BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

LOYAL LAND, LLC,
Intervenor-Respondent.

LUBA No. 2014-080

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.

David J. Petersen, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Tonkon Torp LLP.

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

REMANDED 01/30/2015

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 board of county commissioners' declaratory ruling that the development action authorized by the county's prior approval of the Thornburgh Resort conceptual master plan has been initiated.

INTRODUCTION

A. Prior Appeals

Thornburgh Resort Company, LLC proposed a destination resort, Thornburgh Resort, to be located on approximately 2,000 exclusive farm use zoned acres near the existing Eagle Crest Resort in Central Oregon, between Sisters and Redmond, Oregon. Intervenor-respondent is the successor owner of the subject property.

Approval of a destination resort in Deschutes County follows a sequential, multi-step process. That process begins with conceptual master plan (CMP) approval. Following CMP approval a final master plan (FMP) is approved. Following FMP approval, tentative and final subdivision plans are approved, or a site plan is approved, and destination resort development may then begin. County decisions granting CMP approval and FMP approval for the Thornburgh Resort have been appealed to LUBA and in some cases LUBA's decisions have been appealed to the Court of Appeals.[1]

---

[1] We identify those appeals below:

Gould I *Gould v. Deschutes County*, 54 Or LUBA 205 (2007) (LUBA remand of county's first CMP decision).

The county's first CMP decision was remanded following *Gould I* and *II*. The county's second CMP decision, dated April 15, 2008, was affirmed on appeal. The last appeal of the second CMP decision came to an end on December 9, 2009, when the Court of Appeals issued its appellate judgment on December 9, 2009. That April 15, 2008 CMP decision is indirectly the subject of this appeal.

Intervenor's predecessor sought FMP approval on April 21, 2008, six days after the county's April 15, 2008 CMP decision was issued. That FMP decision was appealed and ultimately remanded to the county on August 17, 2010. One of the reasons the FMP decision was remanded had to do with inadequacies in the proposed wildlife mitigation plan. The Bureau of Land

---

Gould II *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007) (Court of Appeals reversed and remanded LUBA's *Gould I* decision).

Gould III *Gould v. Deschutes County*, 57 Or LUBA 403 (2008) (LUBA affirmed the county's second CMP decision).

Gould IV *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009) (Court of Appeals affirmed LUBA's *Gould III* decision).

Gould V *Gould v. Deschutes County*, 59 Or LUBA 435 (2009) (LUBA remanded the county's first FMP decision).

Gould VI *Gould v. Deschutes County*, 233 Or App 623, 227 P3d 758 (2010) (Court of Appeals affirmed LUBA's *Gould V* decision).

Gould VII *Gould v. Deschutes County*, 67 Or LUBA 1 (2013) (LUBA remanded county hearings officer decision that development authorized by the Thornburgh CMP has been initiated).

Management identified mitigation sites and made it possible to proceed with another FMP decision to respond to the remand. A second FMP decision following our remand in *Gould V* has not yet been adopted.

As we explain later in this decision, under the Deschutes County Code (DCC), the April 15, 2008 CMP decision would become void if it was not "initiated" within two years, with that two-year deadline tolled for periods the CMP decision was subject to appeal. On November 1, 2011, intervenor sought a declaratory ruling that the April 15, 2008 CMP had been timely initiated. The hearings officer found the CMP was timely initiated, but on appeal LUBA remanded that decision in *Gould VII*. LUBA's *Gould VII* decision was affirmed by the Court of Appeals, without opinion. *Gould v. Deschutes County*, 256 Or App 520, 301 P3d 978 (2013).

On remand, the hearings officer found the CMP was not timely initiated. Intervenor appealed the hearings officer's decision to the board of county commissioners, which issued a declaratory ruling that the April 15, 2008 CMP decision was initiated before the two-year deadline for doing so expired. In the current appeal, petitioner challenges that board of county commissioners' declaratory ruling.

