 (when the LUBA appeal was filed) and ended on December 9, 2009 (when the Court of Appeals entered its appellate judgment). We agree with the hearings officer that the 21 days between the date LUBA issued its decision on September 11, 2008 and the date LUBA's decision was appealed to the Court of Appeals is not deducted from the tolling period. DCC provides that the tolling begins when the LUBA appeal was filed (May 6, 2008) and continues "until all appeals are resolved." In this case that date was December 9, 2009.[9] The hearings officer then explained her calculation of the tolling as follows;

[9] The hearings officer explained:

"* * * The Hearings Officer finds the language in [DCC] 22.36.010(E) - tolling 'until all appeals are resolved' - does not contemplate such deductions, but rather sets the parameters of the tolling period from the filing of the first appeal to resolution of the last appeal, without interruption." Record 76 n 8.

> "The LUBA appeal from the board's April 15, 2008 decision was filed on May 6, 2008. LUBA's decision was appealed to the Court of Appeals and to the Supreme Court which denied review in a decision dated October 7, 2009. The Court of Appeals issued its appellate judgment on December 9, 2009. * * *
>
> "* * * * * *
>
> "* * * Accordingly, I find all appeals were resolved on December 9, 2009, and the tolled two-year period for initiation of the CMP approval expired on December 7, 2011 - i.e., 581 (tolled) days after April 15, 2010." Record 76.

Although the hearings officer correctly calculated the separation between May 6, 2008 and December 9, 2009 (581 days), we do not understand how she arrived at December 7, 2011 as the date the two-year period expired with tolling.

On December 9, 2009, when the two-year period that had been tolled on May 6, 2008 began to run again, all that the hearings officer had to do was account for the 21 days of the two-year period that already expired between April 15, 2008 and May 6, 2008. That can be done by projecting forward by two years minus 21 days (739 days) or projecting forward by two years from December 9, 2009 to December 9, 2011 and then subtracting 21 days. Either way, the DCC 22.36.010(B)(1) two year deadline in this matter, as tolled by DCC 22.36.010(E), expired on November 18, 2011.

As far as we can tell, the difference between when the hearings officer believed the DCC 22.36.010(B)(1) two year deadline expired (December 7, 2011), the date the petitioner believes it expired (October 26, 2011) and the date it actually expired (November 18, 2011) makes absolutely no difference in this appeal. Petitioner does not argue that anything happened during the 40 days encompassed by those dates, much less anything of legal significance.[10] Because the hearings officer's calculation of the time limit expiration is harmless error, it follows that the third assignment of error provides no basis for remand.

[10] In fact, because the hearings officer appears to have only relied on actions that predated or were essentially contemporaneous with the April 15, 2008 CMP decision to conclude the proposal was initiated, the hearings officer's discussion of the DCC 22.36.010(E) tolling provision was entirely unnecessary for her

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

A. Introduction

As already noted, DCC 22.36.010(B)(1) provides that "a land use permit is void two years after the date the discretionary decision becomes final if the use approved in the permit is not initiated within that time period." Appendix B. DCC 22.36.020(A) sets out what must be done to *initiate* a use:

> "For the purposes of DCC 22.36.020, development action undertaken under a land use approval described in DCC 22.36.010, has been 'initiated' if it is determined that:
>
> "1. The proposed use has lawfully occurred;
>
> "2. Substantial construction toward completion of the land use approval has taken place; or
>
> "3. Where construction is not required by the approval, the conditions of a permit or approval have been substantially exercised and any failure to fully comply with the conditions is not the fault of the applicant."

The hearings officer concluded that because "no construction was required by the CMP" DCC 22.36.020(A)(3) applies in this case. Record 77. Petitioner does not assign error to that aspect of the hearings officer's decision. As we explain in more detail below, the hearings officer then proceeded to decide which of the 38 CMP decision conditions of approval she believed were "relevant" under DCC 22.36.020(A)(3). She then concluded that all of the 15 CMP decision conditions of approval that she found to be relevant under DCC

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decision. However because we conclude under the fourth assignment of error that the hearings officer erroneously concluded that certain actions required under the CMP conditions of approval are irrelevant in making her decision regarding initiation, the date the DCC 22.36.010(B)(1) two year deadline actually expired may be important if this matter is taken up on remand.

