Exhibit 1: CMP-Court of Appeals Ruling

11/2007

EXHIBIT 1

FILED: November 7, 2007

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ANNUNZIATA GOULD,

Petitioner
Cross-Respondent,

v.

DESCHUTES COUNTY
and CENTRAL OREGON IRRIGATION DISTRICT,

Respondents,

and

THORNBURGH RESORT COMPANY, LLC.,

Respondent
Cross-Petitioner.

Land Use Board of Appeals
2006100

STEVE MUNSON,

Petitioner below,

v.

DESCHUTES COUNTY,

Respondent below,

and

THORNBURGH RESORT COMPANY, LLC;
and CENTRAL OREGON IRRIGATION DISTRICT,

Intervenors below.

Land Use Board of Appeals
2006101;
A135856

Argued and submitted August 10, 2007.

Paul D. Dewey argued the cause and filed the briefs for petitioner - cross-respondent.

Elizabeth A. Dickson and Hurley Re & Gruetter PC filed the brief for respondent Central Oregon Irrigation District.

Peter Livingston argued the cause for respondent - cross-petitioner. With him on the brief was Schwabe, Williamson & Wyatt, P.C.

Laurie A. Craghead waived appearance for respondent Deschutes County.

Before Edmonds, Presiding Judge, and Brewer, Chief Judge, and Sercombe, Judge.

SERCOMBE, J.

Reversed and remanded on petition; affirmed on cross-petition.

SERCOMBE, J.

Petitioner Gould seeks review of an opinion and order of the Land Use Board of Appeals (LUBA). LUBA generally upheld a county decision to approve an application by respondent Thornburgh Resort Company, LLC (Thornburgh) for a conceptual master plan for a destination resort. However, LUBA remanded the county's decision for the adoption of additional findings and conditions to justify satisfaction of an approval standard on required overnight lodging accommodations. Gould pursues review in this court in order to obtain a more extensive remand to the county. Gould contends that LUBA erred in approving the county's adopted findings and conditions on the location of access roads for the development and on the necessary mitigation of the project's effects on fish and wildlife. Thornburgh cross-petitions for review of LUBA's characterization of the county's requirements for the size of the development lots. Because LUBA erred in its review of the county's determinations on mitigation of wildlife impacts, we reverse and remand. We otherwise affirm on Gould's remaining assignments of error and on the cross-petition for review.

Thornburgh applied to Deschutes County for approval of a conceptual master plan for a destination resort. The resort, to be located on about 1,970 acres of land west of the City of Redmond, is proposed to contain 1,425 dwelling units, including 425 units for overnight accommodations and a 50-room hotel. The resort plans also include three golf courses, two clubhouses, a community center, shops, and meeting and dining facilities. The resort property is bordered on three sides by land owned by the Bureau of Land Management. The land is zoned for exclusive farm use but designated "destination resort" in an overlay zone.

State and local law contain special standards for approving destination resort developments. ORS 197.435 to 197.467; OAR 660-015-0000(8) (Statewide Planning Goal 8 (Recreational Needs)); Deschutes County Code (DCC) Chapter 18.113. The county's development code requires a three-step approval process for a destination resort. The first step is consideration and approval of a "conceptual master plan" (CMP). DCC 18.113.040(A). The code sets out a number of detailed requirements for an application for a CMP, DCC 18.113.050, as well as extensive approval standards for the plan, DCC 18.113.060 and DCC 18.113.070. An applicant for a CMP must submit evidence of compliance with those requirements at a public hearing. Any approval must be based on the record created at that hearing. DCC 18.113.040(A). Once the CMP is approved, it becomes the standard for staff evaluation of a "final master plan," the second step in the process. Any "substantial change" in the CMP must be reviewed and approved using the same process as the original plan approval. DCC 18.113.080. The third approval step for a destination resort is allowance of components or phases of the resort through site plan or land division approvals. DCC 18.113.040(C).

Following review of the proposed CMP by a local hearings officer, the board of county commissioners held hearings and approved the proposed CMP with conditions. The primary issue in this case concerns whether the county's adopted findings and conditions on the mitigation of the development's effects on fish and wildlife were sufficient to justify that approval.

The development code requires the CMP application to include a description of the wildlife resources of the site and the effect of the destination resort on those resources, the "methods employed to mitigate adverse impacts on the resources," and a "proposed resource protection plan to ensure that important natural features will be protected and maintained." DCC 18.113.050(B)(1). The approval criteria include a requirement that the decision maker "find from substantial evidence in the record" that "[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource." DCC 18.113.070(D).

The county's findings on the submission requirements of DCC 18.113.050(B)(1) with respect to wildlife note the preparation of a "Habitat Evaluation Procedures" analysis for the site that described "project impacts and corresponding mitigation measures." The findings list the types of wildlife on the site and the short-term and long-term impacts on wildlife and fish by the proposed development. The explanation concludes:

> "According to Tetra Tech [respondent's consultant], approximately 2,149 off-site acres will be needed to offset loss of habitat values on the subject property by virtue of the proposed development. * * * As discussed under DCC 18.113.070 M., the BLM MOU [(Bureau of Land Management memorandum of understanding)] requires [Thornburgh] to complete a wildlife mitigation plan. [Thornburgh] and BLM are currently evaluating the viability of implementing the agreed mitigation measures on federal property in the vicinity of the resort that is commonly known as the 'Masten Allotment.'"

The findings on compliance of the plan with the DCC 18.113.070(D) "no net loss" requirement conclude:

> "The HEP analysis will be used to guide mitigation activities. Due to the size and scope of the project and the related impact from cessation of some cattle-grazing activities, [Thornburgh] is participating with a multi-agency group to finalize the mitigation area. This includes representatives of ODFW [(Oregon Department of Fish and Wildlife)], BLM, Tetra Tech and [Thornburgh].
>
> "* * * * *
>
> "In a letter to the County dated February 9, 2005, Steven George, Deschutes District Wildlife Biologist with ODFW, states that ODFW is working with [Thornburgh] to develop an acceptable wildlife report with mitigation measures and expresses the view that '[Thornburgh] will be able to develop an acceptable program to mitigate the impacts.' * * *
>
> "* * * * *
>
> "The Board finds that, as stated by ODFW, it is feasible to mitigate completely any negative impact on identified fish and wildlife resources so that there is no net loss or net degradation of the resource. The MOU between the BLM and [Thornburgh] requires [Thornburgh] to complete a wildlife mitigation plan that will be reviewed and approved by both ODFW and BLM. * * * The Board imposes as a condition below that the mitigation plan adopted by [Thornburgh] in consultation with Tetra Tech, ODFW and the BLM be adopted and implemented throughout the life of the resort."

In addressing a related requirement that the "resort mitigate any demands that it creates on publicly-owned recreational facilities on public lands in the surrounding area," the county decision details the content of the Bureau of Land Management (BLM) memorandum of understanding (MOU):

> "In Section II.7 of the MOU, [Thornburgh] and BLM agree to work cooperatively to complete a wildlife mitigation plan to compensate for impacts related to the resort. The MOU outlines specific mitigation measures to be undertaken by [Thornburgh] to mitigate the impacts of resort development on surrounding federal recreation facilities. * * * [The] BLM identified federal property located to the south and east (commonly known as the 'Masten Allotment') as an area to be managed with an emphasis on the preservation and enhancement of wildlife habitat. [Thornburgh], BLM and ODFW are working together to evaluate whether [Thornburgh's] wildlife mitigation obligation can be implemented in this location. * * *
>
> "The record contains a report * * * from Tetra Tech, which describes habitat, land uses and mitigation measures to be implemented on the federal lands surrounding the resort. The Tetra Tech report, the BLM MOU and the AAC Agricultural Assessment identify surrounding land uses and potential conflicts between the resort and adjacent uses within 600 feet. The data, analysis and mitigation measures contained in the Tetra Tech report have been incorporated into the final MOU between [Thornburgh] and BLM."

Consistently with those findings, the county approved the conceptual master plan conditionally, requiring among other things that

> "[Thornburgh] shall abide at all times with the MOU with BLM, dated September 28, 2005, regarding mitigation of impacts on surrounding federal lands, to include wildlife mitigation and long-range trail planning and construction of a public trail system. The mitigation plan adopted by [Thornburgh] in consultation with Tetra Tech, ODFW and the BLM shall be adopted and implemented throughout the life of the resort."

The memorandum of understanding requires Thornburgh to complete a wildlife impact mitigation plan that "will specify mitigation measures that are sufficient to insure that there is no net loss of wildlife habitat values as a result of the proposed development." The agreement requires approval of the plan by ODFW and BLM and commits Thornburgh to "work cooperatively with ODFW and BLM to determine the specific locations where the mitigation plan will be implemented." The agreement provides that certain mitigation measures may be undertaken within the Masten Allotment, and those measures "may include" trail construction, removal of old trails, fencing, vegetation thinning and management, and noxious weed controls.

Gould sought review of the county's land use decision by LUBA. Gould's petition for review set out 13 assignments of error by the county. Gould's eleventh assignment of error to LUBA claimed that the county "applied inappropriate legal standards and failed to make proper findings based on substantial evidence in determining that fish and wildlife protection criteria are met." Gould asserted that the county's findings on the feasibility of complying with the fish and wildlife protection criteria were not supported by substantial evidence and that the "deferral of compliance with a criterion and reliance on an agency to decide compliance with the [c]ounty's requirements is not permissible."

LUBA determined that the local government record contained substantial evidence to support the county's findings on compliance with DCC 18.113.070(D). It concluded:

> "Where the county finds that it is feasible to satisfy a mandatory approval criterion, as the county did here with regard to DCC 18.113.070(D), the question is whether that finding is adequate and supported by substantial evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999). Here, Thornburgh supplied the Wildlife Report to identify the negative impacts on fish and wildlife that can be expected in developing Thornburgh resort. The report also describes how Thornburgh proposes to go about mitigating that damage, both on-site and off-site. In response to

comments directed at that report, Thornburgh has entered into discussions with ODFW and a MOU with the BLM to refine that proposal and come up with better solutions to ensure that expected damage is completely mitigated. ODFW and BLM have both indicated that they believe such solutions are possible and likely to succeed. We conclude that the county's finding regarding DCC 18.113.070(D) is supported by substantial evidence and is adequate to explain how Thornburgh Resort will comply with DCC 18.113.070(D).

"Had Thornburgh not submitted the Wildlife Report, we likely would have agreed with petitioners that a county finding that it is feasible to comply with DCC 18.113.070(D) would likely not be supported by substantial evidence. Even though ODFW and BLM have considerable expertise on how to mitigate damage to fish and wildlife, bare assurances from ODFW and BLM that solutions are out there would likely not be the kind of evidence a reasonable person would rely on to find that the damage that Thornburgh resort will do to fish and wildlife habitat can be completely mitigated. But with that report, the dialogue that has already occurred between Thornburgh, ODFW and BLM, the MOU that provides further direction regarding future refinements to ensure complete mitigation, and the optimism expressed by the agencies involved, we believe a reasonable person could find that it is feasible to comply with DCC 18.13.070(D). "

On review, Gould complains that LUBA erred "in determining that the County's findings and evidence concerning feasibility of mitigation for the project's negative impacts on fish and wildlife satisfy the applicable approval standard."[(1)] Gould contends that the approval standard was not met because there was insufficient evidence in the record to show that any particular wildlife impact mitigation plan was feasible and that LUBA erred in not requiring the county to specify a particular mitigation plan and subject that plan to public notice and county hearing processes. Respondents[(2)] counter that our standard of review is whether LUBA correctly applied the "substantial evidence" test in reviewing the findings that a wildlife impact mitigation plan is "feasible." According to respondents, LUBA properly applied the substantial evidence test. Alternatively, respondents further claim that public review of the feasibility of a mitigation plan was sufficient, the county's imposed condition was adequate and specific enough to assure compliance with the approval standard, and the county did not improperly delegate the issue of compliance with an approval standard to another agency.

The issue, then, is whether LUBA erred in affirming the county's findings that the conceptual master plan application complied with DCC 18.113.070(D) because an acceptable mitigation plan was feasible and likely to be adopted by BLM, ODFW, and Thornburgh. The relevant standard of review of LUBA's determination on the adequacy of the county's conclusion of compliance with DCC 18.113.070(D) is whether LUBA's determination is "unlawful in substance." ORS 197.850(9)(a).

LUBA's opinion and order was unlawful in substance for the reasons that follow. First, the county's findings were inadequate to establish the necessary and likely content of any wildlife impact mitigation plan. Without knowing the specifics of any required mitigation measures, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be "completely mitigated" as required by DCC 18.113.070(D). ORS 215.416(9) requires that the county's decision approving the CMP explain "the justification for the decision based on the criteria, standards and facts set forth" in the decision.[(3)] The county's decision is inconsistent with ORS 215.416(9) because the decision lacks a sufficient description of the wildlife impact mitigation plan, and justification of that plan based on the standards in DCC 18.113.070(D). Second, that code provision requires that the content of the mitigation plan be based on "substantial evidence in the record," not evidence outside the CMP record. In this case, the particulars of the mitigation plan were to be based on a future negotiation, and not a county hearing process. Because LUBA's opinion and order concluded that the county's justification was adequate despite those deficiencies, the board's decision was "unlawful in substance."

Nevertheless, relying in part on *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82 (1984), Thornburgh argues that the finding of feasibility, together with the condition requiring adoption of a mitigation plan, is sufficient to prove that the CMP complies with DCC 18.113.070(D). In *Meyer*, we determined that the public participatory rights in a land use hearing on a residential subdivision, then required by *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), were not undercut by conditioning final administrative approval of the subdivision on further technical studies on the individual building sites. That was because the evidentiary record of the subdivision hearing was sufficient to support findings that the approval standards were met, and the results of the technical studies were not necessary to reach that conclusion. We held:

> "The above-quoted findings are supported by substantial evidence in the record, notably a detailed geotechnical study of the area done in 1973, and extensive testimony by the city's experts. Petitioners appeared and were entitled to present evidence at the public hearings upon which the city's findings in this matter were based. It is apparent therefore that the city made the findings required by Code section 33.106 and that petitioners had a full opportunity to be heard on the critical land use issues before the city's decision became final."

Meyer, 67 Or App at 281-82 (footnote omitted).

In reaching that conclusion, we noted that LUBA affirmed the city subdivision approval because the city found the land division to be "feasible." However, we observed that LUBA's use of a "feasibility" standard in determining whether the approval standards were met was misleading:

> "For some reason, LUBA couched its discussion of this question in terms of whether or not the city found the preliminary plan proposed a 'feasible' development project. Petitioners argue that 'feasibility' cannot be the applicable standard because nearly any conceivable project may be feasible from an engineering perspective if enough money is committed to it. It is apparent, however, that by 'feasibility' LUBA means more than feasibility from a technical engineering perspective. It means that substantial evidence supports findings that solutions to certain problems (for example, landslide potential) posed by a project are possible, likely and reasonably certain to succeed."

Id. at 280 n 5 (citations omitted).

Thus, *Meyer* instructs that a proposed land development plan must be specific and certain enough to support findings that the proposal satisfies the applicable approval criteria. If the nature of the development is uncertain, either by omission or because its composition or design is subject to future study and determination, and that uncertainty precludes a necessary conclusion of consistency with the decisional standards, the application should be denied or made more certain by appropriate conditions of approval. Another option is to postpone the decision. As suggested in *Meyer*, however,

> "[a] two-stage approval process is a permissible way to make land use decisions such as the ones made here, so long as interested parties receive a full opportunity to be heard before the decision becomes final.
>
> "Obviously, such an approval process could be used to deny interested parties the full opportunity to be heard if matters on which the public has a right to be heard are not decided until the second stage of the process--that is, the stage of the process in which final approval of the plan takes place and which occurs after public participation has come to an end."

Id. at 280 (citations omitted); *see also Paterson v. City of Bend*, 201 Or App 344, 349, 118 P3d

842 (2005) ("In principle, we agree that nothing in the development code precludes the city from, in effect, postponing a showing of compliance with specific development criteria until the final plat approval, provided there is a showing that compliance is feasible.").

In this case, the county's decision did not postpone a determination that the project complies with DCC 18.113.070(D). The county might have, but did not, postpone determination of compliance with that standard until the final master plan approval step and infuse that process with the same participatory rights as those allowed in the CMP approval hearing.[4] Instead, the county implicitly concluded (but did not directly find) that the nature of the wildlife impact mitigation plan was sufficiently certain and probable to allow a present determination of consistency with the approval criterion. LUBA found that the findings were "adequate" to explain compliance with DCC 18.113.070(D).

But the governing ordinance requires a *Meyer* determination of whether "solutions to certain problems * * * are * * * likely and reasonably certain to succeed"--whether the findings and conditions of the conceptual master plan approval adequately support the conclusion that "any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource" as required by DCC 18.113.070(D). The adopted findings fail to make that case.

The wildlife impact mitigation plan was not yet composed. Although Thornburgh's consultant proposed a number of offsite mitigation measures on federal land, the BLM reported that these measures needed "clarification and further development." In particular, the agency asked that the effect of the development on deer and elk winter range and habitats along a nearby river be clarified. It noted that "[i]t is unclear what types of habitat conditions the resort intends to provide on-site compared to off-site." The BLM concluded that "[s]everal items included in the draft report would not be considered appropriate off-site mitigation," including removal of grazing on the resort property and from offsite mitigation areas, placing rocks on offsite mitigation areas, creation of new water sources for wildlife, and closure of existing roads and trails. Thus, the particular nature of the wildlife impact mitigation plan was not known at the time of the CMP hearing.

The county development code requires that the conceptual master plan application include the "methods employed to mitigate adverse impacts on [wildlife] resources." DCC 18. 113.050(B)(1). That requirement allows little speculation. The code mandates that the applicant submit a "proposed [wildlife] resource protection plan." That requires that the submitted plan be specific enough to apply the approval standards in a meaningful way. The code requirements set out the necessary foundation for a determination that "[*a*]*ny* negative impact on fish and wildlife resources will be *completely mitigated* so that there is no net loss or net degradation of the resource." DCC 18.113.070(D) (emphasis added). The county's substitute of an uncertain plan, a plan yet to be composed, violates those requirements.

The county decision was also defective for a second reason. The code mandates that the approval standards be evaluated "from substantial evidence in the record." DCC 18.113.070(D). That provision requires that the justification be based on evidence submitted at public hearings on the application. The county's decision, however, allows the mitigation plan justification to be established by future discussions among Thornburgh, ODFW, and BLM, and not on evidence submitted during the public hearings. That robs interested persons of the participatory rights allowed by the county ordinance.

In sum, the county's conclusion that DCC 18.113.070(D) is satisfied by a potential mitigation plan is legally insufficient to explain the justification for the decision under ORS 215.419(9). For that reason, LUBA's decision upholding that conclusion is unlawful in substance.

Thornburgh cross-petitions, challenging LUBA's comments in its decision on the effect of the approved residential lot standards. DCC 18.113.060(G)(1) requires a CMP to contain standards

for the "minimum lot area, width, lot coverage, frontage and yard requirements and building heights" as well as any solar access for structures within the resort. The last sentence of DCC 18.113.060(G)(1) concludes that "[n]o lot for a single-family residence shall exceed an overall project average of 22,000 square feet in size."

Thornburgh submitted numeric standards for minimum lot areas, lot width averages, lot frontages, lot coverages, lot setbacks, and building heights for eight different types of lots, with the largest lot type being a minimum of 15,000 square feet in area ("Type A") and the smallest lot type being at least 3,200 square feet in area ("Type H"). The county determined that

> "[t]he [board of county commissioners] finds that additional flexibility may be needed to accommodate the planned range of living units and services. For example, a lot size in excess of one acre may be necessary for a home site in some cases, particularly if it is desirable to preserve rocky or unique terrain. A 1,500-square-foot lot may be appropriate for condominiums or row houses surrounded by common area."

Before LUBA, Gould contended that this finding allowed lots that exceeded the 22,000 square feet maximum prescribed by DCC 18.113.060(G)(1). After quoting the county finding, LUBA said:

> "Thornburgh argues, and we agree, that the final sentence of DCC 18.113.060(G)(1) is 'inartfully worded.' That sentence does not impose a maximum lot size of 22,000 square feet; it prohibits lot sizes that would result in the 'overall project average' exceeding 22,000 square feet. However, to the extent the above quoted findings can be read to grant Thornburgh the 'flexibility' to propose one acre or 1,500 square foot lots, even though the approved lot dimensions at Record 5642 would not permit lots that large or small, we do not believe that grant of flexibility is within the county's discretion under DCC 18.133.060(G)(1). If Thornburgh can subdivide the property into whatever size lots it believes the terrain or high density housing type it desires might warrant, without first amending the CMP to allow such different lot sizes, the exercise required by DCC 18.113.060(G)(1) is a waste of time at best."

On review, Thornburgh contends that LUBA misread the lot standards to limit "lots that large." Thornburgh points out that the development code and the submission set *minimum* parcel sizes and do not require the adoption of *maximum* lot areas. Thus, the approved residential lot area standards would not allow a lot less than 3,200 square feet in area, but would allow any lot of that size or larger in area. LUBA's conclusion, however, rested on the application of the "approved lot dimension" standard, which for lots of 15,000 square feet or more in area required a "lot width average" of 100 feet. The application of that standard to all of the lots within the "Type A" category may operate to limit the sizes of some of the lots. LUBA did not err in reaching that conclusion, although it was not necessary to the determination of Gould's precise assignment of error to LUBA.

Reversed and remanded on petition; affirmed on cross-petition.

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1. Gould raises two other assignments of error. Gould contends that LUBA erred in upholding the county's approval of destination resort roads not located on land zoned for destination resorts and in concluding that there was no need for an exception to Goal 3 in order to locate access roads to the resort on land zoned for exclusive farm uses. We affirm as to those assignments of error without discussion.

Return to previous location.

2. Respondents, as used herein, refers to Central Oregon Irrigation District and Thornburgh Resort Company, LLC.

Return to previous location.

3. ORS 215.416 states the process and justification for the discretionary approval by a county of a proposed development of land. ORS 215.416(9) provides:

> "Approval or denial of a permit * * * shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

That requirement is echoed in the county ordinance on land use hearing procedures. DCC 22.28.010.

Return to previous location.

4. In the context of this case, a determination that a wildlife impact mitigation plan is "feasible" might be appropriate to justify postponement of any evaluation of the application of DCC 18.113.070(D) to the plan. The determination of feasibility, however, is not an adequate substitute for an assessment of whether a specific mitigation plan actually complies with the standard.

Return to previous location.

Home

Exhibit 2: CMP–LUBA Ruling

01/2008

EXHIBIT Z

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

JAN15'08 PM 3:15 LUBA

vs.

DESCHUTES COUNTY,
Respondent,

and

THORNBURGH RESORT COMPANY, LLC and
CENTRAL OREGON IRRIGATION DISTRICT,
Intervenor-Respondents.

LUBA No. 2006-100

STEVE MUNSON,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

THORNBURGH RESORT COMPANY, LLC and
CENTRAL OREGON IRRIGATION DISTRICT,
Intervenor-Respondents.

LUBA No. 2006-101

FINAL OPINION
AND ORDER

On remand from the Court of Appeals.

Paul D. Dewey, Bend, represented petitioner Gould.

Jannett Wilson, Eugene, represented petitioner Munson.

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

Peter Livingston, Portland, represented intervenor-respondent Thornburgh Resort Company, LLC.

Elizabeth A. Dickson and Jennifer L. Coughlin, Bend, represented intervenor-respondent Central Oregon Irrigation District.

Renee Moulun, Assistant Attorney General, Salem, represented Oregon Water Resources Department.

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

REMANDED 01/15/2008

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

Opinion by Holstun.

This appeal is before us on remand from the Court of Appeals. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007), *rev'd and remanded* 216 Or App 150, 171 P3d 1017 (2007). This appeal concerns a destination resort. Deschutes County Code (DCC) 18.113.070(D) requires that the proposed destination resort's negative impacts on fish and wildlife resources must be "completely mitigated so that there is no net loss or net degradation of the resource." To comply with DCC 18.113.070(D), the applicant submitted reports and a memorandum of understanding with the federal Bureau of Land Management. In petitioner Gould's eleventh assignment of error and petitioner Munson's fourth assignment of error, petitioners argued that the county erred in finding that those submittals were sufficient to demonstrate compliance with DCC 18.113.070(D) mitigation standard. LUBA agreed with the county and intervenor-respondent Thornburgh that those submittals were sufficient and denied those assignments of error. 54 Or LUBA at 257-62.

On appeal to the Court of Appeals, petitioners argued that the particulars of the applicant's wildlife impact mitigation plan were not sufficiently known for the county to find that the DCC 18.113.070(D) mitigation standard will be met. Petitioners argued that LUBA erred in concluding otherwise and that LUBA erred in denying petitioner Gould's eleventh assignment of error and petitioner Munson's fourth assignment of error. The Court of Appeals agreed with petitioners.

The county's decision is remanded in accordance with (1) our initial decision, which sustained petitioner Gould's third assignment of error and sustained petitioner Gould's first, fourth, and eighth assignments of error, in part, and (2) the Court of Appeals' decision that LUBA improperly denied petitioner Gould's eleventh assignment of error and petitioner Munson's fourth assignment of error.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2006-100/101 on January 15, 2008, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Elizabeth A. Dickson
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Dated this 15th day of January, 2008.

Kelly Burgess
Paralegal

Debra A. Frye
Executive Support Specialist

IMPORTANT NOTICE

The local record and any exhibits submitted to LUBA in the appeal proceeding captioned in the attached document will be available for pick up at LUBA according to the times specified below. They will not be returned/shipped by LUBA. The record and exhibits will only be released to the Respondent (local government) that filed the record, unless the Respondent authorizes another party to pick them up.

1) If Final Opinion is Attached and the Final Opinion:

IS NOT APPEALED to the Court of Appeals:
Pick up the record between 30 to 45 days from the date of the Final Opinion.

IS APPEALED to the Court of Appeals:
The record will not be available until the Court issues an Appellate Judgment. You will receive another reminder with the issuance of the Board's Notice of Appellate Judgment.

2) If the Notice of Appellate Judgment is Attached:

Pick up the record within 30 days from the date of the Notice of Appellate Judgment.

Please notify us in advance so that we may have the record ready for you when you arrive. We appreciate your cooperation.

Sincerely,
Administrative Staff
Land Use Board of Appeals
550 Capitol Street NE, Suite 235
Salem, Oregon 97301-2552
(503) 373-1265

Exhibit 3: CMP–BOCC Approval of Remand

03/2008

EXHIBIT 3

REVIEWED
LEGAL COUNSEL

For Recording Stamp Only

DECISION OF THE DESCHUTES COUNTY BOARD OF COMMISSIONERS

ON REMAND FROM THE OREGON LAND USE BOARD OF APPEALS

FILE NUMBER: CU-05-20

HEARING DATE: March 19, 2008

APPLICANT:
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STAFF REVIEWER: Ruth Wahl, Associate Planner

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DC-2008-151

I. INTRODUCTION

This decision adopts findings on remand in response to the Final Opinion and Order of the Oregon Land Use Board of Appeals ("LUBA") dated January 15, 2008. LUBA's remand is pursuant to an earlier LUBA Final Opinion and Order dated May 14, 2007, and to a remand to LUBA by the Oregon Court of Appeals in an opinion dated November 7, 2007. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007), *rev'd and remanded* 216 Or App 150, 171 P3d 1017 (2007).

II. READOPTION OF EARLIER COUNTY DECISION WITH MODIFICATIONS

The Deschutes County Board of Commissioners ("Board") readopts its decision dated May 10, 2006 ("2006 Decision"), which approves the application by Thornburgh Resort Company, LLC ("Thornburgh" or "Applicant") for conceptual master plan ("CMP") approval, including the findings and conditions therein, except as they are modified below.

III. APPLICABLE PROCESS

Pursuant to Deschutes County Code ("DCC") 22.34.030, and following a public work session on January 9, 2008, the Board gave notice and an opportunity to participate in the hearing on remand to those who were parties to the earlier proceedings before the County. The Board directed County staff to provide notice to the parties that the Board will hold a hearing on the record and to provide thirty (30) days for the parties to submit legal arguments and no new evidence. The deadline for the submittal of those legal arguments closed at 5:00 pm on February 29, 2008. The Board requested written argument and received comments from Applicant and from the attorneys for the two opponents of the project, Annunziata Gould ("Gould") and Steve Munson ("Munson"), who had appealed to LUBA. On March 19, 2008, the Board conducted its deliberations for the hearing on the record, as authorized by DCC Chapter 22.32 and 22.34, on the issues remanded by the Oregon Court of Appeals and LUBA. Prior to and as part of those deliberations, the Board considered the comments of all the parties prior to making its decision and, as appropriate, responds to them below.

A preliminary issue that must be decided, however, regards the letters that Paul Dewey discussed in and attached to his legal argument argument submitted as part of this proceeding on remand. Mr. Dewey referenced and attached a letter dated February 11, 2008 from him to the Community Development Department regarding the cancellation of the Final Master Plan ("FMP") hearing. Additionally, Mr. Dewey attached a letter dated February 4, 2008 from Assistant Legal Counsel, Laurie Craghead, to Martha Pagel, of attorneys for the applicant, County Legal and CDD staff and the applicant t regarding an agreed upon schedule for the FMP. During the deliberations for the remanded CMP decision, Ms. Craghead recommended that the Board find that those letters are not legal argument pertaining to the remanded CMP issues and, therefore, are new evidence and not allowed to be included as part of the on-the-record hearing. The Board so finds, because Deschutes County Code ("DCC") 22.32.030(E)(6) does not allow the Board to consider new factual information when conducting a hearing on the record, that the two letters and all references to those letters cannot be part of the record in these proceedings because they are new factual information. Thus, the Board will disregard those letters and all references to them.

IV. NEW FINDINGS AND CONDITIONS

LUBA's Decision

LUBA remanded to the County on the following issues:

A. ***Gould's First and Fourth Assignments of Error: Correction of the Inconsistency Between the Phasing Plan and the Overnight and Density Calculations Chart***

FINDINGS: Gould's first and fourth assignments of error dealt with inconsistencies in the record relating to the 2:1 ratio for residential development and overnight lodging. Both assignments of error focused in part on the inconsistency between the Overnight and Density Calculations chart and the Phasing Plan. These inconsistencies arose as a result of Applicant's errors in the preparation of the plan and chart prior to the Board's hearing in December 2005. In its May 14, 2007 Opinion and Order ("LUBA Order"), LUBA concluded that the inconsistencies could be cured by a finding identifying the correct version of the Overnight and Density Calculations chart and by modifying one legend in the Phasing Plan.

In reaching this conclusion, LUBA first rejected most of the first assignment of error, but agreed with Gould about "[t]he third inconsistency, which . . . would require that the phasing plan be modified to show that 62.5 overnight dwelling units will be developed in Phase D with the hotel." LUBA Order, p. 16. According to LUBA, "Until the phasing plan is corrected, it proposes phased development that does not comply with the 2:1 ratio. That problem could have been eliminated if the county had imposed a condition of approval that specifically required that correction."

LUBA explained that, contrary to the arguments made by Gould, the corrections in the Overnight and Density Calculations chart included in Applicant's final legal argument are not new evidence. LUBA disagreed with the Board's concern, which it inferred from the 2006 Decision, that the Board could not consider the corrections because they were included in Applicant's final argument, after the record had closed. It stated that the only "conceivable evidentiary component" of the correction was whether the proposed corrections, if adopted, would in fact preserve the 2:1 ratio. It noted that there was no factual dispute on that matter. Munson and Gould now argue that there is no way to consider an amended phasing plan without reopening the record. However, LUBA made it clear that because the proposed corrections are not new evidence, the Board can consider them without reopening the record. LUBA Order, p. 16, footnote 16.

LUBA explained that the County must either require that Applicant make the corrections in the Overnight and Density Calculations chart included in Applicant's final legal argument, or impose a condition of approval that the correction is made, before it grants approval of the CMP. LUBA Order, p.17.

B. Therefore, consistent with these statements in the LUBA Order, the Board adopts Condition No. 21 listed below under "**Corrected and Additional Conditions of Approval:** ***Gould's Third Assignment of Error: Compliance with ORS 197.445(4)(b)(B) Concerning Construction of the 50 Units of Overnight Lodging Prior to Closure of Sale of Individual Lots or Units***

FINDINGS: Gould's Third Assignment of Error relates to an inconsistency between the wording of the County approval standard and that of a subsequently adopted statute, ORS 197.445(4) (b) (B). LUBA determined the wording of the statute must control and instructed the County to make related corrections in the findings.

In the first paragraph of Condition 21, the 2006 Decision states, "In lieu of construction, [Thornburgh] may provide financial assurances for construction of the required overnight lodging." As explained in the LUBA Order, pp. 21-24, this condition, while consistent with DCC 18.113.060(A) (5), which allows all of the required 150 units of overnight lodging to be "physically provided or financially assured," is inconsistent with the requirement in ORS 197.445(4) (b) (B) that the first 50 of those 150 units "must be constructed prior to the closure of sale of individual lots or units." LUBA Order, p. 23. Because those first 50 units must be constructed prior to the closure of the sale of individual lots or units, the Board finds that it is obvious that those units must be constructed in Phase A in one of the "pods" shown on the Phasing Plan map for Phase A. Identifying exactly which pod those will be located in for Phase A is not necessary, as the first site plan submitted by the applicant will have to provide for these units.

Therefore, consistent with these statements in the LUBA Order, the first paragraph of Condition 21 of the 2006 Decision shall be replaced with the first paragraph listed under **"Corrected and Additional Conditions of Approval"** and the second paragraph shall remain the same.

C. ***Gould's Fourth Assignment of Error: Correction of Phasing Plan to Match Overnight and Density Calculations Chart***

FINDINGS: This issue, which is raised by Gould's fourth assignment of error, is identical to the issue that prompted LUBA to remand on Gould's first assignment of error. It is addressed by the new condition adopted in response to LUBA's remand on that assignment.

D. ***Gould's Eighth Assignment of Error: Required Additional Finding with Respect to DCC 18.113.070(G)(3)(b): "Access within the Project Shall Be Adequate to Serve the Project in a Safe and Efficient Manner for Each Phase of the Project"***

FINDINGS: Gould's eighth assignment of error points out an omission in the original findings: The 2006 Decision failed to include a finding addressing the evidence relating to access roads. LUBA concluded that the County "must address and demonstrate" that the CMP complies with DCC 18.113.070(G)(3)(b). LUBA Order, p. 43. Although the Board's original decision did not include a specific finding, the record included extensive evidence demonstrating the adequacy of access, including statements by representatives of the County road office, the United States Bureau of Land Management ("BLM"), and the City of Redmond Fire Department. Thus, this decision is in the same position as with the original decision in that no new hearing is necessary and what needs to be completed is a written finding that, if any party disagrees with the finding, it is appealable to the LUBA. Therefore, the Board adopts the following additional finding in response to DCC 18.113.070(G)(3)(b), which summarizes evidence already in the record and is consistent with the Board's initial determination approving the CMP:

New Finding: Gould argues that because a finding on this code provision was omitted from the 2006 Decision, the Board must reopen the record for testimony on the issue of adequate internal access. The Board disagrees. The inadvertent failure to include a necessary finding in the 2006 Decision

after the record closed and the Board made a decision of approval does not indicate there was not enough evidence in the record prior to the 2006 Decision to make the necessary finding.

Applicant has submitted a revised Vehicular Access and Circulation Plan, Memorandum of Applicant in Response to Public Comments, September 28, 2005 ("MR"), Ex. 3, A-1.6, which illustrates how roads will provide access throughout each phase of the project. This plan can be viewed together with the revised Phasing Plan, MR, Ex. 13, B-1.08, to determine how the different phases of development will be served by roads. The revised Phasing Plan does not show the roads extending to the Phase G residential area, but Applicant has explained that this is a typographical error, Applicant's Final Argument, October 19, 2005 ("AFA"), p. 8, and the Board relies upon the Vehicular Access and Circulation Plan to determine where the roads will go. The revised Phasing Plan shows the internal roads will be constructed in Phase A or, at the latest, in Phase B.

The Board finds that the roads have been located in a safe and efficient manner. As Applicant explained in its final argument to the hearings officer, AFA, p. 5, roads have been located in response to concerns expressed by the Bureau of Land Management and others. Robert Towne, Field Manager, Deschutes Resource Area of the Bureau of Land Management, states in a September 28, 2005 letter to the County hearings officer, MR, Ex. 14, B-1.40, that the location of the northern access road, which emphasizes shared use of rights-of-way, will "balance BLM's competing objectives" by minimizing "any additional disturbance of the land and . . . consolidate access points in a single location." Mr. Towne states further that Thornburgh's choice of existing road segments for its proposed connecting roads across federal lands in Section 29 and 30 "will minimize the fragmentation of public lands and impacts on the environment." From these statements, the Board concludes the proposed connecting roads will be "efficient," as that term is used in the DCC.

Gould objects that the internal road that accesses the southwest part of the property cannot be described as safe or efficient because it is over two miles from Cline Falls Road and because of "fire danger in the area." However, the distance from Cline Falls Road does not make the road in the southwest part of the property inefficient or unsafe per se. Gould has not identified a standard that would show the road to be unsafe. Efficiency depends on available alternatives, and the Applicant's choice of alternatives appears reasonable to the Board. Because it is not adequately developed, Barr Road is not a reasonable access alternative to the southwest part of the resort. In its May 14, 2007 Opinion and Order, LUBA found that the unavailability of Barr Road for either access or emergency access provides no basis for reversal or remand.

The question of fire danger is addressed by the City of Redmond Fire Department in its January 12, 2005 letter, in which the Fire Chief, Ron Oliver, describes meeting with representatives of the resort project to discuss fire and public safety issues, hazardous fuels reduction and annexation of the resort property into the Deschutes County Rural Fire Protection District #1. Thornburgh's Burden of Proof Statement, dated February 16, 2005 ("BOP"), Ex. 15, B-29a. In a subsequent July 13, 2005 letter, MR, Ex. 15, B-1.32, Chief Oliver states that fire code access requirements will be met through the use of two routes connecting to the Cline Falls Highway and through an all weather access road across the northern portion of the Thornburgh property for additional access via Highway 126. In a September 23, 2005 letter, MR, Ex. 15, B-1.31, Deschutes County Sheriff Les Stiles states that representatives of the sheriff's office have reviewed Thornburgh's Resort Planning and Emergency Preparedness plan, MR, Ex. 15, B-1.30, and find it "consistent with the

evacuation operational plans within Deschutes County." These letters and the Emergency Preparedness Plan itself adequately address the concerns raised by Gould in connection with safe and efficient internal access.

The County depends upon its own Road Department to raise concerns about internal access after reviewing an application. Gary Judd, at the County Road Department, by email dated June 2, 2005, requested from Applicant's traffic consultant a copy of the updated map of the phases and an approximate time line for construction of each phase, in order to assess trip distribution and how it would affect various intersections. On July 1, 2005, Mr. Judd commented to planner Devin Hearing that Thornburgh's traffic study, as modified, "is acceptable to the Road Department." Mr. Judd raised no concerns about internal access.

On remand, Gould repeats her earlier arguments on internal access and also complains that one proposed road would cross Barr Road, which would constitute an impermissible "use" of Barr Road. The Board disagrees, finding that merely crossing Barr Road does not constitute "using" Barr Road.

Based on substantial evidence in the record, the Board finds that Applicant has demonstrated compliance with this standard. In order to assure future compliance, as access roads are designed and constructed, the Board imposed Conditions 5, 7, 27 and 30 in the 2006 Decision. Condition 5 requires the design and construction of the road system in accordance with Title 17 of the Deschutes County Code ("DCC"). It requires further that road improvement plans be approved by the County Road Department prior to construction. DCC Title 17 (and, in particular, DCC chapter 17.48) establishes minimum standards for design and construction of roads and other improvements and facilities. DCC 17.48.180 states applicable minimum road standards for private roads. In addition, DCC 17.48.030 allows the Road Department Director to impose additional design requirements "as are reasonably necessary to protect the interests of the public." Condition 27 requires that road width be consistent with the standards in DCC chapter 17.36. Condition 30 requires Applicant to submit a detailed traffic circulation plan prior to Final Master Plan approval.