B. CMP Initiation

One of the issues that we decided in *Gould VII* was whether the standards that govern whether the second CMP decision was initiated are as set out in OAR 660-033-0140 or DCC 22.36.010.[2] We concluded that the

---

[2] As relevant, OAR 660-033-0140(1) provides:

> "[A] discretionary decision * * * approving a proposed development on agricultural or forest land outside an urban growth

acknowledged standards at DCC 22.36.010 control. *Gould VII*, 67 Or LUBA 9. Under DCC 22.36.010(B)(1), "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." (Emphasis added.) With tolling for appeals, the two-year deadline to initiate the CMP expired on November 18, 2011. *Gould VII*, 67 Or LUBA 11.

A second issue that was resolved in *Gould VII* is whether the standards at subsections (1), (2) or (3) of DCC 22.36.020(A) govern in this case to determine if the CMP was initiated before November 18, 2011.[3] No party in *Gould VII* questioned the hearings officer's decision to apply DCC 22.36.020(A)(3). DCC 22.36.020(A)(3) requires two findings to determine whether the development action authorized by a permit has been "initiated," within the meaning of DCC.36.010(B)(1). First, the county must find "the

---

> 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."

[3] DCC 22.36.020(A) provides:

> "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."

conditions of a permit or approval have been substantially exercised." Second, the county must find that "any failure to fully comply with the conditions is not the fault of the applicant." Although we questioned whether DCC 22.36.020(A)(2) should have been applied instead of DCC 22.36.020(A)(3), that issue is now resolved for purposes of this case. *Gould VII*, 67 Or LUBA 12-13.

C. *Gould VII*

Having determined that whether the development action authorized by the county's CMP decision was initiated before November 18, 2011 is governed by the two-pronged standard at DCC 22.36.020(A)(3), we considered petitioners' challenges to the hearings officer's decision that the development action was initiated prior to November 18, 2011. In doing so, a number of interpretive issues regarding DCC 22.36.020(A)(3) that have some bearing on this appeal were resolved. We identify and clarify those resolved interpretive issues below before turning to petitioner's assignments of error.

1. All 38 Conditions Must be Considered in Applying DCC 22.36.020(A)(3)

A central dispute in applying both the "substantially exercised" prong and the "fault of the applicant" prong of DCC 22.36.020(A)(3), *see* n 3, was whether all 38 conditions had to be considered or whether, as the hearings officer found, only the 15 conditions that the hearings officer found to be "relevant" had to be considered.[4] We rejected the hearings officer's

---

[4] The hearings officer found:

> "The hearings officer finds the *relevant* conditions of approval for the subject initiation of use declaratory ruling are limited to those

interpretation of DCC 22.36.020(A)(3) and concluded that all 38 conditions must be considered in applying DCC 22.36.020(A)(3):

> "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. * * *
>
> "* * * 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

---

with which the CMP required compliance before FMP Approval. * * * Record 82." *Gould VII*, 67 Or LUBA at 17 (emphasis added).

> 22.36.010(B)(1) to avoid having the CMP permit become void.[5] 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." *Gould VII*, 67 Or LUBA 18-19.

To summarize and clarify the above, when applying the "substantially exercised" prong of DCC 22.36.020(A)(3) all 38 conditions of CMP approval must be considered, not just those that can be satisfied without FMP, land division, or site plan approvals.

2. The DCC 22.36.020(A)(3) "Substantially Exercised" Prong Applies to the 38 Conditions as a Whole, Rather Than Each Individual Condition

In applying the "substantially exercised" prong of DCC 22.36.020(A)(3), petitioner argued the county must find that each of the 38 conditions of approval, individually, was substantially exercised during the two-year period. We rejected that argument, concluding it is the 38 conditions, viewed as a whole, that must be substantially exercised:

> "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

---

[5] This sentence, read in isolation, can be read to suggest that we concluded in *Gould VII* that DCC 22.36.020(A)(3) requires that all 38 conditions must be fully satisfied to avoid having the CMP approval become void. However, as the balance of our discussion of the fourth assignment of error in *Gould VII* and our further discussion of that decision here makes clear, DCC 22.36.020(A)(3) is not so absolute.

> '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." *Gould VII*, 19.