22.36.020(A)(3) were fully exercised (which we understand to mean completely satisfied) before, or contemporaneously with, the April 15, 2008 CMP approval decision. Record 91.[11]

Before turning to the parties' arguments, we note that the hearings officer almost certainly misread DCC 22.36.020(A) in concluding that subsection (3) DCC 22.36.020(A) applies in this case, rather than subsection (2), which would require substantial construction. First, while subsection (3) of DCC 22.36.020(A) does say "[w]here construction is not required by the approval," land use permits rarely *require* construction. Rather, they almost always *authorize* construction. The author of subsection (3) of DCC 22.36.020(A) almost certainly intended that subsection (3) of DCC 22.36.020(A) would apply where no new construction is required for the "use approved in the permit." An example would be a permit that authorizes a change in use for an existing building. That is not the case here, since construction is required for the "use approved in the" CMP decision—a destination resort. And in any event, even if DCC 22.36.020(A)(2) is construed in context with DCC 22.36.020(A)(3) to limit application of DCC 22.36.020(A)(2) to cases where the permit decision itself actually specifies and requires construction, the CMP decision includes at least three conditions of approval that do require construction.[12]

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[11] Those conditions of approval include conditions 3, 8, 9, 10, 11, 13, 14A, 14B, 15, 19, 22, 24, 30, 36, and 37. The hearings officer found that the board of commissioner's decision to defer consideration of the adequacy of the applicant's wildlife mitigation plan until FMP approval rendered condition of approval 38 irrelevant in determining whether the use authorized by the CMP decision had been initiated with the two-year period required by DCC 22.36.010(B)(1).

[12] Those conditions are set out below:

> "4. * * * Emergency secondary resort access roads shall be improved before any Final Plat approval or issuance of a building permit, whichever comes first.
>
> "5. The developer will design design and construct roads in accordance with Title 17 of the [DCC]. Road improvement plans shall be approved by the Road Department prior to construction." Record 462.
>
> "33. The resort shall, in the first phase, provide for the following:
>
> "A. At least 150 separate rentable units for visitor-oriented lodging.

But the hearings officer and the parties have proceeded as though subsection (3) of DCC 22.36.020(A) applies in this case. We therefore limit our consideration to petitioner's challenges to the hearings officer's application of DCC 22.36.020(A)(3) and do not further consider whether the hearings officer should have applied DCC 22.36.020(A)(2) instead of DCC 22.36.020(A)(3) in this case. But as will become clear, the hearings officer had a great deal of trouble applying DCC 22.36.020(A)(3) in this case. Some of those troubles are directly attributable to the fact that the use approved by the April 15, 2008 CMP decision does require construction and that construction in some cases requires additional permit approvals that the applicant has had a great deal of difficulty securing and defending on appeal.

B. Consideration of Conditions Beyond the Numbered Conditions

The county's initial CMP decision included 36 conditions of approval. Following LUBA's remand, two more conditions of approval were added, for a total of 38 conditions of approval.[13] Under her first subassignment of error, petitioner argues the county erred by limiting its consideration to these 38 conditions of approval.

> "B. Visitor-oriented eating establishments for at least 100 person and meeting rooms which provide eating for at least 100 persons.
>
> "C. The aggregate cost of developing the overnight lodging facilities and the eating establishments and meeting rooms required by DCC 18.113.060(A)(1) and (2) shall at least $2,000,000 (in 1984 dollars).
>
> "D. At least $2,000,000 (in 1984 dollars) shall be spent on developed recreational facilities.
>
> "E. The facilities and accommodations required by DCC 18.113.060 must be physically provided or financially assured pursuant to DCC 18.113.110 prior to closure of sales, rental or lease of any residential dwellings or lots." Record 466.

[13] Actually condition 14 is broken down into five sub-conditions of approval making the total number of conditions depend on whether you count condition 14 as one condition or five conditions.