This criterion is met.

E. ***Fifth Assignment of Error: Confusion over Dimensional Standards***

FINDINGS: Gould's fifth assignment of error related to minimum dimensional standards for lot sizes within the project. Although LUBA rejected Gould's arguments and upheld the County finding on this issue, the LUBA Order contains a statement that may cause confusion in the future. As a result, Thornburgh asks the Board to make an additional finding to clarify that the specified minimum lot sizes do not at the same time prescribe maximum dimensions.

Gould contended to LUBA that the County's findings in response to DCC 18.113.060(G)(1) "violated the subsection (G) requirement that no lot shall exceed a project average of 22,000 square feet, where the County allowed lots over twice that size and even greater than one acre." LUBA rejected that contention, LUBA Order, p. 30, but added:

"However, to the extent the above quoted findings can be read to grant Thornburgh the 'flexibility' to propose one acre or 1,500 square foot lots, even though the approved lot dimensions at Record 5642 would not permit lots that large or small, we do not believe that grant of flexibility is within the county's discretion under DCC 18.113.060(G)(1).[1] If Thornburgh can subdivide the property into whatever size lots it believes the terrain or high density housing type it desires might warrant, *without first amending the CMP to allow such different lot sizes,* the exercise by DCC 18.113.060(G)(1) is a waste of time at best. Because the above-quoted findings need not be read to authorize lot sizes other than the ones set out at Record 5642, without first amending the CMP to allow such larger or smaller lots, we do not read the findings in that way. *The dimensional standards approved by the county appear at Record 5642. If Thornburgh later discovers that the approved eight different lot types do not offer sufficient flexibility, it may request a change in the CMP to allow additional lot dimensions.*" LUBA Order, pp. 30-31 (emphasis added).

On appeal to the Court of Appeals, Thornburgh pointed out that the development code and the submission set *minimum* parcel sizes and do not require the adoption of *maximum* lot areas. The court agreed that LUBA's conclusion "was not necessary to the determination of Gould's precise assignment of error to LUBA." *Gould*, 216 Or App at 165. However, the court focused on the "lot width average" and speculated that it requires, for lots of 15,000 square feet or more in area, a "lot width average" of 100 feet that "may operate to limit the sizes of some of the lots." Id. at 164-65.

The table in question is reproduced below:

EXHIBIT B-24a – RESIDENTIAL LOT STANDARDS

ITEM	Type A	Type B	Type C	Type D	Type E	Type F	Type G	Type H
Lot Area (Minimum)	15,000	12,500	10,000	8,000	6,000	4,500	3,200	3,200
Lot Width Average (Minimum)	100	90	80	70	60	40	30	25
Lot Frontage – Regular	60	55	50	45	40	40	30	25
Lot Frontage – Cul-de-sac	50	40	40	35	35	30	25	25
Lot Coverage – Footprint (Maximum)	65%	65%	65%	70%	70%	75%	80%	80%
Lot Setbacks								
Front	30	30	30	30	25	25	20	20
Back	25	25	25	20	20	15	15	15
Side	15	15	10	10	10	5	5	0
Building Height* (Maximum)	26	26	26	26	26	26	26	26
*depends on location								

Gould argues on remand that LUBA required that Thornburgh request a change in the CMP to allow additional lot dimensions if it wants lots of a type different from what it identified in the CMP. However, Thornburgh does not seek a change to the residential lot standards in Exhibit B-24a. Since the table clearly states a *minimum* lot width average for each type of lot, it does not establish any limitation on the size of any lots. The Board therefore adopts the following additional, clarifying finding responsive to DCC 18.113.060(G)(1).

[1] The Residential Lot Standards are stated in the BOP, Ex. 8, B-24a.

New Finding: DCC 18.113.060(G)(1) does not state a requirement for maximum lot dimensions other than the general requirement that "No lot for a single-family residence shall exceed an overall project average of 22,000 square feet in size," which LUBA has said (and the Board agrees) "prohibits lot sizes that would result in the 'overall project average' exceeding 22,000 square feet." LUBA Opinion and Order, dated May 14, 2007, p. 30.

The Board understands Applicant's "Residential Lot Standards" chart, Applicant's Burden of Proof Statement, dated February 24, 2005, Ex. 8, B-24, which shows residential lot standards, to state only *minimum* dimensional standards, as required by this code provision, and not to state any limitation on maximum dimensions unless expressly stated (as with the maximum lot coverage and the maximum building height (depending on location)).

In particular, the minimum "lot width average" is understood to state that the average lot width shall not be less than the stated number under any type of lot (e.g., "Type A," "Type B," etc.), but does not state it cannot be more. The lot frontage and lot setback standards are also understood to be minimums, which do not establish maximum lot dimensions.

Court of Appeals Decision

F. Gould's Eleventh and Munson's Fourth Assignments of Error: DCC 18.113.070(D) and Wildlife Mitigation

FINDINGS: The Court of Appeals remanded to LUBA on Gould's eleventh and Munson's fourth assignments of error, which were identical, concerning the process used to determine compliance with DCC 18.113.070(D).

DCC 18.113.070(D) states, "Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource." In response to this criterion, after discussing the evidence in the record, the Board found: "It is feasible to mitigate completely any negative impact on identified fish and wildlife resources so that there is no net loss or net degradation of the resource." 2006 Decision, p. 61. The Board relied upon evidence in the record, including a Tetra Tech Wildlife Report, and on the future participation of the Oregon Department of Fish and Wildlife ("ODFW") and the BLM in devising a final wildlife mitigation plan pursuant to a Memorandum of Understanding between Thornburgh and the BLM.

The Court of Appeals opinion noted two deficiencies in LUBA's (and the County's) decisions. First, "Without knowing the specifics of any required mitigation measures, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be 'completely mitigated' as required by DCC 18.113.070(D)." *Gould*, 216 Or App 150, 159. Second, DCC 18.113.070(D) "requires that the content of the mitigation be based on 'substantial evidence in the record,' not evidence outside the CMP record." Id. at 159-60.

In terms of appropriate procedure, the Court of Appeals stated, "The county might have, but did not, postpone determination of compliance with [DCC 18.113.070(D)] until the final master plan approval step and infuse that process with the same participatory rights as those allowed in the CMP approval hearing." *Gould*, 216 Or App at 162. The court noted further, "[A] determination that a wildlife impact

mitigation plan is 'feasible' might be appropriate to justify postponement of any evaluation of the application of DCC 18.113.070(D) to the plan." Id. at 162, footnote 4.

Gould argues on remand that it is improper to defer to the final master plan hearing the public's opportunity to comment on the wildlife mitigation plan, because the CMP is the legal basis for the final master plan. However, the Court of Appeals clearly stated that it is proper for the County to defer the presentation of the wildlife mitigation plan to the final master plan process, as long as a feasibility determination has been made with respect to DCC 18.113.070(D). As noted above, based on evidence in the record, the Board found in the 2006 Decision that compliance with DCC 18.113.070(D) is feasible.

Consistent with the Court of Appeals' decision, the Board adopts Condition No. 26 below, which postpones determination of compliance with DCC 18.113.070(D) until the final master plan approval step and infuses that process with the same participatory rights as those allowed in the CMP approval hearing:

II. DECISION ON REMAND:

With the new findings above and conditions listed below, the Board concludes that Applicant has satisfied all applicable approval criteria and the directions on remand of the Oregon Court of Appeals and LUBA. Therefore, Thornburgh's CMP application is again **APPROVED**.

Corrected and Additional Conditions of Approval:

21 (Amended First Paragraph): Each phase of the development shall be constructed such that the number of overnight lodging units meets the 150 overnight lodging unit and 2:1 ratio of individually owned units to overnight lodging units standard set out in DCC 18.113.060(A)(1) and 18.113.060(D)(2). Individually owned units shall be considered visitor oriented lodging if they are available for overnight rental use by the general public for at least 45 weeks per calendar year through one or more central reservation and check-in services. As required by ORS 197.445(4)(b)(B), at least 50 units of overnight lodging must be constructed in the first phase of development, prior to the closure of sale of individual lots or units.

In addition to complying with the specific requirements of DCC 18.113.070(U), 1-5, Applicant, its successors and assigns, shall at all times maintain (1) a registry of the individually owned units subject to deed restriction under DCC 18.113.070(U)(2), requiring they be available for overnight lodging purposes; (2) an office in a location reasonably convenient to resort visitors as a reservation and check-in facility at the resort; (3) a separate telephone reservation line and a website in the name of "Thornburgh Resort," to be used by members of the public to make reservations. As an alternative to, or in addition to (3), Applicant may enter into an agreement with a firm (booking agent) that specializes in the rental or time-sharing of resort property, providing that Applicant will share the information in the registry required by (1) and cooperate with the booking agent to solicit reservations for available overnight lodging at the resort. If Applicant contracts with a booking agent, Applicant and the booking agent shall cooperate to ensure compliance with the requirements of DCC 18.113.070(U)(5), by filing a report on January 1 of each year with the Deschutes County Planning Division.

36. Applicant shall modify the Overnight and Density Calculations chart presented to the Board at the appeal hearing on December 20, 2005 by replacing it with the Overnight and Density

Calculations chart included at page 25 in Applicant's final legal argument, dated January 3, 2006, as shown below.

The 75 units of overnight lodging shown in the December 20, 2005 Overnight and Density Calculations table to be developed in Phase C will actually be developed in Phase B, for a total of 150 units in Phase B. The Overnight and Density Calculations table will be corrected to show the 50 hotel units will be developed in Phase D, where the Phasing Plan, attached to the Memorandum of Applicant in Response to Public Comments, Ex. 13, Revised B-1.8, already shows the hotel will be developed. Additionally, the legend in the Phasing Plan will be corrected to show hotel *and* residential overnight lodging uses in Phase D.

ITEM	Phase A	Phase B	Phase C	Phase D	Phase E	Phase F	Phase G	Totals
Residential Single Family (RSF)	300	150	150	125	125	50	50	950
Hotel Overnight	0	0	0	50	0	0	0	50
Residential Overnight	150	150	0	63	62	0	0	425
Net Overnight	150	150	0	113	62	0	0	475
Cumulative RSF	300	450	600	725	850	900	950	950
Cumulative Overnight	150	300	300	413	475	475	475	475
RATIO-RSF/Overnight	2.00	1.50	2.00	1.76	1.79	1.89	2.00	2.00

Applicant shall present the corrected Phasing Plan and Overnight and Density Calculations chart, consistent with this condition, during the Final Master Plan approval process.

37. Applicant shall demonstrate compliance with DCC 18.113.070(D) by submitting a wildlife mitigation plan to the County as part of its application for Final master plan approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participatory rights as those allowed in the CMP approval hearing.

Dated this 9th of April, 2008

BOARD OF COUNTY COMMISSIONERS

DENNIS LUKE, CHAIR

TAMMY (BANEY) MELTON, VICE CHAIR

MICHAEL M. DALY, COMMISSIONER

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OWRD

ATTEST:

Recording Secretary

Exhibit 4: CMP-LUBA Ruling Affirms CMP

09/2008

EXHIBIT 4

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

SEP11'08 PM 3:36 LUBA

and

STEVE MUNSON,
Intervenor-Petitioner,

vs.

DESCHUTES COUNTY,
Respondent.

LUBA No. 2008-068

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

Jannett Wilson, Eugene, filed a petition for review and represented intervenor-petitioner. With her on the brief was the Goal One Coalition.

Laurie E. Craghead, Assistant Legal Counsel, Bend, and Peter Livingston, Portland, filed the response brief and Peter Livingston argued on behalf of respondent. With them on the brief was Schwabe, Williamson & Wyatt PC.

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

AFFIRMED 09/11/2008

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 grants conceptual master plan (CMP) approval for a destination resort.[1]

FACTS

The county's initial approval of the disputed CMP was remanded by LUBA. *Gould v. Deschutes County*, 54 Or LUBA 205, *rev'd and remanded* 216 Or App 150, 171 P3d 1017 (2007). In this opinion, we will refer to our initial decision in this matter as *Gould I* and we will refer to the Court of Appeals' decision as *Gould II*. The decision that is before us in the present appeal is the county's decision following that remand, in which the county responded to the errors identified by LUBA and the Court of Appeals.

FIRST ASSIGNMENT OF ERROR

A. Introduction

The public's right to notice and a meaningful right to participate in local government land use permit proceedings is set out at ORS 215.416 (counties) and 227.175 (cities). Two-stage land use permit approval processes are common. Frequently, the first stage approval requires public hearings at which the public has a right to participate, in accordance with ORS 215.416 and 227.175. Almost as frequently, the public has no participatory rights or limited participatory rights in the second stage approval. In this case, under the Deschutes County Code (DCC), the public has a right to participate in the public hearings that must precede county approval of a CMP. But under the DCC, public hearings are not required by the DCC for final master plan (FMP) approval. The leading case that addresses the aspects of permit decision making that must be completed in the first stage (where the public has a right to participate) and the aspects of permit decision making that may be completed in the final

[1] Intervenor-petitioner's petition for review simply incorporates petitioner Gould's petition for review. In this opinion we refer to petitioner in the singular.

stages (where the public has no participatory rights) is *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den* 297 Or 82 (1984). We discuss the key principles articulated in *Meyer* before turning to the Court of Appeals' decision in *Gould II*.

Meyer concerned a planned unit development (PUD). The decision on appeal granted approval for a preliminary plan for the PUD. The city process for final plan approval for the PUD did not include any public right to participate in the final plan approval. One of the approval standards for the preliminary PUD approval decision required that the city find the proposed PUD "is not detrimental or injurious to the public health, peace or safety, or to the character and value of the surrounding properties." 67 Or App at 278. In *Meyer*, the city approved the PUD preliminary plan with conditions. Those conditions of approval were set out in detail in the Court of Appeals' decision in *Meyer*. Those conditions required that the applicant prepare detailed final geotechnical reports as a condition of securing final plan approval. Under the city's conditions of approval, those final geotechnical reports were to, among other things, "verify that all proposed roadways, drainageways and building sites can be safely developed." 67 Or App at 279 n 4. As described by the Court of Appeals in *Meyer*, there were two issues on review: "(1) Did the city address the issues on which petitioners had a right to be heard during the first stage of the approval process; and (2) are the city's findings on those issues supported by substantial evidence?" 67 Or App at 280.

The development issues that were raised under the city's general "public health, peace or safety" standard in *Meyer* were whether roads, drainageways and building sites could be safely developed and whether there were suitable methods of storm water and groundwater disposal. The city found that public agencies, including the city Bureau of Building's geotechnical engineer, testified that the area was subject to landslides, but that the proposed PUD was responsive to that limitation and that construction was "feasible" in the areas of the site that were proposed for development, which included "ridge tops and areas with slopes less than 30%." 67 Or App at 281. With regard to drainage, the city found that the proposed

use of existing drainage ways and an enlarged pond would be sufficient to ensure adequate drainage. As noted above, the city's geotechnical engineer recommended more detailed geotechnical studies to ensure that building sites were buildable and that post development peak storm water flows would not exceed peak storm water flows before development.

The petitioners in *Meyer* argued that the city preliminary plan approval decision failed to address the building safety and ground and storm water drainage issues they raised under the city's "public health, peace or safety" standard. Petitioners argued those issues "were deferred under the guise of conditions" to the final approval stage where the public would have no right of participation. 67 Or App at 280-81.

The Court of Appeals rejected petitioners' argument that the city improperly deferred discretionary decision making to the final (non-public) approval stage. The court held that the city's findings regarding the "public health, peace or safety" standard were supported by substantial evidence, which the court described as a detailed 1973 geotechnical study of the area and "extensive testimony by the city's experts." 67 Or App at 282. The Court of Appeals also found that the opponents' participatory rights were preserved because they were allowed to appear and "present evidence at the public hearings upon which the city's [PUD preliminary plan approval] findings in this matter were based." *Id.*

In *Meyer*, the Court of Appeals made two important additional points in footnotes. First, the court noted that in LUBA's decision, where LUBA explained why it believed that the city made the decisions it needed to make in the public stage of the process, "[f]or some reason LUBA couched its discussion of this question in terms of whether or not the city found the preliminary plan posed a 'feasible' development project." 67 Or App at 280 n 5. The Court of appeals explained in footnote five that it understood LUBA to use the term "feasibility" to mean more than "technical engineering" feasibility, "[i]t means that substantial evidence supports findings that solutions to certain problems (for example

landslide potential) posed by a project are possible, likely and reasonably certain to succeed." *Id.*

The Court of Appeals made a second important point in footnote six. The court noted that the city obviously did not have the additional detailed geotechnical reports that were required by the city's conditions of approval:

> "It is true that the city council has not identified a precise solution for each and every potential problem posed by the PUD. Although the council must find that solutions are available, detailed technical matters involved in selecting a particular solution to each problem are left to be worked out between the applicant and city's experts during the second stage approval process for the final plan. *Fasano* does not require that technical discussion and review to proceed by way of public hearings." 67 Or App at 282 n 6.

The key principles that we derive from *Meyer* regarding two-stage land use permit approval processes, where the public has no participatory rights in the second stage, are set out below:

1. In such two-stage approval processes, public participatory rights may be limited to the first stage, so long as findings demonstrating compliance with all mandatory, discretionary approval criteria are adopted as part of the first stage approval, and those findings are adequate and supported by substantial evidence.

2. The second *Meyer* principle is a subset or refinement of the first principle. Where a land use permit application and the evidentiary record supporting that land use permit application demonstrate at the first stage that the development complies with all mandatory approval criteria, and in its decision the local government finds that solutions to any identified problems regarding the proposal's compliance with the approval criteria are "feasible," that is, those solutions are shown to be "possible, likely and reasonable certain to succeed," first stage approval may be granted, even if it is not yet known precisely which feasible solutions will be adopted.

3. Where a local government has properly granted first stage land use permit approval under 1 or 2 above, the local government may require any additional technical studies that it believes are necessary, and the public need not be given a right to participate in the review and approval of those technical studies.

B. The Court of Appeals' Decision in *Gould II*

DCC 18.113.070(D) requires that all negative impacts on fish and wildlife resources from a destination resort must be "completely mitigated." As the Court of Appeals explained:

> "The development code requires the CMP application to include a description of the wildlife resources of the site and the effect of the destination resort on those resources, the 'methods employed to mitigate adverse impacts on the resources,' and a 'proposed resource protection plan to ensure that important natural features will be protected and maintained.' DCC 18.113.050(B)(1). The approval criteria include a requirement that the decision maker 'find from substantial evidence in the record' that '[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.' DCC 18.113.070(D)." *Gould II*, 216 Or App at 154.

The destination resort applicant submitted studies and entered into discussions with the Oregon Department of Fish and Wildlife (ODFW) and the federal Bureau of Land Management (BLM) to develop a program to comply with the DCC 18.113.070(D) "complete mitigation" standard. The record includes a letter from an ODFW biologist that expresses the opinion that all habitat impacts can be mitigated. Record 5512.[2] The county ultimately found that "it is *feasible* to mitigate completely any negative impact on identified fish and wildlife resources so that there is no net loss or net degradation of the resource." Record 62.[3] Based on that finding and a condition of approval that a mitigation plan be completed, approved by BLM and ODFW and implemented, the county found that the CMP complied with DCC 18.113.070(D). In our initial decision we rejected petitioners' challenge

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[2] The parties agreed that the county would not be required to resubmit the large record that was compiled in *Gould I* and that "each party will attach to their respective briefs any pages from the original record that party believes is relevant to the party's argument." *Gould v. Deschutes County*, (LUBA No. 2008-068, Order, June 9, 2008), slip op 1. In this opinion we cite to the record in *Gould I* as "Record," and we cite the record that the county compiled following remand as "Remand Record."

[3] The meaning and appropriate role of the concept of "feasibility" in reviewing multi-stage development review where the public has participatory rights in some but not all stages of approval is at the core of petitioner's first assignment of error. We turn to that question below after discussing the Court of Appeals' decision in *Gould II*.

to those findings and concluded that they were adequate and supported by substantial evidence:

> "Where the county finds that it is *feasible* to satisfy a mandatory approval criterion, as the county did here with regard to DCC 18.113.070(D), the question is whether that finding is adequate and supported by substantial evidence. *Salo v. City of Oregon City,* 36 Or LUBA 415, 425 (1999). Here, Thornburgh supplied the Wildlife Report to identify the negative impacts on fish and wildlife that can be expected in developing Thornburgh Resort. The report also describes how Thornburgh proposes to go about mitigating that damage, both on-site and off-site. In response to comments directed at that report, Thornburgh has entered into discussions with ODFW and a MOU with the BLM to refine that proposal and come up with better solutions to ensure that expected damage is completely mitigated. ODFW and BLM have both indicated that they believe such solutions are possible and likely to succeed. We conclude that the county's finding regarding DCC 18.113.070(D) is supported by substantial evidence and is adequate to explain how Thornburgh Resort will comply with DCC 18.113.070(D).
>
> "Had Thornburgh not submitted the Wildlife Report, we likely would have agreed with petitioners that a county finding that it is *feasible* to comply with DCC 18.113.070(D) would likely not be supported by substantial evidence. Even though ODFW and BLM have considerable expertise on how to mitigate damage to fish and wildlife, bare assurances from ODFW and BLM that solutions are out there would likely not be the kind of evidence a reasonable person would rely on to find that the damage that Thornburgh Resort will do to fish and wildlife habitat can be completely mitigated. But with that report, the dialogue that has already occurred between Thornburgh, ODFW and BLM, the MOU that provides further direction regarding future refinements to ensure complete mitigation, and the optimism expressed by the agencies involved, we believe a reasonable person could find that it is *feasible* to comply with DCC 18.13.070(D)." 54 Or LUBA at 260-61 (emphases added; footnote omitted).

The Court of Appeals explained that the issue on review was "whether LUBA erred in affirming the county's findings that the conceptual master plan application complied with DCC 18.113.070(D) because an acceptable mitigation plan was *feasible* and likely to be adopted by BLM, ODFW, and Thornburgh." 216 Or App at 159 (emphasis added). The Court of Appeals concluded that LUBA erred:

> "LUBA's opinion and order was unlawful in substance for the reasons that follow. First, the county's findings were inadequate to establish the necessary

> and likely content of any wildlife impact mitigation plan. Without knowing the specifics of any required mitigation measures, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be 'completely mitigated' as required by DCC 18.113.070(D). ORS 215.416(9) requires that the county's decision approving the CMP explain 'the justification for the decision based on the criteria, standards and facts set forth' in the decision. The county's decision is inconsistent with ORS 215.416(9) because the decision lacks a sufficient description of the wildlife impact mitigation plan, and justification of that plan based on the standards in DCC 18.113.070(D). Second, that code provision requires that the content of the mitigation plan be based on 'substantial evidence in the record,' not evidence outside the CMP record. In this case, the particulars of the mitigation plan were to be based on a future negotiation, and not a county hearing process. Because LUBA's opinion and order concluded that the county's justification was adequate despite those deficiencies, [LUBA's] decision was 'unlawful in substance.'" 216 Or App at 159-60 (footnote omitted).

As explained in *Gould II*, LUBA's error was twofold. First, the specifics of the mitigation measures must be known at the time the county finds the proposal complies with DCC 18.113.070(D), and those specifics are lacking here. Second, because the needed mitigation plan would be completed after the county found the CMP complied with DCC 18.113.070(D), its decision was based on evidence outside the CMP record. In reversing LUBA's decision, we understand the Court of Appeals to have concluded that the standard set forth in DCC 18.113.070(D) requires that the specifics of any mitigation plan or plans that are proposed to comply with DCC 18.113.070(D) must be known to the county so that it may make a finding that the mitigation plan or plans completely mitigate any impacts, and that finding must be supported by substantial evidence in the CMP record.

In reversing LUBA's decision in *Gould I*, the Court of Appeals also noted an alternative the city might have selected, but did not select. The Court of Appeals explained that rather than make a current decision regarding whether the CMP complies with DCC 18.113.070(D), the county could postpone its findings concerning DCC 18.113.070(D) until the mitigation plan had been completed and reviewed and approved by BLM and ODFW so

that the specifics that are necessary to make the finding required by DCC 18.113.070(D) are available. The Court of Appeals explained:

> "In this case, the county's decision did not postpone a determination that the project complies with DCC 18.113.070(D). The county might have, but did not, postpone determination of compliance with that standard until the final master plan approval step *and infuse that process with the same participatory rights as those allowed in the CMP approval hearing*. Instead, the county implicitly concluded (but did not directly find) that the nature of the wildlife impact mitigation plan was sufficiently certain and probable to allow a present determination of consistency with the approval criterion. LUBA found that the findings were 'adequate' to explain compliance with DCC 18.113.070(D).
>
> "But the governing ordinance requires a *Meyer* determination of whether 'solutions to certain problems * * * are * * * likely and reasonably certain to succeed'--whether the findings and conditions of the conceptual master plan approval adequately support the conclusion that 'any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource' as required by DCC 18.113.070(D). The adopted findings fail to make that case." 216 Or App at 162 (emphasis added; footnote omitted).

In footnote four, which is omitted from the foregoing text from *Gould II*, the Court of Appeals observed:

> "In the context of this case, a determination that a wildlife impact mitigation plan is *'feasible'* might be appropriate to justify postponement of any evaluation of the application of DCC 18.113.070(D) to the plan. The determination of *feasibility*, however, is not an adequate substitute for an assessment of whether a specific mitigation plan actually complies with the standard." *Id.*

As will hopefully become clearer later, the option the Court of Appeals suggests in the first of the above-quoted paragraphs is different from the approach that is required in the second *Meyer* principle. Under the second *Meyer* principle, a local government finds that all applicable approval standards are satisfied, and in doing so identifies solutions to identified problems that are "possible, likely and reasonably certain to succeed." In the option described by the Court of Appeals in the first of the above-quoted paragraphs, the local government would defer a finding regarding DCC 18.113.070(D) and defer to a future public proceeding the establishment of any solutions to identified problems. As the second of the

above-quoted paragraphs makes clear, the Court of Appeals concluded in *Gould II* that the county's first decision in this matter attempted, unsuccessfully, to take the approach authorized in the second *Meyer* principle.

Petitioner's first assignment of error rests largely on footnote four, which petitioner interprets to impose a requirement that the county must first find that a mitigation plan that complies with DCC 18.113.070(D) is "feasible," *i.e.*, "likely and reasonably certain to succeed" in completely mitigating any impacts on fish and wildlife resources, before the county can properly defer a decision concerning DCC 18.113.070(D) to a future public hearing and future county decision regarding that standard.

C. The County's Decision on Remand and Petitioner's Argument

On remand, the county deferred its finding regarding DCC 18.113.070(D). As noted above, although the county found in its first decision that a mitigation plan that complies with DCC 18.113.070(D) is feasible, the Court of Appeals determined that the county's feasibility finding in its initial decision was inadequate to demonstrate compliance with DCC 18.113.070(D). The county adopted no further "feasibility" finding on remand, and petitioner assigns error to that failure. Specifically, petitioner argues:

> "The Court of Appeals rejected the County's earlier findings of compliance with DCC 18.113.070(D), which requires:
>
> > "'Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.'
>
> "The County had determined compliance based on its finding of feasibility. The Court ruled that the County's findings of feasibility were inadequate, however, and that there was not sufficient evidence of feasibility. 216 Or App at 159-60. The Court also ruled that an opportunity for public comment is necessary. *Id.*, at 163.
>
> "On remand, the County this time did not make a finding based on substantial evidence that the approval criterion in DCC 18.113.070(D) is satisfied. Instead of making a finding of compliance, the County attempted to postpone a determination of compliance. The County said that it was adding a condition postponing determination of compliance until the [FMP] approval

step and was infusing that process with the same participatory rights as allowed in the CMP approval hearing. The new condition states:

> "'37. Applicant shall demonstrate compliance with DCC 18.113.070(D) by submitting a wildlife mitigation plan to the County as part of its application for [FMP] approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participating rights as those allowed in the CMP approval hearing.'

"However, merely providing for a hearing at the FMP stage does not substitute for the need of a finding of feasibility based on substantial evidence which is needed for a deferral of a decision to a later stage. * * *" Petition for Review 4.

D. Analysis and Conclusion

In its decision in *Gould II*, we understand the Court of Appeals to have articulated two options for the county on remand. Under the first option, the county could make another attempt to find that the proposed destination resort complies with DCC 18.113.070(D), and if it does, grant CMP approval. But the Court of Appeals made it clear that it likely would be impossible for the county to adopt and defend such a decision, based on the existing evidentiary record. That is because DCC 18.113.070(D) requires that an applicant demonstrate that the destination resort impacts on "fish and wildlife will be "completely mitigated." Without more specific information about destination resort impacts and how they can be mitigated, we understand the Court of Appeals to have concluded such a demonstration is problematic or impossible.

The second option in *Gould II* would be to postpone the county's DCC 18.113.070(D) findings to a later stage approval process after the needed information has been developed and made available and "infuse that process with the same participatory rights as those allowed in the CMP approval hearing." Petitioner believes a precondition of that second option is a county finding, supported by substantial evidence, that it is "feasible" that the proposed destination resort will comply with DCC 18.113.070(D). We understand petitioner

to contend that such a "feasibility" demonstration and finding must be sufficient to satisfy the second of the *Meyer* principles discussed earlier in this opinion.

Although the precise meaning of footnote four in *Gould II* is not clear to us, we do not agree that in order to defer the question of compliance with DCC 18.113.070(D) to a later stage that provides public participatory rights, the county must first find that it is "feasible" to comply with DCC 18.113.070(D).

As noted, footnote four in *Gould II* states:

> "In the context of this case, a determination that a wildlife impact mitigation plan is *'feasible'* might be appropriate to justify postponement of any evaluation of the application of DCC 18.113.070(D) to the plan. The determination of *feasibility*, however, is not an adequate substitute for an assessment of whether a specific mitigation plan actually complies with the standard." 216 Or App at 162 (emphases in original).

We do not understand footnote four to *require* a finding that it is "feasible" for the proposed destination resort to comply with DCC 18.113.070(D), as a necessary precondition for the county's decision on remand to defer a finding on DCC 18.113.070(D) to the future and provide full rights of public participation at the time the destination resort's plan for complying with DCC 18.113.070(D) is considered in the future. Even if such a finding of feasibility could be made, we fail to see what function it would serve in that context.

Petitioner also cites *Paterson v. City of Bend*, 201 Or App 344, 118 P3d 842 (2005), which is cited in *Gould II*, for her position that a "feasibility" finding is required to defer a finding of compliance with DCC 18.113.070(D) to a future public hearing process. In *Paterson*, one of the approval standards for tentative subdivision plan approval required the applicant to show that there was street access to each phase of a subdivision that was to be developed in several phases. The hearings officer in *Paterson* found that it was "unclear from the information provided where street access during phase 1 is located." 201 Or App at 348. To respond to that lack of clarity in the application for tentative subdivision approval, the hearings officer imposed a condition of approval that the applicant "'demonstrate that

there will be street access' before final plat approval." *Id.* On appeal, the petitioner argued the city erred by substituting a condition of approval for a finding of compliance with the tentative subdivision approval standard. The applicant argued on appeal that the hearings officer's decision was proper, because there were "four 'feasible' means of access" to phase 1.

In sustaining petitioner's assignment of error, the Court of Appeals explained:

> "In principle, we agree that nothing in the development code precludes the city from, *in effect, postponing a showing of compliance with specific development criteria* until the final plat approval, provided there is a showing that compliance is feasible. *See Meyer v. City of Portland*, 67 Or App 274, 280 n 5, 280-82, 678 P2d 741, *rev den*, 297 Or 82, 679 P2d 1367 (1984) (citing, with approval, LUBA opinion addressing the need for land use decision-maker to find, at a minimum, that compliance with mandatory criteria is "feasible"). *In this case, however, the hearings officer did not expressly find that compliance with the relevant access provisions was feasible.* Nor, where the hearings officer stated that the location of street access was "unclear," are we able to conclude that the hearings officer implicitly made such a finding. We therefore reverse and remand with instructions to remand to the city for further consideration of that issue, including at a minimum, some identification by the city of the factual predicates for its finding. * * *" 201 Or App at 349-50 (emphases added).

The inadequate findings that the court identified in *Paterson* are similar to the inadequate findings that the court identified in *Gould II*. We do not think *Paterson* stands for the principle that a demonstration and finding of "feasibility," is required in order to defer a finding on a discretionary approval standard to a future stage that will be infused with full public participatory rights. As we have already explained, a feasibility finding within the meaning of the second principle from *Meyer* is a constituent part of a *current* finding of compliance with all discretionary approval standards. Such a finding of current compliance under the second principle in *Meyer* would make deferral to a future public process and additional findings unnecessary. In *Paterson*, the hearings officer did not defer a finding of compliance to a second stage with full public participatory rights. The court likely intended the above-quoted passage in *Paterson* as a response to the applicant's argument that there

were four "feasible" ways to provide the required access to phase 1. As the Court of Appeals noted, the hearings officer did not find that there were four "feasible" ways to provide the required access to phase 1. The above-quoted passage from *Paterson* seems to say that had the city adopted findings that established that there were four "feasible" ways to provide the needed access to phase 1, within the meaning of the second principle from *Meyer*, the city could have deferred a choice between those four "feasible" means of access to the final plat approval stage. If so, contrary to the suggestion in the above-quoted text from *Paterson*, such a deferral would not be "postponing a showing of compliance with specific development criteria until the final plat approval." We do not understand the above passage from *Paterson* to contemplate that a public process would be required for final plat approval. To the contrary, it seems clear that the above-quoted passage from *Paterson* anticipates that final plat approval will be a non-public process.

For the reasons explained above, we conclude that neither *Gould II* nor *Paterson* support petitioner's position that the county must first find that it is "feasible," within the meaning of the second principle in *Meyer*, for the destination resort to comply with DCC 18.113.070(D), before it can defer a decision concerning whether the proposed destination resort complies with DCC 18.113.070(D) to a future public process as part of FMP approval. It follows that petitioner's first assignment of error must be denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under state and local law, the ratio of residential units to overnight lodging units may not exceed 2:1, and that maximum ratio must be maintained in each phase of development of a destination resort. In our decision in *Gould I*, we identified some inconsistencies between the destination resort phasing plan and an Overnight Density Calculation chart that were prepared, in part, to demonstrate that the destination resort complies with this maximum 2:1 ratio requirement. We noted in our decision that the applicant proposed that one of those

inconsistencies could be eliminated by modifying the phasing plan "to show that 62.5 overnight dwelling units will be developed in Phase D." 54 Or LUBA at 222. After noting that correction, we stated that the inconsistency "could have been eliminated if the county had imposed a condition of approval that specifically required that correction." *Id.* (footnote omitted).

On remand the county imposed a condition that, among other things, requires that the legend of the phasing plan be amended to show 63 units of overnight dwelling units will be provided in Phase D. That condition concludes with the following text:

> "Applicant shall present the corrected Phasing Plan and Overnight and Density Calculations chart, consistent with this condition, during the Final Master Plan approval process." Remand Record 22.

If we understand petitioner correctly, she argues that the city committed error by allowing the applicant to submit the corrected CMP when the FMP is submitted and instead should have required that the corrected Phasing Plan be prepared and submitted to the county before it issued its decision on remand that approves the CMP with conditions.

The required correction is clear and objective, and is the kind of correction that can be made and confirmed at the time the FMP is submitted. The county committed no error in allowing the corrected Phasing Plan to be submitted at the time the applicant submits the FMP for review and approval.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In *Gould I*, we sustained one of petitioner Gould's subassignments of error under the eighth assignment of error. In that subassignment of error, petitioner argued that the county erred by failing to adopt findings that demonstrate that the CMP complies with DCC 18.113.070(G)(3)(b), which requires that "[a]ccess within the project shall be adequate to serve the project in a safe and efficient manner for each phase of the project." On remand, the county adopted approximately a page and a half of single-spaced findings. In her third

assignment of error, petitioner challenges the adequacy of those findings and argues they are not supported by substantial evidence.

A. Phasing of Internal Roads

The phasing plan shows Phase A will be developed between 2006-2009. Phases F and G are the last phases, and they will be developed between 2014 and 2018. The other phases will be developed in specified intervals between those intervals. To provide assurances that the internal road system will be developed as needed to provide safe and efficient access to each of the development phases, the applicant submitted two plans, one entitled "Phasing Plan – Exhibit # AA-11 (Phasing Plan) and one entitled "Vehicular Access and Circulation" Plan (VAC Plan).[4] The county adopted the following findings on remand:

> "Applicant has submitted a [VAC Plan] * * * which illustrates how roads will provide access throughout each phase of the project. This plan can viewed together with the revised Phasing Plan * * * to determine how the different phases of development will be served by roads. The revised Phasing Plan does not show the roads extending to the Phase G residential area, but Applicant has explained that this is a typographical error * * * and the Board relies upon the [VAC Plan] to determine where the roads will go. The revised Phasing Plan shows the internal roads will be constructed in Phase A or, at the latest, Phase B." Remand Record 17.

Petitioner challenges the county's finding that all roads will be constructed in Phase A or Phase B. Except for the road necessary to serve Phase G, the Phasing Plan shows that the internal roads will be constructed in Phases A, B, D and E. Therefore, petitioner is correct that the county's finding that all roads will be constructed in Phases A or B is erroneous. However, petitioner makes no attempt to explain why that erroneous finding warrants remand. Except for Phase G, the Phasing Plan shows the phases in which the internal roads will be provided to provide access to each phase. If that is not adequate to demonstrate compliance with DCC 18.113.070(G)(3)(b), petitioner does not explain why.

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[4] The Phasing Plan appears at Record 4230 and is attached as Appendix 11 to the Petition for Review. The VAC Plan appears at Record 1049 and is attached as Appendix 12 to the Petition for Review.

The road that will serve Phase G is shown on the VAC Plan, but that road is not shown on the Phasing Plan. In the above-quoted findings, the county notes the omission from the Phasing Plan. With that omission, it is unclear *when* that road will be constructed. We have no idea what the applicant meant by claiming the omission was "a typographical error," and no party has provided us with the pages from the *Gould I* record that might disclose what that statement means. We also have no idea why the challenged decision recognized the potential problem, but did not clarify when the access to Phase G would be provided or impose a condition of approval to require that the omission be corrected. However, the legal standard that is at issue under the third assignment of error is DCC 18.113.070(G)(3)(b), which imposes a requirement that "[a]ccess within the project shall be adequate to serve the project in a safe and efficient manner for each phase of the project." It does not, as petitioner argues, require "a phase by phase analysis" of the proposed internal roads. We conclude the applicant's and the county's failure to specify precisely in which phase the access road that will be needed to develop Phase G will be developed does not warrant remand. Phase G is one of the last two phases. We think it is reasonable to infer that the roadway that is shown on the VAC Plan to serve Phase G will be constructed in Phase G or in one of the prior Phases. In either event, the required roadway will be available to serve Phase G.

B. Emergencies, Safety

Petitioner argues "[f]urthermore, there is no specific evidence on the adequacy of this internal road system to handle emergencies." Petition for Review 10. Three paragraphs later, petitioner argues "[t]he evidence cited by the County simply does not address the issue at hand." Petition for Review 11. Apparently the "issue at hand" includes the alleged inadequacy of the internal road system to "handle emergencies" in a manner that will be adequate for each phase of the proposal. Following that sentence, petitioner identifies a number of documents the county cited in its findings and relies on to find the internal road

system complies with DCC 18.113.070(G)(3)(b). For each item, petitioner identifies an alleged shortcoming. Later in the petition for review, petitioner argues:

> "Furthermore, the findings do not address the issues specifically raised by the Applicant regarding concerns for when the roads funnel into each other and of the adequacy of the road system to handle fires moving uphill." Remand Record 59-60.

We are not sure what petitioner means by roads funneling into each other and fires moving uphill. Without further elaboration by petitioner, we agree with the county that simply making such assertions is not sufficient to obligate the county to adopt findings that specifically address road funneling and fires moving uphill as issues in applying DCC 18.113.070(G)(3)(b).