To summarize and clarify the above, in *Gould VII* we concluded the correct ultimate focus in applying DCC 22.36.020(A)(3) is on the 38 conditions as a whole, not individual conditions. We concluded it could be that individual conditions are not "substantially" or "fully" exercised or not "exercised at all," so long as the record supports a county finding that the 38 conditions viewed as a whole have been "substantially exercised." But unlike the "substantially exercised" prong, the "fault of the applicant" prong of DCC 22.36.020(A)(3) does apply to each condition. For any condition with which the applicant has not "fully complied," the county must find the "applicant is not at fault."

3. The Fault of the Applicant Prong of DCC 22.36.020(A)(3)

In *Gould VII*, we addressed and resolved two additional issues regarding the "fault of the applicant" prong of DCC 22.36.020(A)(3):

> "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. 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." *Gould VII*, 67 Or LUBA 19-20 (footnote omitted).

The first sentence quoted above could have been clearer. It mentions "continuing obligations," but only really addresses "contingent obligations." The first sentence simply states that if the contingency that would trigger obligations under a condition have not occurred, the applicant would not be at fault for not fully complying with the condition. The omitted footnote provided an example of a "contingent obligation," and stated that if the contingency has not occurred, it might also be possible to find the condition is fully satisfied.[6] The second sentence simply states that in applying the "fault of

---

[6] "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 [not] been and may never be any 'substantial change to the approved plan.' *Gould VII*, 19, n 14.

the applicant" prong of DCC 22.36.020(A)(3), the county might be able to find that the applicant's failure to secure additional permits that are necessary to fully comply with a condition within two years was not the "fault of the applicant."

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner's arguments under these assignments of error are frequently overlapping and duplicative. We address the key issues raised under these assignments of error separately below.

A. Interpretive issues that were resolved in *Gould VII* may not be reconsidered by the Board of Commissioners in this new phase of the same case

Following our decision in *Gould VII*, the matter was taken up by the hearings officer. The hearings officer concluded that the applicant had not "substantially exercised" the 42 CMP conditions of approval (38 conditions with condition 14 being made up of five parts). The hearings officer also found that the applicant was at fault for not fully complying with many of the conditions. On appeal of the hearings officer's decision, the board of commissioners found that 19 conditions have been fully complied with, one condition has been substantially exercised, and 22 conditions have neither been substantially exercised nor fully complied with. For the 23 conditions that have not been fully complied with, the board of commissioners found the applicant was not at fault.

An issue was raised before the board of commissioners regarding whether the board of commissioners could revisit interpretive issues that had been resolved by LUBA in *Gould VII*, which was affirmed on appeal, or whether under the law of the case principle set out in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), those already-resolved interpretive issues

could not be reconsidered by the board of commissioners and resolved differently than LUBA resolved them in *Gould VII*. This is a potentially important question, because our decision in *Gould VII* reviewed a hearings officer's decision, which is not entitled to deference on appeal, whereas governing body interpretations of local land use laws are entitled to additional deference on review that is not extended to hearings officer decisions. *Gage v. City of Portland*, 319 Or 308, 316-17, 877 P2d 1187 (1994). Board of county commissioner interpretations of the DCC are entitled to the highly deferential standard of review set out in ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).[7] Therefore, at least in theory, unless *Beck* prevents the board of commissioners from doing so, LUBA could well be required to defer to an interpretation adopted by the board of commissioners in the decision on review in this appeal, even though that interpretation is

---

[7] ORS 197.829(1) provides:

> "The Land Use Board of Appeals 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; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

identical to or materially indistinguishable from an interpretation that the hearings officer adopted and LUBA rejected in *Gould VII*, or is at odds with other interpretations of the DCC that LUBA adopted in *Gould VII*.

