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 on remand from the Court of Appeals.

Paul D. Dewey, Bend, represented petitioner.

Laurie E. Craghead, Assistant County Counsel, Bend, represented respondent.

David J. Petersen, Portland, represented intervenor-respondent.

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

REMANDED 10/09/2015

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

Opinion by Holstun.

INTRODUCTION

This appeal is the latest in a long line of appeals concerning Thornburg Resort, a proposed destination resort in Deschutes County. Our most recent decision was remanded by the Court of Appeals. *Gould v. Deschutes County*, __ Or LUBA ___ (LUBA No. 2014-080, January 30, 2015), *rev'd and remanded in part, aff'd in part*, 272 Or App 666, ___ P3d ___ (2015). The Court of Appeals referred to our January 30, 2015 decision as *Gould IX*, and we do so as well in this opinion. In this opinion, we will refer to the Court of Appeals decision as *Gould X*.

The applicant received conceptual master plan (CMP) approval for Thornburg Resort on April 15, 2008. The county's subsequent October 8, 2008 decision granting final master plan (FMP) approval for Thornburgh Resort was remanded by LUBA and has not been re-approved by the county. Under Deschutes County Code (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."[1] (Emphasis added.) The April 15, 2008 CMP approval qualifies as a "land use permit." DCC 22.36.020(A) sets out a two-pronged standard for determining if the

[1] The two-year deadline is tolled while appeals are pending.

development action authorized by the CMP has been "initiated," and provides in relevant part:

> "[a] development action undertaken under a land use approval * * * has been 'initiated' if it is determined that:
>
> "* * * * *
>
> "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*." (Emphases added.)

The applicant sought a county ruling that its April 15, 2008 CMP approval has been initiated. After a hearings officer applied DCC 22.36.020(A)(3) and found that the April 15, 2008 CMP approval has not been initiated, the board of commissioners on appeal concluded that it has been initiated.

In *Gould IX* we considered petitioner's challenge to the board of commissioners' decision that (1) the Thornburgh Resort CMP conditions of approval have been substantially exercised and (2) for the conditions of approval that have not been fully complied with, the applicant was not at fault.

We sustained petitioner's first three assignments of error, which challenged the board of commissioners' decision concerning the "substantially exercised" prong of DCC 22.36.020(A)(3). That part of our decision was affirmed on appeal. But we rejected petitioner's fourth assignment of error, which challenged the board of commissioners' application of the "fault of the applicant" prong of DCC 22.36.020(A)(3). That part of our decision in *Gould IX* was reversed by the Court of Appeals in *Gould X*.

The CMP for Thornburgh Resort that was approved on April 15, 2008 was subject to 42 conditions of approval. Twenty-three of those conditions could not be fully complied with until after the applicant has secured FMP approval. As noted earlier, the county's FMP approval was appealed to LUBA and remanded on August 17, 2010. The applicant has not again sought FMP approval for Thornburgh Resort. The board of commissioners applied the "fault of the applicant" prong of DCC 22.36.020(A)(3) and concluded it was not the applicant's fault that it had not fully complied with those 23 conditions. The board of commissioners concluded that the fault for applicant's failure to fully comply with those 23 conditions was attributable to the complexity of the county's multi-step destination resort approval process. In *Gould IX*, we concluded that interpretation, while "perhaps unusual," was nevertheless consistent with the text of DCC22.36.020(A)(3), plausible, and therefore not reversible under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Gould IX*, slip op at 25-26. On appeal, the Court of Appeals disagreed:

> "[W]e understand the county to have made the complexity of the three-step process the *only* consideration in determining whether the applicant was at fault for failing to comply with those contingent conditions, and we conclude that that is an implausible interpretation of the DCC." 272 Or App at 679 (emphasis in original).

Our decision in *Gould IX* sustained petitioner's first, second and third assignments of error. Based on the Court of Appeals' decision in *Gould X*, petitioner's fourth assignment of error is also sustained.

The county's decision is remanded.