The county adopted findings that explain that the "roads have been located in response to concerns expressed by the Bureau of Land Management and others." Remand Record 17. Observing that the roads minimize fragmentation of public lands, the county found the road system would "be efficient, as that term is used in the DCC." Remand Record 17. Citing two letters from the City of Redmond Fire Department, a letter from the Deschutes County Sheriff and the applicants' Evacuation and Emergency Preparedness Planning for Thornburgh Resort, the county found that the proposal complies with the DCC 18.113.070(G)(3)(b) requirement for safe and efficient internal access. Given the general nature of the standard and the lack of a more developed argument from petitioner, we conclude that the county's findings concerning emergency and safety issues are adequate.

C. Barr Road

We noted in *Gould I*:

> "Petitioner and Thornburgh agree that Barr Road is not a suitable road, either for access or emergency access. Petitioner points out that Thornburgh at one point intended to rely on Barr Road for emergency access. However, the decision specifically states that no permission is given to use or improve Barr Road. * * *" *Gould I*, 54 Or LUBA at 249.

The road that will be extended to serve Phase G of the proposal will have to cross Barr Road to provide access to the most westerly part of Phase G. The county adopted the following findings to reject petitioner's argument that by allowing the applicant to construct a road that would *cross* Barr Road, the county was allowing the applicant to *use* Barr Road:

> "On remand, Gould repeats her earlier arguments on internal access and also complains that one proposed road would cross Barr Road, which would constitute an impermissible 'use' of Barr Road. The Board disagrees, finding that merely crossing Barr Road does not constitute 'using' Barr Road." Remand Record 18.

We understand petitioner to argue the county erred by finding that allowing the applicant to construct a road that will "cross" Barr Road does not mean the county is allowing the applicant to "use" Barr Road. Even if petitioner's view is possible, we believe the county's contrary view on that point is more reasonable. We see no error.

The third assignment of error is denied.

The county's decision is affirmed.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2008-068 on September 11, 2008, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 11th day of September, 2008.

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Exhibit 5: CMP–Court of Appeals Affirms LUBA

04/2009

EXHIBIT 5

FILED: April 22, 2009

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ANNUNZIATA GOULD,

Petitioner,

and

STEVE MUNSON,

Intervenor-Petitioner,

v.

DESCHUTES COUNTY,

Respondent.

Land Use Board of Appeals
2008068
A140139

Argued and submitted on December 01, 2008.

Paul D. Dewey argued the cause and filed the brief for petitioner.

Laurie E. Craghead argued the cause and filed the brief for respondent.

Before Edmonds, Presiding Judge, and Wollheim, Judge, and Sercombe, Judge.*

SERCOMBE, J.

Affirmed.

*Sercombe, J., *vice* Armstrong, J.

SERCOMBE, J.,

Petitioner Gould seeks review of an opinion and order of the Land Use Board of Appeals (LUBA). That opinion affirms Deschutes County's conditional approval of a conceptual master plan (CMP) for a destination resort proposed by Thornburgh Resort Company, LLC (Thornburgh). The county's initial approval of the CMP was appealed to LUBA and remanded for additional findings to better justify satisfaction of an approval standard on required overnight lodging accommodations. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007) (*Gould I*). Petitioner then sought judicial review in this court to obtain a more extensive remand to the county for further findings on standards pertaining to the location of access roads for the development and mitigation of the development's effects on

wildlife. We concluded that LUBA erred in its review of the county's determinations on wildlife impacts mitigation, affirmed on Gould's remaining assignments of error, and remanded the case. Gould v. Deschutes County, 216 Or App 150, 171 P3d 1017 (2007) (*Gould II*).

Following that remand, the county approved the CMP with further findings and new conditions of approval. The county imposed a condition that postponed determination of the consistency of the CMP with its wildlife impact mitigation standards until a later public hearing on a fully developed wildlife mitigation plan. Petitioner appealed the remand decision to LUBA, and LUBA affirmed the county's decision. *Gould v. Deschutes County*, ___ Or LUBA ___ (2008). On review, petitioner makes four assignments of error, all of which challenge LUBA's determinations as to the legal sufficiency of the county's condition and findings postponing review of application of the wildlife mitigation standards. We conclude that LUBA did not err in upholding the county's conditional approval and affirm.

Our earlier opinion frames the dispute:

> "Thornburgh applied to Deschutes County for approval of a conceptual master plan for a destination resort. The resort, to be located on about 1,970 acres of land west of the City of Redmond, is proposed to contain 1,425 dwelling units, including 425 units for overnight accommodations and a 50-room hotel. The resort plans also include three golf courses, two clubhouses, a community center, shops, and meeting and dining facilities. The resort property is bordered on three sides by land owned by the Bureau of Land Management. The land is zoned for exclusive farm use, but designated "destination resort" in an overlay zone.
>
> "State and local law contain special standards for approving destination resort developments. ORS 197.435 to 197.467; OAR 660-015-0000(8) (Statewide Planning Goal 8 (Recreational Needs)); Deschutes County Code (DCC) Chapter 18.113. The county's development code requires a three-step approval process for a destination resort. The first step is consideration and approval of a 'conceptual master plan' (CMP). DCC 18.113.040(A). The code sets out a number of detailed requirements for an application for a CMP, DCC 18.113.050, as well as extensive approval standards for the plan, DCC 18.113.060 and 18.113.070. An applicant for a CMP must submit evidence of compliance with those requirements at a public hearing. Any approval must be based on the record created at that hearing. DCC 18.113.040(A). Once the CMP is approved, it becomes the standard for staff evaluation of a 'final master plan,' the second step in the process. Any 'substantial change' in the CMP must be reviewed and approved using the same process as the original plan approval. DCC 18.113.080. The third approval step for a destination resort is allowance of components or phases of the resort through site plan or land division approvals. DCC 18.113.040 (C).
>
> "Following review of the proposed CMP by a local hearings officer, the board of county commissioners held hearings and approved the proposed CMP with conditions. The primary issue in this case concerns whether the county's adopted findings and conditions on the mitigation of the

> development's effects on fish and wildlife were sufficient to justify that approval.
>
> "The development code requires the CMP application to include a description of the wildlife resources of the site and the effect of the destination resort on those resources, the 'methods employed to mitigate adverse impacts on the resources,' and a 'proposed resource protection plan to ensure that important natural features will be protected and maintained.' DCC 18.113.050(B)(1). The approval criteria include a requirement that the decision-maker 'find from substantial evidence in the record' that 'any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.' DCC 18.113.070(D)."

Gould II, 216 Or App at 153-54.

The original county findings justified approval of the CMP because it was "feasible" to comply with the wildlife impact mitigation standard in light of a memorandum of understanding (MOU) between Thornburgh and the Bureau of Land Management (BLM). The MOU obligated Thornburgh to complete a wildlife mitigation plan, obtain approval of that plan from BLM and the Oregon Department of Fish and Wildlife, and implement the plan throughout the project. The MOU contained specific mitigation measures that could be undertaken as part of the plan. In the initial review, LUBA concluded that the county's finding of feasibility of compliance was sufficient to prove that there would be "no net loss or net degradation of the resource" under the future resource protection plan.

We held that LUBA's decision was unlawful in substance under ORS 197.850(9)(a).[(1)] We reasoned:

> "LUBA's opinion and order was unlawful in substance for the reasons that follow. First, the county's findings were inadequate to establish the necessary and likely content of any wildlife impact mitigation plan. Without knowing the specifics of any required mitigation measures, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be 'completely mitigated' as required by DCC 18.113.070(D). ORS 215.416(9) requires that the county's decision approving the CMP explain 'the justification for the decision based on the criteria, standards and facts set forth' in the decision. The county's decision is inconsistent with ORS 215.416(9) because the decision lacks a sufficient description of the wildlife impact mitigation plan, and justification of that plan based on the standards in DCC 18.113.070(D). Second, that code provision requires that the content of the mitigation plan be based on 'substantial evidence in the record,' not evidence outside the CMP record. In this case, the particulars of the mitigation plan were to be based on a future negotiation, and not a county hearing process. Because LUBA's opinion and order concluded that the county's justification was adequate despite those deficiencies, the board's decision was 'unlawful in substance.'"

Gould II, 216 Or App at 159-60.

Thus, the approval was improper because the mitigation plan was not yet composed and part of the evidentiary record before the county, and therefore the necessary findings about the sufficiency of that plan could not be made. But beyond those deficiencies, we noted that the county used the wrong standard in evaluating the sufficiency of the evidence in the local government record to show consistency with the approval criteria--whether the evidence showed that compliance with the standards was "feasible."

Instead, under *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82 (1984), the evidentiary record of a land use decision must show that compliance with the approval standards was "likely and reasonably certain," without regard to any modification as a result of later administrative review. *Gould II*, 216 Or App at 161 (citing *Meyer*, 67 Or App at 280 n 5). We concluded:

> "Thus, *Meyer* instructs that a proposed land development plan must be specific and certain enough to support findings that the proposal satisfies the applicable approval criteria. If the nature of the development is uncertain, either by omission or because its composition or design is subject to future study and determination, and that uncertainty precludes a necessary conclusion of consistency with the decisional standards, the application should be denied or made more certain by appropriate conditions of approval. Another option is to postpone the decision."

Id.

We also noted in *Gould II* that proof of a mere possibility of compliance, resulting in a finding that attainment of the standard is "feasible," could be relevant to justify postponement of the application of the standard to a future process, but not to extinguish the duty to apply the standard based on "substantial evidence in the record." We stated:

> "In this case, the county's decision did not postpone a determination that the project complies with DCC 18.113.070(D). The county might have, but did not, postpone determination of compliance with that standard until the final master plan approval step and infuse that process with the same participatory rights as those allowed in the CMP approval hearing.[4] Instead, the county implicitly concluded (but did not directly find) that the nature of the wildlife impact mitigation plan was sufficiently certain and probable to allow a present determination of consistency with the approval criterion. LUBA found that the findings were 'adequate' to explain compliance with DCC 18.113.070(D).
>
> "But the governing ordinance requires a *Meyer* determination of whether 'solutions to certain problems * * * are * * * likely and reasonably certain to succeed'--whether the findings and conditions of the conceptual master plan approval adequately support the conclusion that 'any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource' as required by DCC 18.113.070(D). The adopted findings fail to make that case.

> "[4] In the context of this case, a determination that a wildlife impact mitigation plan is 'feasible' might be appropriate to justify postponement of any evaluation of the application of DCC 18.113.070(D) to the plan. The determination of feasibility, however, is not an adequate substitute for an assessment of whether a specific mitigation plan actually complies with the standard."

Gould II, 216 Or App at 162.

On remand, the county approved the CMP and adopted its prior findings, including the finding that "it is feasible to mitigate completely any negative impact on identified fish and wildlife resources so that there is no net loss or net degradation of the resource." The county also found:

> "[T]he Court of Appeals clearly stated that it is proper for the County to defer the presentation of the wildlife mitigation plan to the final master plan process, as long as a feasibility determination has been made with respect to DCC 18.113.070(D). As noted above, based on evidence in the record, the Board found in the 2006 Decision that compliance with DCC 18.113.070(D) is feasible.
>
> "Consistent with the Court of Appeals' decision, the Board adopts condition No. 26 below, which postpones determination of compliance with DCC 18.113.070(D) until the final master plan approval step and infuses that process with the same participatory rights as those allowed in the CMP approval hearing."

The county imposed the following condition:

> "Applicant shall demonstrate compliance with DCC 18.113.070(D) by submitting a wildlife mitigation plan to the County as part of its application for final master plan approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participatory rights as those allowed in the CMP approval hearing."

Petitioner sought review by LUBA of the decision on remand. One of its assignments of error was that the county erred in making a determination of "feasibility" based on inadequate findings and evidence, so that postponement of the decision was not appropriate. Petitioner argued that the "feasibility" showing that was necessary to postpone a determination under DCC 18.113.070(D) meant that Thornburgh was required to show that particular wildlife impact mitigation measures were "likely and reasonably certain to succeed" under *Meyer* and that this court had held that the county earlier failed to make that showing. Thus, petitioner concluded that the postponement was not justified by the county.

On review, LUBA determined that a showing that compliance with approval standards is "likely and reasonably certain" is not necessary in order to impose a condition postponing consideration of those standards to a later hearing and that it was sufficient for the county to postpone with the condition that full public participation be preserved. LUBA held:

> "For the reasons explained above, we conclude that neither *Gould II* nor *Paterson* support petitioner's position that the county must first find that it is 'feasible,' within the meaning of the second principle in *Meyer* [approval of compliance with standards at first stage of development review upon findings that compliance is 'feasible,' meaning 'possible, likely and reasonably certain to succeed'], for the destination resort to comply with DCC 18.113.070(D), before it can defer a decision concerning whether the proposed destination resort complies with DCC 18.113.070(D) to a future public process as part of FMP approval. It follows that petitioner's first assignment of error should be denied."

Gould, ___ Or LUBA at ___. LUBA affirmed the county's deferral of consideration of the application of DCC 18.113.070(D) to the CMP. Petitioner again seeks review.

In her assignments of error, petitioner complains that the board's order is unlawful in substance for three reasons. In her first assignment of error, petitioner argues that LUBA erred in sustaining the county's conditional approval of the CMP because there was not sufficient evidence in the local government record to show compliance with DCC 18.113.070(D). Petitioner claims in her second assignment of error that any conditional approval of the CMP that defers the application of DCC 18.113.070 must be based on a *Meyer* finding of feasibility and that LUBA erred in failing to require that finding. Finally, petitioner's third assignment of error asserts that the county's finding that compliance with DCC 18.113.070 was feasible was not supported by substantial evidence.(2) Because determination of the merits of petitioner's second and third assignments of error helps to frame the analysis of the first assignment of error, we consider them first.

Petitioner first argues that a particular showing of the feasibility of compliance with DCC 18.113.070(D) was necessary in order to postpone consideration of that approval criterion. Petitioner claims that a showing of "feasibility" is necessary to justify postponement of a determination of compliance with an approval standard and that "feasibility" means the justification required by *Meyer* for determining satisfaction of an approval standard--that compliance with the standard is "likely and reasonably certain to succeed." We agree with LUBA that a finding under *Meyer* (that the local government record shows that compliance with DCC 18.113.070(D) is "likely and reasonably certain to succeed") is not necessary to postpone consideration of compliance with the approval standard. Rather, such a finding under *Meyer* would suffice to justify final adjudication of compliance with the approval criterion, as opposed to putting that determination off for another day.

We agree, however, with petitioner's contention that a showing of feasible compliance with the wildlife mitigation standard is necessary to justify the county's decision to postpone consideration of that standard.(3) That showing of "feasibility," however, is not the same as the *Meyer* requirement. *Meyer* itself highlights the distinction between a determination that an approval criterion is met, and a conclusion that satisfaction of a standard is "feasible." In *Meyer*, LUBA had upheld the subdivision approval because the city found compliance with the subdivision approval standards to be "feasible." *Meyer*, 67 Or App at 280 n 5. This court expressly disapproved LUBA's conclusion that a showing of "feasible" or possible compliance with standards suffices to justify a local government land use decision. Instead, it is necessary that the evidentiary record show

that the approval standards were met, without regard to any modification as a result of later administrative review. We noted in *Meyer*:

> "For some reason, LUBA couched its discussion of this question in terms of whether or not the city found the preliminary plan proposed a 'feasible' development project. Petitioners argue that 'feasibility' cannot be the applicable standard because nearly any conceivable project may be feasible from an engineering perspective if enough money is committed to it. It is apparent, however, that by 'feasibility' LUBA means more than feasibility from a technical engineering perspective. It means that substantial evidence supports findings that solutions to certain problems (for example, landslide potential) posed by a project are possible, likely and reasonably certain to succeed."

Id. (citations omitted).

Although we agree that a *Meyer* justification is not necessary to postpone consideration of DCC 18.113.070(D), we do not agree that *no* justification is necessary. Instead, a finding that compliance with DCC 18.113.070(D) is "feasible," in the sense of a possibility of attainment, is necessary in order to justify a decision to forgo denial of the CMP and to approve it with the deferral condition. The county was obliged to justify "approval or denial" of the CMP with a statement of the relevant criteria, the relevant facts and "the justification for the decision based on the criteria, standards and facts set forth." ORS 215.416(9); DCC 22.28.010(A).[4] Petitioner and others appeared at the hearing on the CMP and argued that the application should be denied based on the record created at that hearing. ORS 215.416(9) requires that the county explain its decision that the CMP application should not be denied, but instead should be conditionally allowed. That explanation necessarily must rule out denial as the outcome required by the hearing record. Denial of an application, as opposed to postponement of consideration, is required if satisfaction of the approval criteria is not possible even with additional evidence. Moreover, a necessary justification for a condition of approval of a land use permit is that the condition can be met, that its satisfaction is feasible. For those reasons, a finding of feasibility--that compliance with the approval criterion is possible--explains the reason for not denying the application and imposing the condition of approval under ORS 215.416(9) and DCC 22.28.010 and is required by those policies.

The county made that finding of feasibility in justifying the condition that postponed approval of a wildlife mitigation plan. The county found that "it is feasible to mitigate completely any negative impact on identified fish and wildlife resources so that there is no net loss or net degradation of the resource." That finding is sufficient to explain the reason under ORS 215.416(9) and DCC 22.28.010(A) why the county did not deny the application and instead approved the application with the postponement condition.

Petitioner's third assignment of error is that LUBA erred in affirming the postponement because the necessary feasibility finding was not supported by substantial evidence in the record. Petitioner again argues that the "evidence and findings on remand clearly do not satisfy the *Meyer* test that solutions 'are possible, likely and reasonably certain to succeed' where the record wasn't opened and no new findings were made." We have already addressed the contention that LUBA erred in failing to require a *Meyer* finding of compliance with DCC 18.113.070(D) in order to justify conditional approval of the

CMP. Thus, petitioner's complaint about lack of substantial evidence to support a *Meyer* finding is misplaced. If petitioner is arguing that the county's actual feasibility finding, which *is* necessary to justify conditional approval, is not supported by substantial evidence, that argument is unpersuasive. That finding was supported by substantial evidence in the record for the reasons stated by LUBA in *Gould I*. 54 Or LUBA at 259-60. Thus, the county's decision to conditionally approve the CMP, rather than deny the CMP application for failure to satisfy DCC 18.113.070(D), complied with ORS 215.416 (9) and DCC 22.28.010.

Petitioner's first assignment of error is that LUBA's order was "unlawful in substance because it affirmed the County readoption of the CMP final land use decision where there was not substantial evidence to determine compliance with the mandatory fish and wildlife approval standards." As we interpret that assignment of error, it raises the same issues as those that were raised in the second and third assignments of error.

LUBA did not err in affirming the county's decision on remand.

Affirmed.

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1. ORS 197.850(9) provides the standard of review used by the Court of Appeals in reviewing a LUBA decision:

> "The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds:
>
> "(a) The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal or remand unless the court shall find that substantial rights of the petitioner were prejudiced thereby;
>
> "(b) The order to be unconstitutional; or
>
> "(c) The order is not supported by substantial evidence in the whole record as to facts found by the board under ORS 197.835(2)."

Return to previous location.

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2. Petitioner's fourth assignment of error--that the postponement of consideration of the fish and wildlife standard to a later hearing will not assure that the standard is met--does not merit discussion. The condition plainly requires that petitioner "demonstrate compliance with DCC 18.13.070(D)" and that the county consider and evaluate that demonstration.

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3. Analysis of that issue is made more difficult by the imprecise use of the word "feasible" by the board and the county. The ordinary meaning of "feasible" is "capable of being done, executed, or effected : possible of realization." *Webster's Third New Int'l Dictionary* 831 (unabridged ed 2002). When we speak of a determination that compliance with a standard is "feasible," we mean the ordinary meaning of the word--that attainment of the approval standard is possible-- and not that attainment of the standard is probable or certain.

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4. As relevant herein, ORS 215.416(9) provides:

> "Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

That justification is also required by a county ordinance on land use hearing procedures, DCC 22.28.010. DCC 22.28.010(A) provides that "[a]pproval or denial of a land use action shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based upon the criteria standards and facts set forth."

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Exhibit 6: CMP–Supreme Court Denial

10/2009

EXHIBIT 6

IN THE SUPREME COURT OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,
Petitioner on Review,

and

STEVE MUNSON,
Intervenor-Petitioner,

v.

DESCHUTES COUNTY,
Respondent,
Respondent on Review.

Court of Appeals
A140139

S057541

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

October 7, 2009
DATE

/s/ Paul J. De Muniz
CHIEF JUSTICE

c: Paul D Dewey
Laurie E Craghead

jf/S057541odpr091007

Exhibit 7: CMP–Court of Appeals, Appellate Judgment

12/2009

EXHIBIT 7

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

and

STEVE MUNSON,
Intervenor-Petitioner,

v.

DESCHUTES COUNTY,
Respondent.

Land Use Board of Appeals
2008068

A140139

APPELLATE JUDGMENT and SUPPLEMENTAL JUDGMENT

Argued and submitted on December 1, 2008.

Paul D. Dewey argued the cause and filed the brief for petitioner.

Laurie E. Craghead argued the cause and filed the brief for respondent.

Before Edmonds, Presiding Judge, and Sercombe and Wollheim, Judges.

SERCOMBE, J.

AFFIRMED

DESIGNATION OF PREVAILING PARTY AND AWARD OF COST

Prevailing party: Respondent [X] Costs allowed, payable by Petitioner.

MONEY AWARD

JUDGMENT #1

Creditor(s): Deschutes County
Attorney: Laurie E. Craghead, 1300 NW Wall St Ste 205, Bend OR 97701
Debtor(s): Annunziata Gould
Attorney: Paul D. Dewey
Costs: $419.40
Total Amount: $419.40

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Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: December 10, 2009

COURT OF APPEALS
(seal)

Exhibit 8: FMP–Hearing Officer Approval

10/2008

EXHIBIT 8

DECISION OF THE DESCHUTES COUNTY HEARINGS OFFICER

THORNBURGH RESORT COMPANY FINAL MASTER PLAN

FILE NUMBER: M-07-2; MA-08-6

APPLICANT/ OWNER: Thornburgh Resort Company
PO Box 264
Bend, OR 97702

APPLICANT'S REPRESENTATIVE: Schwabe, Williamson & Wyatt, PC
Peter Livingston, Attorney at Law
1211 SW Fifth Avenue, Suite 1600
Portland, OR 97204

REQUEST: The Applicant requests approval of a Final Master Plan (FMP) and a Modification of Application (MA) for a 1,970-acre Destination Resort located near Cline Buttes, west of Redmond.

STAFF CONTACT: Ruth Herzer, Associate Planner

HEARING DATES: June 17, 2008, continued to July 15, 2008
Record held open for written submittals until September 11, 2008
Final written legal argument submitted September 17, 2008

DECISION ISSUED: October 6, 2008

I. APPLICABLE CRITERIA:

Title 18, Deschutes County Code, County Zoning Ordinance
Chapter 18.113.090, .100, .110

Title 22, Deschutes County Land Use Procedures Ordinance
Title 23, The Deschutes County Comprehensive Plan

CU-05-20 CMP, issued by the Board of County Commissioners on May 11, 2006, and revised on remand from the Oregon Court of Appeals on April 9, 2008

Oregon Revised Statutes (ORS) Chapter 197.435 to 197.467

II. BASIC FINDINGS:

A. **LOCATION:** The subject property consists of approximately 1,970 acres of land located west of Redmond, Oregon, on the south and west portions of a geologic feature known as Cline Buttes. The property is bordered on three sides by BLM land, and is also in close proximity to Eagle Crest, another destination resort development. The subject property is identified on County Assessor's Index Map 15-12, as tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900 and 8000.[1]

[1] The applicant also has leased inholding parcels from the Department of State Lands for buffer and access roads. See August 12, 2008 rebuttal testimony, Ex. F-2.

B. **ZONING:** The subject properties are zoned Exclusive Farm Use (EFU-TRB). The subject properties are also mapped within the Destination Resort (DR) overlay zone for Deschutes County.

C. **SITE DESCRIPTION:** The resort site is located on an approximately 1,970-acre parcel located adjacent to Cline Buttes. This parcel was formerly a large ranch and has a varied terrain which includes rock outcroppings and drainage washes. On the upper portion of the property there are panoramic views of the Cascade Mountains. Vegetation consists of Juniper woodland with many old growth juniper trees. Three dwellings are located on the property along with the associated roads/driveways. Access to these dwellings is via Cline Falls Highway.

D. **SURROUNDING LAND USES:** The site is surrounded by public land. Over seventy five percent of surrounding property is managed by the US Bureau of Land Management (BLM). A central section is managed by the Oregon Department of State Lands (DSL). The applicant has acquired lease rights for the DSL property. Eagle Crest destination resort is located close to the northern portion of the proposed development.

E. **PROPOSAL:** The applicant is requesting Final Master Plan (FMP) approval for the 1,970-acre destination resort. The applicant has amended the Final Master Plan application to include the Wildlife Mitigation Plan as required by the remand decisions from the Court of Appeals and the Land Use Board of Appeals (LUBA).

F. **LAND USE HISTORY:**

CONCEPTUAL MASTER PLAN:
The Conceptual Master Plan application was approved by the Board of County Commissioners (BOCC) on May 11, 2006 (file no. CU-05-20). The decision was appealed to LUBA and portions of that decision were further appealed to the Court of Appeals. *Gould v. Deschutes County*, 54 Or LUBA 205 (*Gould I*), *rev'd and remanded* 216 Or App 150, 171 P3d 1017 (*Gould II.*) These courts remanded the decision back to Deschutes County. The BOCC held a remand hearing on March 19, 2008. On April 9, 2008, the BOCC signed a decision that adopted much of the initial decision, and included additional findings and conditions. (*Gould III.)* The BOCC decision on remand was appealed to LUBA, which affirmed on September 11, 2008 *Gould v. Deschutes County*, __ Or LUBA __ (LUBA No. 2008-068, September 11, 2008), *Court of Appeals review pending* (*Gould IV.)*

FINAL MASTER PLAN:
An application for Final Master Plan approval was submitted on August 1, 2007 (file no. M-07-2). The application was deemed complete and accepted for review on August 31, 2007. On September 18, 2007 the applicant tolled the deadline for a final decision for 45 days. On December 14, 2008, the applicant again tolled the deadline for 45 days. A hearing was scheduled for February 12, 2008, and interested parties were notified of the hearing on January 4, 2008. The February 12, 2008 hearing was canceled at the applicant's request.

In response to the *Gould III* decision, the applicant submitted a Modification of Application on April 21, 2008 which re-started the 150 day clock. This application was

deemed complete on May 21, 2008. The 150th day in which the County has to make a final decision regarding this application is October 20, 2008.

G. **AGENCY COMMENTS:** The Planning Division mailed notice of the proposed land use to the following agencies: Redmond Fire Department, Deschutes County Assessor, Deschutes County Building Division, Deschutes County Environmental Health, Deschutes County Road Department, Property Address Coordinator, Watermaster, Central Electric Co-op, Pacific Power and Light, Qwest, Redmond School District, Department of Environmental Quality, Division of State Lands, Oregon Department of Transportation, Bureau of Land Management, U.S. Forest Service, Oregon Health Division, Deschutes County Senior Transportation Planner, Central Oregon Parks and Recreation and the Oregon Department of Fish and Wildlife.

The June 10, 2008 staff report summarizes the agency responses and they are not reiterated here. To the extent those comments pertain to applicable approval criteria, they are addressed in the findings below.

H. **PUBLIC COMMENTS:** The Planning Division mailed notice to property owners within 750 feet of the subject property and to other interested parties. Many of those parties submitted written testimony or testified at the hearing. Relevant comments are addressed in the findings below.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. INTRODUCTION

As is typical for a complex development proposal, the applicant submitted written evidence at different times, and the opponents' testimony and evidence responds to those waves of evidence. To simplify references to the various materials, the hearings officer offers the following shorthand citations:

The revised conceptual master plan conditions of approval: CMP COA #__. Unless otherwise noted, the COA # corresponds to the numeric listing in this decision.

M 07-2 and supplemental exhibits: M 07-2, Ex. __
MA 08-6 and supplemental exhibits: MA 08-6, Ex. ___
Applicant's August 12, 2008 rebuttal: August 12, 2008 rebuttal, Ex. __
The applicant's Wildlife Mitigation Plan, including addenda: WMP (and page references, if appropriate)
Correspondence is referenced by agency/author and date, e.g., Gould, June 17, 2008 submittal; ODFW 6/17/08 email
The BOCC and appellate decisions: *Gould I, II, III or IV,* as appropriate.

B. PRELIMINARY MATTERS

Paul Dewey, representing Nunzie Gould, raised several issues pertaining to the timeliness, scope and sufficiency of the FMP application. Gould, June 17, 2008 submittal. They include:

1. Applicable Approval Standards. Ms. Gould argues that DCC 18.113.060 and 18.113.070 include approval standards that apply to each step of the destination resort approval process, and not just to the CMP stage. DCC 18.113.060 and .070 include standards for

destination resorts. For the most part, those standards were considered and addressed in the CMP phase, and where appropriate, conditions of approval were imposed to ensure that the applicant would comply with the criteria through subsequent land use reviews. Here, the BOCC deferred compliance with DCC 18.113.070(D), but otherwise found that the applicable approval standards had been satisfied. The hearings officer cannot ignore those findings, because they form the basis for the conditions of approval that must be applied to the FMP. *See* DCC 18.113.040(A) and (B), which explain the relationship between the CMP and FMP processes: The hearings officer concludes that the staff report sets out the applicable review standards for the FMP application.

2. CMP is not a final decision. As noted above, the BOCC's decision on remand has been appealed to the Court of Appeals. Ms. Gould argues that the county cannot rely on a CMP decision that is not yet final to provide review standards for the FMP. The matters at issue in *Gould IV* are rather narrow, in that they challenge the BOCC's decision to defer compliance with DCC 18.113.070(D) to the FMP stage, which would include proceedings and evidence presented to the hearings officer, rather than to the planning director. Ms. Gould argued that the BOCC's deferral must first include a finding that shows that it is feasible for the standard to be met before deferring actual findings of compliance to the latter stage. LUBA rejected that argument, concluding that nothing in the Court of Appeals decision in *Gould II* required a feasibility finding when a determination of compliance was deferred to a later proceeding, infused with the same procedural safeguards offered through the initial proceeding. *Gould IV*, slip op 13. This is the latter proceeding where the issue of compliance with DCC 18.113.070(D) is addressed. The hearings officer finds no impediment to addressing compliance with the standard in this proceeding, as it has not yet been addressed in the CMP process.

In addition, Ms. Gould challenged the BOCC's findings with respect to compliance with overnight lodging ratios, internal access phasing, and road crossings over Barr Road. These issues can be addressed through clarifying findings and conditions in the FMP; they need not wait until the CMP appeals are completed. Even if the hearings officer errs in addressing these issues in this proceeding, it is not clear how that error prevents the applicant and the hearing officer from relying on the findings and conditions of approval in that decision to provide the framework for decision making in this application.

3. Specificity of Submittals and Identification of Modifications. Ms. Gould argues that the FMP evidence is not sufficiently specific to demonstrate (1) that the proposal is consistent with the CMP approval and (2) that the proposal satisfies FMP criteria. In addition, Ms. Gould argues that unless each aspect of the CMP application that is being modified in this decision is identified in this application, the hearings officer has no basis to conclude that the application implements the CMP, and that the FMP is not a substantial modification that requires plenary review as a new CMP.

The hearings officer agrees with Ms. Gould that in most instances, it is much easier to make a determination as to whether the proposal is generally consistent with the initial approval when the applicant identifies the changes that are being made from one phase to the next. With that said, the hearings officer has reviewed the materials that have been cited as being different than the original proposal, and concludes that none of the changes, either alone or cumulatively, are significant enough to warrant either a modification to the FMP application or a new CMP approval.

Turning to the specificity of the evidence, the hearings officer concludes that the evidence provided by the applicant is specific enough to demonstrate that the applicable approval criteria are satisfied.

Other parties submitted testimony and arguments that challenge the need for and appropriateness of the Destination Resort Overlay designation for the site, or request that a decision on the application be postponed until legislative and administrative rule amendments are adopted. The hearings officer concludes that these arguments are outside the scope of these proceedings, and do not provide a basis for delaying or denying the application. With respect to arguments that the applicant needs to demonstrate that the proposal is consistent with the Endangered Species Act (ESA), the hearings official concludes that the ESA is not an approval criterion for FMPs, although it may apply to the applicant's proposal. Therefore, compliance with the ESA is not addressed in this decision.

C. CHAPTER 18.113, DESTINATION RESORTS

1. 18.113.090 Requirements for Final Master Plan

It shall be the responsibility of the applicant to provide a Final Master Plan (FMP) which includes text and graphics explaining and illustrating:

A. The use, location, size and design of all important natural features, open space, buffer areas and common areas;

FINDING: The applicant's exhibits explain and illustrate the use, location, size and design of all important natural features, open space, buffer and common areas. According to the applicant, *"there are no natural streams, watercourses, or wetlands on the property. The site does not contain any significant natural features * * * which define the topography of the area. The site is characterized by bunchgrass. The site contains scattered areas of rock outcroppings. There are no threatened or endangered, or designated Goal 5 habitat areas on the site, as explained in the Wildlife Evaluation approved by the CMP Decision."*

The applicant's exhibits depict approximately 1,293 acres of open space. These are divided into three categories: golf open space (approximately 632 acres,) common open space (approximately 569 acres) and buffer open space (approximately 92 acres.) This buffer is a 50 foot wide strip abutting the perimeter of the resort. The open space totals 66 percent of the gross developed acreage. The evidence refines and clarifies the more general depictions set out in the CMP materials.

The applicant's submittals satisfy DCC 18.113.090(A).

B. The use and general location of all buildings, other than residential dwellings and the proposed density of residential development by location;

FINDING: The applicant submitted a map (MA-08-6 Ex. A3.1) depicting the location of all buildings other than residential dwellings and the proposed density of residential development by location. The applicant states, *"Building associated with the resort infrastructure (including maintenance buildings, shops, substation, pump houses, reservoirs, and sewer treatment building, as well as others) will be located in the areas designated for "infrastructure" on the Master Development Plan. The resort will also include buildings associated with the significant recreational amenities provided. These structures will include: two golf clubhouses, a recreation*

center, a spa and fitness center, a boat club house, game rooms, libraries, a golf learning center, a pro-shop, tennis pro-shop and learning center, swimming pools and associated structures, and sports facilities" Proposed visitor-oriented facilities include restaurants, convention facilities, business center, art gallery and cultural center. The overall residential density of the development will not exceed 0.72 dwelling units per acre (see Burden of Proof, MA-08-6, page 4, and Ex. A-8d).

DCC 18.113.090(B) is satisfied.

C. Preliminary location of all sewer, water, storm drainage and other utility facilities and materials, and specifications and installation methods for water and waste water systems;

FINDING: The applicant submitted revised maps (MA 08-2, Exhibit B2.1 and B1.1) depicting the proposed sewer and water easements, and a map showing where the utilities will be located within the resort roadways. Storm drainage from individual lots will be contained and disposed of on each lot. Treatment and disposal of drainage within roadways will involve the use of treatment swales, retention ponds or other means. DCC 18.113.090(C) is satisfied.

D. Location and widths of all roads, streets, parking, pedestrian ways, equestrian trails and bike paths;

FINDING: The applicant has submitted a map depicting the location of all roads, parking areas and trails located within the resort. All on-site streets will be privately owned and maintained. Accordingly, the streets will comply with the private road standards set out in DCC Title 17. In addition, a significant network of trails is depicted within the resort. These trails generally follow the proposed interior road system. The path system will accommodate pedestrians and bicycles in a multi-use design. These trails will be constructed to the standards set out in DCC Title 17.48.140. DCC 18.113.090(D) is satisfied.

E. Methods to be employed to buffer and mitigate potential adverse impacts on adjacent resource uses and property;

FINDING: Most of the land surrounding the resort is owned by the BLM. The applicant has negotiated a Memo of Understanding (MOU) with the BLM to mitigate offsite impacts that the resort may have on the public lands. The applicant has included the signed MOU dated September 28, 2005. In accordance with this MOU, the applicant has agreed to:

- Participate in all phases of the Cline Buttes Recreation Area planning process
- work with BLM to determine appropriate mitigation measures for the protection of the Tumalo Canal Area of Critical Environmental Concern (Canal ACEC).
- adhere to the specific "Protective Treatment Measures" outlined in MA 08-6, Ex. C3. These measures include additional setbacks from the historic resource, fence construction standards, measures for the screening of the resource, the rehabilitation of existing ATV trails in the area and the curtailment of livestock grazing in the immediate vicinity of the resource. Based upon the agreed mitigation measures, BLM has determined that development of the resort will have "no adverse effect on the historic property."

- construct and maintain cattle guards and/or gates on all access roads and entry points to insure the resort development does not impact livestock grazing.

With respect to abutting DSL property, the applicant has acquired leases to use the property consistent with DSL rules, and the development proposal. DCC 18.113.090(E) is satisfied.

F. Building elevations of visitor-oriented accommodations, recreational facilities and commercial services sufficient to demonstrate the architectural character of the proposed development;

FINDING: The applicant submitted building elevations of visitor-oriented accommodations, recreational facilities and commercial services. *See* M-07-2 Ex. D1, depicting conceptual designs and elevations for the community center, the welcome center, cottages and townhomes. The welcome center will contain real estate sales offices. The community center will include physical fitness and swimming pool facilities. DCC 18.113.090(F) is satisfied.

G. A description of all commercial uses including approximate size and floor area;

FINDING: The applicant has indicated that the commercial activities, including specialty retail and real estate related uses, will include 20,000 square feet and 15,000 square feet, respectively. The applicant grouped dining, eating areas and hotel (and related services) into Commercial Facilities/Visitor Oriented Accommodations. These structures include approximately 75,000 square feet. The commercial uses are likely to include, but are not limited to, the types of uses described in the Amenities Description included in M 07-2 Ex A8d. DCC 18.113.090(G) is satisfied.

H. The location of or distance to any emergency medical facilities and public safety facilities;

FINDING: The applicant provided maps showing the proximity of the Deschutes County Sheriff, Redmond Fire Station Nos 1 and 2, St. Charles Hospital, Redmond Police, and the Cline Falls Fire Station, (see M 07-2, Ex. F1). The applicant also included a Wildfire/Natural Hazard Protection Plan (M 07-2, Ex. F2), a map showing the fire evacuation routes (M 07-2, Ex. F.7.1), and a letter from former County Sheriff Les Stiles, (M 07-2, Ex. F6) finding the evacuation plan is adequate for this stage of the development. In its modified application, the applicant provided a revised fire evacuation map (M 08-6, Ex. F7.1), and a letter from Tim Moor, Deschutes County Rural Fire Protection District #1 (M 08-6, Ex. F8). Finally, the applicant submitted a September 10, 2008 letter from the Redmond Fire and Rescue, stating that the internal roads are adequate to accommodate emergency vehicles.

DCC 18.113.090(H) is satisfied.

I. When a phase includes a residential subdivision, a general layout of the subdivision shall include the number of lots, minimum and maximum lot sizes, and approximate location of roadways shall be included:

FINDING: The CMP site plan shows that the Resort will be developed in seven phases, A through G, (see M 07-2, Ex. G1.1b). A general layout of the residential subdivisions, including the number of lots, minimum and maximum lot sizes, and approximate location of roadways is shown on the Residential Development Plan (M 07-2, Exhibit G1.1b). According to that exhibit,

the resort will consist of 950 lots ranging in size from 3,200 square feet to 97,300 square feet. The applicant proposes to submit a more precise layout for each lot through subsequent subdivision applications. DCC 18.113.090(I) is satisfied.

J. A description of measures taken, with copies of deed restrictions, CC&R's and rental contracts, to implement the measures identified in DCC 18.113 assuring that individually-owned lodging units considered to be overnight lodgings for at least 45 weeks per calendar year through a central reservation and check-in service.