Petitioner argued below that the DCC 22.36.020(A)(3) language "conditions of permit approval" requires the county to go beyond the 38 enumerated "conditions of approval" to consider "elements of its [destination resort] proposal submitted to demonstrate compliance [with relevant approval criteria] regardless of whether such compliance is required through conditions of approval[.]" Record 77. If we understand petitioner correctly, she argues that any plans or development components of the destination resort proposal set out in the application that are necessary to demonstrate compliance with applicable approval criteria must be subject to the DCC 22.36.020(A)(3) two-year initiation standard without regard to whether that aspect of the proposal is the subject of one or more of the enumerated 38 conditions of approval. The hearings officer rejected that argument:

> "The plain language of the operative phrase -- 'conditions of a permit or approval' -- includes within it the term 'conditions of approval.' It does not include terms such as 'plans' or other development components." Record 78.

We agree with the hearings officer. Petitioner attempts to convert the already complicated analysis required by DCC 22.36.020(A)(3) into an unworkable metaphysical exercise of identifying additional "conditions" beyond the enumerated conditions of approval that are stated as such. Like the hearings officer, we conclude the task of applying DCC 22.36.020(A)(3) is sufficiently onerous when it is limited to the enumerated conditions of approval. DCC 22.36.020(A)(3) does not mandate the uncertain and subjective exercise of finding unenumerated "condition of a permit or approval" based on the importance of particular plans or development components in demonstrating compliance with relevant approval criteria.

Petitioner's theory regarding the proper interpretation and application of DCC 22.36.020(A)(3) is based in large part on LUBA cases that have determined that a permit approval may in some cases require that an applicant follow through on representations or promises the applicant made in the application for the permit, without regard to whether such follow through is expressly required in one of the enumerated permit conditions of approval.

Perry v. Yamhill County, 26 Or LUBA 73, 87-88, *aff'd* 125 Or App 588, 865 P2d 1344 (1993); *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106, 123-24, *rev'd and remanded on other grounds* 129 Or App 33, 877 P2d 1205 (1994); *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411, 421, *aff'd* 123 Or App 256, 860 P2d 278, *on recon* 125 Or App 122, 866 P2d 463 (1993). But that principle has no bearing on the issue presented under this subassignment of error. That issue is whether in considering whether "conditions of a permit or approval have been substantially exercised" under DCC 22.36.020(A)(3) the hearings officer is obligated to go beyond the 38 enumerated conditions of approval and treat aspects of the proposal that are not included in one of those 38 enumerated conditions of approval as "conditions of a permit or approval," within the meaning of DCC 22.36.020(A)(3). We agree with the hearings officer that she was not obligated to do so.

C. The Relevant Conditions of Approval

Petitioner's second subassignment of error addresses the heart of the parties' dispute. In the first part of this subassignment of error, petitioner contends the hearings officer erroneously limited her consideration to those conditions the hearings officer found to be relevant. In the second part of this subassignment of error, petitioner contends the hearings officer erroneously found that for conditions of approval that were fully satisfied at one time, it does not matter that actions were subsequently taken that may mean the condition is no longer fully satisfied.

1. Limiting Application of DCC 22.36.020(A)(3) to Relevant CMP Conditions of Approval

We set out again for convenience of reference the relevant requirements of DCC 22.36.010(B)(1) and DCC 22.36.020(A)(3). Under DCC 22.36.020(A)(3), to initiate the destination resort "use approved in the [CMP] permit" within the two-year period required by DCC 22.36.010(B)(1):

> "Where construction is not required by the approval, *the conditions of a permit or approval* [must] *have been substantially exercised and any failure to fully comply with the conditions is not the fault of the applicant*." (Emphasis added.)

Simply stated, the parties' dispute whether the obligation to substantially exercise "the conditions" applies to *all* 38 conditions or only to the 15 conditions that the hearings officer found to be relevant. Also, the parties dispute whether the requirement that "any failure to fully comply with the conditions [must not be] the fault of the applicant" applies to all of the conditions of approval, or only to the conditions that the hearings officer found to be relevant.