The Court of Appeals recently summarized how the *Beck* law of the case principle works in LUBA appeals:

> "* * *' In *Beck*, the Supreme Court determined the scope of judicial review of LUBA's land use decision when the petitioners, in an earlier proceeding, had appealed a local land use decision to LUBA, prevailed in part and received a remand back to the local government, and later appealed the local government's new decision on remand to LUBA. 313 Or at 150. In deciding the scope of judicial review, the Supreme Court initially determined whether the petitioners' second appeal was part of the same case as the earlier proceeding. *Id*. at 151. The court held that, in a quasi-judicial proceeding, when (1) a local government decision is appealed to LUBA, (2) LUBA issues an order remanding that decision, (3) the local government conducts a further proceeding and issues a new order, and (4) the new decision is appealed to LUBA, then the two LUBA appeals are 'two phases of the same case.' *Id.* The Supreme Court then addressed whether appellate courts can review issues that LUBA decided in the same case but that were not challenged in the first appeal to LUBA. The Supreme Court held that, when LUBA remands a case for further proceedings, the parties are limited to 'new, unresolved issues' relating to those remand instructions and cannot raise any 'issues that LUBA affirmed or reversed on their merits, which are old, resolved issues.' *Id*." *Hatley v. Umatilla County*, 256 Or App 91, 107, 301 P3d 920, *rev den* 353 Or 867, 306 P3d 639 (2013).

As intervenor correctly notes, in one case, the Court of Appeals expressly left open whether a local government might, on remand, interpret local land use legislation differently than LUBA had interpreted that legislation under ORS 197.829(2), which authorizes LUBA to interpret local land use legislation when the local government has not adopted a reviewable

interpretation. *Canfield v. Yamhill County*, 142 Or App 12, 20, n 4, 920 P2d 558 (1996). *Canfield* was an appeal of a board of county commissioners' decision approving a conditional use permit for a kennel and home occupation. LUBA interpreted a traffic standard, which the board of commissioners had not interpreted, to require a traffic comparison that the board of county commissioners failed to make. The Court of Appeals rejected a challenge to LUBA's interpretation, concluding it was correct and the only plausible reading of the traffic standard. In deciding it did not need to decide the board of commissioners' interpretive options regarding LUBA's interpretation on remand, the Court of Appeals explained:

> "We do not decide the underlying question of whether a local government, on remand, may interpret its legislation differently from the way LUBA or we interpreted it, pursuant to ORS 197.829(2), in remanding the decision. We conclude only that the local government may resolve interpretive issues that were not decided by LUBA or us in reviewing the remanded local decision. The underlying question is academic in this case because, as we have noted, LUBA's disposition of the narrow interpretive issue it addressed is the only plausible one. Therefore, no questions of deference or of relative interpretive authority can be presented by the unambiguous facet of the ordinance that LUBA addressed." 142 Or App at 20, n 4.

If the board of commissioners was free to adopt interpretations of the DCC that are inconsistent with LUBA's interpretations in *Gould VII*, and is entitled to *Siporen* deference in this appeal, it very well might affect our decision, since the outer boundaries of *Siporen* deference remain somewhat

unclear to us.[8] Therefore, we resolve the issue that the Court of Appeals left open in *Canfield*.

Beck law of the case facilitates judicial efficiency. It was derived by the Supreme Court from statutes that require LUBA to decide as many issues as possible, limit new evidence and issues when records are reopened, and require issues to be raised below before local governments to preserve them for review by LUBA on appeal. *Beck*, 313 Or at 151. That judicial efficiency would be sacrificed if an appeal of a hearings officer's decision is allowed to go forward to LUBA and the appellate courts, without *Siporen* deference on issues of interpretation of local land use laws, but in a decision by the governing body following remand of the hearings officer's decision, all those resolved interpretive issues could be revisited and then reviewed under a different, more deferential standard of review in a second appeal to LUBA. The board of commissioners could have adopted the hearings officer's first decision, and had it done so, in *Gould VII* LUBA would have reviewed any board of commissioners' interpretations under ORS 197.829(1) and the deferential standard of review set out in *Siporen*. *Green v. Douglas County*, 245 Or App 430, 438 n 5, 263 P3d 355 (2011). But for whatever reason the board of commissioners declined review of the hearings officer's decision that was appealed in *Gould VII*. We conclude the Court of Appeals would apply *Beck* in the circumstance presented in this appeal, and not permit the board of commissioners to now adopt new interpretations of the DCC that are inconsistent with LUBA's interpretations of the DCC in *Gould VII*. If faced

