

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

3
4 CENTRAL OREGON LANDWATCH,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11
12 and

13
14 MICHAEL GEMMET,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2022-087

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Deschutes County.

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24 Carol Macbeth filed the petition for review and reply brief and argued on
25 behalf of petitioner.

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27 No appearance by Deschutes County.

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29 Lisa Andrach filed the intervenor-respondent's brief and argued on behalf
30 of intervenor-respondent. Also on the brief was Fitch & Neary, PC.

31
32 RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board
33 Member, participated in the decision.

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35 REMANDED 02/03/2023

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

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NATURE OF THE DECISION

Petitioner appeals a county hearing officer decision approving an application for a declaratory ruling that a guest ranch previously approved as a conditional use has been initiated on the subject property.

MOTION TO INTERVENE

Michael Gemmet (intervenor), the applicant below, moves to intervene on the side of the county. The motion is unopposed and granted.

FACTS

The subject property is an approximately 155-acre tract of land located near the city of Sisters, with the Deschutes National Forest adjacent to the north, west, and southeast. The subject property is zoned Exclusive Farm Use-Sisters/Cloverdale (EFU-SC).

In 2002, the county approved a conditional use permit (CUP) for a guest ranch on the subject property. Deschutes County Code (DCC) 22.36.010(B)(1) provides that a land use permit generally becomes void after two years “if the use approved in the permit is not initiated within that time period.” However, DCC 22.36.010(C) provides for extensions of land use approvals.¹

¹ DCC 22.36.010(C) provides:

“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:

1 The county approved a series of extensions of the CUP, with the last
2 extension ending on June 26, 2007. Some of the infrastructure and cabins for the
3 guest ranch were partially constructed pursuant to the extended CUP. As we
4 understand it, development of the guest ranch under the CUP may have been
5 discontinued between 2009 and 2021. Running Waters Properties of Oregon LLC
6 (Running Waters) acquired the property in 2021. Intervenor is the agent, owner,
7 and managing member of Running Waters. Record 40, 47. Intervenor submitted
8 a county land use application in which they stated that they were seeking a
9 “Declaratory Ruling for an Initiation of Use.”² Record 444.

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- “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 The hearings officer’s decision notes that intervenor testified that, when intervenor sought building permits from the county, county staff recommended that intervenor apply for a declaratory ruling that the use has been initiated. Record 40.

1 DCC 22.36.020(A) provides that a development has been initiated if it is
2 determined that

3 “(1) The proposed use has lawfully occurred;

4 “(2) Substantial construction toward completion of the land use
5 approval has taken place; or

6 “(3) Where construction is not required by the approval, the
7 conditions of a permit or approval have been substantially
8 exercised and any failure to fully comply with the conditions
9 is not the fault of the applicant.”

10 DCC 22.36.010(D)(1) provides that “[a] determination of whether a land use has
11 been initiated shall be processed as a declaratory ruling.” DCC 22.40.010(A)
12 provides for declaratory rulings, stating, in part:

13 “Subject to the other provisions of DCC 22.40.010, there shall be
14 available for the County’s comprehensive plans, zoning ordinances,
15 the subdivision and partition ordinance and DCC Title 22 a process
16 for:

17 “1. Interpreting a provision of a comprehensive plan or ordinance
18 (and other documents incorporated by reference) in which
19 there is doubt or a dispute as to its meaning or application;

20 “2. Interpreting a provision or limitation in a land use permit
21 issued by the County or quasi-judicial plan amendment or
22 zone change (except those quasi-judicial land use actions
23 involving a property that has since been annexed into a city)
24 in which there is doubt or a dispute as to its meaning or
25 application;

26 “3. *Determining whether an approval has been initiated* or
27 considering the revocation of a previously issued land use
28 permit, quasi-judicial plan amendment or zone change;

29 “4. Determining the validity and scope of a nonconforming use;

1 “5. Determination of other similar status situations under a
2 comprehensive plan, zoning ordinance or land division
3 ordinance that do not constitute the approval or denial of an
4 application for a permit; and

5 “6. Verifying that a lot of parcel meets the ‘lot of record’
6 definition in 18.040.030 pursuant to DCC 22.04.040(D).”
7 (Emphasis added.)