The hearings officer provided the following explanation for her position that the "substantially exercised" and "not fault of the applicant" inquiries that are required by DCC 22.36.020(A)(3) are limited to the 15 conditions she found to be relevant:

> "* * * The only question before me in this declaratory ruling proceeding is whether the destination resort use allowed through the CMP approval has been initiated – *not* whether the applicant ultimately will be able to develop the resort. The applicant's ability to put into place all of the destination resort's components may well be relevant at the FMP and specific development steps.
>
> "The remaining question raised by the parties under [the language of DCC 22.36.020(A)(3)] is whether all or only some of the 38 conditions of approval in the board's decisions are relevant in determining whether the use approved through the CMP has been 'initiated.' The Hearings Officer finds the answer to that question is determined by both the language of the conditions of approval and their context within the three-step destination resort process. [DCC] 18.113.050 states the CMP provides the 'framework' for development of the destination resort. [DCC] 18.113.040(B) states that in order to develop the destination resort the applicant must submit and obtain approval for the FMP 'which incorporates all requirements of the County approval for the CMP' and demonstrates compliance with 'all conditions of approval of the conditional use permit.' [DCC] 18.113.040(C) states 'each element or development phase of the destination resort must receive additional approval through the required site plan approval or subdivision criteria,' and must be in compliance with the FMP.
>
> "Consistent with the [destination resort] context, the conditions of approval in the board's decisions specify different times for compliance – e.g., some

> before FMP approval, some before specific development approval, and some at all times – as shown in the following summary of conditions." Record 79.

The hearings officer then proceeded to separate the 38 conditions of approval into nine categories: (1) "Conditions To Be Met Prior to FMP Approval" (nine conditions); (2) "Conditions To Be Met On or With Final Master Plan Submission" (six conditions); (3) "Condition of FMP Approval" (one condition); (4) "Conditions to Be Met Before or With First Phase of Development/First Tentative Plat and/or First Site Plan" (two conditions); (5) "Conditions to Be Met Before Final Plat Approval" (two conditions); (6) "Conditions to be Met With/On Final Plat" (three conditions of approval); (7) "Conditions To Be Met Prior To or With Construction" (two conditions); (8) "Conditions To Be Met With Each Development Phase" (one condition); and (9) "Conditions To Be Met At All Times" (19 conditions). Record 79-81.

In rejecting petitioner's contention that DCC 22.36.020(A)(3) requires that all 38 conditions of approval must be "substantially exercised," the hearings officer points out that DCC 22.36.020(A)(3) refers to "the conditions" not "all conditions" and that petitioner's interpretation would effectively require that the Thornburgh Destination Resort would have to be fully constructed within two years after April 15, 2008 to avoid the CMP decision becoming void under DCC 22.36.010(B)(1). The hearings officer avoided that result by concluding that only those conditions that were required to be completed before FMP approval were relevant in applying DCC 22.36.010(B)(1) and DCC 22.36.020(A)(3) to the April 15, 2008 CMP decision:

> "The hearings officer finds the relevant conditions of approval for the subject initiation of use declaratory ruling are limited to those with which the CMP required compliance before FMP approval. * * *." Record 82.

The hearings officer is correct that the text of DCC 22.36.020(A)(3) refers to "the conditions" and does not refer to "all conditions." Of course it is also correct that DCC 22.36.020(A)(3) refers to "the conditions;" and does not refer to "relevant conditions." More

to the point, it does not refer to "conditions of approval that must be satisfied before FMP approval."

We can appreciate that initiating a complicated project like the Thornburgh Destination Resort by "substantially exercis[ing]" all 38 conditions of approval within two years and demonstrating that any failures to "fully comply with the [38] conditions is not the fault of the applicant" is an extremely difficult and perhaps practically impossible obligation in this case, given the way the 38 conditions of approval are written. But that difficulty is equally attributable to (1) the way DCC 22.36.020(A)(3) is written, and (2) the way the 38 conditions of approval are written. If the county had anticipated in its CMP decision that some of the conditions of approval might be difficult or impossible to satisfy fully within two years and therefore potentially cause the CMP decision to become void under DCC 22.36.010(B)(1), the county perhaps could have drafted those 38 conditions of CMP approval as notices of future conditions of approval that would be attached to required future permits and other approvals. And as we have already pointed out, it is highly likely that the county should have applied DCC 22.36.020(A)(2) instead of DCC 22.36.020(A)(3), in which case any problems with "substantially exercis[ing]" the CMP conditions of approval would be irrelevant, so long as the applicant was able to complete "[s]ubstantial construction toward completion of the land use approval" within two years.