---

[8] Petitioner contends the board of commissioner's interpretations that are inconsistent with LUBA's interpretations in *Gould VII* could not be affirmed, even with *Siporen* deference. We need not and do not decide that question.

with the question we are faced with in this appeal, we believe the Court of Appeals would conclude giving the board of county commissioners a belated opportunity to readdress interpretive issues that have already been resolved in prior appeals, and also receive *Siporen* deference in doing so, comes at too high a cost to the parties, LUBA and the appellate courts.

We set out below some of the findings the board of commissioners adopted that seem to conclude that it was free to readdress interpretive issues that were resolved in *Gould VII*:

> "As an initial matter, the Board first considered the permissible scope of its interpretation of DCC 22.36.020(A)(3). In the first decision on Loyal's application dated April 12, 2012, prior to the LUBA appeal, the Hearings Officer found that for purposes of DCC 22.36.020(A)(3), not all conditions of approval of the CMP were relevant to determining whether or not the CMP was initiated. Rather, the Hearings Officer found that only those conditions that required compliance before final master plan (FMP) approval or concurrently with a FMP application were relevant to whether or not the CMP was initiated (a total of 16 conditions).
>
> "After the Board declined to hear an appeal of that decision, opponent appealed the Hearings Officer's decision to LUBA, which interpreted DCC 22.36.020(A)(3) to require consideration of all the conditions of approval, not just those the Hearings Officer found relevant. Over Loyal's objection, the Hearings Officer applied LUBA's interpretation on remand. In this appeal, Loyal argued that the Board, as the ultimate arbiter of the meaning of the DCC, can and should adopt an interpretation of DCC 22.36.020(A)(3) that differs from the interpretation given by LUBA in its January 8, 2013 decision and applied by the Hearings Officer in the Hearings Officer's Decision. Opponent, on the other hand, argued that the Board is bound by LUBA's interpretation.

> "*The Board agrees with Loyal, to an extent. The Board finds that interpretation of the DCC is ultimately the responsibility of the Board, and since the Board has not previously interpreted DCC 22.36.020(A)(3) it is empowered and may do so now*. The Board finds that the CMP is the 'framework' of a destination resort approval under DCC 18.113.050, and ultimately any development under a destination resort approval requires completion of all three steps of the permitting process under DCC 18.113.040. None of the three steps is elevated in importance over the others; they are all of equal importance in developing a destination resort under DCC Chapter 18.113. Approval of a CMP alone does not authorize any construction on the land subject to the CMP; all it authorizes is the right of the applicant to proceed to the FMP stage of the process. The FMP then incorporates all the requirements of the CMP and becomes the guiding approval document for the project pursuant to DCC 18.113.040.8.
>
> "Therefore, in light of that three-step process in which the actual construction of the resort does not occur until after the FMP approval, the Board interprets the CMP conditions that were not completed by November 18, 2011 such that the failure was not the fault of the applicant. *The Board finds this despite the CMP conditions not having been written 'as notices of future conditions of approval' as LUBA would have preferred, Thus, the CMP is initiated under the Board's interpretation of DCC 22.36.020(A)(3).*" Record 18 (italics and underlining added).

The board of commissioners is of course, as a general proposition, free to interpret its land use regulations. But to the extent the first italicized sentence takes the position that the board of commissioners is free in this proceeding on remand to interpret the DCC in ways that are inconsistent with LUBA's interpretation of the DCC *Gould VII*, we do not agree. Under *Beck* law of the case, the hearings officer was not free to revisit and continue consideration of interpretive issues that were resolved in *Gould VII*, and she did not attempt to do so. The board of commissioners also was not free to do so.

The underlined finding goes to the "fault of the applicant" prong of DCC 22.36.020(A)(3). That finding is not inconsistent with any of the interpretive issues we resolved in *Gould VII* regarding whether all 38 conditions had to be considered in applying the "substantially exercised" prong of DCC 22.36.020(A)(3). Our decision in *Gould VII* said very little about the "fault of the applicant" prong of DCC 22.36.020(A)(3).