8 On June 16, 2022, the hearings officer held a public hearing on the
9 application. On August 5, 2022, the hearings officer issued their declaratory
10 ruling that the guest ranch use has been initiated. On August 17, 2022, petitioner
11 appealed the hearings officer’s decision to the board of county commissioners.
12 On August 31, 2022, the board of county commissioners issued its order stating
13 that it would not hear the appeal and that, pursuant to DCC 22.35.035(A), the
14 hearings officer’s decision was the county’s final decision. This appeal followed.

15 **SECOND ASSIGNMENT OF ERROR**

16 Petitioner withdrew its second assignment of error at oral argument, and
17 we do not address it further.³

18 **FOURTH ASSIGNMENT OF ERROR**

19 Petitioner’s fourth assignment of error is that hearings officer misconstrued
20 DCC 22.40.020(A) when they determined that intervenor had standing to submit
21 the application for the declaratory ruling. We will reverse or remand a land use

³ Petitioner’s second assignment of error was that “[t]he 2002 guest ranch approval became void by its own terms on June 26, 2007, when the applicant did not begin operation of a guest ranch by that date.” Petition for Review 10.

1 decision if we determine that the local government improperly construed the
2 applicable law. ORS 197.835(9)(a)(D). We review the hearings officer’s
3 interpretation of the local code to determine whether it is correct. *Devin Oil Co.*
4 *Inc. v. Morrow County*, 70 Or LUBA 420, 429 (2014).

5 DCC chapter 22.40 sets out the county regulations applicable to
6 declaratory rulings. DCC 22.40.010(A)(3) provides that declaratory rulings may
7 be requested to determine whether a use has been initiated. DCC 24.40.010(A)(2)
8 provides that a declaratory ruling may be requested to “interpret[] a provision or
9 limitation in a land use permit issued by the County or quasi-judicial plan
10 amendment or zone change (except those quasi-judicial land use actions
11 involving a property that has since been annexed into a city) in which there is
12 doubt or a dispute as to its meaning or application.” DCC 22.40.020(A) provides:

13 “DCC 22.08.010(B) notwithstanding, the following persons may
14 initiate a declaratory ruling under DCC 22.40:

- 15 “1. The owner of a property requesting a declaratory ruling
16 relating to the use of the owner’s property;
- 17 “2. In cases where the request is to interpret a previously issued
18 quasi-judicial plan amendment, zone change or land use
19 permit, the holder of the permit; or
- 20 “3. In all cases arising under DCC 22.40.010, the Planning
21 Director.

22 “No other person shall be entitled to initiate a declaratory ruling.”⁴

⁴ DCC 22.08.010(B) provides that

1 Intervenor is the manager and owner of Running Waters and the owner of
2 the subject property. Record 47. The hearings officer concluded:

3 “DCC 22.40.020(A) expressly states that the ‘owner of a property
4 requesting a declaratory ruling relating to the use of the owner’s
5 property’ can initiate a declaratory ruling under DCC 22.40. The
6 record indicates that Running Waters * * * is the owner of the
7 Subject Property and that [intervenor] is an agent of the owner
8 because he is the managing member and sole owner of the corporate
9 entity. Based on the foregoing, I find that [intervenor] has standing
10 to file the Application as the agent of the Owner.” Record 40.

11 Petitioner argues that the hearings officer misconstrued the law by finding
12 that intervenor had standing to request the declaratory ruling. Petition for Review
13 23. Petitioner maintains that ownership of the property is insufficient to establish
14 intervenor’s standing because resolution of the application for a declaratory

“Applications for development or land use action shall:

“1. Be submitted by the property owner or a person who has written authorization from the property owner as defined herein to make the application;

“2. Be completed on a form prescribed by the Planning Director;

“3. Include supporting information required by the zoning ordinance and that information necessary to demonstrate compliance with applicable criteria; and

“4. Be accompanied by the appropriate filing fee, unless such fees are waived by the Board of County Commissioners.

“5. Include an affidavit attesting to the fact that the notice has been posted on the property in accordance with DCC 22.24.030(B).”

1 ruling requires interpretation of a quasi-judicial decision, the CUP, and *only* the
2 holder of the permit may request a declaratory ruling requiring interpretation of
3 the CUP. *Id.* at 25.

4 Intervenor responds, and we agree, that the hearings officer did not
5 misconstrue the law and that intervenor has standing to request a declaratory
6 ruling. Interpretation of the law requires that we consider the text and context.
7 *PGE v. Bureau of Labor and Industries*, 317 Or 606, 614, 859 P2d 1143 (1993).