FINDING: The applicant has submitted copies of the deed restrictions, CC&R's and rental contracts (MA 08-6, Ex. H3a, H3b.1, H4.1, and H5b). DCC 18.113.090(J) is satisfied.

K. A description of measures taken, with copies of deed restrictions and a final management plan, to implement the open space management plan required by DCC 18.113.

FINDING: The CMP decision concludes that the applicant's open space proposals are sufficient to maintain more than 50 percent open space through all phases of the development. Condition #14 ensures that the 50 percent open space requirement is maintained in perpetuity. The delineation of open space required by condition 14 (A) is included in the FMP application as Exhibit A1 (Open Space Plan), which is substantially similar to the open space plan submitted as Ex. 9, B-14 of the "Memorandum of Applicant" dated September 25, 2005. In addition, the CC&Rs have been amended in accordance with Condition 14 (B) to provide that land designated as open space on the plat shall be used and maintained as such in perpetuity. The applicant has also prepared deed restrictions requiring the perpetual maintenance of open space areas, as required by Condition 14 (C). DCC 18.113.090(K) is satisfied.

L. The status of all required off-site roadway improvements.

FINDING: A Memorandum of Understanding (MOU) with the Oregon Department of Transportation (ODOT), dated September 25, 2005 (Exhibit 14) requires the applicant to make a substantial contribution of funds towards the construction of a grade separated interchange at the Highway 20/Cook Avenue intersection in Tumalo.[2] The MOU with ODOT also requires the applicant to construct to ODOT standards, a westbound left-turn lane and an eastbound right-turn lane on Highway 126 at Eagle Crest Blvd. at the time ODOT issues an approach permit to Thornburgh. The applicant has obtained a right of way grant from the BLM authorizing a connection between Oregon Highway 126 and the northern resort access point in Section 17. This road has been constructed. The right-of-way grant is included with the application materials as Exhibit 12. The applicant also intends to construct turn lanes on the Cline Falls Highway at the southern resort entrance.

Opponents argue that these proposals are inadequate to assure that necessary road improvements are implemented prior to or concurrent with development. They note that several intersections in the Tumalo area are at or near failure, and that the additional trips on these roads will exacerbate traffic, pedestrian and bicycle safety concerns. They argue that additional traffic studies must be conducted to address changes in road conditions since the application

[2] The applicant is obliged to contribute in proportion to the impact the development will have on nearby roads. At the hearing, the applicant's representative testified that the applicant's intended contribution will likely exceed its proportionate share.

was initially approved in 2006, and additional conditions of approval should be imposed to ensure that the traffic from the proposed development will not significantly impede road capacity and safety.

The applicant responds that its proposal is fully consistent with the MOU, and that its documented actions since the MOU became effective demonstrate the applicant's commitment to minimizing the resort's impact on local transportation systems. However, the applicant emphasizes, it is not obliged to fully remedy existing system deficiencies. The applicant argues that the FMP application provides evidence regarding the status of all required off-site roadway improvements sufficient to satisfy DCC 18.113.090(L). The hearings officer agrees.

M. Methods to be employed for managing automobile traffic demand.

FINDING: The applicant states that the resort will construct the transportation improvements proposed in the Transportation Impact Analysis and approved in the CMP. Applicant will adhere to the requirements of its MOU with ODOT. Internal roadways within the resort development will be developed and constructed consistent with the Access, Circulation and Trail Plan and DCC Title 17. In addition, the hearings officer adopts the findings set out in DCC 18.113.090(L) to support a finding that DCC 18.113.090(M) is satisfied as well.

N. A copy of a WPCF permit issued by DEQ consistent with the requirements of DCC 18.113.070(L).

FINDING: A copy of the Water Pollution Control Facilities Permit (WPCF) has been submitted with the application. (M-07-2, Ex. J1.) DCC 18.133.090(N) is satisfied.

2. 18.113.100 Procedure for Approval of Final Master Plan

A. The FMP shall be submitted in a form approved by the County Planning Director consistent with DCC Title 22 for a development permit. The Planning Director shall review the FMP and if the Planning Director finds that all standards of the CMP have been met, the FMP shall be approved in writing without notice. If approval the FMP involves the exercise of discretion, the FMP shall be treated as a land use action and notice shall be provided in accordance with DCC Title 22;

FINDING: The CMP approval included 37 conditions of approval. Some of the conditions of approval must be satisfied prior to final FMP approval. Others carry through to specific development proposals that must be submitted for each phase of development. In this decision, the hearings officer sets out findings for each condition, concluding whether it applies to FMP approval in the first instance and, if so whether the condition of approval is fully satisfied. For those conditions that cannot be satisfied prior to FMP approval, the hearings officer adopts FMP conditions that are intended to ensure compliance throughout the development process, and in some cases, through the life of the development itself.

1. **Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application.**

FINDING: The FMP substantially conforms to the plan approved in the BOCC's remand decision, and a condition of approval is imposed to maintain conformity throughout the development process.

2. **All development in the resort shall require tentative plat approval through Title 17 of the County Code, the county Subdivision/{Partition Ordinance, and/or Site Plan Review through Title 18 of the County Code, the Subdivision Ordinance.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

3. **Applicant shall provide a signed grant right of way from the US Department of the Interior-Bureau of Land Management for an access easement connection to US Highway 126, prior to submission of a Final Master Plan application.**

FINDING: The applicant has submitted the signed right-of-way agreement which allows the applicant to construct, operate, maintain, and terminate a paved access road and bike path, and 8 inch sewer pipeline, an 8-12 inch water pipeline and two signs on public lands. COA 3 is satisfied.

4. **Subject to US Department of the Interior- Bureau of Land Management (BLM) approval, any secondary emergency ingress/egress across the BLM-owned land or roadways shall be improved to a minimum width of 20 feet with all-weather surface capable of supporting a 60,000-lb. fire vehicle. Emergency secondary resort access roads shall be improved before any Final Plat approval or issuance of a building permit, whichever comes first.**

FINDING: The above mentioned MOU allows for access easements in sections 8, 9, 28, 29 and 30 in T. 15, S. R. 12, E. This allows for both a northern and southern access from Cline Falls Highway. The applicant testified that the northern road has been constructed. To ensure that this condition is satisfied and a southern access road is constructed, it is made a condition of FMP approval.

5. **The developer will design and construct the road system in accordance with Title 17 of the Deschutes County Code (DCC). Road improvement plans shall be approved by the Road Department prior to construction.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

6. **All easements of record or right-of-ways shall be shown on any final plat. Plans shall be approved by the road Department prior to construction.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

7. **All new proposed road names must be reviewed and approved by the Property Address Coordinator prior to final plat approval.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

8. **Plan review and approval of water supply plans for phase 1 will be required by Oregon Department of Human Services-Drinking Water Program (DHS-DWP0 prior to Final Master Plan approval.**

FINDING: The applicant has received approval from the Oregon Department of Human Services for the Final Master Plan for Thornburgh Resort. It has been approved as a "Master Plan" by DHS-DWPO and therefore will not require further review at the different levels of development so long as they work with a registered professional engineer.

9. **Applicant shall designate the location of all utility lines and easements that burden the property on the FMP.**

FINDING: The applicant has submitted a map with the Modification of Application showing the location of all utility lines and easements that currently burden the property.

10. **Applicant shall comply with all applicable requirements of state water law as administered by OWRD for obtaining a state water right permit and shall provide documentation of approval of its application for a water right permit prior to approval of the final master plan. Applicant shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase.**

FINDING: The applicant obtained approval of a water right application. *See* MA 08-6, Ex. K2. It will become final upon a showing that the required mitigation has been provided for. A condition of approval is imposed to require documentation that mitigation and a water rights permit has been issued for each development phase.

11. **At the time of submission for Final Master Plan (FMP) approval, Applicant shall include a written plan for entering into cooperative agreements with owners of existing wells within a two-mile radius of Applicant's wells. The plan shall include a description of how Applicant will provide notice to affected well owners and of the terms and conditions of an option for well owners to enter into a written agreement with Applicant under which Applicant will provide indemnification to well owners in the event of actual well interference as a result of Applicants water use. The plan shall remain in effect for a period of five years following full water development by Applicant.**

FINDING: The applicant has submitted its written plan for entering into cooperative agreements with owners of existing wells within a two-mile radius of the resort. The plan describes how the applicant will provide notice to affected will owners including the terms and conditions under which well owners may enter into an indemnification agreement with Thornburgh in the event of

actual interference as a result of the resort's water use. The specific terms and conditions of the plan were developed in cooperation with County staff and the Oregon Water Resources Department. COA 11 is satisfied.

12. **Commercial, cultural, entertainment or accessory uses provided as part of the destination resort shall be contained within the development and shall not be oriented to public roadways. Commercial, cultural and entertainment uses allowed within the destination resort shall be incidental to the resort itself. As such, these ancillary uses shall be permitted only at a scale suited to serve visitors to the resort. Compliance with this requirement shall also be included as a condition of FMP approval.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

13. **Applicant shall specify all recreational facilities within the proposed resort as part of final master plan submittal.**

FINDING: The applicant has specified the recreational facilities within the proposed resort. They have also shown locations of recreational facilities along with the layout of trail heads, trails and viewpoints. COA 13 is satisfied.

14. **Applicant and it successors shall do the following to ensure that all open space used to assure the 50% open space requirement of Section 18.113.060 (D) (1) is maintained in perpetuity:**

A. **Applicant shall submit for approval, as part of the Final Master Plan, a delineation of the Open Space that is substantially similar to the area shown in the Open Space Plan submitted as Ex. 9, B-14 to the "Memorandum of Applicant, in a response to public comments dated September 28, 2005, Open Space shall be used and maintained as "open space areas" as that term is used in DCC 18.113.030 (E).**

FINDING: The applicant has proposed approximately 1,293 acres of open space (Exhibit A1.1 of MA-08-6). This is divided into three categories, golf open space, common open space and buffer open space. The acreage that is included as open space constitutes approximately 66% of the entire acreage of the resort. The map submitted as part of the Modification of Application is substantially the same as the Open Space map that was approved as part of the CMP. COA 14A is satisfied.

B. **The CC&R's, as modified and submitted to the County on December 20, 2005, shall be further revised such that, Section 3.4 retains the first two sentences, but then the balance of 3.4 is replaced with the following:**

At all times, the Open Space shall be used and maintained as "open space areas." The foregoing sentence is a covenant and equitable servitude, which runs with the land in perpetuity and is for the benefit of all of the Property, each Owner, The Declarant, and the Association, and the Golf Club. All of the foregoing

entities shall have the right to enforce covenant and equitable servitude. This Section 3.4 may not be amended except if approved by affirmative vote of all Owners, the Declarant, the Golf Club and the Association.

FINDING: The applicant has submitted CC&R's which contain the above referenced language. *See* M07-2, Ex. H4. COA 14B is satisfied.

C. All deeds conveying all or any part of the subject property shall include the following restriction:

This property is part of the Thornburgh Resort and is subject to the provisions of the Final Master Plan for Thornburgh Resort and the Declaration of Covenants, Conditions and Restriction of Thornburgh Resort. The final Master Plan and the Declaration contain a delineation of open space areas that shall be maintained as open space areas in perpetuity.

FINDING: The proposed deeds contain this statement. *See* M07-2, Ex. H3a and H5b. A condition of approval is imposed to ensure the standard is met throughout the life of the project.

D. All open space areas shall be clearly delineated and labeled on the Final Plat.

FINDING: The applicant has submitted maps which clearly delineate the open space. As a condition of any approval, the applicant should be required to clearly delineate and label open space areas on subsequent plats. A condition of approval is imposed to ensure this condition is satisfied through full build-out.

E. Any substantial change to the open space approved under this decision will require a new land use permit.

FINDING: The applicant asserts that the open space areas depicted on the FMP site plan is identical to the open space drawings referred to in Condition 14A. If the applicant proposes to revise the open space areas in future development proposals, the open space requirements will be submit to new land use approval. This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

15. Applicant shall obtain an approved Water Pollution Control Facility (WPCF) permit (as described in DCC 18.113.070 (L) prior to application for Final Master Plan.

FINDING: The applicant has obtained the necessary permit from the Department of Environmental Quality. It is included in the application as Exhibit J1 and is permit number 102900. COA 15 is satisfied.

16. All temporary structures shall be limited to a maximum of 18 months on the resort site.

FINDING: The FMP proposal does not propose temporary structures. This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

17. **All development within the proposed resort shall meet all fire protection requirements of the Redmond Fire Department. Fire protection requirements shall include all minimum emergency ingress/egress roadway improvements.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

18. **No development shall be allowed on slopes of 25% or more on the site.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

19. **Applicant shall implement a "Wildfire/Natural hazard Protection Plan" for the resort, as identified in Ex. 15, B-29 of the burden of proof statement. Prior to approval of the Final Master Plan and each subdivision and site plan, Applicant shall coordinate its evacuation plans through that development phase with the Deschutes County Sheriff's Office and the Redmond Fire Department. At the same time, Applicant shall also coordinate its plans for the movement of evacuees over major transportation routes with the Oregon State Police and the Oregon Department of Transportation.**

FINDING: The applicant has submitted a revised fire evacuation plan which shows the fire evacuation routes during the various phases of the development. A letter from former Deschutes County Sheriff, Les Stiles, and a letter from Tim Moor, Fire Chief of the Deschutes County Rural Fire Protection District #1 is included, stating the evacuation plan is adequate for this stage of the development. A condition of approval is imposed to ensure that it is addressed in each development phase.

20. **The cumulative density of the development at the end of any phase shall not exceed a maximum density of 0.72 dwelling units per acre (including residential dwelling units and excluding visitor-oriented overnight lodging).**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

21. **Each phase of the development shall be constructed such that the number of overnight lodging units meets the 150 overnight lodging unit and 2:1 ratio of individually owned units to overnight lodging unit standards set out in DCC 18.113.060 (A) (1) and 18.113.060 (D) (2). Individually owned units shall be considered visitor oriented lodging if they are available for overnight rental use by the general public for at least 45 weeks per calendar year through one or more central reservation and check-in services. As required by ORS 197.445 (4) (b) (B), at least 50 units of overnight lodging must be constructed in the first phase of development, prior to the closure of sale of individual lots or units.**

In addition to complying with the specific requirements of DCC 18.113.070 (U), 1-5, Applicant, its successors and assigns, shall at all times maintain

(1) a registry of the individually owned units subject to deed restriction under DCC 18.113.070 (U) (2), requiring they be available for overnight lodging purposes; (2) an office in a location reasonable convenient to resort visitors as a reservation and cheek-in facility at the resort; and (3) a separate telephone reservation line and website in the name of "Thornburgh Resort", to be used by members of the public to make reservations. As an alternative to or in addition to (3), Applicant may enter into an agreement with a firm (booking agent) that specializes in the rental of time-sharing of resort property, providing that Applicant will share the information in the registry required by (1) and cooperate with the booking agent to solicit reservations for available overnight lodging at the resort. If Applicant contracts with a booking agent, Applicant and the booking agent shall cooperate to ensure compliance with the requirements of DCC 18.113.070 (U) (5), by filing a report on January 1 of each year with the Deschutes County Planning Division.

FINDING: The applicant has agreed to comply with the above stated agreement at each phase of development. The applicant agrees to meet the 150 overnight lodging unit requirement in the first phase, as required by DCC 18.113.06 (A)(1). The applicant will meet the 2:1 ratio requirement of DCC 18.113.06 (D)(2).

22. **Applicant shall submit final covenants, conditions and restrictions to the county prior to Final Master Plan approval. The final covenants, conditions and restrictions adopted by the developer and amendments thereto shall conform in all material respects to this decision and the requirements of the DCC.**

FINDING: The applicant has submitted covenants, conditions and restrictions. The CC&R's comply with the requirements of the Deschutes County Code. A condition of approval is imposed to require conformance with the FMP CC&Rs through the life of this development.

23. **No permission to use or improve Barr Road as access to the Resort is given or implied by this decision.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

24. **Applicant shall complete annexation of the property in any area of development into Deschutes County Rural Fire Protection District No 1 before commencing combustible construction in the area.**

FINDING: The applicant has submitted a letter from the Deschutes County Rural Fire Protection District No 1 stating that the property has been annexed to the district.

25. **Applicant shall submit a detailed erosion control plan with the first Tentative Plat or Site plan, whichever comes first.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

26. **Lot size, width (frontage), coverage, off-street parking and setbacks, including solar setbacks, are permitted as described in Applicant's Exhibit 8, B-24a in the Burden of Proof document, subject to review during the subdivision approval process to confirm that there will be safe vehicle access to each lot. Compliance with the dimensional standards shall be confirmed during subdivision approval for each development phase. All multi-family units, commercial structures, and other resort facilities are exempted from meeting the solar setback standards.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

27. **Road width shall be consistent with the requirements set forth in the County's subdivision ordinance. DCC Chapter 17.36.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

28. **Applicant shall demonstrate compliance with DCC 18.113.070 (D) by submitting a wildlife mitigation plan to the County as part of its application for Final Master Plan approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participatory rights as those allowed in the CMP approval hearing.**

FINDING: This condition was remanded to the BOCC. The *Gould III* decision includes this as COA #38. It is discussed below.

29. **Applicant shall abide at all times with the MOU with ODOT, regarding required improvements and contributions to improvements on ODOT administered roadways (Agreement Number 22759, dated 10/10/05).**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

30. **Applicant shall submit a detailed traffic circulation plan, delineating resort access roads, resort internal circulation roads and resort secondary emergency ingress/egress roads, prior to Final Master Plan approval.**

FINDING: The applicant has submitted the required plan. COA 30 is satisfied.

31. **All exterior lighting must comply with the Deschutes County Covered Outdoor Lighting Ordinance per Section 15.10 of Title 15 of the DCC.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

32. **No permission to install helicopter landing zone (helipad) at the Resort is given or implied by this decision.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

33. **The Resort shall, in the first phase, provide for the following:**

A. **At least 150 separate rentable units for visitor-oriented lodging.**

B. **Visitor-oriented eating establishments for at least 100 persons 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 in DCC 10.113.060 (A) (1) and (2) shall be at least $2,000,000 (in 1984 dollars).**

D. **At least $2,000,000 (in 1984 dollars) shall be spent on developed residential 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.**

FINDING: This condition applies through Phase A. Accordingly, it is made a condition of FMP approval.

34. **Where construction disturbs native vegetation in open space areas that are to be retained in a substantially natural condition, Applicant shall restore the native vegetation. This requirement shall not apply to land that is improved for recreational uses, such as golf courses, hiking or nature trails or equestrian or bicycle paths.**

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

35. **The contract with the owners of units that will be used for overnight lodging by the general public shall contain language to the following effect: "[Unit Owner] shall make the unit available to [Thornburgh Resort/booking agent] for overnight rental use by the general public at least 45 weeks per calendar year through a central reservation and check-in service."**

FINDING: The revised Rental Management Agreement between Thornburgh Resort Company and the owners of overnight lodging units contain the required wording. A condition of approval is imposed to ensure that it is implemented through the life of the project.

36. **Applicant shall coordinate with the Sheriff's Office and its designated representative to address all public safety needs associated with the resort and the development process.**

FINDING: A letter from the Deschutes County Sheriff's Office has been submitted at attachment F6. The applicant has coordinated public safety planning for the resort with the Sheriff's Office through the "Public Safety Protection Report for Thornburgh Destination Resort" attached as Exhibit F5.

37. **(COA #36 in *Gould III*) Applicant shall modify the Overnight and Density Calculations chart presented to the Board at the appeal hearing on December 20, 2005 by replacing it with the Overnight and Density Calculations chart included at page 25 in Applicant's final legal argument, dated January 3, 2006, as shown below. The 75 units of overnight lodging shown in the December 20, 2005 Overnight and Density Calculations table to be developed in Phase C will actually be developed in the Phase B, for a total of 150 units in Phase B. The Overnight and Density Calculations table will be corrected to show the 50 hotel units will be developed in Phase D, where the Phasing Plan, attached to the Memorandum of Applicant in Response to Public comments, Ex. 13, Revised B-1.8, already shows the hotel will be developed. Additionally the legend in the Phasing Plan will be corrected to show hotel and residential overnight lodging uses in Phase D. Applicant shall present the corrected Phasing Plan and Overnight and Density Calculations chart, consistent with this condition, during the Final Master Plan approval process.**

FINDING: The corrected Phasing Plan and Overnight and Density Calculations chart has been submitted as part of the FMP application. COA 37 is satisfied.

38. **(COA #37 on remand). Applicant shall demonstrate compliance with DCC 18.113.070 (D) by submitting a wildlife mitigation plan to the County as part of its application for Final Master Plan approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participatory rights as those allowed in the CMP approval hearing.**

FINDING: In its CMP proposal, the applicant provided evidence regarding existing habitat, the types of animal species that inhabit the site, and provided documents from ODFW and the BLM that asserted that a plan to address fish and wildlife impacts could be crafted and implemented to the satisfaction of those agencies. The county relied on that evidence and testimony to conclude that DCC 18.113.070(D) could be satisfied with conditions that required the applicant to work with the state and federal agencies to provide appropriate mitigation, primarily on federal land. LUBA affirmed that conclusion in *Gould I*.

In *Gould II*, the Court of Appeals disagreed with the county and LUBA. The court noted that the county had relied on evidence that the applicant, its experts, the BLM and ODFW would work together to craft a plan to mitigate the impact of the development on fish and wildlife, but that the evidence showed that some of the mitigation alternatives proposed by the application were not acceptable to those agencies. The court held that the county's findings (1) were inadequate to describe what was needed to satisfy DCC 18.113.070(D); (2) lacked a sufficient description of the applicant's wildlife plan; and (3) lacked an explanation as to why the county believed DCC 18.113.070(D) had been met. Further, the court found that the county could not rely on conditions to satisfy the standard, because the particulars were based on a future negotiation among the agencies and applicant, and not a county hearing process. In the absence of findings explaining the applicant's proposal, and how conditions could be imposed to ensure that the mitigation measures were likely and reasonably certain to succeed, the court found that the conditions alone did not provide the opportunity for public review and comment required by the statutes and case law.

In its decision on remand, the BOCC deferred a finding of compliance with this standard to the FMP. *Gould III,* Condition 37, page 10. Thus, the meaning of the standard, and the sufficiency of the evidence to address it was the major focus of the parties in the FMP proceedings. The applicant provided a wildlife mitigation plan that had been reviewed by the BLM and ODFW, and both agencies endorse the applicant's identification of likely impacts on fish and wildlife, and conclude that the applicant's plan addresses the impact of the development on those resources such that the "no net loss" standard of DCC 18.113.070(D) is satisfied. The opponents challenge the approach used by the applicant to identify resources, the estimate impact the resort development will have on fish and wildlife, and the adequacy of the plan to mitigate the impacts on the identified resources.

1. What is required to satisfy DCC 18.113.090(D)?

The applicant argues that the standard requires a general assessment of the habitat on the site, the species that exist within those habitats, an identification of the impact of the development on the habitats and species, and a plan to ensure that fish and wildlife resources overall will not be degraded or lost. The applicant concedes that for some species, development on the site will eliminate or degrade their habitat, but argues that its proposal, overall, will provide habitat for new species, will improve terrestrial habitat in the area, and will protect fish species. The applicant notes that it has proposed to improve habitat on local public lands, will contribute financially to programs to measure and improve habitat quality and will participate in longitudinal studies to evaluate the effectiveness of the mitigation over time. Those proposals have been reviewed and accepted by the BLM and ODFW. The applicant argues that conditions can be imposed to require additional or alternative mitigation if the proposed mitigation is not sufficient to protect fish and wildlife.

The opponents argue that this standard requires a much more specific analysis of the animal species on the site, and a similarly specific program to mitigate the development's impact on those species. The opponents argue that the applicant's plan is seriously deficient because it relies on one on-site survey, and studies addressing property to the north (Eagle Crest III) and superficial assumptions about development on indicator species to identify the animals on the site and how the development will affect them. In addition, the opponents argue that the applicant's proposal is not sufficient to *completely* mitigate those impacts, in part because the final location for off-site mitigation has not yet been identified, and in part because it assumes public agencies and private land owners will commit to implementing the plan over time. Finally, opponents argue that the applicant's commitment to remedy deficiencies in the plan is not credible because the applicant and the agencies have yet to adopt a methodology to evaluate and quantify success/failure.

While the "no net loss" mitigation standard is difficult to quantify, given the range of species that could occupy the site and be affected by development, the hearings officer concludes that it does not require the on-site specificity and review that opponents suggest is necessary. The standard requires an analysis of species on the site, the likely impacts of development, and the applicant's plan to address those impacts. It does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio. Such a requirement would be

difficult, if not impossible to satisfy. In addition, to the extent that conditions of approval are necessary to ensure that the plan is implemented as proposed, conditions can provide both accountability and flexibility to address changes in habitat needs and approaches to mitigation over time.

Having explained what DCC 18.113.070(D) requires, the question turns to whether the applicant's evidence demonstrates that the standard is satisfied. The applicant's wildlife mitigation plan, the mitigation and monitoring plan and the proposed conditions of approval are adequate to demonstrate that the proposal is likely and reasonably certain to succeed.

2. The applicant's wildlife mitigation plan[3]

The site includes approximately 2,000 acres. Of that total, 426 acres will be devoted to residential development, 316 acres will be devoted to resort facilities, including roads, 589 acres will be developed with golf courses, and 45 acres will be developed with artificial watercourses, streams and lakes. According to the applicant, approximately 897 acres of native vegetation will be retained in yards, buffer areas, common areas, and golf course "rough" areas.

The applicant's wildlife expert identified three major existing habitat areas on the site: juniper woodland (1,715 acres); sagebrush steppe (215 acres) and juniper woodland/outcrop (35 acres.) There are no existing wetlands, water resources, or riparian areas on the site. Further, no threatened, endangered, or sensitive species (plant or animal) or habitats have been identified on site. While the site has been identified as a deer and elk winter range by the BLM, the county has not included the site in its Goal 5 winter range habitat inventory.

After development, the applicant estimates that 615 acres will be managed grassland, juniper shrub-steppe, or golf course. This includes approximately 159 acres of retained native vegetation, of which 61 acres will be temporarily disturbed and need re-vegetation and/or restoration. The remaining 98 acres will include mature juniper and native shrubs and herbs. The applicant proposes to improve habitat by removing invasive plant species and young junipers. Habitat within the residential areas will be maintained on approximately 170 acres, of which 43 acres will need re-vegetation and/or restoration. The remaining 127 acres of native vegetation will have young junipers removed and understory vegetation, consistent with "Fire-wise community" standards.[4] Approximately 568 acres will be retained in native condition, of which approximately 69 acres will need re-vegetation and restoration. The 69 acres will be restored by planting native grasses, herbs, shrubs and trees.

The applicant evaluated the impact of resort development on wildlife resources by using a modified Habitat Evaluation Procedures (HEP) analysis. The HEP analysis was developed by the US Fish and Wildlife Service in the early 1990s, and Central Oregon wildlife management

[3] The summary of the applicant's wildlife plan is based on MA 08-6, Ex. 12, the applicant's August 12, 2008 rebuttal evidence, and supplemental evidence provided by Tetra Tech, the applicant's wildlife consultant.

[4] "Fire-wise communities" are developments that conform to special fire suppression avoidance standards. According to the applicant, conformance with Fire-wise standards will also improve habitat quality by removing invasive underbrush.

agencies have used it to evaluate development impacts since 1993. The applicant explains the HEP analysis as follows:

> "HEP is an accounting method, in which the value of each habitat type for each of a series of evaluation species is expressed in terms of habitat units (HU). These are calculated as the number of acres of that habitat multiplied by an index of its quality, expressed as a number between 0 and 1, which is termed the Habitat Suitability Index (HSI). One HU is the equivalent of one acre of the best habitat available for a species. Two acres of habitat half as good would also equal one HU, and so on. In the HEP analysis, to make the process manageable, an 'evaluation species' is chosen to represent a number of species with similar lifestyles and habitat requirements." MA 08-6, Ex. 12 (L1), page 4 and August 12, 2008 rebuttal, Ex. B-10.

The applicant relied on a 2004 modified HEP analysis for Eagle Crest III (which is located to the north of the subject property) to estimate HSIs for baseline habitat quality and post-development habitat quality.[5] The applicant's experts coordinated with ODFW to identify the evaluation species for this site, which include: northern flicker, American kestrel, red-tailed hawk, mountain bluebird, small mammals (generic), western fence lizard, and mule deer. The modified HEP results were used to estimate the off-site acreage that would be required to fully mitigate development impacts and result in "no net loss" of the wildlife habitat on the site and within one mile of the site boundaries. The plan includes mitigation for the impact of increased traffic volumes to wildlife movement on Cline Falls Highway. A table summarizing the impacts is set out in MA 08-6, Ex. 12 (L1), page 6.

According to the HEP analysis, 8,474 off-site HUs would be needed to mitigate the impacts of development, resulting in an estimated $883,190.00 investment in off-site mitigation. The HUs would be located on public land managed by the BLM and would be established on an incremental basis to correspond with the phased development of the resort.

The applicant has agreed to restore 4,501 acres of juniper woodlands in the Cline Buttes sub-area to mitigate the loss of the 8,474 HUs.[6] The specific BLM land on which the restoration is subject to the adoption of the Cline Buttes Recreation Area Plan (CBRAP), and has yet to be finally identified. However, the applicant and BLM have identified three areas where wildlife and habitat restoration is likely to occur under the CBRAP: the Canyons Region, the Deep Canyons Region, and the Maston Allotment. Restoration includes weed management, vegetation enhancement, reduction of unauthorized off-road motor vehicle use, creation of wildlife water sources ("guzzlers") and traffic speed monitoring devices. The specific activities and monitoring program for the BLM land are identified in an "Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project" (Tetra Tech, August 2008), included in the applicant's August 12, 2008 rebuttal, Ex. B3.

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[5] The applicant's use of the Eagle Crest III HEP was suggested by ODFW staff.

[6] The applicant's modified HEP analysis concluded that approximately 4498.7 acres would be needed for off-site enhancement to satisfy the 8,474 HU requirement. Modified HEP analysis, August 5, 2008, page 8.

If, at the time of development, insufficient off-site areas are not available, the applicant proposes to provide funding for implementing mitigation in a dedicated fund for use by ODFW to use to improve or purchase mitigation sites within Deschutes County. After the mitigation is established, the applicant will provide continuing funding for the lifetime of the development through a real estate transfer fee.

3. The applicant's fish mitigation plan

The applicant obtained 2,129 acre-feet of water rights to support the proposed development year-round. The development's water supply is to be obtained from six wells that are proposed to be drilled on the property. The water rights were granted upon a finding that the applicant was responsible for providing 1,356 acre-feet of mitigation water.[7] The applicant proposes to obtain 836 acre-feet from Deep Canyon Creek irrigation rights that were granted to Big Falls Ranch. The remaining mitigation water is to be obtained from the Central Oregon Irrigation District (COID).

With respect to the Deep Canyon Creek water, irrigation rights involve water flowing for six months of the year (mid-April through mid-October). Based on average daily consumption for the resort, the applicant asserts that the proposal will result in more mitigation water flowing into the creek during the summer months, that the average daily consumption of water from the development. To address water temperatures that affect salmonid habitat, the applicant has entered into an agreement with Big Falls Ranch to remove two diversion dams from the creek. As a result, water will flow directly from cold water springs and seeps into the creek, rather than be impounded above ground.[8] In addition, the applicant proposes to abandon three on-site wells that pump approximately 3.65 acre-feet from the aquifer, and provide for thermal modeling on Whychus Creek. In the event the hearings officer concludes that the proposal will likely increase the creek water temperatures, the applicant provided evidence that it can purchase mitigation credits for 106 acre-feet of water from Three Sisters Irrigation District to increase instream water flows, and thereby mitigate the impact. The applicant asserts that the latter three measures have not been required by OWRD or ODFW, but are in addition to the required mitigation.

4. The Parties' Evidence

The applicant argues that the combination of on-site and off-site mitigation is sufficient to demonstrate that the proposal satisfies DCC 18.113.070(D), and continued compliance can be assured by the adoption of conditions that require continued monitoring of the habitat in the selected areas.

The opponents disagree. The opponents' evidence regarding impacts to wildlife can be reduced to three main points: (1) the applicant's use of the HEP analysis and choice of indicator species are inadequate to identify all of the impacts of development on fish and wildlife; (2) the applicant

[7] The Oregon Water Resources Department (OWRD) calculated the needed mitigation water based on a 60 percent consumptive use, meaning that 60 percent of the resort water supply will not be returned to the aquifer through golf course irrigation or other surface applications. The opponents dispute that ORWD used the appropriate consumption rate.

[8] The parties agree that surface water tends to be warmer than aquifer water during the summer months.

improperly identified the extent of impact of the proposed wells and underestimated its severity by assuming only 60 percent of the water used for the development would be consumed; and (3) the applicant has not adequately demonstrated that the proposed mitigation will compensate for the lost habitat or be successful in the long run. Further, the opponents argue that other alternatives, such as the purchase of impacted land and full restoration, are preferable to the more limited restoration efforts proposed for BLM land.

a. Indicator Species/HEP analysis v. Extensive On-site Ground Surveys

The opponents point out that the applicant heavily relied on species survey data from Eagle Crest III and on general habitat investigations performed in the area that were then evaluated in a modified HEP analysis. The opponents argue that these studies and the applicant's indicator species are inadequate to account for and address the complete biota on the site. They also contend that the applicant has failed to demonstrate that the modified HEP analysis adequately accounts for the impact of development on the site, suggesting that a full HEP analysis is the minimum necessary to address habitat impacts. They argue that the applicant's superficial survey is inadequate to provide essential baseline data from which to measure the success or failure of the applicant's mitigation plan. The opponents argue that at the very least, the applicant must provide a two-year survey of plant and animal specials, noting that a multi-year survey better accounts for the vast fluctuations in animal populations that can occur due to site conditions, weather and disease. Finally, opponents argue that even if the indicator species can adequately replicate habitat needs for a wider population, the applicant's studies do not address the cumulative impact of development in the Tumalo area.

The applicant concedes that indicator species will not fully account for all of the many and varied species on the site and the effect the development will have on them. However, the applicant argues that such specificity is not needed to satisfy DCC 18.113.070(D). The applicant asserts that its analysis has been subject to extensive review and comment from ODFW, and is more extensive than plans for other destination resort developments in the area. The applicant argues that its assumptions are reasonable, and the modified HEP analysis adequately quantifies the impacts, and provides a workable methodology to compensate for the impact. With respect to cumulative impacts, the applicant argues that it considered and addressed reasonably foreseeable cumulative impacts. *See* August 12, 2008 rebuttal, Ex. B-14. The hearings officer agrees.

b. Adequacy of Fish Mitigation Plan

Opponents argue (1) the Deep Canyon Creek water is already pledged to mitigate development on another property or has been abandoned;[9] (2) the amount of mitigation water required by

[9] Opponents argue that the acquisition of water rights is not evidence that water will actually be returned to the rivers and streams as alleged. According to opponents, water rights are merely paper representations of water quantities and do not mean that the cool water needed to maintain instream temperatures will be available. The hearings officer understands the limitations of the water rights process, but concludes that under Oregon water law, the only way to adequately account for water in the streams is through the ORWD administration. Therefore, the hearings officer concludes that evidence

OWRD is inadequate to assure that surface water flows will be maintained year-round, as fish need more water early in the spring season; and (3) the use of surface water will degrade existing conditions by taking cold water out of the aquifer where it seeps into Whychus Creek and replacing it with warmer surface water.

The applicant acknowledges that the proposal require the development of wells on the property that will affect basin water flows. However, the applicant argues that it has addressed those impacts by purchasing mitigation credits from COID, and by acquiring irrigation water rights that will return water to Deep Canyon Creek. They argue that both OWRD and ODFW have reviewed its proposal and have agreed that the proposal mitigates both water quantity and quality that will be removed from the aquifer due to the resort development. The applicant supplied a copy of an agreement between the owners of Deep Falls Ranch and the Daniels Group showing those owners have agreed to the removal of two dams that diverted flow from Deep Canyon Creek.[10] In response to testimony from opponents that the proposed mitigation does not adequately address increases in water temperature in Whychus Creek, the applicant argues its proposal will have little or no impact on water temperatures on the creek. Even if water temperatures in Whychus Creek do increase incrementally, the applicant asserts that the increase can be addressed by requiring the applicant to fund a water conservation project sponsored by the Three Sisters Irrigation District to return 106 acre-feet of water to instream uses.

The OWRD mitigation requirement adequately addresses water quantity; it does not fully address water habitat quality. Its assumptions regarding the benefits of replacing more water during the irrigation season than is consumed on an average daily basis by the resort does not account for the higher water consumption that will likely occur during the summer months. Therefore, the hearings officer concludes that the additional mitigation offered through the Three Sisters Irrigation District restoration program is necessary to assure that water temperatures in Whychus Creek are not affected by the proposed development.

c. Adequacy and Likely Success of the Proposed Mitigation

The opponents generally dispute that the applicant's proposed mitigation plan will result in no net loss to fish and wildlife resources. The opponents argue that the plan assumes that terrestrial animals will adapt to the built environment on the site, or will be attracted to the improved habitat that is being provided off-site. The opponents argue that such assumptions do not take into account the fragmentation of habitat, or address species recovery from the changes in the habitat. Further, opponents argue that the proposal does little to address or combat the problem of invasive species, such as starlings, who are attracted to the environment

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regarding the location and volume of water rights is substantial evidence as to the likely location and volume of water in the identified streams.

[10] The Daniels Group owns a former strip mine that has recently been proposed to be redeveloped for residential uses. It is this entity that the opponents assert owns or has options to the Deep Canyon Creek water. However, the opponents have not provided evidence as to the nature and extent of the conflict. The hearings officer concludes there is substantial evidence in the record to support a finding that the applicant has the authority to use water from Deep Canyon Creek, and to remove dams that would impede flows from underground seeps and springs.

that will be developed on the property, and will compete for the limited habitat that remains on the site. With respect to long term habitat improvements, the opponents argue that the applicant is unreasonably optimistic about cheatgrass eradication, and CC&Rs that limit domestic animals to indoor or leashed pets. Finally, the opponents argue that the applicant's mitigation on BLM land does not adequately account for competing BLM priorities, such as grazing, off-road vehicle recreational use, that undermine the restorative goals of the mitigation plan.

The applicant responds that the HEP analysis considered habitat degradation, including habitat fragmentation and the introduction of new non-native species. As a result, the applicant proposes mitigation activities on approximately 4,500 acres to compensate for the loss of 1,000 acres of habitat on its site. Further, the applicant asserts that while it is not certain that the "if you build it, they will come" habitat restoration efforts will be completely effective, the academic evidence supports a finding that habitat improvements will attract species that are being squeezed out by development elsewhere. With respect to the success of its cheatgrass eradication program and competing BLM priorities, the applicant argues that it does not expect that cheatgrass will be fully eradicated, but has proposed a series of measures to minimize its growth and spread, including periodic chemical applications and the introduction of more acceptable competing plant species. In addition, the applicant concedes that the BLM may adopt programs that will cause the mitigation to be less successful than if the mitigation sites were completely off-limits to those competing uses, but argues that there is substantial evidence to support its reliance on the identification of special habitat restoration areas to compensate for those competing activities, and on its mitigation efforts within those areas, to compensate for the loss of habitat on this site. The applicant also notes that it has accounted for circumstances where the BLM mitigation land is not available, by funding replacement mitigation programs through ODFW.

While the applicant's mitigation plan does rely on its program to make general habitat improvements on BLM land, it also acknowledges that BLM management priorities may reduce the success of those efforts. Its plan includes monitoring and alternatives to provide replacement mitigation in the event the anticipated BLM improvements are not successful. The hearings officer concludes that the applicant has demonstrated that the mitigation plan, as conditioned is reasonably likely to success.

d. Alternative Mitigation Plans

The applicant's expert explained that the proposed mitigation is consistent with current wildlife habitat restoration practices, and that the opponents' alternatives, while potentially viable, are no more restorative than the applicant's proposal. The hearings officer has concluded that its plan is adequate to ensure that the impact of the development on fish and wildlife habitats results in no net loss. Therefore, the applicant need not address or consider alternatives that would work equally well or better.