The second italicized sentence, however, can be read to adopt a broader interpretation that is inconsistent with our decision in *Gould VII*. Our observation that the county could have drafted the conditions of approval as "notice of future conditions of approval," that would be attached to the FMP decision or other decisions, was made in the context of rejecting the hearings officer's decision that a large number of conditions, which were drafted in a way that required FMP or other approvals to comply with the conditions, could be set aside as irrelevant in applying DCC 22.36.020(A)(3) to determine if the CMP conditions of approval have been "substantially exercised." The three-step process described in the above findings may be considered in applying the "fault of the applicant" prong, but under our decision in *Gould VII*, the difficulties presented in this case by that three step process are irrelevant in applying the "substantially exercised" prong of DCC 22.36.020(A)(3). To the extent the second italicized sentence above takes a contrary position, we reject it.

B. The County's Findings Regarding the "Substantially Exercised" Prong of DCC 22.36.020(A)(3)

The board of commissioners addressed each of the 42 CMP conditions of approval separately and found that 19 of the 42 conditions of approval were fully complied with before the November 18, 2011 deadline. Record 20-27.

The separate findings for each of those 19 conditions are nearly identical, and there really has been no dispute regarding these 19 conditions.[9] For one condition, Condition 38, the board of commissioners found the condition was substantially exercised, but that the applicant has not fully complied with Condition 38. Record 27-28. For the 22 remaining conditions, the board of commissioners found that those conditions have neither been fully complied with nor "substantially exercised," in almost all cases because an approved FMP will be required to fully comply with the condition.[10] Then, the board of commissioners adopted the following findings that the 38 conditions, viewed as a whole, have been substantially exercised:

---

[9] The board of commissioners' finding regarding Condition Number 1 is representative:

> "The Hearings Officer's finding in A-13-8 regarding this condition was not challenged in this appeal. Therefore, the Board agrees with and adopts the finding of the Hearings Officer in the Hearings Officer's Decision that the applicant fully complied with condition 1 prior to the November 18, 2011 deadline." Record 20.

[10] The board of commissioners' finding regarding condition Number 2 is representative:

> "The Board finds that condition 2 was not substantially exercised nor was it fully complied with by the November 18, 2011 deadline. The Board further finds that full compliance with condition 2 cannot occur until there is a final, approved FMP for the project, and that contingency has not yet occurred. The Board further finds that the failure of the applicant to fully comply with the condition is not the applicant's fault for that reason and for the reasons explained below under the heading 'Cumulative Findings-Failure to Fully Comply is Not the Fault of the Applicant.'" Record 20.

"**Cumulative Findings- Substantial Exercise**

> "As explained above with respect to each condition, the Board has found that 19 of the 42 conditions were fully exercised and, therefore also substantially exercised, and one additional condition (38) was substantially but not fully exercised, before November 18, 2011. The Board also finds that substantial exercise of each of the 22 remaining conditions required the occurrence of a contingency that did not occur by November 18, 2011. The Board also finds, however, that the applicant has substantially exercised 100% of the conditions of approval *that were relevant and necessary* to initiation of the CMP, as set forth in the Hearings Officer's April 12, 2012 decision in DR-11-8. The Board finds that these facts, taken together, constitute substantial exercise of the conditions of approval of the CMP as a whole." Record 28 (emphasis added).

We understand the board of county commissioners' finding that the 42 CMP conditions of approval have been "substantially exercised, to be based on three findings of fact, which we restate below to facilitate our discussion of the board of commissioners' reasoning:

1. Nineteen of the 42 conditions have been fully exercised and one has been substantially exercised.

2. Those 19 fully exercised conditions are "100% of the conditions of approval that were relevant and necessary to initiation of the CMP, as set forth in the Hearings Officer's April 12, 2012 decision in DR-11-8."

3. The remaining 22 conditions that have not been substantially exercised or fully exercised are subject to a "contingency," FMP approval, which has not yet finally occurred.