8 In the construction of the code, we “simply * * * ascertain and declare what is,
9 in terms or in substance, contained therein, [and we do] not * * * insert what has
10 been omitted, or * * * omit what has been inserted.” ORS 174.010. Petitioner
11 argues that the two standing provisions at DCC 22.40.020(A)(1) and (2) are
12 inconsistent and that the specific controls. Petition for Review 24. “[W]here there
13 are several provisions or particulars such construction is, if possible, to be
14 adopted as will give effect to all.” ORS 174.010. Nothing in DCC 22.40.020(A)
15 indicates that the standing provisions for requesting a declaratory ruling are
16 mutually exclusive. Giving effect to all the provisions, both the owner of the
17 property and the holder of the permit may request a declaratory ruling. Petitioner
18 contends that intervenor is not the holder of the permit because the CUP is no
19 longer valid for reasons discussed in the now-waived second assignment of error.
20 Petition for Review 24. For the reasons set out above, we agree with intervenor
21 that standing is not limited to the holder of the permit. The hearings officer did

1 not misconstrue the law in determining that intervenor had standing as the owner
2 of the property.

3 The fourth assignment of error is denied.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioner's first assignment of error is that the request for the declaratory
6 ruling was untimely and, as a result, the hearings officer's decision violates
7 applicable law and is prohibited as a matter of law. Petition for Review 10.
8 Petitioner maintains that the CUP "became void at 12:01 AM on June 26, 2007,
9 by operation of law *when no proof of initiation of use was offered before that*
10 *time.*" *Id.* at 8 (emphasis added).

11 In determining whether the use has been initiated, the hearings officer
12 considered evidence of investments made prior to June, 26, 2007, the end date
13 for the last CUP extension. Record 25. Petitioner argues that a request for a
14 determination that development has been "initiated" had to be made before June
15 26, 2007. Stated differently, petitioner argues that the CUP expired on June 26,
16 2007, because a determination of initiation was not requested before that date and
17 that intervenor may no longer request a determination of initiation.⁵

18 OAR 660-033-0140(1) provides:

19 "Except as provided for in section (5) of this rule, a discretionary

⁵ Petitioner argues that "[t]he request for a declaratory ruling comes 15 years too late. The challenged decision violates applicable law and is prohibited as a matter of law and must be reversed." Petition for Review 10.

1 decision, except for a land division, made after the effective date of
2 the decision approving a proposed development on agricultural or
3 forest land outside an urban growth boundary under ORS 215.010
4 to 215.293 and 215.317 to 215.438 or under county legislation or
5 regulation adopted pursuant therefor is void two years from the date
6 of the final decision *if the development is not initiated in that*
7 *period.*” (Emphasis added.)

8 DCC 22.36.010(B)(1) provides, “Except as otherwise provided under DCC
9 22.36.010 or under applicable zoning ordinance provisions, a land use permit is
10 void two years after the date the discretionary decision becomes final *if the use*
11 *approved for the permit is not initiated within that time period.*” (Emphasis
12 added.)

13 In interpreting an administrative rule or ordinance, we will not insert what
14 has been omitted. ORS 174.010. Nothing in OAR 660-033-0140 states that the
15 request for a declaratory ruling that a use has been initiated must occur before the
16 permit is set to expire. Similarly, DCC 22.36.010 does not state that a request for
17 a determination of initiation must occur before the permit is set to expire.

18 Other provisions of the DCC provide relevant context for interpreting the
19 local code. DCC 22.36.010(D)(1) establishes that “[a] determination of whether
20 a land use has been initiated shall be processed as a declaratory ruling.” DCC
21 22.36.025(B) explicitly provides that,

22 “[n]otwithstanding any condition to the contrary in an individual
23 approval, a determination may be made for any land use approval
24 described in DCC 22.36.010(B) * * *, under DCC 22.36.010(D)(1)
25 as to whether a use was ‘initiated’ within the duration of the land
26 use approval. If it is determined that the use was ‘initiated’ during
27 the life of the permit, the permit will be considered to be a valid

1 existing permit and any land use described in the permit will be
2 deemed to be authorized under the County's ordinances, subject to
3 any applicable revocation provisions."