For the reasons set forth above, the hearings officer concludes that, as conditioned, DCC 18.113.070(D) is satisfied.

V. DECISION:

For the reasons set out above, the hearings officer concludes that the proposal satisfies all applicable criteria, or that it is feasible to satisfy the criteria through the implementation of conditions of approval. Accordingly, M 07-2/MA 08-6 are approved, subject to the following conditions. To provide consistency among the decisions, the hearings officer retains the numerical listings included in the BOCC's CMP decision, noting by the word "satisfied" those conditions that no longer apply.

1. Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application.

2. All development in the resort shall require tentative plat approval through Title 17 of the County Code, the county Subdivision/Partition Ordinance, and/or Site Plan Review through Title 18 of the County Code, the Subdivision Ordinance.

3. Satisfied.

4. Subject to US Department of the Interior-Bureau of Land Management (BLM) approval, any secondary emergency ingress/egress across the BLM-owned land or roadways shall be improved to a minimum width of 20 feet with all-weather surface capable of supporting a 60,000-lb. fire vehicle. 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 and construct the road system in accordance with DCC Title 17. Road improvement plans shall be approved by the Road Department prior to construction.

6. All easements of record or right-of-ways shall be shown on any final plat. Plans shall be approved by the Road Department prior to construction.

7. All new proposed road names must be reviewed and approved by the Property Address Coordinator prior to final plat approval.

8. Satisfied.

9. Satisfied.

10. Applicant shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase.

11. Satisfied.

12. Commercial, cultural, entertainment or accessory uses provided as part of the destination resort shall be contained within the development and shall not be oriented to public roadways. Commercial, cultural and entertainment uses allowed within the destination resort shall be incidental to the resort itself. As such, these ancillary uses shall be permitted only at a scale suited to serve

visitors to the resort. Compliance with this requirement shall also be included as a condition of FMP approval.

13. Satisfied.

14. Applicant and it successors shall do the following to ensure that all open space used to assure the 50% open space requirement of Section 18.113.060 (D) (1) is maintained in perpetuity:

    A. Satisfied.

    B. Satisfied.

    C. All deeds conveying all or any part of the subject property shall include the following restriction:

    This property is part of the Thornburgh Resort and is subject to the provisions of the Final Master Plan for Thornburgh Resort and the Declaration of Covenants, Conditions and Restriction of Thornburgh Resort. The final Master Plan and the Declaration contain a delineation of open space areas that shall be maintained as open space areas in perpetuity.

    D. All open space areas shall be clearly delineated and labeled on the Final Plat.

    E. Any substantial change to the open space approved under this decision will require a new land use permit.

15. Satisfied.

16. All temporary structures shall be limited to a maximum of 18 months on the resort site.

17. All development within the proposed resort shall meet all fire protection requirements of the Redmond Fire Department. Fire protection requirements shall include all minimum emergency ingress/egress roadway improvements.

18. No development shall be allowed on slopes of 25% or more on the site.

19. Applicant shall implement a "Wildfire/Natural Hazard Protection Plan" for the resort, as identified in Ex. 15, B-29 of the CMP burden of proof statement. Prior to approval of each subdivision and site plan, Applicant shall coordinate its evacuation plans through that development phase with the Deschutes County Sheriff's Office and the Redmond Fire Department. At the same time, Applicant shall also coordinate its plans for the movement of evacuees over major transportation routes with the Oregon State Police and the Oregon Department of Transportation.

20. The cumulative density of the development at the end of any phase shall not exceed a maximum density of 0.72 dwelling units per acre (including residential dwelling units and excluding visitor-oriented overnight lodging).

21. Each phase of the development shall be constructed such that the number of overnight lodging units meets the 150 overnight lodging unit and 2:1 ratio of individually owned units to overnight lodging unit standards set out in DCC 18.113.060 (A) (1) and 18.113.060 (D) (2). Individually owned units shall be considered visitor oriented lodging if they are available for overnight rental use by the general public for at least 45 weeks per calendar year through one or more central reservation and check-in services. As required by ORS 197.445 (4) (b) (B), at least 50 units of overnight lodging must be constructed in the first phase of development, prior to the closure of sale of individual lots or units.

In addition to complying with the specific requirements of DCC 18.113.070 (U), 1-5, Applicant, its successors and assigns, shall at all times maintain (1) a registry of the individually owned units subject to deed restriction under DCC 18.113.070 (U) (2), requiring they be available for overnight lodging purposes; (2) an office in a location reasonable convenient to resort visitors as a reservation and cheek-in facility at the resort; and (3) a separate telephone reservation line and website in the name of "Thornburgh Resort", to be used by members of the public to make reservations. As an alternative to or in addition to (3), Applicant may enter into an agreement with a firm (booking agent) that specializes in the rental of time-sharing of resort property, providing that Applicant will share the information in the registry required by (1) and cooperate with the booking agent to solicit reservations for available overnight lodging at the resort. If Applicant contracts with a booking agent, Applicant and the booking agent shall cooperate to ensure compliance with the requirements of DCC 18.113.070 (U) (5), by filing a report on January 1 of each year with the Deschutes County Planning Division.

22. The final covenants, conditions and restrictions adopted by the developer and amendments thereto shall conform in all material respects to this decision and the requirements of the DCC.

23. No permission to use or improve Barr Road as access to the Resort is given or implied by this decision.

24. Satisfied.

25. Applicant shall submit a detailed erosion control plan with the first Tentative Plat or Site plan, whichever comes first.

26. Lot size, width (frontage), coverage, off-street parking and setbacks, including solar setbacks, are permitted as described in Applicant's Exhibit 8, B-24a in the Burden of Proof document, subject to review during the subdivision approval process to confirm that there will be safe vehicle access to each lot. Compliance with the dimensional standards shall be confirmed during subdivision approval for each development phase. All multi-family units, commercial structures, and other resort facilities are exempted from meeting the solar setback standards.

27. Road width shall be consistent with the requirements set forth in the County's subdivision ordinance, DCC Chapter 17.36.

28. See conditions #38 and #39.

29. Applicant shall abide at all times with the MOU with ODOT, regarding required improvements and contributions to improvements on ODOT administered roadways (Agreement Number 22759, dated 10/10/05).

30. Satisfied.

31. All exterior lighting must comply with the Deschutes County Covered Outdoor Lighting Ordinance per Section 15.10 of Title 15 of the DCC.

32. No permission to install helicopter landing zone (helipad) at the Resort is given or implied by this decision.

33. The Resort shall, in the first phase, provide for the following:

    A. At least 150 separate rentable units for visitor-oriented lodging.
    B. Visitor-oriented eating establishments for at least 100 persons 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 in DCC 10.113.060 (A) (1) and (2) shall be at least $2,000,000 (in 1984 dollars).
    D. At least $2,000,000 (in 1984 dollars) shall be spent on developed residential 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.

34. Where construction disturbs native vegetation in open space areas that are to be retained in a substantially natural condition, Applicant shall restore the native vegetation. This requirement shall not apply to land that is improved for recreational uses, such as golf courses, hiking or nature trails or equestrian or bicycle paths.

35. The contract with the owners of units that will be used for overnight lodging by the general public shall contain language to the following effect: "[Unit Owner] shall make the unit available to [Thornburgh Resort/booking agent] for overnight rental use by the general public at least 45 weeks per calendar year through a central reservation and check-in service."

36. Applicant shall coordinate with the Sheriff's Office and its designated representative to address all public safety needs associated with the resort and the development process.

37. Satisfied.

38. The applicant shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of off-site mitigation efforts. Consistent with the plan, the applicant shall submit an annual report to the county detailing mitigation activities that have occurred over the previous year. The mitigation measures include removal of existing wells on the subject property, and coordination with ODFW to model stream temperatures in Whychus Creek.

39. The applicant shall provide funding to complete a conservation project by the Three Sisters Irrigation District to restore 106 acre-feet of instream water to mitigate potential increase in stream temperatures in Whychus Creek. The applicant shall provide a copy of an agreement with the irrigation district detailing funding agreement prior to the completion of Phase A.

Dated this 6th day of October, 2008.

Mailed this 8th day of October, 2008.

Anne Corcoran Briggs, Hearings Officer

THIS DECISION IS FINAL UNLESS APPEALED IN ACCORDANCE WITH THE PROVISIONS OF DCC TITLE 22.

Exhibit 9: FMP–LUBA Decision Remanded

09/2009

EXHIBIT 9

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

THORNBURGH RESORT COMPANY, LLC,
Intervenor-Respondent.

LUBA No. 2008-203

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.

Peter Livingston, Portland, filed the response brief. With him on the brief was Schwabe, Williamson & Wyatt PC. Peter Livingston and Martha Pagel argued on behalf of intervenor-respondent.

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

REMANDED 09/09/2009

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 county approval of a final master plan for Thornburgh Resort, a destination resort.

INTRODUCTION

A. Prior Appeals

Under the Deschutes County Code (DCC), destination resorts are subject to a three-step approval process. The first step is approval of a conceptual master plan (CMP), which is processed as though it were a conditional use permit. DCC 18.113.040(A). There is a right to a public hearing at the CMP stage of approval, and the county decision approving a CMP must be based on evidence that is submitted during that public process. As explained below, the county's CMP decisions have been challenged at LUBA and at the Court of Appeals and Supreme Court. The second step in approving a destination resort is approval of a final master plan (FMP). DCC 18.113.040(B). A county decision to grant FMP approval is not required in all cases to include a public hearing. The decision that is before LUBA in this appeal is the county's decision that grants FMP approval for the Thornburgh Resort. The final step in the county's three-step approval process is site plan or land division approval. DCC 18.113.040(C). Presumably those decisions will be rendered once the appeals concerning the county's CMP and FMP decisions have been finally resolved.

A central issue in petitioner's appeals challenging the county's CMP decision, and the central issue in this appeal of the county's FMP decision, concerns one of the CMP approval criteria, DCC 18.113.070(D). DCC 18.113.070 provides, in relevant part:

> "In order to approve a destination resort, the Planning Director or Hearings Body shall find from substantial evidence in the record that:
>
> "* * * * *
>
> "D. Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.

"* * * * *."

In this opinion we sometimes refer to DCC 18.113.070(D) as the "no net loss" standard.

The county's initial decision granting CMP approval was appealed to LUBA. We sustained three of the petitioner's 13 assignments of error, in part, and remanded the county's CMP decision on May 14, 2007. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007) (*Gould I*). In one of the assignments of error that LUBA denied in *Gould I*, LUBA rejected petitioner's argument that the county erroneously found that Thornburgh's proposed wildlife mitigation plan was adequate to allow the county to make the "no net loss" finding required by DCC 18.113.070(D). Petitioner Gould appealed our decision to the Court of Appeals, assigning error to our rejection of her challenge to the county's DCC 18.113.070(D) finding. The Court of Appeals reversed and remanded our decision in *Gould I*, finding that Thornburgh's wildlife mitigation proposal was not sufficiently developed to allow the county to make the required DCC 18.113.070(D) "no net loss" finding. *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007) (*Gould II*). As particularly relevant here, the Court of Appeals in its *Gould II* decision determined that the county must either require that Thornburgh's wildlife mitigation proposal be adequately developed as part of the CMP approval process, or defer consideration of that more fully developed wildlife mitigation proposal to the FMP approval stage and allow a full right of public participation in rendering the FMP decision. We set out the Court of Appeals' reasoning in its *Gould II* decision in some detail later in this opinion.

After the Court of Appeals' decision in *Gould II*, the county granted CMP approval for a second time on April 1, 2008. In doing so the county chose the second option set out in *Gould II* and deferred its finding regarding DCC 18.113.070(D) to the FMP stage of approval and imposed a condition requiring a full public process for FMP approval.[1] The county's

[1] That condition is set out below:

second CMP approval decision, which deferred the required finding on DCC 18.113.070(D) to the FMP stage, was also appealed to LUBA. LUBA affirmed that decision on September 11, 2008. *Gould v. Deschutes County*, 57 Or LUBA 403 (2008) (*Gould III*). Petitioner appealed LUBA's *Gould III* decision to the Court of Appeals. The Court of Appeals affirmed LUBA's decision on April 22, 2009. *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009) (*Gould IV*). A petition for Supreme Court review of the Court of Appeals' decision in *Gould IV* is presently pending before the Supreme Court.

On August 11, 2007, Thornburgh submitted its application for FMP approval. On April 21, 2008, Thornburgh submitted an amended application for FMP approval. On October 8, 2008, after LUBA's decision in *Gould III* but before the Court of Appeals' decision in *Gould IV*, the county hearings officer granted FMP approval. That FMP approval decision, which includes the county's finding that Thornburgh's modified proposal complies with DCC 18.113.070(D), is the decision that is before us in this appeal.

With the above review of the appeals of the county's CMP and FMP decisions, we return now to the Court of Appeals' decision in *Gould II*. Because we believe that decision in large part dictates the outcome of this appeal, we quote extensively from the portion of that opinion that addresses the DCC 18.133.070(D) "no net loss" standard before turning to the parties' arguments:

> "The county's findings on the submission requirements of DCC 18.113.050(B)(1) with respect to wildlife note the preparation of a 'Habitat Evaluation Procedures' analysis for the site that described 'project impacts and corresponding mitigation measures.' The [county's] findings list the types of wildlife on the site and the short-term and long-term impacts on wildlife and fish by the proposed development. The explanation concludes:

"37. Applicant shall demonstrate compliance with DCC 18.113.070(D) by submitting a wildlife mitigation plan to the County as part of its application for [FMP] approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participatory rights as those allowed in the CMP approval hearing." Record 2754.

> "'According to Tetra Tech [respondent's consultant], approximately 2,149 off-site acres will be needed to offset loss of habitat values on the subject property by virtue of the proposed development. * * * As discussed under DCC 18.113.070 M., the BLM MOU [(Bureau of Land Management memorandum of understanding)] requires [Thornburgh] to complete a wildlife mitigation plan. [Thornburgh] and BLM are currently evaluating the viability of implementing the agreed mitigation measures on federal property in the vicinity of the resort that is commonly known as the 'Masten Allotment.'"

"The [county's] findings on compliance of the plan with the DCC 18.113.070(D) 'no net loss' requirement conclude:

> "'The HEP analysis will be used to guide mitigation activities. Due to the size and scope of the project and the related impact from cessation of some cattle-grazing activities, [Thornburgh] is participating with a multi-agency group to finalize the mitigation area. This includes representatives of ODFW [(Oregon Department of Fish and Wildlife)], BLM, Tetra Tech and [Thornburgh].
>
> "'* * * * *
>
> "'In a letter to the County dated February 9, 2005, Steven George, Deschutes District Wildlife Biologist with ODFW, states that ODFW is working with [Thornburgh] to develop an acceptable wildlife report with mitigation measures and expresses the view that '[Thornburgh] will be able to develop an acceptable program to mitigate the impacts.' * * *"
>
> "'* * * * *
>
> "'The Board [of County Commissioners] finds that, as stated by ODFW, it is feasible to mitigate completely any negative impact on identified fish and wildlife resources so that there is no net loss or net degradation of the resource. The MOU between the BLM and [Thornburgh] requires [Thornburgh] to complete a wildlife mitigation plan that will be reviewed and approved by both ODFW and BLM. * * * The Board imposes as a condition below that the mitigation plan adopted by [Thornburgh] in consultation with Tetra Tech, ODFW and the BLM be adopted and implemented throughout the life of the resort."

"In addressing a related requirement that the 'resort mitigate any demands that it creates on publicly-owned recreational facilities on public lands in the surrounding area,' the county decision details the content of the Bureau of Land Management (BLM) memorandum of understanding (MOU):

> "'In Section II.7 of the MOU, [Thornburgh] and BLM agree to work cooperatively to complete a wildlife mitigation plan to compensate for impacts related to the resort. The MOU outlines specific mitigation measures to be undertaken by [Thornburgh] to mitigate the impacts of resort development on surrounding federal recreation facilities. * * * [The] BLM identified federal property located to the south and east (commonly known as the 'Masten Allotment') as an area to be managed with an emphasis on the preservation and enhancement of wildlife habitat. [Thornburgh], BLM and ODFW are working together to evaluate whether [Thornburgh's] wildlife mitigation obligation can be implemented in this location. * * *
>
> "'The record contains a report * * * from Tetra Tech, which describes habitat, land uses and mitigation measures to be implemented on the federal lands surrounding the resort. The Tetra Tech report, the BLM MOU and the AAC Agricultural Assessment identify surrounding land uses and potential conflicts between the resort and adjacent uses within 600 feet. The data, analysis and mitigation measures contained in the Tetra Tech report have been incorporated into the final MOU between [Thornburgh] and BLM.'"

"Consistently with those findings, the county approved the conceptual master plan conditionally, requiring among other things that

> "'[Thornburgh] shall abide at all times with the MOU with BLM, dated September 28, 2005, regarding mitigation of impacts on surrounding federal lands, to include wildlife mitigation and long-range trail planning and construction of a public trail system. The mitigation plan adopted by [Thornburgh] in consultation with Tetra Tech, ODFW and the BLM shall be adopted and implemented throughout the life of the resort.'

"The memorandum of understanding requires Thornburgh to complete a wildlife impact mitigation plan that 'will specify mitigation measures that are sufficient to insure that there is no net loss of wildlife habitat values as a result of the proposed development.' The agreement requires approval of the plan by ODFW and BLM and commits Thornburgh to 'work cooperatively with ODFW and BLM to determine the specific locations where the mitigation

plan will be implemented.' The agreement provides that certain mitigation measures may be undertaken within the Masten Allotment, and those measures 'may include' trail construction, removal of old trails, fencing, vegetation thinning and management, and noxious weed controls.

"Gould sought review of the county's land use decision by LUBA. Gould's petition for review set out 13 assignments of error by the county. * * * Gould asserted that the county's findings on the feasibility of complying with the fish and wildlife protection criteria were not supported by substantial evidence and that the 'deferral of compliance with a criterion and reliance on an agency to decide compliance with the [c]ounty's requirements is not permissible.'"

"LUBA determined that the local government record contained substantial evidence to support the county's findings on compliance with DCC 18.113.070(D). [LUBA] concluded:

> "'Where the county finds that it is feasible to satisfy a mandatory approval criterion, as the county did here with regard to DCC 18.113.070(D), the question is whether that finding is adequate and supported by substantial evidence. *Salo v. City of Oregon City,* 36 Or LUBA 415, 425 (1999). Here, Thornburgh supplied the Wildlife Report to identify the negative impacts on fish and wildlife that can be expected in developing Thornburgh resort. The report also describes how Thornburgh proposes to go about mitigating that damage, both on-site and off-site. In response to comments directed at that report, Thornburgh has entered into discussions with ODFW and a MOU with the BLM to refine that proposal and come up with better solutions to ensure that expected damage is completely mitigated. ODFW and BLM have both indicated that they believe such solutions are possible and likely to succeed. We conclude that the county's finding regarding DCC 18.113.070(D) is supported by substantial evidence and is adequate to explain how Thornburgh Resort will comply with DCC 18.113.070(D).
>
> "'Had Thornburgh not submitted the Wildlife Report, we likely would have agreed with petitioners that a county finding that it is feasible to comply with DCC 18.113.070(D) would likely not be supported by substantial evidence. Even though ODFW and BLM have considerable expertise on how to mitigate damage to fish and wildlife, bare assurances from ODFW and BLM that solutions are out there would likely not be the kind of evidence a reasonable person would rely on to find that the damage that Thornburgh resort will do to fish and wildlife habitat can be completely mitigated. But with that report, the dialogue that has already occurred between Thornburgh,

> ODFW and BLM, the MOU that provides further direction regarding future refinements to ensure complete mitigation, and the optimism expressed by the agencies involved, we believe a reasonable person could find that it is feasible to comply with DCC 18.13.070(D).'
>
> "On review, Gould complains that LUBA erred 'in determining that the County's findings and evidence concerning feasibility of mitigation for the project's negative impacts on fish and wildlife satisfy the applicable approval standard." Gould contends that the approval standard was not met because there was insufficient evidence in the record to show that any particular wildlife impact mitigation plan was feasible and that LUBA erred in not requiring the county to specify a particular mitigation plan and subject that plan to public notice and county hearing processes. * * *
>
> "* * * * *
>
> "LUBA's opinion and order was unlawful in substance for the reasons that follow. First, the county's findings were inadequate to establish the necessary and likely content of any wildlife impact mitigation plan. Without knowing the specifics of any required mitigation measures, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be 'completely mitigated' as required by DCC 18.113.070(D). ORS 215.416(9) requires that the county's decision approving the CMP explain 'the justification for the decision based on the criteria, standards and facts set forth' in the decision. The county's decision is inconsistent with ORS 215.416(9) because the decision lacks a sufficient description of the wildlife impact mitigation plan, and justification of that plan based on the standards in DCC 18.113.070(D). Second, that code provision requires that the content of the mitigation plan be based on 'substantial evidence in the record,' not evidence outside the CMP record. In this case, the particulars of the mitigation plan were to be based on a future negotiation, and not a county hearing process. Because LUBA's opinion and order concluded that the county's justification was adequate despite those deficiencies, the board's decision was "unlawful in substance." *Gould II*, 216 Or App at 154-60 (footnotes omitted).

As the above-quoted language from *Gould II* makes reasonably clear, the primary problem with Thornburgh's wildlife report was that many of the details of the ultimate mitigation plan remained to be resolved by Thornburgh, in conjunction with BLM and ODFW. Given that state of uncertainty regarding those details, the Court of Appeals concluded it was simply not possible for a reasonable person to conclude that the wildlife mitigation plan would ensure compliance with the DCC 18.113.070(D) "no net loss"

standard. To summarize, in the Court of Appeals' view, the county's and LUBA's decisions in *Gould I* were erroneous for two related reasons. First, a reasonable person could not make the "no net loss" finding required by DCC 18.113.070(D) until the uncertainties that were present in Thornburgh's wildlife report and the BLM MOU were resolved. Second, allowing those uncertainties to be resolved *after* the finding required by DCC 18.113.070(D) was adopted and *after* the county public planning process ended violated ORS 215.416(9), because the "facts" necessary to make the required "no net loss" finding could not be set out in the decision.[2] With that understanding of the problems with the initial findings and evidence concerning DCC 18.113.070(D) we next describe Thornburgh's wildlife management plan, and then turn to petitioner's challenge to the county's findings regarding DCC 18.113.070(D) in its FMP decision.

B. Thornburgh's Wildlife Management Plan

Thornburgh's wildlife management plan has two components; one component addresses terrestrial wildlife impacts and the other component addresses off-site fish habitat impacts. According to Thornburgh, the terrestrial wildlife plan is made up of two documents, the "Thornburgh Resort Wildlife Mitigation Plan for Thornburgh Resort" (Terrestrial WMP) and the "Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project" (M&M Plan). Record 2609-33; 416-32.[3] The fish component is also made up of two documents, the "Thornburgh Resort Fish and Wildlife

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[2] ORS 215.416(9) provides:

> "Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, *states the facts relied upon in rendering the decision* and explains the justification for the decision based on the criteria, standards and facts set forth." (Emphasis added.)

[3] Thornburgh also points out there are communications from the Oregon Department of Fish and Wildlife and Bureau of Land Management that express support for the Terrestrial WMP and M&M Plan and communications from Tetra Tech EC, Inc., Thornburgh's environmental consultant, that respond to alleged deficiencies in those plans. Record 126-33, 415, 470, 732-34, 1287-95, 1800-05.

Mitigation Plan relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat," dated April 21, 2008 (Fish WMP) and an August 11, 2008 letter that proposes additional mitigation if needed for Whychus Creek. Record 2609-2744; 378-79. We describe the key features of the Terrestrial WMP and M&M Plan here and discuss the Fish WMP and August 11, 2008 letter in our discussion of the second assignment of error.

It is undisputed that development of the proposed destination resort will destroy or damage some existing terrestrial wildlife habitat, making that existing terrestrial habit unavailable for wildlife or less suitable for wildlife. Thornburgh proposes to mitigate for that loss in two ways, on-site mitigation and off-site mitigation. The on-site mitigation will reduce the amount of habitat loss that would otherwise result from construction of the destination resort; the off-site mitigation is to compensate for the habitat loss that cannot be avoided when the destination resort is constructed. Presumably because Thornburgh owns the on-site property, a large number of on-site mitigation measures are proposed.[4] A shorter list of mitigation measures is proposed for off-site property.[5] The Terrestrial WMP explains how Thornburgh went about assessing how much mitigation will be required:

> "ODFW suggested a habitat modeling approach that uses a modification of the U.S. Fish and Wildlife Service's (1981) Habitat Evaluation Procedures (HEP) analysis. This describes existing habitat values and estimates impacts. HEP is an accounting method, in which the value of each habitat type for each

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[4] Those mitigation measures include: (1) eliminate livestock grazing, (2) implement a noxious weed control program, (3) remove young junipers to return areas to old growth juniper habitat, (4) remove invasive species and enhance herbaceous vegetation to achieve conditions prior to white settlement of the area, (5) eliminate unregulated off-road vehicle use, (6) generally prohibit feeding of wildlife, (7) prohibit unrestrained outdoor pets, (8) install and maintain bluebird boxes, install and maintain kestrel nests and bat boxes, (9) retain snags over 12 inches in diameter, (10) preserve downed logs, (11) install animal underpasses, (12) encourage native landscaping, (13) preserve at least 80 percent of total acreage of rock outcrops, (14) control use of poisonous baits, (15) obtain waivers of remonstrance concerning wildlife damage control activities, and (16) implement a wildlife educational program. Record 2615-2619.

[5] Those mitigation measures include: (1) implement a weed control program consistent with BLM's Upper Deschutes Resource Management Program, (2) thin young junipers and manage unwanted woody debris in old-growth juniper habitats, (3) work with BLM to reduce unauthorized off-road vehicle impacts, (4) maintain two existing water supplies (guzzlers) on BLM land, (5) contribute $20,000 towards traffic speed monitoring devices. Record 2620-2621.

> of a series of evaluation species is expressed in terms of habitat units (HUs) These are calculated as the number of acres of that habitat multiplied by an index of its quality, and expressed as a number between 0 and 1, which is termed the Habitat Suitability Index (HSI). One HU is the equivalent of one acre of the best habitat available for a species. Two acres of habitat half as good would also equal one HU, and so on. In the HEP analysis, to make the process manageable, an 'evaluation species' is chosen to represent a number of species with similar lifestyles and habitat requirements (USFWS 1980, 1981).
>
> "Eagle Crest in collaboration with ODFW conducted a modified HEP for the proposed Eagle Crest III development in 2004, and ODFW provided Tetra Tech with a Tabulation of the results of that modified HEP. Eagle Crest and ODFW used best-judgment estimates of the HSIs for baseline habitat quality and post-development habitat quality, rather than calculating it from quantitative data (from field and office measurements of vegetation and habitat characteristic) and running it through formal mathematical models. This estimation method is similar to the HEP process that was used by the USFWS prior to their developing quantitative models for individual wildlife species. The evaluation species used in the Eagle Crest III modified HEP analysis were: golden eagle, American kestrel, red-tailed hawk, mountain bluebird, small mammals (a generic group), western fence lizard, and mule deer." Record 2612-2613.

The Terrestrial WMP goes on to explain that the northern flicker was substituted in place of the golden eagle as one of the indicator species, at ODFW's request. The before-development HSI was multiplied by the number of acres of habitat for each species, on-site and within one mile of the site, to determine the HUs for each species. Post-development, post on-site mitigation HSIs were determined and applied to those same acreages. The results are displayed in a table in the Terrestrial WMP, which is reproduced below.

Summary of Impacts by Species and Total Habitat Units						
Evaluation Species	**Pre-development HUs**		**Post-development HUs**		**Net Change**	
	Onsite	**Offsite**	**Onsite**	**Offsite**	**Onsite**	**Offsite**
Northern flicker	2,466	10,958	487	10,877	-1,979	-82
American kestrel	487	2,159	317	2,071	-171	-88
Red-tailed hawk	630	2,651	118	2,270	-512	-381
Mountain bluebird	1,142	5,063	926	4,939	-216	-125
Small mammals	2,491	10,746	1,127	9,974	-1,364	-772
Western fence lizard	2,309	10,035	946	9,422	-1,363	-612
Mule deer	983	4,298	173	4,298	-810	0
Total	10,508	45,910	4,094	43,851	-6,414	-2,060

Based on the above, the Terrestrial WMP determined that onsite total HUs would be reduced from 10,508 to 4,094 (a reduction of 6,414 HUs) and off-site total HUs within one mile of the proposed destination resort would be reduced from 45,910 to 43,851 (a reduction of 2,060 HUs). Thornburgh's off-site mitigation obligation would be 8,474 HUs (6,414 +2,060). The Terrestrial WMP proposes to satisfy that mitigation obligation on "public land managed by the BLM." Record 2614. The Terrestrial WMP explains:

> "[Thornburgh] shall restore and enhance approximately 4,501 acres of juniper woodlands on public lands administered by the BLM in the Clines Buttes Sub-Area to mitigate the loss of 8,474 HUs. The specific areas, subject to specific rehabilitation or enhancement actions will be determined through consultation by BLM, [Thornburgh] and ODFW resource management specialists, based upon the current conditions of the mitigation site and the agreed amount and type of enhancement. [Thornburgh] shall maintain rehabilitated areas through ongoing efforts as needed, such as reduction of weeds, thinning of junipers, and reclosing unwanted travel routes. BLM will manage public land on which this mitigation will be implemented, to comply with BLM's rangeland health standards to maintain desirable habitat for wildlife. * * *."[6] Record 2620.

The M&M Plan elaborates on how off-site mitigation will be carried out:

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[6] It is not clear to us how the decision was made that rehabilitation of 4,501 acres of juniper woodlands will suffice to achieve the needed 8,474 HUs to completely mitigate the impact of the destination resort on the wildlife resource. However, petitioner does not assign error to that calculation.

> "This Mitigation and Monitoring Plan * * * has been developed in coordination with the [BLM]. Currently, the BLM is in the process of finalizing the Cline Buttes Recreation Area Plan (CBRAP), which provides management direction to over 50 square miles of public land in the Cline Buttes region. Because the CBRAP is not yet final, the exact location where the proposed mitigation will take place could not be identified. However, a broad, adaptive management approach, consistent with BLM policy and management objectives was used to structure [the M&M Plan]. The objective of [the M&M Plan] is to 1) outline the methods that will be used to characterize existing habitat conditions in the area proposed for mitigation, 2) specify the types of habitat treatments used to enhance habitat for wildlife, and 3) develop a monitoring plan that will monitor the effectiveness of the habitat treatments through either direct or indirect means. The methods used in [the M&M Plan] have been structured such that they could be applicable to any parcel of land within the Clines Buttes Recreation Area (CBRA) that BLM determines is suitable for mitigation once the CBRAP has been finalized." Record 418.

The M&M Plan goes on to explain that BLM methods will be followed to develop a baseline habitat condition assessment. The M&M Plan also describes the mitigation treatments that will be applied. The M&M Plan calls for an "adaptive approach:"

> "The proposed mitigation plan will use an adaptive approach to vegetation management that is consistent with the procedures outlined in the draft CBRAP. * * * The BLM's Land Use Planning Handbook defines adaptive management as '*a system of management practices based on clearly identified outcomes, monitoring to determine if management actions are meeting outcomes, and, if not, facilitating management changes that will best ensure that outcomes are met or to re-evaluate the outcomes*.' An adaptive approach to vegetation management in the Cline Buttes Area is appropriate because, in some situations, there is a lack of information available to assist in accurately predicting the response of the existing plant communities to different types and levels of ground disturbing activities related to thinning woody plants, understory shrub enhancement and reducing fuel loadings * * *." Record 421-22 (italics in original).

FIRST AND THIRD ASSIGNMENTS OF ERROR[7]

In her first assignment of error, petitioner argues the county incorrectly or inadequately interpreted the DCC 18.113.070(D) "no net loss" standard. In six of the ten subassignments of error under the third assignment of error, petitioner alleges the county's findings and conditions of approval are inadequate to demonstrate that the Terrestrial WMP will be sufficient to ensure that development of the disputed destination resort will comply with the DCC 18.113.070(D) "no net loss" standard.

A. Use of the Habitat Evaluation Procedures (HEP) Analysis

In her first four subassignments of error under the first assignment of error, we understand petitioner to challenge the county's interpretation of DCC 18.133.070(D) to allow Thornburgh to use the HEP analysis, rather than conducting a more detailed on-site study to precisely identify all the wildlife now present on the proposed destination resort site and then ensure that any wildlife resource damage that is caused by the destination resort is mitigated on a one-for-one basis to ensure that there is no net loss in that resource. Specifically, petitioner argues in subassignment of error one that the hearings officer improperly lumped all fish and wildlife resources together and treated them as a whole. In subassignments of error two and three, petitioner argues the county improperly interpreted DCC 18.133.070(D) to allow existing species to be destroyed and replaced with other species at less than a 1:1 ratio. Finally, in subassignment of error four, petitioner argues that Thornburgh's and the county's focus on fish and wildlife "habitat" is misplaced, since the DCC 18.133.070(D) "no net loss" standard protects "fish and wildlife resources," not just fish and wildlife habitat.

While some of the hearings officer's findings, viewed in isolation, can be read to suggest that the hearings officer thought it might be acceptable to lump all fish and wildlife

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[7] We consider subassignments of error A-1 through A-6 under the third assignment of error in our discussion and resolution of the first assignment of error. We consider subassignments of error B-1 through B-4 under the third assignments of error in our discussion below of the second and fourth assignments of error.

resources together into one fungible, undifferentiated wildlife resource, that is not what Thornburgh proposed and that is not the approach that the county approved in this case.[8] The HEP analysis that was employed by Thornburgh and approved by the county uses seven indicator species to make the job of identifying the nature, quality and extent of the wildlife resource before and after development more manageable. The indicator species are selected to simplify the task of identifying and assessing the habitat needs of all resident species. That analysis produces an estimate of the nature and extent of the off-site mitigation obligation Thornburgh must shoulder to comply with the DCC 18.133.070(D) "no net loss" standard. Unless someone comes forward with evidence that the HEP analysis missed or inadequately addressed some aspect of the wildlife resource, we believe a reasonable person could rely on the HEP analysis. There is nothing inherently improper about employing such an analysis to simplify the potentially exceedingly complicated task of assessing how much damage the proposed destination resort would cause to the wildlife resource and how much mitigation should be required to ensure there is no net loss to that wildlife resource. To the extent petitioner's first subassignment of error suggests otherwise, we reject the suggestion.

We reject petitioner's second and third subassignments of error for similar reasons. The HEP analysis that was used in this case is admittedly a less than perfect way to demonstrate compliance with the DCC 18.133.070(D) "no net loss" standard. In addition to using seven indicator species in place of an inventory of and explicit consideration of all

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[8] For example, the hearings officer adopted the following findings:

> "While the 'no net loss' mitigation standard is difficult to quantify, given the range of species that could occupy the site and be affected by development, the hearings officer concludes that it does not require the on-site specificity and review that opponents suggest is necessary. The standard requires an analysis of species on the site, the likely impacts of development, and the applicant's plan to address those impacts. It does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio. Such a requirement would be difficult, if not impossible to satisfy. In addition, to the extent that conditions of approval are necessary to ensure that the plan is implemented as proposed, conditions can provide both accountability and flexibility to address changes in habitat needs and approaches to mitigation over time." Record 29-30.

species present on the subject property, the HSIs that were used apparently were borrowed from another analysis that was done for a neighboring destination resort without any on-site analysis to confirm that the sites are sufficiently similar to allow the assumptions and indices that were used in that analysis to be used in this case. But petitioner does not develop a reviewable challenge to the "borrowed" nature of the HEP analysis. Petitioner's argument under these subassignments of error is that the hearings officer determined that one species can be destroyed and replaced with another species and can be replaced at less than a 1:1 ratio. We do not understand the Terrestrial WMP and the M&M Plan to propose replacement of one species with another or to propose on-site and off-site habitat enhancements that will result in less than a complete replacement of the 8,474 HUs that Thornburgh estimates will be lost due to development of the destination resort.

At oral argument we questioned whether a proposal to develop and thereby damage or destroy wildlife habitat that is currently occupied by a threatened or endangered species could be replaced with enhanced habitat that is suitable only for small mammals that are not endangered or threatened. If there was evidence that the subject property contains threatened or endangered species, we seriously doubt that habitat needed for those threatened or endangered species could be destroyed and replaced under DCC 18.133.070(D) with an equivalent amount of enhanced off-site habitat that is suitable for one or more of the seven indicator species but is not suitable for the threatened or endangered species. But there are no threatened or endangered species on the subject property, and there is no wildlife on the subject property that the county has determined must be protected under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). Neither has

petitioner identified any wildlife species on the subject property that have habitat needs that go beyond or are different from the habitat needs of the seven indicator species.[9]

Petitioner's second and third subassignments of error under the first assignment of error are denied.

Finally, petitioner's challenge to the county's focus on wildlife *habitat* rather than the wildlife itself, while a literally plausible criticism based on the words of DCC 18.133.070(D), ignores the reality of wildlife resource protection. Development rarely if ever is carried out in a way that purposefully causes harm to the wildlife that may actually be present on a development site. The wildlife typically is gone before construction equipment shows up. The harm is caused by altering or destroying the habitat that the wildlife requires for continued existence, so that the habitat is no longer available for the wildlife to use or is less suitable for wildlife use. The county's focus on wildlife habitat does not constitute error.

Petitioner first four subassignments of error under the first assignment of error are denied.

B. The Terrestrial WMP is Inadequate

Whereas petitioner's first through fourth subassignments of error under the first assignment of error present what is a largely abstract or philosophical dispute about the county's interpretation of DCC 18.133.070(D), petitioner's fifth, sixth and seventh subassignments of error under the first assignment of error and the first through sixth subassignments of error under the third assignment of error, collectively, present a more direct challenge to the adequacy of the Terrestrial WMP and the M&M Plan that the county relied on to find that the proposed destination resort complies with the DCC 18.133.070(D) "no net loss" standard. We will not attempt to labor through each of those subassignments of

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[9] Petitioner does argue the Fish WMP does not adequately address possible damage to off-site fish habitat that might result from withdrawal of cold water from the aquifer below the destination resort site. We address those arguments in our discussion below concerning fish resources.

error individually. The unifying and underlying theme of those seven subassignments of error is that the Terrestrial WMP and M&M Plan fail to provide the specificity that is required under the Court of Appeals' decision in *Gould II* and therefore do not constitute substantial evidence that the damage that will be caused to the wildlife resource by the proposed destination resort will be "completely mitigated so that there [will be] no net loss or net degradation of the resource," as DCC 18.133.070(D) requires. We understand petitioner to argue that the Terrestrial WMP and M&M Plan cannot constitute substantial evidence in support of the finding required by DCC 18.133.070(D) until a number of unresolved factors are resolved and that contrary to the Court of Appeals' *Gould II* decision, these unresolved factors will be resolved after petitioner's chance to object to the adequacy of the Terrestrial WMP and M&M Plan in the County FMP proceeding has passed. For the reasons that follow, we agree with petitioner.

We earlier described the Terrestrial WMP and M&M Plan in some detail. The hearings officer's description of those plans is set out in part below:

> "The applicant has agreed to restore 4,501 acres of juniper woodlands in the Cline Buttes sub-area to mitigate the loss of the 8,474 HUs. The specific BLM land on which the restoration [will be carried out] is subject to the adoption of the Cline Buttes Recreation Area Plan (CBRAP), and has yet to be finally identified. However, the applicant and BLM have identified three areas where wildlife and habitat restoration is likely to occur under the CBRAP: the Canyons Region, the Deep Canyons Region, and the Maston Allotment. Restoration includes weed management, vegetation enhancement, reduction of unauthorized off-road motor vehicle use, creation of wildlife water sources ('guzzlers') and traffic speed monitoring devices. The specific activities and monitoring program for the BLM land are identified in [the M&M Plan], included in the applicant's August 12, 2008 rebuttal * * *.
>
> "If, at the time of development, [sufficient] off-site areas are not available, the applicant proposes to provide funding for implementing mitigation in a dedicated fund for use by ODFW to use to improve or purchase mitigation sites *within Deschutes County*. After the mitigation is established, the applicant will provide continuing funding for the lifetime of the development through a real estate transfer fee." Record 31-32 (emphasis added; footnote omitted).