There are problems with all three findings that the board of commissioners relied on to conclude the 42 conditions, viewed as a whole, have been "substantially exercised."

Finding number one is accurate, as far as it goes. But it is inadequate, without more, to establish that the 42 conditions viewed as whole have been substantially exercised. There does not appear to be any dispute that 19 of the 42 conditions have been fully implemented, and for that reason are also substantially exercised. Petitioner does not agree that condition 38 has been substantially exercised, but we agree with intervenor that the record in this matter supports the finding that it has been substantially exercised, for the reasons set out on pages 23 and 24 of the intervenor's brief. Petitioner argued successfully to the hearings officer that the 42 conditions should not be viewed as equal, since some conditions require very little effort, whereas complying with others will require significant efforts. Record 1143-44. Petitioner made the same argument to the board of county commissioners, but the board of commissioners did not adopt that view of the conditions. We do not mean to suggest that the board of county commissioners necessarily must consider the substance of what was required to fully comply with 19 of the 42 conditions or that the board of commissioners must, as the hearings officer did, assign more weight to conditions that impose more challenging obligations. But if the board of commissioners wants to treat the 42 conditions of CMP approval as fungible equals, which it appears to have done in the decision that is on appeal, we cannot agree that fully complying with 19 of 42 conditions of approval is a sufficient basis for determining that the 42 conditions as a whole have been "substantially exercised." Of course finding number one is not the only finding the board of commissioners adopted. We next consider the remaining findings to determine if those findings, with finding number one, are sufficient to establish that the 42 conditions of approval have been "substantially exercised."

The problem with finding number two, that the 19 fully exercised conditions are "100% of the conditions of approval that were relevant and necessary to initiation of the CMP, as set forth in the Hearings Officer's April 12, 2012 decision in DR-11-8," is not hard to see. In *Gould VII*, we rejected the hearings officer's straightforward attempt to sort the 42 conditions of approval into relevant conditions (those that can be completed without submitting a FMP for approval) and irrelevant conditions (those that require FMP approval) and rely only on the relevant conditions in determining whether the 42 conditions of approval have been substantially exercised. We concluded that interpreting DCC 22.36.020(A)(3) to permit such an exercise required inserting limiting text into DCC 22.36.020(A)(3) that is simply not there, in violation of ORS 174.010. Finding number two does essentially the same thing. To the extent it is possible to draw a distinction between finding number two and the hearings officer's "relevant/irrelevant" methodology in *Gould VII*, it is a distinction without a material difference.

Finally, finding number three, that the 22 conditions that remain unexercised are subject to a "contingency," FMP approval, which has not yet finally occurred, appears to be based on a misreading of our decision in *Gould VII*. In *Gould VII* we said "with regard to the conditions that provide contingent * * * 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." *Gould VII*, 67 Or LUBA 19. There are three problems with the board of commissioners' reliance on that language to find that the 42 conditions have been "substantially exercised." First, in that part of our decision in *Gould VII* we were talking about the "fault of the applicant"

prong, where fault is an important factor, not the "substantially exercised" prong, where fault is not important. Second, the condition we identified in *Gould VII*, was a "contingent" condition, because it imposed no obligation at all unless the applicant amended the approved CMP in the future. *See* n 6. The unexercised conditions finding number three is referring to are not subject to a contingency that must occur before any obligation is imposed by the condition. FMP approval may be a *necessary* step in complying with some of the conditions, but that does not make them "contingent conditions," as we used that term in *Gould VII*. The third problem with finding number three is quite similar to the problem with finding number two. It is another attempt to try to avoid our ruling in *Gould VII* that in applying the "substantially exercised" prong of DCC 22.36.020(A)(3) all of the 42 conditions must be considered as a whole. Just as we held the hearings officer could not avoid considering the conditions that require FMP approval by treating them as irrelevant, the board of commissioners may not dismiss them as unimportant in applying DCC 22.36.020(A)(3).