Whatever the difficulties created by the language of DCC 22.36.020(A)(3) and the wording of the 38 conditions, the hearings officer is not free to remove that difficulty by rewriting DCC 22.36.020(A)(3). The hearings officer essentially rewrote DCC 22.36.020(A)(3), to add the bold language set out below:

> "Where construction is not required by the approval, the conditions of a permit or approval **that must be satisfied before FMP approval** have been substantially exercised and any failure to fully comply with the conditions is not the fault of the applicant."

Under ORS 174.010, the hearings officer is not entitled to add and subtract language from DCC 22.36.020(A)(3). The simplest way to describe the hearings officer's error is that she assumed that because other approvals would be required to fully comply with some of the 38 conditions of CMP approval those conditions of approval should not be treated as relevant conditions of CMP approval under DCC 22.36.020(A)(3). However, whether it was intentional or unintentional, by imposing conditions of approval that would require the applicant first to secure additional land use permits, the city effectively required the applicant to secure those additional permits within the two-year period imposed by DCC 22.36.010(B)(1) to avoid having the CMP permit become void. That result may be harsh in this case, but it cannot be avoided by interpreting DCC 22.36.020(A)(3) to say something that it does not say.

On remand the hearings officer must consider whether all of the 38 conditions of approval have been "substantially exercised," including those that required that the applicant seek additional permits and approvals. We do not agree with petitioner that DCC 22.36.020(A)(3) requires that *each* of the 38 conditions of approval must have been "substantially exercised" within the two-year period, although the county could probably interpret DCC 22.36.020(A)(3) to impose that obligation. Because DCC 22.36.020(A)(3) is ambiguous about whether *each* of the 38 conditions of approval must *separately* be "substantially exercised," we conclude the hearings officer could interpret DCC 22.36.020(A)(3) to require only that the 38 conditions of approval, viewed as whole, have been "substantially exercised," even though some of those 38 conditions of approval have not been "substantially" or "fully" "exercised," or perhaps have not been"exercised" at all. But the hearings officer must be able to find both that the 38 conditions of approval, viewed as a whole, have been substantially exercised *and* that for any of the 38 conditions of approval where there has been a failure to fully exercise the condition, the applicant is not at fault. Of course the evidentiary record must also be such that it provides substantial evidence for such

findings. We suspect that the hearings officer will encounter difficulty in making those findings, but that is the only potential route to a decision under DCC 22.36.020(A)(3) that the use approved by the CMP approval—the Thornburgh Destination Resort—was initiated within the two-year period required by DCC 22.36.010(B)(1) so that the April 15, 2008 CMP decision is not void.

Finally with regard to the conditions that provide contingent or continuing obligations, it may be sufficient for the hearings officer to find that failure to comply with such conditions is not the fault of the applicant because the contingency that would trigger obligations under the condition does not and may never exist.[14] Similarly, for those conditions that require the applicant first to seek additional land use approvals, the hearings officer may be able to find that the applicant's failure to secure those additional land use approvals is not the fault of the applicant. We express no position on whether such findings are possible for any of those conditions of approval or whether the evidentiary record would support such findings. But it is simply inaccurate for the hearings officer to say that the applicant would necessarily have to completely construct the Thornburgh Destination Resort to avoid having the April 15, 2008 CMP decision become void under DCC 22.36.010(B)(1) and DCC 22.36.020(A)(3). All that would be required is for the hearings officer to find that for any conditions of approval that are not fully exercised because the applicant failed to secure additional permits that are necessary to fully comply with such conditions of approval, that failure was not the applicant's fault.

The first part of the second subassignment of error is sustained.

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[14] As an example condition 1 provides in part that "[a]ny substantial change to the approved plan will require a new application." The parties apparently dispute whether there have been such changes. But if there have not been substantial changes to the approved plan, it likely would be sufficient for the hearings officer to find that condition 1 is fully satisfied because there has been and may never be any "substantial change to the approved plan."