The Terrestrial WMP and M&M Plan provide a fair amount of detail about the kinds of habitat restoration activities that might be employed to improve the habitat value of the 4,501 acres that are to be selected in the future. The record also indicates that Thornburgh's consultant and BLM and ODFW staff are confident that those restoration efforts will be successful and result in compliance with DCC 18.133.070(D). But what our description and the hearings officer's description of the Terrestrial WMP and M&M Plan make clear is that a number of important parts of Thornburgh's proposal to comply with the DCC 18.133.070(D) "no net loss" standard have not yet been determined, and will not be determined until a future date at which petitioner may or may not have any right to comment on the adequacy of the proposed mitigation. We do not know the location of the 4,501 acres that will be restored to provide the required mitigation. They may be located in the Canyons Region, the Deep Canyons Region or the Maston Allotment. Or they may be located somewhere else in Deschutes County. Until those 4,501 acres are located we cannot know what kind of habitat those 4,501 acres provide, and we cannot know what the beginning habitat value of those 4,501 acres is. We also do not know what particular mix of restoration techniques will be provided to those 4,501 acres.[10] We do not know what the habitat value of those 4,501 acres will be after restoration. We therefore cannot know if that restoration effort will result in the needed 8,474 HUs. The question for us is whether given all of these uncertainties, the confidence of Thornburgh, BLM and ODFW is sufficient to provide substantial evidence that the proposed mitigation plan will result in compliance with DCC 18.133.070(D). The answer to that question under the principles articulated in *Gould II* is no.

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[10] As we noted earlier, the Terrestrial WMP explains:

> "The specific areas subject to specific rehabilitation or enhancement actions will be determined through consultation by BLM, [Thornburgh] and ODFW resource management specialists, based upon the current conditions of the mitigation site and the agreed amount and type of enhancement." Record 2620.

While we have no reason to doubt the professional judgment of Thornburgh's consultant and the staff at BLM and ODFW, under the Court of Appeals' decision in *Gould II*, petitioner has a right to confront the mitigation plan that Thornburgh intends to rely on to comply with DCC 18.133.070(D). While we know more about what that mitigation plan might ultimately look like than we did when *Gould I* and *Gould II* were decided, there are simply too many remaining unknowns in the Terrestrial WMP and M&M Plan to allow petitioner a meaningful chance to confront the adequacy of that plan. See *Gould II*, 216 Or App 159-60 ("Without knowing the specifics of any required mitigation measures, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be 'completely mitigated' as required by DCC 18.113.070(D). * * * [T] hat code provision requires that the content of the mitigation plan be based on 'substantial evidence in the record,' not evidence outside the CMP record.") The details that must be supplied before petitioner can be given that meaningful chance to confront the proposed mitigation plan will not be known until some undetermined future date. Under the Court of Appeals' holding in *Gould II*, that is not a permissible approach for demonstrating compliance with DCC 18.133.070(D).

Petitioner's first through fourth subassignments of error under the first assignment of error are denied. Petitioner's fifth through sixth assignments of error under the first assignment of error and first through sixth assignments of error under the third assignment of error are sustained.[11]

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[11] Again we sustain those subassignments of error only to the extent that they express the argument challenging the adequacy of the Terrestrial WMP and M&M Plan that we describe in the text of this opinion. To the extent those subassignments of error include additional arguments, we do not address those arguments.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR[12]

A. Whychus Creek

The main stem of the Deschutes River is located approximately 2 miles to the east of the eastern boundary of the proposed resort. *Gould I* 54 Or LUBA at 262. Several tributaries of the Deschutes River, including Whychus Creek and Deep Canyon Creek are located a number of miles north of the proposed resort. The proposed destination resort will use deep wells to supply water. The aquifers that will provide that water are hydrologically connected to off-site down-gradient surface waters and the aquifer water is cooler than the receiving surface waters of the Deschutes River and its tributaries. While Thornburgh has been required to acquire and retire water rights to mitigate for its planned volume of water use, that mitigation water will not necessarily offset thermal impacts of its withdrawal of cool water from the aquifers under the destination resort if the mitigation water is warmer than the ground water that is removed from the system. During the proceedings below, ODFW submitted a letter in which it specifically recognized the value of groundwater fed springs and seeps for cooling waters in the main stem of the Deschutes River and its tributaries. ODFW recognized that this cooling groundwater "provides thermal refuge[] for salmonid which thrive in cooler water." Record 900. However, ODFW ultimately concluded that

> "In this particular case the potential impact to springs and seeps will likely be mitigated by transferring springs flows used for irrigation directly back into Deep Canyon Creek and the Deschutes River. These springs should provide similar habitat and help with water temperatures in the Deschutes River." *Id.*

The opponents' expert expressed concerns that the proposed mitigation would not be adequate to off-set the diversion of cool groundwater from Alder Springs, which drains into

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[12] As we noted earlier, we consider subassignments of error A-1 through A-6 under the third assignment of error in our discussion and resolution of the first assignment of error. We consider subassignments of error B-1 through B-4 under the third assignments of error in our discussion of the second and fourth assignments of error.

Whychus Creek, a tributary of the Deschutes River that provides habitat for the federally listed bull trout and other fish species. Thornburgh's experts submitted rebuttal testimony in which they took the position that any thermal impact on Whychus Creek would be negligible. Record 1245-1253. One of those experts took the position that the thermal impact would be less than .01 degree Celsius. Record 1246. In an August 11, 2008 letter to the county, Thornburgh's attorney noted that Thornburgh disagreed with some of the assumptions that led the opponents' expert to conclude the proposed destination resort would have a damaging thermal impact on Alder Springs and Whychus Creek. Record 379. But Thornburgh's attorney offered to provide additional mitigation if the hearings officer determined that additional mitigation was necessary to address concerns about thermal impacts on Whychus Creek:

> "* * * Thornburgh does not want to be caught short if you determine that additional mitigation is required for possible impacts on to Whychus Creek. Therefore, we are providing evidence to demonstrate that it would be feasible for Thornburgh to provide additional flow of 106 acre-feet per year in Whychus Creek, if needed to meet the county approval standard. This would be in addition to the amount of mitigation water already described in Thornburgh's Addendum. * * *" Record 379.

We understand that the referenced 106 acre-feet of mitigation would be achieved by reducing irrigation diversion from Whychus Creek and leaving that water in-stream.

In response to that proposal, opponents' expert submitted a letter, which is set out in part below:

> "[In Thornburgh's letter of] August 11, 2008, it is proposed that Thornburgh could provide mitigation for loss of groundwater discharge to lower Whychus Creek due to the pumping of its proposed wells. The mitigation would consist of 106 acre feet of water provided by Three Sisters Irrigation District through transfer of irrigation water to instream flow. This will not mitigate impact to Whychus Creek because it replaces cold groundwater with warm water from upstream during the irrigation season. It is the cold groundwater discharge at Alder Springs that is the defining and essential factor that makes the lower reach of Whychus Creek critical habitat for native bull trout, redband trout and reintroduced steelhead trout and Chinook salmon.

"The pumping of Thornburgh wells will reduce cold groundwater discharges. Replacing this lost flow of 106 acre feet by reducing upstream irrigation diversions would result in more hot water mixing with the cold water of the lower reach of Whychus Creek. The proposed mitigation is harmful to critical fish habitat in two ways: first it would allow the reduction of cold groundwater discharge to the stream, and second it would increase the flow of warm water into the cold lower reach of the stream.

"Using the thermal mass balance equation, the calculated increase in stream temperature at Alder Springs due to the pumping of the Thornburgh wells would be 0.07° C. The calculated change in stream temperature due to both the reduction in cold groundwater discharge and the increased stream flow due to the proposed mitigation would result in even a greater stream temperature increase of 0.12° C at Alder Springs. It is clear that the proposed mitigation for Thornburgh's impact to Whychus Creek would only increase the impact to critical cold water habitat that native and reintroduced fish are dependant on." Record 312.

In its August 28, 2008 argument to the county hearings officer, petitioner's attorney reiterated the above:

"The Applicant in its August 12 materials for the first time proposes the addition of 106 acre feet of water to Whychus Creek to make up for the water withdrawal impacts to the Creek. This is discussed in the Applicant's Exhibit A-3 letter * * * and the Exhibit A-9 letter from * * * the Three Sisters Irrigation District. This is apparently in response to our argument that there needs to be some mitigation provided for Whychus Creek. Unfortunately, what is proposed would actually compound the problem by increasing temperatures in the creek. Adding more warm surface water into the creek does not compensate for withdrawals of cold groundwater. * * *" Record 281.

In her decision, the hearings officer adopted findings to address the potential thermal impact on Whychus Creek, including the following findings:

"The OWRD [Oregon Water Resources Department] mitigation requirement adequately addresses water quantity; it does not fully address water habitat quality. Its assumptions regarding the benefits of replacing more water during the irrigation season than is consumed on an average daily basis by the resort does not account for the higher water consumption that will likely occur during the summer months. Therefore, the hearings officer concludes that the additional mitigation offered through the Three Sisters Irrigation District restoration program is necessary to assure that water temperatures in Whychus Creek are not affected by the proposed development." Record 34.

From the above findings, it appears the hearings officer was not persuaded by Thornburgh's experts that the potential thermal impact on Whychus Creek was so small that it could be ignored. To ensure that there would be no adverse thermal impact, the hearings officer took Thornburgh up on its offer to secure additional mitigation water from the Three Sisters Irrigation District. Unfortunately, in doing so, the hearings officer either did not recognize or for some other reason failed to respond to petitioner's contention that the mitigation water from the Three Sisters Irrigation District that will be generated by eliminating upstream irrigation diversions will not mitigate the destination resort's thermal impacts on Whychus Creek because that mitigation will replace cool water with warmer water. There may be a simple answer to the opponents' concern, but it is lacking in the hearings officer's decision. Without that explanation, the decision must be remanded for addition findings to explain why the additional mitigation water from the Three Sisters Irrigation District will be sufficient to eliminate the hearings officer's concern that summer water use by the destination resort could have adverse thermal impacts on Whychus Creek.

Thornburgh points to the following statement by its expert:

> "It should be noted that if there is flow in Whychus Creek that is not from Alder Springs, whether warmer than Alder Springs or not, the resulting increase in temperature at the mouth would be even less than the estimated maximum of 0.01 [degree Celsius]." Record 1248.

Citing *Molalla River Reserve v. Clackamas County*, 42 Or LUBA 251, 268-69 (2002), Thornburgh contends that the hearings officer was entitled to choose which expert testimony she found more believable.

The problem with Thornburgh's attempt to rely on *Molalla River Reserve* is that in that case the decision maker recognized that there was a difference of opinion between the experts. As we noted in *Molalla River Reserve*:

> "The findings make clear that the county considered the issue to be a battle of the experts and chose to believe the opponents' experts. A local government may rely on the opinion of an expert if, considering all of the relevant

> evidence in the record, a reasonable person would have chosen to rely on the expert's conclusion." 42 Or LUBA at 268.

In this case the hearings officer either did not recognize or for some other reason failed to address the conflicting expert testimony about the efficacy of relying on the mitigation water from the Three Sisters Irrigation District to address the hearings officer's concern about the thermal impacts water use at the destination resort would have on Whychus Creek during the summer months.[13] Without some attempt by the hearings officer to resolve that conflict or to identify which expert testimony she found more persuasive, remand is required.

The second assignment of error, subassignment of error (B)(2) under the third assignment of error and subassignment of error 4 under the fourth assignment of error are sustained.

B. The Hearings Officer's Fish Mitigation Findings

Petitioner's entire argument under subassignment of error B(1) under the third assignment of error is set out below:

> "Unlike with the Applicant's wildlife plans (where the Hearings Officer in her conditions of approval at least attempted to identify the plans to be followed), the Hearings Officer did not identify any fish mitigation plans or require compliance with them in her conditions of approval. Any plans relied upon must be required in conditions of approval. It cannot just be assumed that everything mentioned in a land use application will be done. * * *
>
> "She also made no findings of compliance with the standards for fish resources, other than just saying that the OWRD mitigation requirement addresses water quantity and that additional mitigation is needed for water quality on Whychus Creek. She made no findings on water quality for the

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[13] We need not and do not decide here whether the expert statement cited by Thornburgh would be sufficient to overcome the opponents' expert's concerns. However, we note that if the water that would remain in Whychus Creek by virtue of the Three Sisters Irrigation District mitigation is only slightly warmer than Alder Springs water and significantly cooler than the in-stream water at the mouth of Whychus Creek, Thornburgh's expert's statement at Record 1248 is no doubt true. That may well be the case. But if the water that is not going to be diverted for irrigation is significantly warmer than the Alder Springs water and approximately the same temperature as the in-stream water at the mouth of Whychus Creek, it is difficult to see how leaving that water in Whychus Creek would have any material impact on the in steam water temperature at the mouth of Whychus Creek. Some effort to clarify the expert's statement will likely be required.

Deschutes River or on impacts to fish species in Whychus Creek and the Deschutes River." Petition for Review 30.

Condition of approval 38 requires that Thornburgh "abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement * * *." Record 40. While it could certainly be clearer, we conclude that that reference includes the Terrestrial WMP dated April 15, 2008, the Fish WMP dated April 21, 2008, the M&M Plan dated August 20, 2008 and the two-page letter regarding Whychus Creek mitigation dated August 11, 2008. With regard to the findings that petitioner claims are missing, Thornburgh identifies findings that it contends are adequate. Thornburgh's Response Brief 26. Without a more developed argument from petitioner, we reject this subassignment of error.

Subassignment of error B(1) under the third assignment of error is denied.

C. Big Falls Ranch Mitigation Water

In subassignment of error B(3) under the third assignment of error, petitioner contends that the hearings officer found that groundwater impacts on the Deschutes River would be mitigated in part by acquiring Big Falls Ranch water rights and returning that water to Deep Canyon Creek. According to petitioner the hearings officer failed to condition the challenged decision to require that the Big Falls Ranch water rights be acquired and that the water be returned to Deep Canyon Creek.

Thornburgh responds that the Fish WMP and the August 11, 2008 letter to the hearings officer make it clear that Thornburgh is obligated to mitigate by acquiring the Big Falls Ranch water rights and returning that water to Deep Canyon Creek. Record 378, 2699. We agree with Thornburgh.

Subassignment of error B(3) under the third assignment of error is denied.

D. Central Oregon Irrigation District Mitigation Water

In subassignment of error B(4) under the third assignment of error petitioner contends the hearings officer failed to impose a condition requiring that Thornburgh acquire mitigation

water from the Central Oregon Irrigation District (COID) if necessary. In subassignment of error 3 under the fourth assignment of error, petitioner argues the hearings officer erred by failing to address her argument that mitigation water may not be available from COID.

Thornburgh responds, and we agree, that the issue of the feasibility of acquiring water rights from COID if necessary was resolved in our decision in *Gould I*, and that condition 10 in the FMP approval decision is adequate to ensure that those water rights are secured if necessary. *Gould I*, 54 Or LUBA at 266-67.

Subassignment of error B(4) under the third assignment of error and subassignment of error 3 under the fourth assignment of error are denied.

E. Ninty Percent Consumption Versus Sixty Percent

Petitioner contends the county erroneously assumed that only 60 percent of the groundwater that is removed from the wells will actually be consumed and that 40 percent of that groundwater withdrawal would be returned to the subsurface hydrologic system. Although OWRD used a 60 percent consumption figure in computing Thornburgh's mitigation responsibility, petitioner contends she submitted evidence that once the destination resort is fully operational it will produce 326,000 gallons of effluent per day and that under DEQ's permit much of that water will not percolate back into the groundwater. Record 1145.

Thornburgh responds that its expert concluded that under the DEQ permits sewage effluent is permitted to seep into the ground. Record 391. The hearings officer specifically recognized petitioner's argument that consumption should be assumed to be 90 percent rather than 60 percent. Record 33. Thornburgh contends the hearings officer was entitled to rely on Thornburgh's rebuttal and to use the same assumptions that were used by OWRD. We agree with Thornburgh.

Subassignment of error 1 under the fourth assignment of error is denied.

F. Loss of Cool Patches

Petitioner argues the county never responded to its concerns about the loss of "cool patches" in the Deschutes River and tributaries through withdrawal of cool ground water for use by the proposed destination resort.

Thornburgh responds that the record includes a fair amount of evidence that was submitted to demonstrate that any impacts on cool water patches will be mitigated through the mitigation steps Thornburgh has agreed to take. Record 97, 101, 106-107, 900-901, 1251, 2135-2139, 2698-2701. With the exception of the potential for impacts on Whychus Creek, the hearings officer was satisfied that the proposed destination resort would not have adverse impacts on cool patches in the Deschutes River basin. The hearings officer concluded that with the proposed additional mitigation proposed through the Three Sisters Irrigation District, that potential adverse thermal impact on Whychus Creek would be avoided. We have already determined that the challenged decision must be remanded for a better explanation for why the hearings officer believes the additional mitigation through the Three Sisters Irrigation District will be sufficient to resolve her concerns about thermal impacts on Whychus Creek. But the hearings officer apparently concluded that the proposed mitigation was sufficient to resolve concerns about other cool patches, and we agree with Thornburgh that that conclusion is supported by substantial evidence.

Subassignment of error 2 under the fourth assignment of error is denied.

The second assignment of error is sustained. The third and fourth assignments of error are sustained in part.

FIFTH ASSIGNMENT OF ERROR

DCC 18.113.090 sets out the requirements for destination resort FMPs and provides in relevant part:

> "It shall be the responsibility of the applicant to provide a Final Master Plan (FMP) which includes text and graphics explaining and illustrating:

"A. The use, location, size and design of all important natural features, open space, buffer areas and common areas;

"B. The use and general location of all buildings, other than residential dwellings and the proposed density of residential development by location;

"* * * * *

"G. A description of all commercial uses including approximate size and floor area[.]"

Under her fifth assignment of error, petitioner contends the FMP lacks the information that is required by DCC 18.113.090(A), (B) and (G) and condition 13 of CMP approval, which requires that the "[a]pplicant shall specify all recreational facilities within the proposed resort as part of final master plan approval."

A. Natural Areas

Petitioner first argues that "the Applicant does not identify where [the] natural areas are." Petition for Review 36. Thornburgh points to a graphic that appears at Record 1232 and shows the locations and acreages of the "Common Area Open Space," "Lake and Golf Open Space," and "50' Wide Buffer Zone." In the proceedings below, Thornburgh explained that "the common [area] open space is 'natural' open space, in contrast with the golf courses, developed open spaces and buffer." Record 1218. Based on that response it appears that Thornburgh has supplied "text and graphics explaining and illustrating" "natural areas," as required by DCC 18.113.090(A).

This subassignment of error is denied.

B. Recreation Facilities

Under CMP condition of approval 13, the applicant was to "specify all recreation facilities" that will be included in the destination resort, "as part of final master plan approval." Petitioner contends that all the applicant has done is provide a list of recreational uses that "would be allowed at Thornburgh Resort." Record 2498-2501.

Thornburgh responds:

"In addition to furnishing lists of proposed recreational facilities (R 2500, 2879), Thornburgh explained

> "'The common areas within the resort will include the common open space areas (i.e., those that do not alter the existing or natural landscape, except as permitted by DCC 18.113.030(E)). Common areas within the resort will also include many of the amenities and facilities listed in the Amenities Description attached as revised Ex. A8d [R 2879]: the community center, amphitheater, game rooms, libraries, stables and equestrian facilities, swimming pools, sports fields, vista view points and a cultural and interpretive center. These amenities will be located in the areas depicted as 'visitor oriented' and 'recreational' on the revised master Development Plan, FMP, Ex. A3.1 [R 2495].' (R 47)." Thornburgh's Response Brief 31.

Although we could be mistaken, we understand petitioner to argue that every single recreational use that will ultimately be constructed as part of the Thornburgh Resort must be precisely identified on the FMP. We understand Thornburgh to argue the supplied list of potential recreational facilities is adequate to comply with CMP condition of approval 13, even though the list that begins at Record 2498 expressly provides that "[i]t does not require that all of the following will be built, or be built to any specific standards."

Whatever ultimate mix of recreational facilities is selected from the list that begins at Record 2498 must comply with the ORS 197.445(3) requirement that "[a]t least $7 million must be spent on improvements for on-site developed recreational facilities and visitor-oriented accommodations," and at least "one-third of this amount must be spent on developed recreational facilities." With the caveat that the proposal must ultimately comply with ORS 197.445(3), we agree that the list at Record 2498-2501 is sufficient to comply with CMP condition 13. While that condition certainly could be interpreted to require more specificity and certainty than Thornburgh has provided, we do not believe it must be interpreted to do so.

SIXTH ASSIGNMENT OF ERROR

We understand petitioner to argue that the version of DCC 18.113.060(A)(4) that applies in this matter requires that "[a]t least $2,000,000 (in 1984) dollars shall be spent on developed *recreational* facilities." (Emphasis added.) To ensure compliance with DCC 18.113.060(A)(4), the hearings officer imposed the following condition of approval:

> "33. The Resort shall, in the first phase, provide for the following
>
> "* * * * *
>
> "D. At least $2,000,000 (in 1984 dollars) shall be spent on developed *residential* facilities.
>
> "* * * * *." (Emphasis added.)

Petitioner argues that because the hearings officer mistakenly calls for at least two million dollars in *residential* facilities, instead of the *recreational* facilities specified in DCC 18.113.060(A)(4), the decision must be remanded.

We agree with Thornburgh that the hearings officer almost certainly intended to require that "at least $2,000,000 (in 1984 dollars) shall be spent on developed recreational facilities" and that her use of the word "residential" was likely inadvertent. However, the hearings officer's decision must be remanded for other reasons. On remand, the hearings officer should correct the erroneous reference to residential facilities in Condition 33(D).

The sixth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

In her seventh assignment of error, petitioner argues it was error for the hearings officer to consider the DCC 18.113.070(D) "no net loss" standard in her decision granting FMP approval rather than in her CMP approval decision. Petitioner argues that "a complete and final CMP decision" is required before the county can grant FMP approval. Petition for Review 38. Petitioner contends:

> "It is fundamentally inconsistent for the County to have approved the CMP as a land use permit (CUP) while deferring mandatory approval criteria without

C. Use and General Location of All Buildings

Petitioner's argument under this assignment of error is similar to her argument under the previous subassignment of error. DCC 18.113.090(B) requires that Thornburgh show "the use and general location of all buildings." We understand petitioner to argue that Thornburgh failed to do so.

It is worth noting that DCC 18.113.090(B) does not require that Thornburgh show "buildings" on the FMP, instead DCC 18.113.090(B) requires that Thornburgh show "the use and general location of" the proposed buildings. Thornburgh argues that the Final Master Plan graphic that appears at Record 2872 shows where "Residential," "Visitor Oriented," "Visitor Lodging," "Commercial," "Recreational," "Infrastructure," "Open Space (Common)" and "Open Space (Golf)" uses will be located and that together with the list of proposed uses is sufficient to comply with DCC 18.113.090(B). We agree with Thornburgh.

D. Approximate Size and Floor Area of Commercial Uses

DCC 18.113.090(G) requires that the FMP include "[a] description of all commercial uses including approximate size and floor area[.]" We understand petitioner to argue that the exhibit list that appears at Record 2498-2501 is inadequate to comply with DCC 18.113.090(G). According to that exhibit, Thornburgh Resort will include "20,000 Square Feet" of "Specialty Retail," "15,000 Square Feet" of "Real Estate Sales and Related," "75,000 Square Feet" of "Hotel, Dining and Related," "20,000 Square Feet" of "Golf Clubhouse," "25,000 Square Feet" of "Spa Facilities," and "15,000 Square Feet" of "Recreation Center." Record 2499. We agree with Thornburgh that petitioner has not demonstrated that more is required to comply with DCC 18.113.090(G).

This subassignment of error is denied.

The fifth assignment of error is denied.

> feasibility findings that compliance is 'likely and reasonably certain to succeed' under [*Meyer v. City of Portland*, 67 Or App 274, 280 n5, 678 P2d 741, *rev den* 297 Or 82 (1984)]. However, the County's CMP approval decided to defer consideration of the standard to the FMP stage. Petitioner appealed this decision to LUBA (Petition at Rec. 3139) and the Court of Appeals which affirmed the County decision. * * * A petition for review to the Supreme Court is being filed." Petition for Review 38-39.

Petitioner's arguments under the seventh assignment of error are arguments that either were made or should have been made in her appeal of the county's second CMP decision. They provide no independent basis for reversal or remand of the county's FMP decision.

The seventh assignment of error is denied.

The county's decision is remanded.

Exhibit 10: FMP–Court of Appeals Affirmed

02/2010

EXHIBIT 10

FILED: February 24, 2010

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ANNUNZIATA GOULD,

Petitioner
Cross-Respondent,

v.

DESCHUTES COUNTY,

Respondent,

and

THORNBURGH RESORT COMPANY, LLC,

Respondent
Cross-Petitioner.

Land Use Board of Appeals
2008203
A143430

Argued and submitted on December 01, 2009.

Paul D. Dewey argued the cause and filed the briefs for petitioner - cross-respondent.

Peter Livingston argued the cause for respondent - cross-petitioner. With him on the brief was Schwabe, Williamson & Wyatt, PC.

No appearance for respondent Deschutes County.

Before Landau, Presiding Judge, and Schuman, Judge, and Ortega, Judge.

ORTEGA, J.

Affirmed on petition and cross-petition.

ORTEGA, J.

This petition and cross-petition for judicial review arise from a Land Use Board of Appeals (LUBA) decision that remanded Deschutes County's approval of the final master plan (FMP) for development of a destination resort by Thornburgh Resort Company, LLC (Thornburgh). The issues on review concern Thornburgh's fish and wildlife mitigation plans. Petitioner Gould argues that LUBA remanded too little to the county. On a cross-petition, Thornburgh contends that LUBA remanded too much. We affirm on the petition

and the cross-petition.

This is but the latest appeal of several regarding Thornburgh's development of a destination resort. For context, we begin with a brief procedural history.

After the county approved Thornburgh's conceptual master plan (CMP), Gould appealed to LUBA, which remanded for additional findings. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007) (*Gould I*). Gould sought a more extensive remand from this court, and we concluded that LUBA had erred in its review of the county's determinations regarding wildlife mitigation. *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007) (*Gould II*).

On remand, the county approved Thornburgh's CMP with further findings and new conditions of approval; it postponed determination of the consistency of the CMP with its wildlife mitigation standards until a later public hearing. Gould again appealed to LUBA, and LUBA affirmed. *Gould v. Deschutes County*, 57 Or LUBA 403 (2008) (*Gould III*). Gould sought judicial review, and we affirmed. *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106, *rev den*, 347 Or 258 (2009) (*Gould IV*).

Meanwhile, Thornburgh developed its fish and wildlife mitigation plan and pursued approval of its FMP. We take the description of Thornburgh's mitigation plan from the LUBA order and from the record.

Thornburgh's wildlife management plan contains two components. The first addresses terrestrial wildlife and is described in the "Thornburgh Resort LLC Wildlife Mitigation Plan for Thornburgh Resort" ("Terrestrial WMP") and the "Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project," dated August 2008 ("M&M Plan"). The second component addresses off-site fish habitat and is described in the "Thornburgh Resort Fish and Wildlife Mitigation Plan Addendum Relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat" ("Fish WMP") and an August 11, 2008, letter proposing additional mitigation for Whychus Creek.[(1)] LUBA explained:

> "It is undisputed that development of the proposed destination resort will destroy or damage some existing terrestrial wildlife habitat, making that existing terrestrial habitat unavailable for wildlife or less suitable for wildlife. Thornburgh proposes to mitigate for that loss in two ways, on-site mitigation and off-site mitigation. The on-site mitigation will reduce the amount of habitat loss that would otherwise result from construction of the destination resort; the off-site mitigation is to compensate for the habitat loss that cannot be avoided when the destination resort is constructed. * * * The Terrestrial WMP explains how Thornburgh went about assessing how much mitigation will be required:
>
> "'ODFW [the Oregon Department of Fish and Wildlife] suggested a habitat modeling approach that uses a modification of the U.S. Fish and Wildlife Service's (1981) Habitat Evaluation Procedures (HEP) analysis. This describes existing habitat values and estimates impacts. HEP is an accounting method, in which the value of each habitat type for each of a series of evaluation species is expressed in terms of habitat units (HUs). These are calculated as the number of acres of that habitat multiplied by an index of its

> quality, and expressed as a number between 0 and 1, which is termed the Habitat Suitability Index (HSI). One HU is the equivalent of one acre of the best habitat available for a species. Two acres of habitat half as good would also equal one HU, and so on. In the HEP analysis, to make the process manageable, an "evaluation species" is chosen to represent a number of species with similar lifestyles and habitat requirements (USFWS 1980, 1981)."'

According to the Terrestrial WMP, Thornburgh's off-site mitigation would be 8,474 HUs. The Terrestrial WMP provides:

> "[Thornburgh] shall restore and enhance approximately 4,501 acres of juniper woodlands on public lands administered by the BLM [Bureau of Land Management] in the Cline Buttes Sub-Area to mitigate the loss of 8,474 HUs. The specific areas subject to specific rehabilitation or enhancement actions will be determined through consultation by BLM, [Thornburgh], and ODFW resource management specialists, based upon the current conditions of the mitigation site and the agreed amount and type of enhancement. [Thornburgh] shall maintain rehabilitated areas through ongoing efforts as needed, such as reduction of weeds, thinning of junipers, and reclosing unwanted travel routes. BLM will manage public land on which this mitigation will be implemented, to comply with BLM's rangeland health standards to maintain desirable habitat for wildlife."

The M&M Plan, which was developed in coordination with the BLM, further explains how off-site mitigation will be implemented. Because the BLM had not finalized the Cline Buttes Recreation Area Plan (CBRAP), the exact location of the mitigation efforts could not be identified. The mitigation methods used in the M&M Plan, however, were structured to be applicable to any parcel of land in the Cline Buttes Recreation Area that the BLM, after finalizing the CBRAP, determined to be suitable for mitigation. The mitigation methods include weed management, vegetation enhancement, reduction of unauthorized off-road motor vehicle use, creation of wildlife water sources, and traffic speed monitoring devices. Thornburgh plans to use an adaptive approach to vegetation management, in which the management efforts are monitored and may be changed to better meet desired goals.

Thornburgh also proposed, as what it calls "an ultimate backstop, in order to eliminate the remote possibility that the BLM land would somehow become unavailable," to fund mitigation elsewhere in Deschutes County. As the hearings officer noted, that contingent proposal involved a dedicated fund for use by ODFW.

After a public hearing, a county hearings officer approved the FMP with conditions. In proceedings before the county, as on appeal, significant portions of the argument focused on Deschutes County Code (DCC) 18.113.070(D), sometimes referred to as the "no net loss" standard, which provides:

> "In order to approve a destination resort, the Planning Director or Hearings Body shall find from substantial evidence in the record that:
>
> "* * * * *

> "D. Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource."

The hearings officer concluded that, although the standard is difficult to quantify, it "requires an analysis of species on the site, the likely impacts of development, and the applicant's plan to address those impacts. It does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio." The hearings officer went on to agree with Thornburgh's argument that "the modified HEP analysis adequately quantifies the impacts and provides a workable methodology to compensate for the impact" and decided that Thornburgh had demonstrated that the mitigation plan was reasonably likely to succeed. The hearings officer concluded that Thornburgh's mitigation plan "is adequate to ensure that the impact of the development on fish and wildlife habitats results in no net loss."

After the board of county commissioners declined to hear Gould's appeal, Gould appealed to LUBA. LUBA rejected her challenges to the hearings officer's construction of DCC 18.113.070(D); sustained her challenge to the adequacy of the Terrestrial WMP and M&M Plan under *Gould II*; sustained her challenge to the sufficiency of the hearings officer's findings regarding the efficacy of mitigation of thermal impacts on Whychus Creek; rejected her challenges to the sufficiency of the findings regarding fish mitigation; and rejected her challenge to the sufficiency of the evidence concerning "cool patches" in the Deschutes River basin.

Gould petitioned for judicial review. She asserts three assignments of error, contending that LUBA's order is unlawful in substance because (1) LUBA misinterpreted DCC 18.113.070(D); (2) LUBA erroneously determined that the conditions of approval are sufficient to identify and require fish mitigation; and (3) LUBA erred in determining that the hearings officer's findings regarding mitigation of fish resources were adequate. Thornburgh cross-petitioned, arguing that LUBA erred by concluding that Thornburgh's mitigation plan was not specific enough to satisfy the standard described by this court in *Gould II*.

We review to determine whether LUBA's order was "unlawful in substance or procedure." ORS 197.850(9)(a). In interpreting the county code, we give no deference to the interpretation made by the hearings officer or by LUBA. *Gage v. City of Portland*, 319 Or 308, 315-17, 877 P2d 1187 (1994) (*Gage I*); *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995) (*Gage II*). In reviewing LUBA's determination of substantial evidence,

> "[o]ur task is not to assess whether the local government erred in making a finding, but to determine whether LUBA properly exercised its review authority. Thus, we do not substitute our judgment for LUBA's on whether a reasonable person could make a finding of fact based upon the entire local government record. Instead, we evaluate whether LUBA properly stated and applied its own standard of review. If LUBA does not err in the articulation of its substantial evidence standard of review under ORS 197.835(9)(a)(C), we would reverse LUBA's decision only when there is no evidence to support the finding or if the evidence in the case is 'so at odds with LUBA's evaluation that a reviewing court could infer that LUBA had misunderstood or misapplied its scope of review.' *Younger* [*v. City of Portland*, 305 Or 346, 359, 752 P2d 262 (1988)]."

Citizens for Responsibility v. Lane County, 218 Or App 339, 345, 180 P3d 35 (2008).

I. GOULD'S FIRST ASSIGNMENT OF ERROR

In her first assignment of error, Gould contends that LUBA's order "is unlawful in substance because it incorrectly determined without substantial evidence that the hearings officer's finding of compliance with the DCC 'no net loss' standard for fish and wildlife mitigation did not impermissibly involve substitution of species and maintenance/replacement of species at less than a 1:1 ratio." Before LUBA, Gould argued that DCC 18.113.070(D) could not be satisfied by simply improving habitat, that mitigation must be directed toward the species affected by the proposed development, and that mitigation cannot result in less than a 1:1 replacement ratio. LUBA rejected those arguments, reasoning that there was "nothing inherently improper about employing [an HEP] analysis to simplify the potentially exceedingly complicated task of assessing how much damage the proposed destination resort would cause to the wildlife resource and how much mitigation should be required to ensure there is no net loss to that wildlife resource."[(2)] LUBA further concluded that Gould's

> "challenge to the county's focus on wildlife *habitat* rather than the wildlife itself, while a literally plausible criticism based on the words of DCC 18.113.070(D), ignores the reality of wildlife resource protection. Development rarely if ever is carried out in a way that purposefully causes harm to the wildlife that may actually be present on a development site. The wildlife typically is gone before construction equipment shows up. The harm is caused by altering or destroying the habitat that the wildlife requires for continued existence, so that the habitat is no longer available for the wildlife to use or is less suitable for wildlife use. The county's focus on wildlife habitat does not constitute error."

(Emphasis in original.)

On review, Gould's arguments in support of her first assignment of error shift between issues of legal interpretation and issues of substantial evidence. She contends that, as a matter of law, DCC 18.113.070(D) requires the prevention of *any* loss of any species. At the same time, however, she acknowledges that she has not argued that DCC 18.113.070 (D) requires "studying every wildlife species" but rather has argued that a longer, on-the-ground survey was required as a basis for mitigation.

At oral argument, Gould stated that she did not contend that a mitigation plan must catalog the numbers of each species present on the land before development--by counting, for example, the exact number of crickets on the land--and mitigate by providing for equal numbers after development. When asked what DCC 18.113.070(D) requires, as a matter of code interpretation, Gould suggested that the legal principle depends on the evidence of species surveys and that, if an opponent of the development can identify a species for which complete mitigation is not provided, then a question of legal interpretation arises.

We thus understand Gould's argument to be two-fold: (1) that, as a legal matter, DCC 18.113.070(D) requires that the development of a destination resort cause no loss of numbers of any species identified as having been affected by the development--that is, that the mitigation plan must maintain or replace those species at a 1:1 ratio; and (2) that, as a factual matter, Thornburgh's plan does not meet that standard.

We begin with the code interpretation issue. As noted above, DCC 18.113.070(D) requires substantial evidence that "[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource." The parties seem to agree that DCC 18.113.070(D) requires, first, an assessment of fish and wildlife resources before development and, second, mitigation to make up for negative impacts caused by development. Although the parties do not frame the issue this way, the heart of their dispute appears to be a disagreement about what the county meant by "fish and wildlife resources"--that is, what exactly the county requires to be "completely mitigated so that there is no net loss or net degradation."

The meaning of "fish and wildlife resources" is not immediately clear, and resort to a dictionary is of limited assistance.[3] Other provisions of the county code, however, provide some guidance. That context suggests that "fish and wildlife resources" are not identical to fish and wildlife *species*. For example, among provisions of the county's comprehensive plan that address fish and wildlife, DCC 23.104.020 states the following goals:

> "1. To conserve and protect existing fish and wildlife areas.
>
> "2. To maintain all species at optimum levels to prevent serious depletion of indigenous species.
>
> "3. To develop and manage the lands and waters of this County in a manner that will enhance, where possible, the production and public enjoyment of wildlife.
>
> "4. To develop and maintain public access to lands and waters and the wildlife resources thereon.
>
> "5. To maintain wildlife diversity and habitats that support the wildlife diversity in the County."

The varying word choices--with references to "fish and wildlife areas," "species," "wildlife," and "wildlife resources"--suggest that the phrase "wildlife resources" is not identical to "wildlife" or "species."

Consistently with that view, DCC 23.104.010 provides, in part:

> "It is recognized that *failure to protect fish and wildlife resources will result in loss of habitat and loss of endangered species*, declining tourist expenditures, loss of recreational opportunities and loss of quality of life. Already, Deschutes County has witnessed the serious degrading of the cold-water fishery by irrigation withdrawals, loss of sensitive deer winter rangelands to development and the disturbance of deer migration corridors due to residential and recreational construction.
>
> "* * * * *
>
> "Throughout committee discussions and public testimony, the public expressed concern that local fish and wildlife resources be protected. * * * During periodic review the County also updated the fish and wildlife

> inventories and completed Economic, Social, Environmental and Energy analysis of conflicting uses and developed programs *to protect the significant Goal 5 wildlife resources*."

(Emphasis added.) Thus, the county associated damage to "fish and wildlife resources" with "loss of habitat and loss of endangered species," which suggests that the resources concerns are closely related to habitat concerns.

The county also associated protection of "fish and wildlife resources" with protection of "significant Goal 5 wildlife resources." Goal 5 associates the protection of "resources" with habitat:

> "Local governments shall adopt programs that will protect natural resources and conserve scenic, historic, and open space resources for present and future generations. These resources promote a healthy environment and natural landscape that contributes to Oregon's livability.
>
> "The following *resources* shall be inventoried:
>
> "a. Riparian corridors, including water and riparian areas and *fish habitat*;
>
> "* * * * *
>
> "c. *Wildlife Habitat*[.]"

(Emphasis added.) Goal 5 thus treats fish and wildlife habitat as "resources."