4 DCC 22.36.025 does not place a time restriction on the request for a
5 determination of whether a use has been initiated. Rather, it states that the
6 determination will be whether the use *was initiated within the duration of the*
7 *permit's life*, without a time constraint on the inquiry. We contrast this with the
8 DCC provision for requesting an extension of a permit. DCC
9 22.36.010(1)(C)(1)(b) provides that a request for a permit extension is to be
10 submitted, along with the appropriate fee, "prior to the expiration of the approval
11 period." The county clearly knows how to insert a time requirement into an
12 application provision if it wishes to do so. It has not done so in the case of a
13 declaratory ruling addressing initiation of a use. The initiation activity must have
14 occurred before the extended permit expired. However, nothing in state law or
15 the DCC requires an applicant or a landowner to prove up the initiation activity
16 by requesting a declaratory ruling prior to the expiration date. This appeal does
17 not involve an approval of an extension of an application. Instead, it is a
18 declaratory ruling that the permitted use was initiated before the permit expired.

19 Petitioner cites *Devin Oil Co.* as authority for the proposition that the
20 county may not revive a void land use permit. 70 Or LUBA 420. According to
21 petitioner,

22 "[i]n 2007, the applicant for the guest ranch was in the same position
23 as the applicant in *Devin*. In both cases it was within the applicant's
24 power to prevent a land use permit from becoming void by filing

1 applications with the local government by a given date, and in both
2 cases a failure to act by that date meant the permit became void by
3 operation of law.” Petition for Review 10.

4 However, *Devin Oil Co.* did not concern a request to determine whether a use
5 had been initiated. Rather, *Devin Oil Co.* concerned a planning director’s
6 issuance of an extension approval where the code allowed extensions “if the
7 extension request [was] submitted ‘prior to the expiration of the approval
8 period.’” 70 Or LUBA at 422, 426.

9 Petitioner also cites *Gould v. Deschutes County*, in which the
10 determination of initiation was requested before the permit’s date of expiration.
11 272 Or App 666, 669, 362 P3d 679 (2015). The fact that the declaratory ruling
12 process *may* be used to request a determination before an expiration date does
13 not mean that the request *must* be made before that date. We agree with intervenor
14 that neither OAR 660-033-0140 nor DCC 22.36.010 requires that a request for a
15 determination of initiation occur before the permit expires. We agree with
16 intervenor that the hearings officer did not misconstrue the law in determining
17 that the request for the declaratory ruling was timely.

18 The first assignment of error is denied.

19 **THIRD ASSIGNMENT OF ERROR**

20 ORS 215.130 provides, in part:

21 “(5) The lawful use of any building, structure or land at the time
22 of the enactment or amendment of any zoning ordinance or
23 regulation may be continued. Alteration of any such use may
24 be permitted subject to subsection (9) of this section.
25 Alteration of any such use shall be permitted when necessary

1 to comply with any lawful requirement for alteration in the
2 use. Except as provided in ORS 215.215, a county shall not
3 place conditions upon the continuation or alteration of a use
4 described under this subsection when necessary to comply
5 with state or local health or safety requirements, or to
6 maintain in good repair the existing structures associated with
7 the use. A change of ownership or occupancy shall be
8 permitted.

9 “* * * * *

10 “(7)

11 “(a) Any use described in subsection (5) of this section may
12 not be resumed after a period of interruption or
13 abandonment unless the resumed use conforms with
14 the requirements of zoning ordinances or regulations
15 applicable at the time of the proposed resumption.”

16 The hearings officer found:

17 “Testimony from multiple participants asserts that the Guest Ranch
18 use has been ‘abandoned’ and therefore, the Application must be
19 denied. * * * [Petitioner] cites to ORS 215.130(5) *et seq.*

20 “ORS 215.130(5), and the subsequent statutes referring to that
21 statute, relate to non-conforming uses. Under that statute, a use that
22 lawfully existed at the time of a land use regulation’s enactment can
23 lawfully continue even if it would no longer be allowed because of
24 the new regulation. Such uses, however, can lose that
25 nonconforming status if they are abandoned. That statute is not
26 applicable here. [Intervenor] does not seek to continue a non-
27 conforming use. Instead, [intervenor] seeks only a determination
28 that a conforming, conditional use was initiated within a certain
29 time.” Record 39-40.

30 Petitioner’s third assignment of error is that the hearings officer’s findings are
31 inadequate and misconstrue the applicable law. Petition for Review 15, 19.