2. Subsequent Events

Petitioner contends that while some CMP conditions of approval may have been fully satisfied as some point in time, for several of those conditions subsequent events have occurred such that those conditions are no longer satisfied. For example, petitioner contends that the hearings officer found that some CMP conditions of approval were fully satisfied by memoranda of understanding between Thornburgh Resort Company and its affiliates with the Bureau of Land Management, Oregon Department of Transportation and Department of State Lands and water rights held by Thornburgh Resort Company. Petitioner contends that Loyal Land has not yet established that it has any rights under the memoranda of understanding or the water rights and for that reason the hearings officer should not have found that those conditions were fully satisfied.

Petitioner identifies five conditions of approval: condition 3 (requiring grant of right-of-way from the Bureau of Land Management (BLM) for access across BLM land; condition 8 (requiring Oregon Department of Human Services approval water supply plans); condition 11 (requiring written plan for cooperative agreements with owners of nearby wells); condition 15 (requiring an approved Water Pollution Control Facility permit); and condition 30 (requiring a detailed traffic circulation plan).[15] However, all of these conditions of approval require that they be satisfied prior application for FMP approval (conditions 3, 11, 15) or prior to FMP approval (conditions 8 and 30). The county hearings officer who granted FMP approval found that all of these conditions had been fully satisfied before she granted FMP approval, and we do not understand petitioner to dispute that all of those conditions were fully satisfied according to their terms before the county granted FMP approval.

[15] Petitioner also identifies condition 4, but that condition requires certain road improvements before final subdivision plat approval or before a building permit is issued. Record 462. The hearings officer did not find that condition 4 has been substantially or completely satisfied.

The hearings officer found that once a CMP condition of approval has been fully satisfied, she was not required to consider subsequent events that may call into question whether the current property owner has any rights under agreements that may have been entered into or plans that may have been approved to satisfy those conditions. With the caveat that Loyal Land will of course have to ultimately be successful in securing any rights that may be necessary to construct the Thornburgh Destination Resort in conformance with all applicable conditions of approval, we agree with the hearings officer that for purposes of determining whether the Thornburgh Destination Resort was initiated under DCC 22.36.020(A)(3) within the time period required by DCC 22.36.010(B)(1), the hearings officer is not required to consider events that postdate the dates CMP conditions of approval were fully satisfied.

This part of the second subassignment of error is denied.

3. Conditions of Approval that were Satisfied before April 15, 2008

Under the third part of her second subassignment of error, petitioner contends the hearings officer erred in finding some of the CMP conditions of approval were fully satisfied "within [the] time period" required by DCC 22.36.010(B)(1).[16] Again, that time period began on April 15, 2008 and ended on October 23, 2011.

Petitioner contends that the actions that the hearings officer relied on to find that conditions of approval 3, 8, 9, 10, 11, 13, 14A, 14B, 15, 22 and 24 have been fully satisfied pre-date the April 15, 2008 beginning of the two-year time period and the hearings officer therefore erred in relying on those actions to find the conditions were fully satisfied "within [the] time period" required by DCC 22.36.010(B)(1).

[16] Loyal Land contends petitioner failed to preserve this issue for review by LUBA by adequately raising the issue below. For the reasons set out in petitioner's reply brief, we agree the issue was adequately preserved for review.

Although petitioner's argument may be textually plausible, we reject it. DCC 22.36.010(B)(1) simply does not anticipate that a condition of approval might be fully satisfied before the condition is imposed. Where that is the case, we cannot think of any reason why the enactors of DCC 22.36.010(B)(1) would have intended to require that those actions be duplicated after the condition is imposed, and we decline to interpret DCC 22.36.010(B)(1) to impose such a pointless requirement.

Finally, petitioner points out that some of the documents the hearings officer relied on to find that conditions of approval 19, 30, 36 and 37 are satisfied are undated. However, petitioner does not further develop her arguments concerning those conditions and we do not consider them further.[17] She also points out the hearings officer improperly determined that condition 38 concerning the wildlife mitigation plan is irrelevant in this proceeding. We have already agreed with petitioner elsewhere that that finding by the hearings officer is in error and petitioner's repetition of that argument here provides no additional basis for remand. Under our resolution of the second subassignment of error, the hearings officer will be required to find that the applicant is not at fault if condition 38 has not been fully satisfied.