Thus, the context of DCC 18.113.070(D) strongly suggests that "fish and wildlife resources" refers not to species of fish and wildlife, but to the habitat that supports fish and wildlife. In light of that context, we conclude that DCC 18.113.070(D) allows a focus on fish and wildlife habitat to establish that "[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource." That standard may be satisfied by a plan that will completely mitigate any negative impact on the habitat that supports fish and wildlife, without showing that each individual species will be maintained or replaced on a one-to-one basis. LUBA did not err by rejecting Gould's contrary interpretation of DCC 18.113.070(D).

We turn to Gould's arguments concerning substantial evidence. We understand those arguments to depend, in large part, on her interpretation of DCC 18.113.070(D). In any event, Gould makes no persuasive argument that LUBA erred in its substantial evidence review of the hearings officer's findings. Accordingly, LUBA's order is not unlawful in substance as Gould contends in her first assignment of error.

II. GOULD'S SECOND ASSIGNMENT OF ERROR

Gould's second assignment of error is that LUBA's order "is unlawful in substance and is not based on substantial evidence in its determination that the hearings officer's conditions of approval are adequate to ensure Code compliance with 'no net loss' of fish resources or are adequate to identify the required mitigation plans." LUBA rejected Gould's argument that the hearings officer had failed to require compliance with specific fish mitigation plans as a condition of approval of the FMP. The hearings officer imposed this condition:

> "38. [Thornburgh] shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of off-site mitigation efforts. Consistent with the plan, [Thornburgh] shall submit an annual report to the county detailing mitigation activities that have occurred over the previous year. The mitigation measures include removal of existing wells on the subject property, and coordination with ODFW to model stream temperatures in Whychus Creek."

As condition 39, the hearings officer required restoration of in-stream water in Whychus Creek through a Three Sisters Irrigation District conservation project; that restoration was mentioned in the August 11, 2008, letter as possible mitigation that "would be in addition to the amount of mitigation water already described in Thornburgh's Addendum."

LUBA reasoned that, although condition 38 could be clearer, it requires compliance with the Terrestrial WMP, the M&M Plan, the Fish WMP, and the August 11, 2008, letter regarding Whychus Creek mitigation. Gould argues that LUBA erred and that there was no basis for LUBA to conclude that the Fish WMP and the August 11, 2008, letter were included in the condition of approval.[(4)] Thornburgh acknowledges before this court, as it did before LUBA, that it must comply with the fish mitigation plan documents that it submitted to the county, and it contends that the conditions of approval are sufficiently clear.

We agree with LUBA that the disputed documents (that is, the Fish WMP and the August 11, 2008, letter) were included in the condition of approval. Each document was labeled an "Addendum" to the "Fish and Wildlife Mitigation Plan." The hearings officer appears to have treated the "Wildlife Mitigation Plan" as a single plan with addenda: In the introduction to her findings of fact and conclusions of law, the hearings officer explains that she uses the abbreviation "WMP" to refer to "[Thornburgh's] Wildlife Mitigation Plan, including addenda." In the conditions of approval, the hearings officer referred to the WMP and "the August 2008 Supplement," an apparent reference to the M&M Plan, which was dated August 2008 and which, in the overview section of the M&M Plan, is described as "a supplement to the original Mitigation Plan." Under the circumstances, LUBA did not err in concluding that the conditions of approval included compliance with the Fish WMP and the August 11, 2008, letter.

III. GOULD'S THIRD ASSIGNMENT OF ERROR

In her third assignment of error, Gould contends that the hearings officer's findings regarding fish resources were inadequate because the hearings officer simply repeated the parties' arguments without making any "actual findings of compliance" and failed to address the need for mitigation of impacts on the cool habitat patches in the mainstem Deschutes River. The record does not support Gould's argument, and we reject it without further discussion.

IV. THORNBURGH'S CROSS-PETITION FOR JUDICIAL REVIEW

In its cross-petition, Thornburg argues that its wildlife mitigation plan was specific enough to meet the requirements of DCC 18.113.070(D), as interpreted by this court in *Gould II*, and that LUBA erred by concluding otherwise.

To frame our analysis, we begin with a detailed discussion of *Gould II* and *Gould IV*. In

Gould II, the county had approved Thornburgh's CMP with the condition that Thornburgh abide by its memorandum of understanding (MOU) with the BLM concerning wildlife mitigation. 216 Or App at 156. The MOU required Thornburgh

> "to complete a wildlife impact mitigation plan that 'will specify mitigation measures that are sufficient to insure that there is no net loss of wildlife habitat values as a result of the proposed development.' The agreement requires approval of the plan by ODFW and BLM and commits Thornburgh to 'work cooperatively with ODFW and BLM to determine the specific locations where the mitigation plan will be implemented.' The agreement provides that certain mitigation measures may be undertaken within the Masten Allotment, and those measures 'may include' trail construction, removal of old trails, fencing, vegetation thinning and management, and noxious weed controls."

Id. at 157. LUBA concluded that, in light of Thornburgh's wildlife report and its MOU with the BLM, the record contained substantial evidence to support the county's finding that Thornburgh's CMP complied with DCC 18.113.070(D), the "no net loss" standard. 216 Or App at 157-58. The issue on appeal was "whether LUBA erred in affirming the county's findings that the conceptual master plan application complied with DCC 18.113.070(D) because an acceptable mitigation plan was feasible and likely to be adopted by BLM, ODFW, and Thornburg." *Gould II*, 216 Or App at 159. We concluded:

> "LUBA's opinion and order was unlawful in substance for the reasons that follow. First, the county's findings were inadequate to establish the necessary and likely content of any wildlife impact mitigation plan. Without knowing the specifics of any required mitigation measures, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be 'completely mitigated' as required by DCC 18.113.070(D). ORS 215.416 (9) requires that the county's decision approving the CMP explain 'the justification for the decision based on the criteria, standards and facts set forth' in the decision. The county's decision is inconsistent with ORS 215.416(9) because the decision lacks a sufficient description of the wildlife impact mitigation plan, and justification of that plan based on the standards in DCC 18.113.070(D). Second, that code provision requires that the content of the mitigation plan be based on 'substantial evidence in the record,' not evidence outside the CMP record. In this case, the particulars of the mitigation plan were to be based on a future negotiation, and not a county hearing process. Because LUBA's opinion and order concluded that the county's justification was adequate despite those deficiencies, the board's decision was 'unlawful in substance.'"

Gould II, 216 Or App at 159-60 (footnote omitted).

We rejected Thornburgh's argument that a finding of feasibility, coupled with a condition requiring adoption of a mitigation plan, was enough to show compliance with DCC 18.113.070(D). *Id.* at 160-62. Thornburgh relied, in part, on *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82 (1984), which we described as requiring that

> "a proposed land development plan must be specific and certain enough to

> support findings that the proposal satisfies the applicable approval criteria. If the nature of the development is uncertain, either by omission or because its composition or design is subject to future study and determination, and that uncertainty precludes a necessary conclusion of consistency with the decisional standards, the application should be denied or made more certain by appropriate conditions of approval."

Gould II, 216 Or App at 161. In *Gould II*, we explained,

> "the county implicitly concluded (but did not directly find) that the nature of the wildlife impact mitigation plan was sufficiently certain and probable to allow a present determination of consistency with the approval criterion. LUBA found that the findings were 'adequate' to explain compliance with DCC 18.113.070(D).
>
> "But the governing ordinance requires a *Meyer* determination of whether 'solutions to certain problems * * * are * * * likely and reasonably certain to succeed'--whether the findings and conditions of the conceptual master plan approval adequately support the conclusion that 'any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource' as required by DCC 18.113.070(D). The adopted findings fail to make that case.
>
> "The wildlife impact mitigation plan was not yet composed. Although Thornburgh's consultant proposed a number of offsite mitigation measures on federal land, the BLM reported that these measures needed 'clarification and further development.' In particular, the agency asked that the effect of the development on deer and elk winter range and habitats along a nearby river be clarified. It noted that '[i]t is unclear what types of habitat conditions the resort intends to provide on-site compared to off-site.' The BLM concluded that '[s]everal items included in the draft report would not be considered appropriate off-site mitigation,' including removal of grazing on the resort property and from offsite mitigation areas, placing rocks on offsite mitigation areas, creation of new water sources for wildlife, and closure of existing roads and trails. Thus, the particular nature of the wildlife impact mitigation plan was not known at the time of the CMP hearing.
>
> "The county development code requires that the conceptual master plan application include the 'methods employed to mitigate adverse impacts on [wildlife] resources.' DCC 18.113.050(B)(1). That requirement allows little speculation. The code mandates that the applicant submit a 'proposed [wildlife] resource protection plan.' That requires that the submitted plan be specific enough to apply the approval standards in a meaningful way. The code requirements set out the necessary foundation for a determination that '[*a*]*ny* negative impact on fish and wildlife resources will be *completely mitigated* so that there is no net loss or net degradation of the resource.' DCC 18.113.070(D) (emphasis added). The county's substitute of an uncertain plan, a plan yet to be composed, violates those requirements.
>
> "The county decision was also defective for a second reason. The code mandates that the approval standards be evaluated 'from substantial evidence

> in the record.' DCC 18.113.070(D). That provision requires that the justification be based on evidence submitted at public hearings on the application. The county's decision, however, allows the mitigation plan justification to be established by future discussions among Thornburgh, ODFW, and BLM, and not on evidence submitted during the public hearings. That robs interested persons of the participatory rights allowed by the county ordinance."

Gould II, 216 Or App at 162-63 (alterations in *Gould II*).

Later, in *Gould IV*, Gould challenged the county's conditional approval of Thornburgh's CMP, contending that LUBA erred regarding the legal sufficiency of the county's condition and findings postponing its review of Thornburgh's mitigation plan to later hearings on the FMP. 227 Or App at 603. As we summarized our earlier decision in *Gould II*, the county's initial approval of Thornburgh's CMP "was improper because the mitigation plan was not yet composed and part of the evidentiary record before the county, and therefore the necessary findings about the sufficiency of that plan could not be made." *Gould IV*, 227 Or App at 606. In addition, we noted, the county had used the wrong standard to evaluate the sufficiency of the evidence; under *Meyer*, "the evidentiary record of a land use decision must show that compliance with the approval standards was 'likely and reasonably certain,' without regard to any modification as a result of later administrative review." *Id.* (quoting *Gould II*, 216 Or App at 161 (citing *Meyer*, 67 Or App at 280 n 5)). We rejected Gould's argument that the *Meyer* standard had to be met to justify postponement of the determination of compliance with DCC 18.113.070(D). *Gould IV*, 227 Or App at 609-10. Rather, we agreed with LUBA's conclusion that

> "a finding under *Meyer* (that the local government record shows that compliance with DCC 18.113.070(D) is 'likely and reasonably certain to succeed') is not necessary to postpone consideration of compliance with the approval standard. Rather, such a finding under *Meyer* would suffice to justify final adjudication of compliance with the approval criterion, as opposed to putting that determination off for another day."

Gould IV, 227 Or App at 610.

With that background in mind, we turn to the LUBA decision at issue here. LUBA sustained Gould's assignments of error concerning the adequacy of Thornburgh's Terrestrial WMP and M&M Plan. Regarding Thornburgh's plan to restore 4,501 acres of juniper woodlands on BLM land, LUBA reasoned:

> "The Terrestrial WMP and M&M Plan provide a fair amount of detail about the kinds of habitat restoration activities that might be employed to improve the habitat value of the 4,501 acres that are to be selected in the future. The record also indicates that Thornburgh's consultant and BLM and ODFW staff are confident that those restoration efforts will be successful and result in compliance with DCC 18.113.070(D). But what our description and the hearings officer's description of the Terrestrial WMP and M&M Plan make clear is that a number of important parts of Thornburgh's proposal to comply with the DCC 18.113.070(D) 'no net loss' standard have not yet been determined, and will not be determined until a future date at which [Gould] may or may not have any right to comment on the adequacy of the proposed

> mitigation. We do not know the location of the 4,501 acres that will be restored to provide the required mitigation. They may be located in the Canyons Region, the Deep Canyons Region or the Maston Allotment. Or they may be located somewhere else in Deschutes County. Until those 4,501 acres are located we cannot know what kind of habitat those 4,501 acres provide, and we cannot know what the beginning habitat value of those 4,501 acres is. We also do not know what particular mix of restoration techniques will be provided to those 4,501 acres. We do not know what the habitat value of those 4,501 acres will be after restoration. We therefore cannot know if that restoration effort will result in the needed 8,474 HUs. The question for us is whether given all of these uncertainties, the confidence of Thornburgh, BLM and ODFW is sufficient to provide substantial evidence that the proposed mitigation plan will result in compliance with DCC 18.1[1]3.070 (D). The answer to that question under the principles articulated in *Gould II* is no.
>
> "While we have no reason to doubt the professional judgment of Thornburgh's consultant and the staff at BLM and ODFW, under the Court of Appeals' decision in *Gould II*, [Gould] has a right to confront the mitigation plan that Thornburgh intends to rely on to comply with DCC 18.113.070(D). While we know more about what that mitigation plan might ultimately look like than we did when *Gould I* and *Gould II* were decided, there are simply too many remaining unknowns in the Terrestrial WMP and M&M Plan to allow [Gould] a meaningful chance to confront the adequacy of that plan. *See Gould II*, 216 Or App [at] 159-60 ('Without knowing the specifics of any required mitigation measures, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be 'completely mitigated' as required by DCC 18.113.070(D). * * * [T]hat code provision requires that the content of the mitigation plan be based on "substantial evidence in the record," not evidence outside the CMP record.'). The details that must be supplied before [Gould] can be given that meaningful chance to confront the proposed mitigation plan will not be known until some undetermined future date. Under the Court of Appeals' holding in *Gould II*, that is not a permissible approach for demonstrating compliance with DCC 18.113.070 (D)."

(Footnote omitted; omission and alteration to quotation from *Gould II* in LUBA order.)

In its cross-petition for judicial review, Thornburgh argues that "LUBA erred in concluding that the proposed wildlife mitigation plan does not meet the requirements of DCC 18.113.070(D) as interpreted by the Court of Appeals in *Gould II*." Thornburgh contends that LUBA incorrectly applied the substantial evidence test in light of *Gould II* and the record in this case. In Thornburgh's view, although "the BLM legally could not commit itself to provide a specific location where mitigation was to occur," the BLM's CBRAP was likely to be finalized, and mitigation on three areas within the Cline Buttes Recreation Area would then be welcome. Thornburgh further contends that the strategy and monitoring process are sufficient to show that the mitigation plan is reasonably likely to succeed.

Gould responds that Thornburgh's mitigation "strategy" is too indefinite to be a "plan" that meets the mitigation standard and that, without knowing more about the location of the

mitigation site--which could be anywhere in Deschutes County--it is impossible to say what kind of habitat the site will provide and whether the site will mitigate the habitat lost because of the development. In Gould's view, details are especially necessary because the proposed development will affect thousands of acres of habitat, and too many details are left to BLM, which is not obligated to comply with DCC 18.113.070(D).

As noted, LUBA reasoned that the Terrestrial WMP is inadequate because the location of mitigation efforts could be at one of the three BLM sites or "somewhere else in Deschutes County." Without specific identification of the acres where restoration will occur, LUBA noted, one cannot assess the existing habitat and its value, know the particular mix of restoration techniques to be used, or determine the post-restoration habitat value.

As we explained in *Gould IV*, a final adjudication of compliance requires a showing that compliance with DCC 18.113.070(D) is "'likely and reasonably certain to succeed.'" 227 Or App at 610 (quoting *Meyer*, 67 Or App at 280 n 5). We do not understand LUBA to have concluded that, if the proposed mitigation approach outlined in the M&M Plan occurred on one of the three parcels of BLM land, there was a lack of substantial evidence that the Terrestrial WMP was likely and reasonably certain to succeed. To the contrary, LUBA noted that it had "no reason to doubt the professional judgment of Thornburgh's consultant and the staff at BLM and ODFW." However, as LUBA noted, it remained uncertain whether the habitat restoration would in fact occur on BLM land or, rather, elsewhere in Deschutes County, through Thornburgh's back-up plan of a dedicated fund to be used by ODFW for mitigation.

If the only remaining uncertainty in Thornburgh's mitigation plan were which portion of BLM land would be the site of habitat restoration, we would conclude that LUBA erred in its application of *Gould II*. There, *no* mitigation plan had been composed; Thornburgh was required only to complete a plan and to obtain ODFW and BLM approval of it. 216 Or App at 156-57; *see also Gould IV*, 227 Or App at 606 (explaining that the county's approval of the CMP "was improper because the mitigation plan was not yet composed and part of the evidentiary record before the county, and therefore the necessary findings about the sufficiency of that plan could not be made"). Here, the nature of the mitigation plan proposed for BLM land is clear: the Terrestrial WMP provides that Thornburgh will restore and enhance about 4,501 acres of juniper woodlands within the Cline Buttes Recreation Area, and the M&M Plan sets out mitigation methods that could be applied to any parcel of land within that area. Thus, the adequacy of Thornburgh's mitigation efforts as they pertain to BLM land can be assessed now, based on the record as it exists. If some portion of BLM land turns out to be unsuitable for mitigation or if some mitigation methods are inappropriate, those objections could be raised, and the county could deny approval of the FMP on that basis or could condition approval to address those objections.

LUBA also concluded, however, that it had not yet been determined whether Thornburgh's restoration efforts would in fact occur on BLM land. The BLM was still finalizing the CBRAP and so had not yet committed to allowing Thornburgh's proposed habitat restoration to occur on BLM land. Further, Thornburgh's back-up plan of a dedicated fund for mitigation suffers from the same defects as the plan at issue in *Gould II*. In light of those uncertainties, we cannot conclude that LUBA erred in exercising its review authority and concluding that Thornburgh's proposed mitigation efforts are not likely and reasonably certain to result in compliance with DCC 18.113.070(D).

Affirmed on petition and cross-petition.

---

1. The letter is captioned "Clarification/Modification of Addendum to Fish and Wildlife Mitigation Plan Relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat." It contains two sections, the first of which states that Thornburgh had earlier indicated its willingness to remove a second dam on Deep Canyon Creek "as part of its Fish and Wildlife Mitigation Plan. This letter confirms that intention and so modifies the Addendum." The second section states that Thornburgh believed its mitigation efforts were sufficient, but that Thornburgh could, if necessary, provide additional flow of 106 acre-feet per year in Whychus Creek by participating in a conservation project with the Three Sisters Irrigation District.

Return to previous location.

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2. LUBA observed that a loss in habitat that is currently occupied by threatened or endangered species likely could not be mitigated by improving off-site habitat suitable for some other species, but it noted that there are no threatened or endangered species on the property. We understand LUBA's observation as a reference to other legal requirements for protection of threatened or endangered species. *See, e.g.*, ORS 197.460(1) (requiring counties considering destination resorts to ensure that "[i]mportant natural features, including habitat of threatened or endangered species, streams, rivers and significant wetlands shall be retained"); DCC 23.84.020 (setting a goal to provide for destination resort development, *inter alia*, "in a manner that will maintain important natural features, such as habitat of threatened or endangered species, streams, rivers and significant wetlands").

Return to previous location.

---

3. A common meaning of the adjective "net" (as in "no net loss or net degradation of the resource") is "free from all charges or deductions: as **a :** remaining after the deduction of all charges, outlay, or loss <~ earnings> <~ proceeds> -- opposed to *gross*." *Webster's Third New Int'l Dictionary* 1519 (unabridged ed 2002).

Return to previous location.

---

4. Gould asserts that the Fish WMP and the August 11, 2008, letter are not the entire fish mitigation plan, because Thornburgh also submitted an "Evaluation of the Proposed Thornburgh Resort Project Impact on Hydrology and Fish Habitat." That May 2008 document appears to be strictly an analysis of the plan, and Gould does not identify any mitigation plan provisions that are proposed in that 311-page document.

Return to previous location.

Exhibit 11: FMP–LUBA Appellate Judgment w/COA

08/2010

EXHIBIT 11

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

THORNBURGH RESORT COMPANY, LLC,
Intervenor-Respondent.

LUBA No. 2008-203

AUG 17 '10 AM 9:44 LUBA

NOTICE OF APPELLATE JUDGMENT

The Court of Appeals issued an opinion in *Gould v. Deschutes County*, CA A143430, on February 24, 2010. The appellate judgment was filed on April 8, 2010.

The appellate court decision in this case requires no change in our final opinion and order dated September 9, 2009.

Dated this 17th day of August, 2010.

Michael A. Holstun
Board Chair

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Certificate of Mailing

I hereby certify that I served the foregoing Notice of Appellate Judgment for LUBA No. 2008-203 on August 17, 2010, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Laurie E. Craghead
Assistant Legal Counsel
Deschutes County Counsel
1300 NW Wall Street Suite 200
Bend, OR 97701-1960

Paul D. Dewey
Attorney at Law
1539 NW Vicksburg Ave
Bend, OR 97701

Peter Livingston
Schwabe, Williamson & Wyatt PC
1211 SW Fifth Avenue, Suite 1600
Portland, OR 97204

Dated this 17th day of August, 2010.

Kelly Burgess
Paralegal

Kristi Seyfried
Executive Support Specialist

Exhibit 12: Foreclosure – Trustees Notice of Sale

10/2010

EXHIBIT 12

2241878242

TRUSTEE`S NOTICE OF SALE

Loan No: 1580000245 Parker Group
T.S. No.: 10-01473-4 OR

Reference is made to that certain deed made by, Parker Group Investments, LLC, an Oregon Limited Liability Company, Thornburgh Resort Company, LLC, an Oregon Limited Liability Company, as to Parcels 1 through 6 and John E. Evenson and Barbara L. Evenson, each as to an undivided 50% interest, as to an undivided 49% interest as to Parcel 6 only, as grantor, to Ameritltle, as trustee, in favor of Sterling Savings Bank, as beneficiary, dated as of November 19, 2007, and recorded November 26, 2007, in the Records of Deschutes County, Oregon, Volume-Page **2007- 61125** and re-recorded December 5, 2007 in Volume-Page **2007-62677**of Official Records in the office of the Recorder of Deschutes County, OR to-wit:

APN: 151200-00-05000, 05001, 05002, 07700, 07701, 07800, 07801 and 07900
Legal Description attached hereto and made a part hereof as "Exhibit A"

Commonly known as: No Common Designation, Cline Falls Road, Redmond, OR

Both the beneficiary and the trustee have elected to sell the said real property to satisfy the obligations secured by said trust deed and notice has been recorded pursuant to Section 86.735(3) of Oregon Revised Statutes: the default for which the foreclosure is made is the grantor's: failed to pay the balance of the principal sum which became due; together with interest thereon; failed to pay late charges; together with advances made by the Beneficiary;

By this reason of said default the beneficiary has declared all obligations secured by said deed of trust immediately due and payable, said sums being the following, to-wit: The sum of $ 10,955,999.50 together with interest thereon at the rate of 9.0 % per annum from September 1, 2009 until paid; plus all accrued late charges thereon; and all trustee's fees, foreclosure costs and any sums advanced by the beneficiary pursuant to the terms of said deed of trust.

Whereof, notice hereby is given that FIDELITY NATIONAL TITLE INSURANCE COMPANY, the undersigned trustee will on **March 4, 2011** at the hour of **01:00 PM**, Standard of Time, as established by section 187.110, Oregon Revised Statues, At the front entrance to the Deschutes County Courthouse, 1164 NW Bond St., Bend, County of Deschutes , State of Oregon, sell at public auction to the highest bidder for cash the interest in the said described real property which the grantor had or had power to convey at the time of the execution by him of the said trust deed, together with any interest which the grantor or his successors in interest acquired after the execution of said trust deed, to satisfy the foregoing obligations thereby secured and the costs and expenses of sale, including a reasonable charge by the trustee. Notice is further given that any person named in Section 86.753 of Oregon Revised Statutes has the right to have the foreclosure proceeding dismissed and the trust deed reinstated by payment to the beneficiary of the entire amount then due (other than such portion of said principal as would not then be due had no default occurred), together with the costs, trustee`s or attorney`s fees and curing any other default complained of in the Notice of Default by tendering the performance required under the obligation or trust deed, at any time prior to five days before the date last set for sale.

FOR FURTHER INFORMATION CONTACT:FIDELITY NATIONAL TITLE INSURANCE COMPANY,
135 Main St. Ste.1900, San Francisco, CA 94105
415-247-2450

SALE INFORMATION CAN BE OBTAINED ON LINE: www.prioritypostingcom
AUTOMATED SALES INFORMATION:
714-573-1965

TRUSTEE`S NOTICE OF SALE

In construing this notice, the masculine gender includes the feminine and the neuter, the singular includes plural, the word "grantor" includes any successor in interest to the grantor as well as any other persons owing an obligation, the performance of which is secured by said trust deed, the words "trustee" and 'beneficiary" include their respective successors in interest, if any.

Dated: October 14, 2010

FIDELITY NATIONAL TITLE INSURANCE COMPANY

Grace Mancillas

State of California
County of San Francisco

I, the undersigned, certify that I am the Trustee Sale Officer and that the foregoing is a complete and exact copy of the original Trustee's Notice of Sale.

Grace Mancillas

EXHIBIT "A"
LEGAL DESCRIPTION

PARCEL 1:
The Southeast Quarter of the Southeast Quarter (SE1/4SE1/4) of Section Twenty-nine (29), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon.

PARCEL 2:
The Northwest Quarter of the Southeast Quarter (NW1/4SE1/4) of Section Twenty-nine (29), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon.

PARCEL 3:
In Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, Deschutes County, Oregon, Section Twenty-nine (29): Northeast Quarter, East Half of the Southeast Quarter, Southeast Quarter of the Northwest Quarter, Southwest Quarter of the Northwest Quarter, Northeast Quarter of the Southwest Quarter and the Northwest Quarter of the Southwest Quarter (NE1/4, E1/2 SE/1/4, SE1/4 NW1/4, SW1/4 NW1/4, NE1/4 SW1/4, NW1/4 SW1/4).

EXCEPTING THEREFROM the Southeast Quarter of the Southeast Quarter (SE1/4SE1/4).

TOGETHER WITH:

In Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, Deschutes County, Oregon, Section Thirty (30): The Southeast Quarter of the Northeast Quarter (SE1/4NE1/4) and the Northeast Quarter of the Southeast Quarter (NE1/4SE1/4).

PARCEL 4:
The East Half of the Northwest Quarter (E1/2NW1/4), the South Half of the Southwest Quarter (S1/2SW1/4) and the West Half of the East Half (W1/2E1/2) of Section Seventeen (17):.

The Northwest Quarter (NW1/4), the West Half of the Northeast Quarter (W1/2NE1/4), the North Half of the Southwest Quarter (N1/2SW1/4), the Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian.

EXCEPTING THEREFROM:

TRACT A:
Beginning at the center one-quarter (1/4) corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, the true point of beginning; thence North 88°44'26" West along the center line 653.40 feet, thence North 00°06'54" East 200.00 feet. Thence South 88°44'26" East 653.40 feet to the North-South center line: thence South 00°06'54" West 200.00 feet to the true point of beginning.

TRACT B:
Beginning at the South center one-sixteenth (1/16) corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, thence North 00°06'54" East along the North-South center line 179.75 feet to the true point of beginning: Thence North 89°53'06" West 208.71 feet. Thence North 00°06'54" East 208.71 feet; thence South 89°53'06" East 208.71 feet to the said center line; thence South 00°06'54" West along said center line 208.71 feet to the true point of beginning.

PARCEL 5:
The Northeast Quarter of the Southeast Quarter (NE1/4SE1/4) and the South Half of the Southeast Quarter (S1/2SE1/4) of Section Twenty (20); the Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Twenty-one (21); the North Half (N1/2) and the North Half of the South Half (N1/2S1/2) of Section Twenty-eight (28), all in Township Fifteen (15) South, Range Twelve (12), East, of the Willamette Meridian, Deschutes County, Oregon.

EXCEPTING:

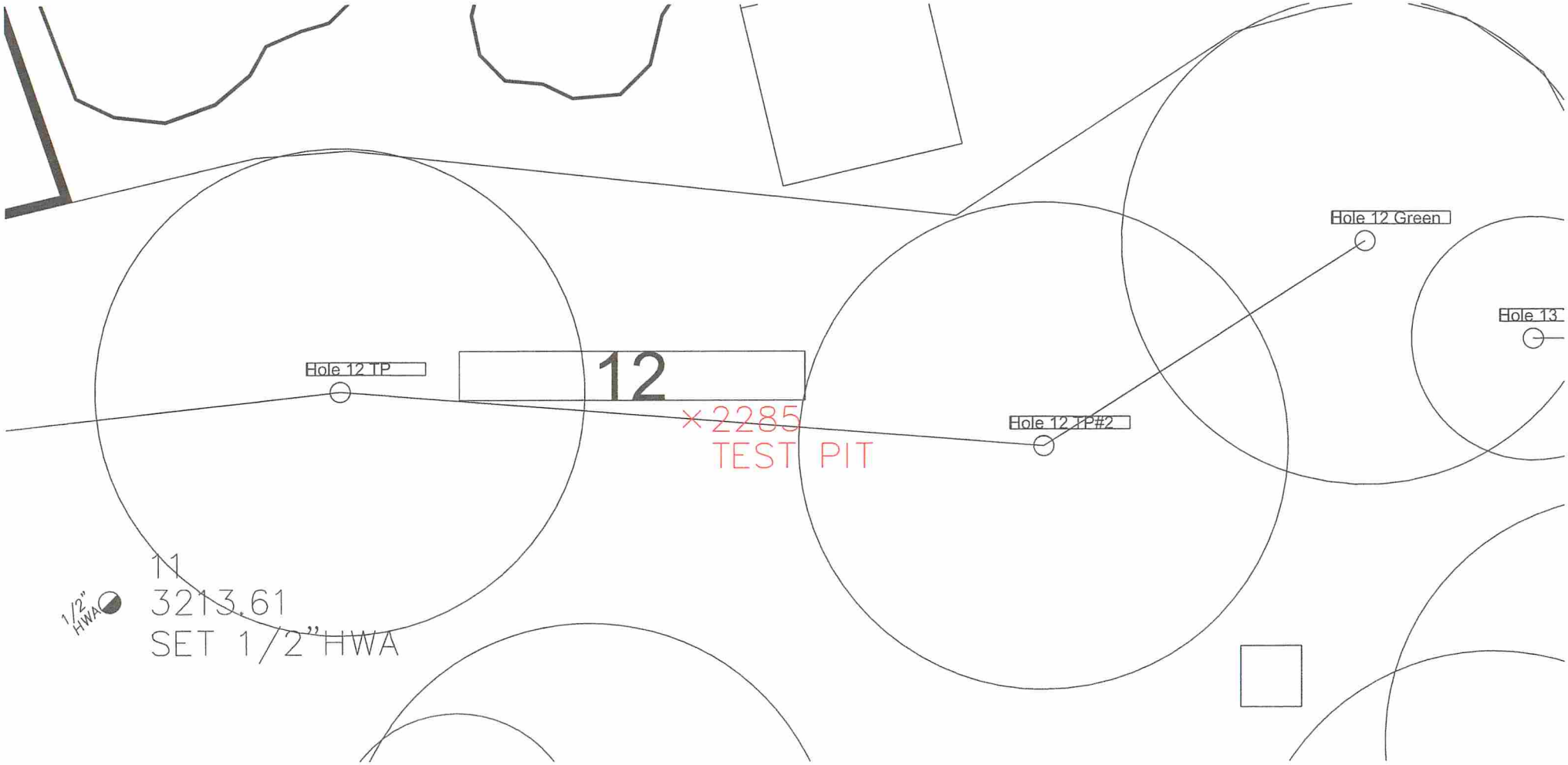
TRACT C:
Beginning at the East 1/4 corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence South 00°06'37" West along the East line of said Section 20, 208.71 feet; thence North 88°44'26" West, 208.71 feet; thence North 00°06'37" East, 208.71 feet to the East-West centerline of said Section 20; thence South 88°44'26" East along said centerline, 208.71 feet to the true point of beginning.

PARCEL 6:

TRACT A:
Beginning at the center 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence North 88°44'26" West along the centerline, 653.40 feet; thence North 00°06'54" East, 200.00 feet; thence South 88°44'26" East, 653.40 feet to the North-South centerline; thence South 00°06'54" West, 200.00 feet to the true point of beginning.

TRACT B:
Beginning at the South center 1/16 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon; thence North 00°06'54" East along the North-South centerline, 179.75 feet to the true point of beginning; thence North 89°53'06" West, 208.71 feet; thence North 00°06'54" East, 208.71 feet; thence South 89°53'06" East, 208.71 feet to the said centerline; thence South 00°06'54" West along said centerline, 208.71 feet to the true point of beginning.

TRACT C:
Beginning at the East 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence South 00°06'37" West along the East line of said Section 20, 208.71 feet; thence North 88°44'26" West, 208.71 feet; thence North 00°06'37" East, 208.71 feet to the East-West centerline of said Section 20; thence South 88°44'26" East along said centerline, 208.71 feet to the true point of beginning.



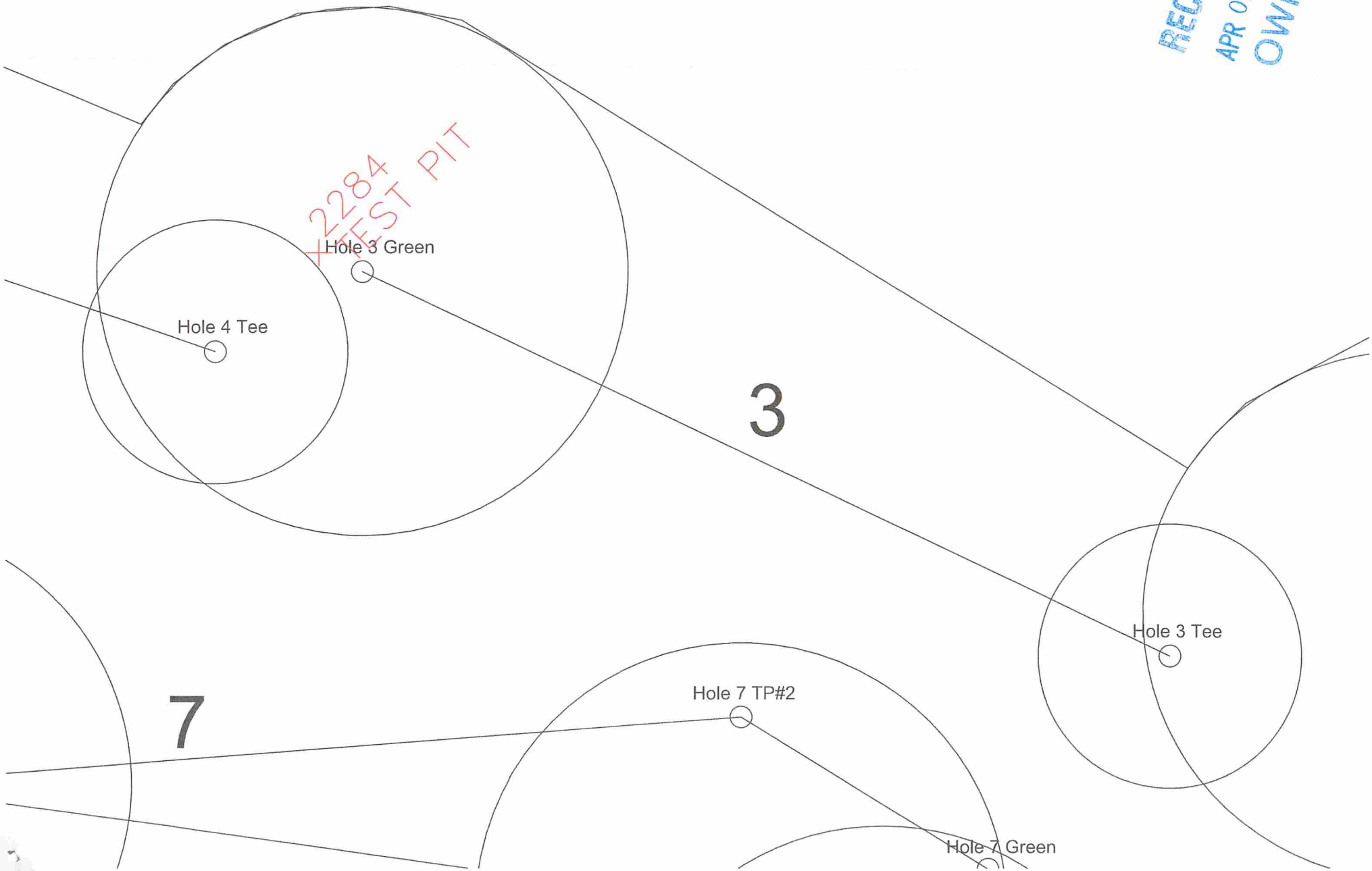


Exhibit 13: Foreclosure-BK Filing

03/2011

EXHIBIT 13

B1 (Official Form 1) (4/10) Case 11-31897-tmb11 Doc 1 Filed 03/11/11

UNITED STATES BANKRUPTCY COURT District of Oregon	VOLUNTARY PETITION

Name of Debtor (if individual, enter Last, First, Middle): Thornburgh Resort Company, LLC	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all): 20-1409735	Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all):
Street Address of Debtor (No. and Street, City, and State): 67525 SW Cline Falls Hwy Redmond, OR ZIP CODE 97756	Street Address of Joint Debtor (No. and Street, City, and State): ZIP CODE
County of Residence or of the Principal Place of Business: Deschutes	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): P.O. Box 264 Bend, OR ZIP CODE 97702	Mailing Address of Joint Debtor (if different from street address): ZIP CODE
Location of Principal Assets of Business Debtor (if different from street address above): ZIP CODE	

Type of Debtor
(Form of Organization)
(Check **one** box.)

- ☐ Individual (includes Joint Debtors)
  See Exhibit D on page 2 of this form.
- ☑ Corporation (includes LLC and LLP)
- ☐ Partnership
- ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)

Nature of Business
(Check **one** box.)

- ☐ Health Care Business
- ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51B)
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Clearing Bank
- ☑ Other
  Resort, Utilities, Real Estate

Tax-Exempt Entity
(Check box, if applicable.)

- ☐ Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).

Chapter of Bankruptcy Code Under Which the Petition is Filed (Check **one** box.)

- ☐ Chapter 7
- ☐ Chapter 9
- ☑ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
- ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Nature of Debts
(Check one box.)

- ☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- ☑ Debts are primarily business debts.

Filing Fee (Check one box.)

- ☑ Full Filing Fee attached.
- ☐ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.
- ☐ Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.

Chapter 11 Debtors

Check one box:
- ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
- ☑ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

Check if:
- ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,343,300 (*amount subject to adjustment on 4/01/13 and every three years thereafter*).

Check all applicable boxes:
- ☐ A plan is being filed with this petition.
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

Statistical/Administrative Information

- ☑ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

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Estimated Number of Creditors

☐ 1-49	☐ 50-99	☑ 100-199	☐ 200-999	☐ 1,000-5,000	☐ 5,001-10,000	☐ 10,001-25,000	☐ 25,001-50,000	☐ 50,001-100,000	☐ Over 100,000

Estimated Assets

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☑ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Estimated Liabilities

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☑ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Voluntary Petition *(This page must be completed and filed in every case.)*	Name of Debtor(s): Thornburgh Resort Company, LLC	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet.)		
Location Where Filed:	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet.)		
Name of Debtor:	Case Number:	Date Filed:
District: District of Oregon	Relationship:	Judge:

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I have delivered to the debtor the notice required by 11 U.S.C. § 342(b).

X _____
Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

☑ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D completed and signed by the debtor is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.

Information Regarding the Debtor - Venue
(Check any applicable box.)

☑ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Certification by a Debtor Who Resides as a Tenant of Residential Property
(Check all applicable boxes.)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____
(Name of landlord that obtained judgment)

_____
(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included with this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

☐ Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

Voluntary Petition
(This page must be completed and filed in every case.)