1 Intervenor responds that the hearings officer correctly concluded that ORS
2 215.130 and the DCC provisions governing nonconforming uses did not apply to
3 the declaratory ruling proceeding because intervenor did not seek a
4 nonconforming use determination. We reject that argument. DCC 22.40.010(A)
5 provides that, as part of making a declaratory ruling, “the Planning Director
6 (where appropriate) or Hearings Body (where appropriate) shall have the
7 authority to declare the rights and obligations of persons affected by the ruling.”⁶
8 At the beginning of their decision, the hearings officer characterized the
9 application as follows: “[Intervenor] has requested a Declaratory Ruling that the
10 Guest Ranch authorized in the CUP Approval, although only partially
11 constructed, has been initiated, which would allow [intervenor] to continue
12 pursuing construction of the Guest Ranch.” Record 31. In conducting the analysis
13 of whether sufficient investments had been made to initiate the use, the hearings
14 officer concluded that,

15 “[a]s a precursor to the analysis set forth in DCC 22.36.020(B), the
16 date of any ‘time, labor, or money spent’ relied on must be
17 determined. Only time, labor or money spent prior to the end of the
18 applicable time period—in this case, June 26, 2007—can be
19 considered in the Initiation Analysis. At the end of that time, the
20 permit is either void, because it has not been initiated, or it is no
21 longer voidable, because it has been initiated. Time, labor, or money
22 spent after that time period would therefore not be relevant to the
23 status of the land use approval and whether it was initiated in time.”

⁶ For example, the hearings officer concluded, in their decision, that the CUP conditions of approval continued to apply. Record 41.

1 Record 35-36.

2 Taken together, these statements may reflect a conclusion by the hearings
3 officer that the determination that the guest ranch use was initiated no later than
4 June 26, 2007, necessarily means that the guest ranch may, subject to the
5 conditions of approval, be constructed and operate on the subject property
6 without any other limitations.⁷

7 During the proceedings before the hearings officer, petitioner argued that
8 development of the guest ranch under the CUP was discontinued in 2009 and that
9 state and local regulations for guest ranches changed in 2010, 2018, and 2021.
10 Petitioner maintained that, as a result of amendments to the guest ranch statute at
11 ORS 215.461 and amendments to the DCC provisions applicable to guest
12 ranches, intervenor's guest ranch use no longer conforms to applicable
13 regulations, making it a nonconforming use. Petitioner argued that the guest
14 ranch use has been abandoned for 13 years and cannot be resumed without
15 complying with currently applicable law. The hearings officer did not address
16 those arguments for the reasons explained in the portion of the findings quoted
17 above.

⁷ The hearings officer stated that “[intervenor] seeks only a determination that a conforming, conditional use was initiated within a certain time” and that the CUP is no longer “voidable” because the use has been initiated. Record 35-36, 40. The dictionary defines “voidable” as “capable of being adjudged void” and “void” as “of no legal force or effect.” *Webster's Third New Int'l Dictionary* 2562 (unabridged ed 2002).

1 Findings must address and respond to specific issues relevant to
2 compliance with applicable approval standards that were raised in the
3 proceedings below. *Norvell v Portland Area LGBC*, 43 Or App 849, 853, 604
4 P2d 896 (1979). The hearings officer's findings are inadequate because they fail
5 to adequately address the issues raised by petitioner.

6 The hearings officer's findings do not address petitioner's argument that
7 the use, even if it was initiated by the relevant date, has been abandoned and, as
8 a result of subsequent changes to applicable land use regulations, may not be
9 continued. We agree that the findings are inadequate.

10 We also agree with petitioner that the hearing officer misconstrued the law
11 in determining that they were not required to address ORS 215.130 after the
12 applicability of that statute was raised by petitioner. In determining whether the
13 guest ranch use may occur on the property pursuant to the CUP, the hearings
14 officer must address whether the guest ranch use that was initiated by 2007 has
15 been abandoned.

16 The third assignment of error is sustained.

17 **DISPOSITION**

18 Petitioner asks that we reverse the decision, asserting that "Running
19 Waters cannot resume the guest ranch use without demonstrating conformance
20 with current regulations." Petition for Review 22. OAR 661-010-0071(1)
21 provides:

22 "The Board shall reverse a land use decision when:

1 “(a) The governing body exceeded its jurisdiction;

2 “(b) The decision is unconstitutional; or

3 “(c) The decision violates a provision of applicable law and is
4 prohibited as a matter of law.”

5 We will remand a decision for further proceedings where the findings are
6 insufficient to support the decision. OAR 661-010-0071(2)(a). The decision is
7 inadequate because it does not include findings addressing the arguments set
8 forth in petitioner’s third assignment of error. Accordingly, we conclude that
9 remand is appropriate.

10 The county’s decision is remanded.