

Northwest Real Estate Forum

The Court of Appeals Identifies Limits to the Deference Given to Local Government Interpretations

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For the past nine years, Thornburgh Resort Company, LLC and its successor Loyal Land, LLC have attempted to site a destination resort on 2,000 acres in Deschutes County. Ms. Annunziata Gould has continually challenged this effort. The latest challenge, *Gould v. Deschutes County (Gould X)*, may have been the last, for the Oregon Court of Appeals latest decision identified some significant boundaries to the deference that it and LUBA must give to local government interpretations of their own plan and land use regulations. A little background is necessary.

The county code provides that the approval is void in two years if the permit is not “initiated” within that time period. A permit is “initiated,” in cases where construction is not required, when “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.” Ten days before the permit was to expire, the landowner asked the county for a declaratory ruling that its permit had been “initiated” and the County determined that the CMP had been “initiated.” Ms. Gould appealed this decision to LUBA (*Gould VII*). Owing no deference to a hearings officer’s interpretation, LUBA found that, although the applicant does not need to show that all 42 of the conditions were satisfied, but that “the 42 conditions of approval, viewed as a whole, have been substantially exercised.” The Court of Appeals affirmed (*Gould VIII*).

On remand, the county concluded that 19 of the conditions were satisfied; one condition was “substantially exercised” and 22 of the conditions “required the occurrence of a contingency that did not occur.” The county also found that the failure to comply with the 23 remaining conditions was not the applicant’s fault “because of the three-step process for approving destination resorts.” The county explained that in creating the three-step process, it “never intended that the general two-year expiration” would require completion of all of the CMP conditions within that timeframe, which would be “practically impossible.”

Not surprisingly, Ms. Gould appealed this decision to LUBA (*Gould IX*). LUBA remanded the decision finding that the county could not “revisit” or reinterpret the “substantially exercised” requirement once LUBA had already resolved it to require consideration of all of the conditions of approval. In other words, under the “law of the case” principle, once LUBA interprets a local

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code provision and no further appeal occurs, the county may not interpret it differently on remand.

Ms. Gould also challenged the county's finding that the applicant was not at fault for its failure to comply with the conditions because of the complexity of the local process. LUBA must affirm a local government's interpretation of its own regulations so long as the interpretation "plausibly accounts for the text and context" of the provisions. LUBA found that "while it is perhaps unusual" for the county to blame its own complex land use approval structure for the failure to comply with the conditions, such an interpretation was not implausible.

Again, it should come as no surprise that Ms. Gould asked the Court of Appeals for review (*Gould X*). On appeal, Court found the county failed to explain why the complexity of the process or the nature of the contingent conditions made it impossible for an applicant to comply with the conditions within two years. The interpretation that the applicant is excused from fault solely because the process is too complex failed to take into account the applicant's efforts to avoid such a contingency made the county's interpretation implausible. Although the local government took the first bite at the interpretation apple, judicial efficiency allows LUBA to make an interpretation binding on a local government when it fails to appeal an adverse decision.

It is unclear whether this case will be the end of this odyssey for Ms. Gould and her dedication to stopping this destination resort. This case stands for the proposition that local government decision-making of local code contains some important limits. First, a plausible interpretation is one that fully considers all of the relevant text within the code. Second, where the local government policy-maker fails to make an interpretation in the first instance or fails to appeal an adverse decision, it will be bound by LUBA's interpretation in perpetuity.

Tags: county code, Gould v. Deschutes County (*Gould X*), land use, land use regulations, LUBA, Oregon Court of Appeals