This part of the second subassignment of error is denied.

The first part of the second subassignment of error is sustained. The remaining parts of the second subassignment of error are denied.

The fourth assignment of error is sustained in part.

FIFTH ASSIGNMENT OF ERROR

In her fifth assignment of error, petitioner challenges the hearings officer's failure to consider whether failure to fully comply with many of the CMP conditions of approval is not the fault of the applicant. As we have already explained, the hearings officer found that

[17] We also do not understand petitioner to dispute that those conditions were fully satisfied sometime before the county granted FMP approval on October 8, 2008.

relevant conditions of approval have been fully satisfied and that she was not required under DCC 22.36.020(A)(3) to consider, with regard to conditions she found to be irrelevant, whether any failure to fully comply with such irrelevant conditions is not the fault of the applicant. In sustaining the fourth assignment of error in part above, we agree with petitioner that the hearings officer erred in concluding that many of the 38 conditions of approval are irrelevant for purposes of DCC 22.36.020(A)(3). On remand, for any conditions that have not been fully complied with during the two-year period, the hearings officer can conclude that the CMP approval was initiated only if she finds, based on substantial evidence, that for such conditions, the "failure to comply with the conditions is not the fault of the applicant." Petitioner's fifth assignment of error adds nothing to our resolution of the fourth assignment of error, and we do not consider it further.

The county's decision is remanded in accordance with our resolution of the fourth assignment of error.

Appendix A

"660-033-0140

"Permit Expiration Dates

"(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(1)(q), (3) and (4), 215.283(1)(p), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3)."

Appendix B

"**22.36.010. Expiration of Approval.**

"A. Scope.

"1. Except as otherwise provided herein, DCC 22.36.010 shall apply to and describe the duration of all approvals of land use permits provided for under the Deschutes County Land Use Procedures Ordinance, the various zoning ordinances administered by Deschutes County and the subdivision/partition ordinance.

"* * * * *

"B. Duration of Approvals.

"1. Except as otherwise provided under DCC 22.36.010 or under applicable zoning ordinance provisions, a land use permit is void two years after the date the discretionary decision becomes final if the use approved in the permit is not initiated within that time period.

"* * * * *

"4. The approval period for the following dwellings in the Exclusive Farm Use and Forest Use Zones is for 4 years:

"a. Replacement dwelling

"b. Nonfarm dwelling

"c. Lot of record dwelling

"d. Large tract dwelling

"e. Template dwelling.

"C. Extensions.

"1. The Planning Director may grant one extension of up to one year for a land use approval or a phase of a land use approval, and two years for those dwellings listed in DCC

22.36.010(B)(4) above, regardless of whether the applicable criteria have changed, if:

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

"b. The request, along with the appropriate fee, 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 or meeting conditions of approval within the approval period; and

"d. The County determines that the applicant was unable to begin or continue development or meet conditions of approval during the approval period for reasons for which the applicant was not responsible, including, but not limited to, delay by a state or federal agency in issuing a required permit.

"2. Up to two additional one-year extensions, or two-year extensions for those dwellings listed under DCC 22.36.010(B)(4) above, may be granted under the above criteria by the Planning Director or the Planning Director's designees where applicable criteria for the decision have not changed.

"3. In addition to the extensions granted in DCC 22.36.010(C)(1), one additional two-year extension for a land use approval or a phase of a land use approval may be granted by the Planning Director or the Planning Director's designee under the criteria listed under DCC 22.36.010(C)(1) for approvals issued prior to June 8, 2011. This subsection does not apply for those dwellings listed under DCC 22.36.010(B)(4) above.

"D. Procedures.

"1. A determination of whether a land use has been initiated shall be processed as a declaratory ruling.

"2. Approval of an extension granted under DCC 22.36.010 is an administrative decision, is not a land use decision described in ORS 197.015 or Title 22 and is not subject to appeal as a land use decision and shall be processed under DCC Title 22 as a

development action, except to the extent it is necessary to determine whether the use has been initiated.

"E. Effect of Appeals. The time period set forth in DCC 22.36.010(B) shall be tolled upon filing of an appeal to LUBA until all appeals are resolved."