Petitioners first, second and third assignments of error are sustained.[11]

FOURTH ASSIGNMENT OF ERROR

Petitioner's fourth assignment of error concerns the "fault of the applicant" prong of DCC 22.36.020(A)(3). Petitioner argued below that intervenor was at "fault" for its failure to fully comply with 23 of the conditions of approval, due to its delay in initiating remand proceedings after

[11] Petitioner's challenge to the board of commissioners' finding concerning condition 38 appears under the third assignment of error. We reject that challenge in our discussion of the first three assignments of error, so that part of the third assignment of error is not sustained.

the FMP decision was finally remanded to the county on August 17, 2010, and its failure to seek extensions of the CMP permit. We do not know why the intervenor or its predecessor did not seek CMP extensions. Intervenor's delay in initiating FMP proceedings was partially attributable to a delay in the Bureau of Land Management providing needed information to address identified shortcomings in the wildlife mitigation plan.

The board of commissioners' findings addressing the "fault of the applicant" prong of DCC 22.36.020(A)(3) appear at Record 28-29. In those findings the board of commissioners first explain that the county's multi-step process for reviewing applications for destination resort proposals is lengthy and quite complex, with the result that meaningful review of such applications can easily take more than two years from start to finish. The board of commissioners then state that it "never intended that the general two-year expiration of land use permits under DCC 22.36.010.B.1 would require full compliance with all conditions of a CMP within two years of approval of the CMP (tolled only for appeals of the CMP)." Record 29.

There is short answer to that finding, to the extent it was intended as a reason for not imposing the DCC 22.36.010(B)(1) two year expiration limit or the DCC 22.36.020(A)(3) requirements for initiation to avoid permit expiration under DCC 22.36.010(B)(1). The problem with CMP permits expiring before FMP, land division, and site plan approvals can be obtained, if it is a problem that cannot be addressed through existing authority to extend CMP permits, can be addressed by amending the DCC so that CMP decisions are not subject to the DCC 22.36.010(B)(1) two year expiration limit. As we pointed out in *Gould VII* another alternative would be to not impose conditions of CMP approval that will effectively require the applicant to seek and receive FMP

approval or permits to comply with the CMP conditions of approval. As we noted in *Gould VII*, the fact that DCC 22.36.010(B)(1) as currently written does subject CMP decisions to the two-year limit, and the fact that many of the conditions of approval are written in a way that requires additional approvals to comply with them, has been the problem with this phase of the case from the beginning.

Nevertheless the board of commissioners' "fault of the applicant" findings go further and seem to take the position that the three-step destination resort process is so complex and time consuming that it is that complex and time consuming process, rather than any "fault" that is properly attributable to intervenor, that is to blame for intervenor's failure to fully comply with 23 of the 42 conditions of CMP approval:

> "Accordingly, the applicant is not at fault for failing to achieve something (full compliance with all CMP conditions within two years) that: * * * (c) would be practically impossible to achieve for a complex project such as the Thornburgh Resort under the three-step [destination resort] approval process created by DCC Chapter 18.113." Record 29.

As we have already noted, unlike the "substantially exercised" prong of DCC 22.36.020(A)(3), our *Gould VII* decision said very little about the "fault of the applicant" prong. If the board of commissioners wants to make the complexity and length of the process that is required for destination resorts in general, and this one in particular, an important consideration in finding that it is not the "fault of the applicant" under DCC 22.36.020(A)(3) that the applicant has not fully complied with 23 of the 42 conditions of approval, there is nothing in our decision in *Gould VII* that is inconsistent with that interpretation and application of DCC 22.36.020(A)(3). While it is perhaps unusual for a county to lay the blame for an applicant's inability to comply with CMP

conditions of approval on the complexity of the county's own regulatory scheme, the county's interpretation and application of the "fault of the applicant" prong of DCC 22.36.020(A)(3) is not inconsistent with the text of DCC 22.36.020(A)(3), read in context, and it is not implausible. Therefore, under ORS 197.829(1) and *Siporen* that interpretation and application of DCC 22.36.020(A)(3) is affirmed.

The fourth assignment of error is denied.

The county's decision is remanded, in accordance with our disposition of the first through third assignments of error.