Name of Debtor(s): Thornburgh Resort Company, LLC

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (if not represented by attorney)

_____
Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only **one** box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
(Signature of Foreign Representative)

_____
(Printed Name of Foreign Representative)

_____
Date

Signature of Attorney*

X /s/ Gary Underwood Scharff
Signature of Attorney for Debtor(s)

Gary Underwood Scharff
Printed Name of Attorney for Debtor(s)

Law Office of Gary Underwood Scharff
Firm Name

621 SW Morrison St. # 1300
Portland, OR 97205
Address

503-493-4353
Telephone Number

03/11/2011
Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

_____
Printed Name and title, if any, of Bankruptcy Petition Preparer

_____
Social-Security number (If the bankruptcy petition preparer is not an individual, state the Social-Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

_____
_____
Address

X _____

_____
Date

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social-Security number is provided above.

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X /s/ Kameron DeLashmutt
Signature of Authorized Individual

Kameron DeLashmutt
Printed Name of Authorized Individual

Manager
Title of Authorized Individual

03/10/2011
Date

Exhibit 14: Foreclosure–Loyal authority to Foreclose

06/2011

Below is an order of the court.

U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re THORNBURGH RESORT COMPANY, LLC, Debtor.	No. 11-31897-tmb11 **ORDER GRANTING LOYAL LAND, LLC'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

THIS MATTER came on for hearing on Loyal Land, LLC's Motion Motion for Relief from Stay (the "Motion"). The Court, having reviewed the Motion, the arguments of counsel presented at the hearings held on May 18, 31, June 1, 2, 8 and 10, 2011, and after due deliberation and consideration and sufficient cause appearing therefor; it is hereby FOUND AND DETERMINED THAT:

A. Notice of the Motion and the hearing thereon was due and sufficient under the circumstances.

B. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

C. This is a core proceeding under 11 U.S.C. § 157(b)(G).

IT IS ORDERED, ADJUDGED AND DECREED THAT:

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

1. The Motion is granted pursuant to 11 U.S.C § 362(d)(1) and (2), and Loyal is hereby granted relief from the automatic stay provisions of 11 U.S.C. § 362(a) ~~such that Loyal may exercise its state law rights and remedies to foreclose upon the Debtor's Property and to exercise all the rights and remedies available to it as a secured creditor at law, equity and otherwise to enforce its rights against the Property;~~ provided that Loyal shall not conduct any foreclosure sale prior to August 10, 2011.

2. This Court retains jurisdiction to enforce and resolve any disputes arising under or related to this Order.

###

Presented by:

PERKINS COIE LLP

By: /s/ Jeanette L. Thomas
Jeanette L. Thomas, Bar No. 980420

Attorneys for Loyal Land, LLC

cc: Via ECF Notification to:
Gary U. Scharff
Justin D. Leonard
Charles R. Markley
U.S. Trustee

Via U.S. Mail to:
Sandra L Knapp
Ikon Office Solutions

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

SRNECFR (12/1/10) rdl

UNITED STATES BANKRUPTCY COURT
District of Oregon

In re **Thornburgh Resort Company, LLC** Debtor(s)	)	Case No. **11-31897-tmb11**
	)	NOTICE TO SERVE DOCUMENT(S)

Janette L. Thomas IS NOTIFIED that a copy of document(s) entitled **Order Re: [13] Motion for Relief from Stay Loyal Land LLC** included as additional PDF file(s) in the Notice of Electronic Filing (NEF) of this document, and any additional required attachment(s) must be immediately served on all appropriate parties as follows:

1. Before serving the copies you must:

   a. [If there is a Notice of Hearing enclosed] Place the Notice of Hearing on top of any other documents to be served on paper.

   b. Attach copies of any attachments originally filed with the document to be served, unless that is not required by the Certificate of Service on that document; and

   c. [If there is a Certificate of Service on the document to be served] Attach copies of any other document(s) required by the certificate.

   Do not attach a copy of this Notice.

2. Within **14** days of the date below, unless an order on the document to be served provides otherwise, you must file a completed, dated, and signed certificate of service, without any attachments, that links to the original document and, unless you use a certificate included on the document to be served, includes: (a) a certification that you served the document(s) on all appropriate parties, and (b) a clearly identified list of the names and addresses of all parties served conventionally using paper.

Dated: 6/16/11

Clerk, U.S. Bankruptcy Court
1001 SW 5th Ave #700
Portland, OR 97204

Exhibit 15: Foreclosure–Suit TRC versus Loyal to Quiet Title

08/2011

EXHIBIT 15

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR DESCHUTES COUNTY

Thornburgh Resort Company, LLC, Plaintiff, v. **Loyal Land, LLC, an Oregon limited liability company; Terrence Larsen; Sterling Savings Bank, d/b/a Action Mortgage; Central Oregon Investment Holdings, LLC, a dissolved Oregon limited liability company; Parker Group Investments, LLC, an Oregon limited liability company; Jeffrey Parker; William Witt; Central Property Holdings, LLC, an Oregon limited liability company,** Defendants.	11CV0655 **AMENDED COMPLAINT** (Declaratory Relief; Decree Quieting Title; Breach of Contract; Breach of Fiduciary Duty; Unjust Enrichment; Promissory Estoppel; Interference with Business Relations)

Plaintiff Thornburgh Resort Company, LLC ("Plaintiff") alleges as follows:

Parties

1.

Plaintiff is an Oregon limited liability company with its principal place of business in Redmond, Oregon. Plaintiff was the debtor and debtor in possession in the Chapter 11

Law Office of Gary Underwood Scharff
621 S.W. Morrison Street Suite 1300
Portland, Oregon 97205
(503) 493-4353

Exhibit 16: Foreclosure–Trustee's Deed transfers land to Loyal

09/2011

EXHIBIT 16

After recording return to:

Until a change is requested all tax statements
Shall be sent to the following address:

Loyal Land, LLC
18363 Calle Stellina
Rancho Santa Fe, CA 92091

CERTIFIED A TRUE COPY OF THE ORIGINAL
Document Recorded 9-15-11
Recorder's Serial No. 2011-32307
DESCHUTES County Recorder

DEFAULT RESOLUTION NETWORK
By [signature]

(Recorder's Use)

TRUSTEE'S DEED

T.S. No.: 10-01473-4 OR
Loan No.: 158000245 Parker Group

THIS INDENTURE, Made August 31, 2011, between **FIDELITY NATIONAL TITLE INSURANCE COMPANY** hereinafter called trustee, and Loyal Land, LLC hereinafter called the second party:

WITNESSETH:

RECITALS: Parker Group Investments, LLC, an Oregon Limited Liability Company and Thornburgh Resort Company, LLC, an Oregon Limited Liability Company, as to Parcels 1 through 6 and John E. Evenson and Barbara L. Evenson, each as to an undivided 50% interest, as to an undivided 49% interest as to parcel 6 only, as grantor, executed and delivered to Amerititle as the original trustee, for the benefit of Sterling Savings Bank ("Sterling"), as the original beneficiary, a certain trust deed dated November 19, 2007, duly recorded on November 26, 2007, as Instrument No. 2007- 61125, in the mortgage records of Deschutes County, Oregon, and thereafter re-recorded on December 5, 2007, as Instrument No. 2007-62677, in the mortgage records of Deschutes County, Oregon (the "Deed of Trust").

In said Deed of Trust the real property therein and hereinafter described was conveyed by said grantor to said trustee to secure, among other things, the performance of certain obligations of the grantor to the said beneficiary. The said grantor thereafter defaulted in its performance of the obligations secured by said Deed of Trust as stated in the notice of default hereinafter mentioned and such default still existed at the time of the sale hereinafter described.

By reason of said default, the owner and holder of the obligations secured by said Deed of Trust, being the original beneficiary named therein, or its successor in interest, declared all sums so secured immediately due and owing; a notice of default, containing an election to sell the said real property and to foreclose said Deed of Trust by advertisement and sale to satisfy grantor's said obligations was recorded in the mortgage records of said county on **October 27, 2010** and referenced as Instrument No. **2010-42961** to which reference now is made. Also, a certain Appointment of Successor Trustee was recorded in the mortgage records of said county on **October 27, 2010** and referenced as Instrument No. **2010-42960**, and thereafter re-recorded in the mortgage records of said county on **July 15, 2011** and referenced as Instrument No. **2011-24778**, appointing Fidelity National Title Insurance Company ("Fidelity") as successor trustee to the Deed of Trust. Fidelity was the trustee under the Deed of Trust at the time of the sale hereinafter described (in such capacity, Fidelity is referred to herein as the "Trustee").

After the recording of said notice of default and appointment of successor trustee, as aforesaid, **FIDELITY NATIONAL TITLE INSURANCE COMPANY**, the undersigned Trustee, gave notice of the time for and place of sale of said real property as fixed by him and as required by law. Copies of the Trustee's Notice of Sale were served pursuant to ORCP 7D(2) and 7D.(3) or mailed by both first class and certified mail with return receipt requested, to the last-known address of the persons or their legal representatives, if any, named in ORS 86.740(1) and (2)(a), at least 120 days before the date the property was sold, and the Trustee's Notice of Sale was mailed by first class and

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TRUSTEE`S DEED

T.S. No.: 10-01473-4 OR
Loan No.: 158000245 Parker Group

certified mail with return receipt requested, to the last-known address of the guardian, conservator or administrator or executor of any person named in ORS 86.740(1), promptly after the Trustee received knowledge of the disability, insanity or death of any such person: the Notice of Sale was served upon occupants of the property described in the Deed of Trust in the manner in which a summons is served pursuant to ORCP 7D.(2) and 7D.(3) at least 120 days before the date the property was sold, pursuant to ORS 86.750(1). In addition, pursuant to HB 3630, the additional notice was sent or served in accordance with Sections 20 and 21, Chapter 19, Oregon Laws 2008. If the foreclosure proceedings were stayed and released from the stay, copies of an Amended Notice of Sale in the form required by ORS 86.755(6) were mailed by registered or certified mail to the last- known address of those persons listed in ORS 86.740 and 86.750(1) and to the address provided by each person who was present at the time and place act for the sale which was stayed within 30 days after the release from the stay. Further, the Trustee published a copy of said notice of sale in a newspaper of general circulation in each county in which the said real property is situated, once a week for four successive weeks; the last publication of said notice occurred more than twenty days prior to the date of such sale. The mailing, service and publication of said notice of sale are shown by one or more affidavits or proofs of service duly recorded prior to the date of sale in the official records of said county, said affidavits and proofs. Together with the said notice of default and election to sell and the trustee`s notice of sale, being now referred to and incorporated in and made a part of this trustee`s deed as fully as if act out herein verbatim. The undersigned Trustee has no actual notice of any person, other than the persons named in said affidavits and proofs as having or claiming a lien on-or interest in said described real property, entitled to notice pursuant to ORS86.740(1)(b) or (1)(c).

Pursuant to that certain Assignment of Deed of Trust recorded on March 10, 2011 in the Official Records as Instrument No. 2011-09462 and re-recorded on July 15, 2011 in the Official Records as Instrument No. 2011-24810, Sterling assigned its beneficial interest under the Deed of Trust to Central Oregon Investment Holdings, LLC, an Oregon limited liability company ("Holdings"). Pursuant to that certain Assignment of Trust Deed recorded on March 10, 2011 in the Official Records as Instrument No. 2011-09463 and re-recorded on July 15, 2011 in the Official Records as Instrument No. 2011-24811, Holdings assigned its beneficial interests under the Deed of Trust to Loyal Land, LLC, an Oregon limited liability company ("Loyal Land"). Loyal Land was the current beneficiary under the Deed of Trust at the time of the sale hereinafter described.

Pursuant to said notice of sale and amended notice of sale described above, the undersigned Trustee on **August 31, 2011**, at the hour of **1:00 PM**, of said day, in accord with the standard of time established by ORS 187.110, the place so fixed for sale, as aforesaid, in full accordance with the laws of the state of Oregon and pursuant to the powers conferred upon him by said Deed of Trust, sold said real property in one parcel at public auction to Loyal Land for the sum of **$8,000,000.00**, it being the highest and best bidder at such sale and said sum being the highest and best sum bid for said property. The true and actual consideration paid for this transfer is sum of **$8,000,000.00**.

NOW THEREFORE, in consideration of the said sum so paid by Loyal Land in cash, the receipt whereof is acknowledged, and by the authority vested in said Trustee by the laws of the state of Oregon and by said Deed of Trust, theTrustee does hereby convey unto Loyal Land all interest which the grantor had or had the power to convey at the time of the grantor`s execution of said Deed of Trust , together with any interest the said grantor or his successors in interest acquired after the execution of said deed in and to the following described real property, to-wit:

AS MORE PARTICULARLY DESCRIBED IN EXHIBIT "A" ATTACHED HERETO AND MADE PART HEREOF.

TRUSTEE`S DEED

T.S. No.: 10-01473-4 OR
Loan No.: 158000245 Parker Group

In constructing this instrument and whenever the context so requires, the masculine gender includes the feminine and the neuter and the singular includes the plural; the word "grantor" includes any successor-in-interest to the grantor as well as each and all other persons owing an obligation, the performance of which is secured by said Deed of Trust; the word "trustee" includes any successor trustee, the word "beneficiary" includes any successor-in-interest of the beneficiary first named above, and the word "person" includes corporation and any other legal or commercial entity.

IN WITNESS WHEREOF, the undersigned trustee has hereunto set his hand; if the undersigned is a corporation, it has caused its corporate name to be signed and its corporate seal to be affixed hereunto by its officers duly authorized thereunto by order of its Board of Directors.

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, AND SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009. THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, AND SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009.

[SIGNATURE PAGE FOLLOWS]

TRUSTEE'S DEED

T.S. No.: 10-01473-4 OR
Loan No.: 158000245 Parker Group

August 31, 2011

FIDELITY NATIONAL TITLE INSURANCE COMPANY

James Gips, Authorized Signature

State of California }ss.
County of San Francisco }ss

On August 31, 2011 before me, Elida Rosado, a Notary Public in and for said county, personally appeared James Gips, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

ELIDA ROSADO
COMM. #1882764
Notary Public-California
SAN FRANCISCO COUNTY
My Comm. Exp. MAR. 14, 2014

Elida Rosado # 1882764
My Commission Expires March 14, 2014

(Seal)

PDX_DOCS:470945.2 [38119.00100]

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EXHIBIT A

LEGAL DESCRIPTION

PARCEL 1:
The Southeast Quarter of the Southeast Quarter (SE1/4SE1/4) of Section Twenty-nine (29), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon.

PARCEL 2:
The Northwest Quarter of the Southeast Quarter (NW1/4SE1/4) of Section Twenty-nine (29), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon.

PARCEL 3:
In Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, Deschutes County, Oregon, Section Twenty-nine (29): Northeast Quarter, East Half of the Southeast Quarter, Southeast Quarter of the Northwest Quarter, Southwest Quarter of the Northwest Quarter, Northeast Quarter of the Southwest Quarter and the Northwest Quarter of the Southwest Quarter (NE1/4, E1/2 SE/1/4, SE1/4 NW1/4, SW1/4 NW1/4, NE1/4 SW1/4, NW1/4 SW1/4).

EXCEPTING THEREFROM the Southeast Quarter of the Southeast Quarter (SE1/4SE1/4).

TOGETHER WITH:

In Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, Deschutes County, Oregon, Section Thirty (30): The Southeast Quarter of the Northeast Quarter (SE1/4NE1/4) and the Northeast Quarter of the Southeast Quarter (NE1/4SE1/4).

PARCEL 4:
The East Half of the Northwest Quarter (E1/2NW1/4), the South Half of the Southwest Quarter (S1/2SW1/4) and the West Half of the East Half (W1/2E1/2) of Section Seventeen (17):

The Northwest Quarter (NW1/4), the West Half of the Northeast Quarter (W1/2NE1/4), the North Half of the Southwest Quarter (N1/2SW1/4), the Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian.

EXCEPTING THEREFROM:

TRACT A:
Beginning at the center one-quarter (1/4) corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, the true point of beginning; thence North 88°44'26" West along the center line 653.40 feet, thence North 00°06'54" East 200.00 feet, Thence South 88°44'26" East 653.40 feet to the North-South center line: thence South 00°06'54" West 200.00 feet to the true point of beginning.

TRACT B:
Beginning at the South center one-sixteenth (1/16) corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, thence North 00°06'54" East along the North-South center line 179.75 feet to the true point of beginning: Thence North 89°53'06" West 208.71 feet. Thence North 00°06'54" East 208.71 feet; thence South 89°53'06" East 208.71 feet to the said center line; thence South 00°06'54" West along said center line 208.71 feet to the true point of beginning.

EXHIBIT A

LEGAL DESCRIPTION

PARCEL 5:
The Northeast Quarter of the Southeast Quarter (NE1/4SE1/4) and the South Half of the Southeast Quarter (S1/2SE1/4) of Section Twenty (20); the Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Twenty-one (21); the North Half (N1/2) and the North Half of the South Half (N1/2S1/2) of Section Twenty-eight (28), all in Township Fifteen (15) South, Range Twelve (12), East, of the Willamette Meridian, Deschutes County, Oregon.

EXCEPTING:

TRACT C:
Beginning at the East 1/4 corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence South 00°06'37" West along the East line of said Section 20, 208.71 feet; thence North 88°44'26" West, 208.71 feet; thence North 00°06'37" East, 208.71 feet to the East-West centerline of said Section 20; thence South 88°44'26" East along said centerline, 208.71 feet to the true point of beginning.

PARCEL 6:

TRACT A:
Beginning at the center 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence North 88°44'26" West along the centerline, 653.40 feet; thence North 00°06'54" East, 200.00 feet; thence South 88°44'26" East, 653.40 feet to the North-South centerline; thence South 00°06'54" West, 200.00 feet to the true point of beginning.

TRACT B:
Beginning at the South center 1/16 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon; thence North 00°06'54" East along the North-South centerline, 179.75 feet to the true point of beginning; thence North 89°53'06" West, 208.71 feet; thence North 00°06'54" East, 208.71 feet; thence South 89°53'06" East, 208.71 feet to the said centerline; thence South 00°06'54" West along said centerline, 208.71 feet to the true point of beginning.

TRACT C:
Beginning at the East 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence South 00°06'37" West along the East line of said Section 20, 208.71 feet; thence North 88°44'26" West, 208.71 feet; thence North 00°06'37" East, 208.71 feet to the East-West centerline of said Section 20; thence South 88°44'26" East along said centerline, 208.71 feet to the true point of beginning.

Exhibit 17: CMP Initiation–Loyal Application

11/2011

EXHIBIT 17

Perkins Coie

1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
PHONE: 503.727.2000
FAX: 503.727.2222
www.perkinscoie.com

Steven L. Pfeiffer
PHONE (503) 727-2261
FAX (503) 346-2261
EMAIL SPfeiffer@perkinscoie.com

November 1, 2011

COPY

VIA HAND DELIVERY

Tom Anderson
Community Development Director
Deschutes County
117 NW Lafayette Avenue
Bend, OR 97701

Re: Thornburgh Destination Resort Conceptual Master Plan (County File No. CU-05-20); Applications for Extension of Development Approval Period and Declaratory Ruling that Use Has Been Initiated

Dear Mr. Anderson:

This office represents Loyal Land, LLC, an Oregon limited liability company ("Loyal Land"), the owner of the land subject to the land use applications and entitlements for the Thornburgh Resort, including the Conceptual Master Plan identified as Deschutes County ("County") File No. CU-05-20 ("CMP").

Enclosed please find the following:

- Loyal Land's application for a Declaratory Ruling that the use associated with the CMP has been initiated, together with a narrative and related exhibits demonstrating how the application satisfies applicable approval criteria for a Declaratory Ruling and a check in the amount of $1,230.00 made payable to "Deschutes County" to cover the applicable fee.

- Loyal Land's application for an Extension of the CMP development approval period, together with a narrative and related exhibits demonstrating how the application satisfies applicable approval criteria and a check in the amount of $310.00 made payable to "Deschutes County" to cover the applicable fee.

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Please process these applications. Loyal Land offers the Application for Extension in the alternative to the application for a Declaratory Ruling. Loyal Land requests that none of the statements set forth in the extension request be used to prejudice the application for the Declaratory Ruling.

The undersigned will serve as Loyal Land's representative in this matter. Accordingly, feel free to contact me with any questions. Please provide me with copies of all notices, staff reports, decisions, and correspondence from agencies and the general public relating to this matter. Thank you.

Very truly yours,

Steven L. Pfeiffer

Enclosures

SLP:crl
cc: Laurie E. Craghead, Assistant Legal Counsel (via U.S. Mail) (w/encls.)
Michael W. Peterkin (via U.S. Mail) (w/encls.)
Client (via U.S. mail) (w/encls.)

DESCHUTES COUNTY

Community Development Department
Planning Division

117 NW Lafayette Avenue, Bend, OR 97701-1925
(541) 388-6575 - Fax (541) 385-1764
http://www.deschutes.org/cdd

LAND USE APPLICATION

INCOMPLETE APPLICATIONS WILL NOT BE ACCEPTED

1. Complete the application form and provide appropriate original signatures.
2. Include a copy of the current deed showing the property owners.
3. Attach correct fee.
4. Include a plot plan that shows all property lines and existing and proposed structures, parking, landscaping, lighting, etc.
5. If this application includes oversized plans a single, reduced-size plan no larger than 11" x 17" with graphic scale shall also be included. If color exhibits are submitted, black and white copies with captions or shading delineating the color areas shall also be provided.
6. All applicable standards and criteria must be addressed in writing prior to acceptance of the application. Detailed descriptions, maps and other relevant information must be attached to the application.

TYPE OF APPLICATION (check one): FEE: $1,230.00

Conditional Use (CU) ___	**Temporary Use (TU)** ___	**Setback Exception (SE)** ___
Partition (MP) ___	**Site Plan (SP)** ___	**Other** Declaratory Ruling
Subdivision (TP) ___	**Variance (V)** ___	

Applicant's Name (print): Loyal Land, LLC Phone: (___) ___

Mailing Address: 18363 Cafe Stellina City/State/Zip: Rancho Santa Fe, CA 92091

Applicant's Email Address: ___

Property Owner's Name (if different)*: same Phone: (___) ___

Mailing Address: ___ City/State/Zip: ___

1. Property Description: Township 15S Range 12E Section 29, 30 Tax Lot 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900, 8000
2. Property Zone(s): EFU-TBR (DR overlay) Property Size (acres or sq. ft.): 1,970 acres
3. Lot of Record? (State reason): Yes, per County permits LR-91-56, LR-98-44, CU-79-159, CU-91-68, and MP-79-159
4. Property Address: N/A
5. Present Use of Property: Low-intensity grazing and open space
6. Existing Structures: Three dwellings and barn
7. Request: Declaratory ruling that applicant has initiated the use
8. Property will be served by: Sewer On-site Onsite Disposal System ___
9. Domestic Water Source: On-site

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Applicant's Signature: [signature] for Loyal Land LLC Date: 10/31/17

Property Owner's Signature (if different)*: ___ Date: ___

Agent's Name (if applicable): Steven L. Pfeiffer Phone: (503) 727-2261

Mailing Address: Perkins Coie LLP, 1120 NW Couch St., 10th Floor City/State/Zip: Portland, OR 97209

Agent's Email Address: spfeiffer@perkinscoie.com

***If this application is not signed by the property owner, a letter authorizing signature by the applicant must be attached. By signing this application, the applicant understands and agrees that Deschutes County may require a deposit for hearings officers' fees prior to the application being deemed complete; and if the application is heard by a hearings officer, the applicant will be responsible for the actual costs of the hearings officer.**

7/09

Exhibit 18: CMP Initiation–Hearing Officer approves Loyal App.

06/2012

EXHIBIT 18

DECISION OF DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBER: DR-11-8

APPLICANT:
Loyal Land, LLC
27333 N. 96th Way
Scottsdale, Arizona 85262

PROPERTY OWNERS:
Loyal Land, LLC
(Tax Lots 5000, 5001, 5002, 7700, 7701, 7800 and 7900)

Agnes DeLashmutt
4048 N.W. Xavier
Redmond, Oregon 97756
(Tax Lot 8000)

APPLICANT'S ATTORNEY:
Steven L. Pfeiffer, Attorney at Law
Perkins Coie
1120 N.W. Couch Street, Tenth Floor
Portland, Oregon 97209-4128

OPPONENTS' ATTORNEYS:
David J. Petersen
Tonkin Torp LLP
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204
Attorney for Kameron DeLashmutt

Gary Underwood Scharff
1300 American Bank Building
621 S.W. Morrison Street
Portland, Oregon 97205
Attorney for Thornburgh Resort Company, LLC

Paul D. Dewey
1539 N.W. Vicksburg Avenue
Bend, Oregon 97701
Attorney for Nunzie Gould

REQUEST: The applicant requests a declaratory ruling that the use approved through the Thornburgh Destination Resort conceptual master plan has been initiated.

STAFF REVIEWER: Kevin Harrison, Principal Planner

HEARING DATE: February 7, 2012

RECORD CLOSED: March 13, 2012

I. APPLICABLE STANDARDS AND CRITERIA:

A. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance

1. Chapter 18.16, Exclusive Farm Use Zones

*** Section 18.16.035, Destination Resorts**

2. Chapter 18.113, Destination Resorts Zone (DR)

*** Section 18.113.040, Application Submission**
*** Section 18.113.050, Requirements for Conditional Use Permit and Conceptual Master Plan Applications**
*** Section 18.113.060, Standards for Destination Resorts**
*** Section 18.113.075, Imposition of Conditions**
*** Section 18.113.080, Procedure for Modification of a Conceptual Master Plan**
*** Section 18.113.090, Requirements of Final Master Plan**

B. Title 22 of the Deschutes County Code, the Development Procedures Ordinance

1. Chapter 22.08, General Provisions

*** Section 22.08.010, Application Requirements**

2. Chapter 22.20, Review of Land Use Action Applications

*** Section 22.20.040, Final Action in Land Use Actions**

3. Chapter 22.24, Land Use Action Hearings

*** Section 22.24.080, Standing**

4. Chapter 22.28, Land Use Action Decisions

*** Section 22.28.010, Decision**

Exhibit 19: CMP Initiation–LUBA Remands HO Decision

01/2013

EXHIBIT 19

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

JAN08'13 PM 3:20 LUBA

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.

Exhibit 20: CMP Initiation–Court of Appeals Affirms LUBA

05/2013

EXHIBIT 20

FILED: May 01, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Respondent,

v.

DESCHUTES COUNTY and KAMERON DELASHMUTT
Respondents,

and

LOYAL LAND, LLC,
Petitioner.

Land Use Board of Appeals
2012042

A153486

Argued and submitted on April 08, 2013.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Duncan, Judge.

Attorney for Petitioner: Seth J. King.

Attorney for Respondent Annunziata Gould: Paul D. Dewey.

No appearance for respondent Deschutes County.

No appearance for respondent Kameron Delashmutt.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

[ ] No costs allowed.
[X] Costs allowed, payable by Petitioner as to Respondent Annunziata Gould.

Exhibit 21: Asset Transfers–Loyal App to Transfer Water Rights

05/2011

EXHIBIT 21

Perkins Coie

1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
PHONE: 503.727.2000
FAX: 503.727.2222
www.perkinscoie.com

Lawrence H. Reichman
PHONE: (503) 727-2019
FAX: (503) 346-2019
EMAIL: LReichman@perkinscoie.com

December 5, 2011

BY HAND DELIVERY

Mr. Jerry Sauter
Water Rights Program Analyst
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Re: Request for Assignment of Application G-16385 (Partial)

Dear Mr. Sauter:

Enclosed for filing is a Request for Assignment of Application G-16385 (Partial), and the required fee, filed by Loyal Land LLC which owns the majority of the property covered by the application, as identified on the enclosed map. Loyal Land LLC acquired this property from Thornburgh Utility Group, LLC through a foreclosure sale. Thornburgh Utility Group, LLC has been administratively dissolved by the Oregon Secretary of State.

There is one other current record owner of the property described in the application, Agnes M. DeLashmutt, to whom notice has been provided. I certify that I caused a copy of this letter including the enclosed Request for Assignment to be deposited with the United States Postal Service on this date for delivery by certified mail, return receipt requested, addressed to that other record owner as follows:

Agnes M. DeLashmutt
4048 NW Xavier
Redmond, OR 97756

If you have any questions about this assignment, please call Jeff Parker at 503-742-1942 or the undersigned.

Very truly yours,

Lawrence H. Reichman

LHR:dma
Enclosures

Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301
(503) 986-0900
www.wrd.state.or.us

Request for Assignment

By Proof of Ownership (If Water Right Holder is Not Available)

If for multiple rights, a separate form and fee for each right will be required.

1. Loyal Land, LLC
(Name of Party Requesting Assignment)

1800 Blankenship Rd suite 200 West Linn, OR 97068
(Mailing Address) *(City)* *(State)* *(Zip)* *(Phone #)* 503-942 1942

☐ hereby request assignment of application/permit/transfer/license/GR Certificate of Registration;

☒ hereby request assignment of a portion of application/permit/transfer/license/GR Certificate of Registration; *(You must include a map showing the portion of the application/permit/transfer/license/GR Certificate of Registration to be assigned)*

I have attached proof of ownership that may include but not be limited to: a copy of the deed to the land, a copy of a land sales contract, a court order or decree, documentation of survivorship of property held jointly. The Department cannot accept a copy of a tax statement.

Application # G16385 ; Permit # _____ ; Transfer # _____
-OR-
License # _____ GR Statement # _____ ; GR Certificate of Registration # _____

Thornburgh Utility Group, LLC (Dissolved - See attach)
(Name of Holder of Record)

OR

(Mailing Address) *(City)* *(State)* *(Zip)* *(Phone #)*

Note: You are required to furnish proof acceptable to the Department that notice of the assignment has been given or attempted for each identified property owner not a party to the assignment. ORS 537.220(3) *Failure to submit this proof will result in the return of your request. (Proof may include but not be limited to: a copy of returned certified mailing, copy of a Death Certificate, or a court order.)*

1) I certify that I am the current owner of the property described in this application, Permit, transfer, license or GR Certificate of Registration.
2) I have the legal right to request assignment under OAR 690-310-0280 and 690-320-0060.
3) I have not been able to contact the owner(s) of record for the above referenced application or water right.
4) I further certify that the information provided herein is true and correct to the best of my knowledge.

Witness my hand this 2nd day of December, 20 11

Party Requesting Assignment: Loyal Land, LLC

Party Requesting Assignment: _____

DO NOT WRITE IN THIS BOX

The completed "Request for Assignment" form *must* be submitted to the Department along with the recording fee of $75.

OREGON SECRETARY OF STATE
▶ Corporation Division

HOME | business information center | business name search | oregon business guide | referral list | business registry/renewal | forms/fees | notary public | uniform commercial code | uniform commercial code search | documents & data services

Business Name Search

New Search Printer Friendly

Business Entity Data

11-17-2011
09:02

Registry Nbr	Entity Type	Entity Status	Jurisdiction	Registry Date	Next Renewal Date	Renewal Due?
260927-91	DLLC	INA	OREGON	01-04-2005		
Entity Name	THORNBURGH UTILITY GROUP, LLC					
Foreign Name						

New Search Printer Friendly

Associated Names

Type	PPB	PRINCIPAL PLACE OF BUSINESS		
Addr 1	67525 SW CLINE FALLS HWY			
Addr 2				
CSZ	REDMOND	OR	97756	Country: UNITED STATES OF AMERICA

Please click here for general information about registered agents and service of process.

Type	AGT	REGISTERED AGENT	Start Date	01-28-2010	Resign Date	
Of Record	593723-84	AW SERVICES, INC.				
Addr 1	1331 NW LOVEJOY ST #900					
Addr 2						
CSZ	PORTLAND	OR	97209	Country	UNITED STATES OF AMERICA	

Type	MEM	MEMBER		Resign Date	
Of Record	229147-90	THORNBURGH RESORT COMPANY, LLC			
Addr 1	67525 SW CLINE FALLS HWY				
Addr 2					
CSZ	REDMOND	OR	97756	Country	UNITED STATES OF AMERICA

RECEIVED
APR 02 2018
OWRD

New Search Printer Friendly

Name History

Business Entity Name	Name Type	Name Status	Start Date	End Date
THORNBURGH UTILITY GROUP, LLC	EN	CUR	01-04-2005	

Please read before ordering Copies.

New Search Printer Friendly

Summary History

Image Available	Action	Transaction Date	Effective Date	Status	Name/Agent Change	Dissolved By
	ADMINISTRATIVE DISSOLUTION	03-04-2011		SYS		
	NOTICE LATE ANNUAL	01-07-2011		SYS		
	ANNUAL REPORT PAYMENT	02-02-2010	02-01-2010	SYS		
	NOTICE LATE ANNUAL	01-29-2010		SYS		
	AMENDMENT TO ANNUAL REPORT	01-28-2010		FI		
	CHANGE OF REGISTERED AGENT/ADDRESS	01-28-2010		FI	Agent	
	NOTICE RESIGNED AGENT OF 30 DAYS	12-04-2009		SYS		
	AGENT RESIGNATION	11-02-2009		FI	Agent	
	ANNUAL REPORT PAYMENT	12-23-2008		SYS		
	ANNUAL REPORT PAYMENT	01-09-2008	01-08-2008	SYS		
	ANNUAL REPORT PAYMENT	01-04-2007	01-03-2007	SYS		
	AMENDED ANNUAL REPORT	01-05-2006		FI		
	ARTICLES OF ORGANIZATION	01-04-2005		FI	Agent	

After recording return to:

Until a change is requested all tax statements
Shall be sent to the following address:

Loyal Land, LLC
18363 Calle Stellina
Rancho Santa Fe, CA 92091

CERTIFIED A TRUE COPY OF THE ORIGINAL
Document Recorded 9-15-11
Recorder's Serial No. 2011-32307
DESCHUTES County Recorder

DEFAULT RESOLUTION NETWORK
By _____

(Recorder's Use)

TRUSTEE'S DEED

T.S. No.: 10-01473-4 OR
Loan No.: 158000245 Parker Group

THIS INDENTURE, Made August 31, 2011, between FIDELITY NATIONAL TITLE INSURANCE COMPANY hereinafter called trustee, and Loyal Land, LLC hereinafter called the second party:

WITNESSETH:

RECITALS: Parker Group Investments, LLC, an Oregon Limited Liability Company and Thornburgh Resort Company, LLC, an Oregon Limited Liability Company, as to Parcels 1 through 6 and John E. Evenson and Barbara L. Evenson, each as to an undivided 50% interest, as to an undivided 49% interest as to parcel 6 only, as grantor, executed and delivered to Amerititle as the original trustee, for the benefit of Sterling Savings Bank ("Sterling"), as the original beneficiary, a certain trust deed dated November 19, 2007, duly recorded on November 26, 2007, as Instrument No. 2007- 61125, in the mortgage records of Deschutes County, Oregon, and thereafter re-recorded on December 5, 2007, as Instrument No. 2007-62677, in the mortgage records of Deschutes County, Oregon (the "Deed of Trust").

In said Deed of Trust the real property therein and hereinafter described was conveyed by said grantor to said trustee to secure, among other things, the performance of certain obligations of the grantor to the said beneficiary. The said grantor thereafter defaulted in its performance of the obligations secured by said Deed of Trust as stated in the notice of default hereinafter mentioned and such default still existed at the time of the sale hereinafter described.

By reason of said default, the owner and holder of the obligations secured by said Deed of Trust, being the original beneficiary named therein, or its successor in interest, declared all sums so secured immediately due and owing; a notice of default, containing an election to sell the said real property and to foreclose said Deed of Trust by advertisement and sale to satisfy grantor's said obligations was recorded in the mortgage records of said county on October 27, 2010 and referenced as Instrument No. 2010-42961 to which reference now is made. Also, a certain Appointment of Successor Trustee was recorded in the mortgage records of said county on October 27, 2010 and referenced as Instrument No. 2010-42960, and thereafter re-recorded in the mortgage records of said county on July 15, 2011 and referenced as Instrument No. 2011-24778, appointing Fidelity National Title Insurance Company ("Fidelity") as successor trustee to the Deed of Trust. Fidelity was the trustee under the Deed of Trust at the time of the sale hereinafter described (in such capacity, Fidelity is referred to herein as the "Trustee").

After the recording of said notice of default and appointment of successor trustee, as aforesaid, FIDELITY NATIONAL TITLE INSURANCE COMPANY, the undersigned Trustee, gave notice of the time for and place of sale of said real property as fixed by him and as required by law. Copies of the Trustee's Notice of Sale were served pursuant to ORCP 7D(2) and 7D.(3) or mailed by both first class and certified mail with return receipt requested, to the last-known address of the persons or their legal representatives, if any, named in ORS 86.740(1) and (2)(a), at least 120 days before the date the property was sold, and the Trustee's Notice of Sale was mailed by first class and

certified mail with return receipt requested, to the last-known address of the guardian, conservator or administrator or executor of any person named in ORS 86.740(1), promptly after the Trustee received knowledge of the disability, insanity or death of any such person: the Notice of Sale was served upon occupants of the property described in the Deed of Trust in the manner in which a summons is served pursuant to ORCP 7D.(2) and 7D.(3) at least 120 days before the date the property was sold, pursuant to ORS 86.750(1). In addition, pursuant to HB 3630, the additional notice was sent or served in accordance with Sections 20 and 21, Chapter 19, Oregon Laws 2008. If the foreclosure proceedings were stayed and released from the stay, copies of an Amended Notice of Sale in the form required by ORS 86.755(6) were mailed by registered or certified mail to the last- known address of those persons listed in ORS 86.740 and 86.750(1) and to the address provided by each person who was present at the time and place act for the sale which was stayed within 30 days after the release from the stay. Further, the Trustee published a copy of said notice of sale in a newspaper of general circulation in each county in which the said real property is situated, once a week for four successive weeks; the last publication of said notice occurred more than twenty days prior to the date of such sale. The mailing, service and publication of said notice of sale are shown by one or more affidavits or proofs of service duly recorded prior to the date of sale in the official records of said county, said affidavits and proofs. Together with the said notice of default and election to sell and the trustee`s notice of sale, being now referred to and incorporated in and made a part of this trustee`s deed as fully as if act out herein verbatim. The undersigned Trustee has no actual notice of any person, other than the persons named in said affidavits and proofs as having or claiming a lien on-or interest in said described real property, entitled to notice pursuant to ORS86.740(1)(b) or (1)(c).

Pursuant to that certain Assignment of Deed of Trust recorded on March 10, 2011 in the Official Records as Instrument No. 2011-09462 and re-recorded on July 15, 2011 in the Official Records as Instrument No. 2011-24810, Sterling assigned its beneficial interest under the Deed of Trust to Central Oregon Investment Holdings, LLC, an Oregon limited liability company ("Holdings"). Pursuant to that certain Assignment of Trust Deed recorded on March 10, 2011 in the Official Records as Instrument No. 2011-09463 and re-recorded on July 15, 2011 in the Official Records as Instrument No. 2011-24811, Holdings assigned its beneficial interests under the Deed of Trust to Loyal Land, LLC, an Oregon limited liability company ("Loyal Land"). Loyal Land was the current beneficiary under the Deed of Trust at the time of the sale hereinafter described.

Pursuant to said notice of sale and amended notice of sale described above, the undersigned Trustee on August 31, 2011, at the hour of 1:00 PM, of said day, in accord with the standard of time established by ORS 187.110, the place so fixed for sale, as aforesaid, in full accordance with the laws of the state of Oregon and pursuant to the powers conferred upon him by said Deed of Trust, sold said real property in one parcel at public auction to Loyal Land for the sum of $8,000,000.00, it being the highest and best bidder at such sale and said sum being the highest and best sum bid for said property. The true and actual consideration paid for this transfer is sum of $8,000,000.00.

NOW THEREFORE, in consideration of the said sum so paid by Loyal Land in cash, the receipt whereof is acknowledged, and by the authority vested in said Trustee by the laws of the state of Oregon and by said Deed of Trust, theTrustee does hereby convey unto Loyal Land all interest which the grantor had or had the power to convey at the time of the grantor`s execution of said Deed of Trust , together with any interest the said grantor or his successors in interest acquired after the execution of said deed in and to the following described real property, to-wit:

AS MORE PARTICULARLY DESCRIBED IN EXHIBIT "A" ATTACHED HERETO AND MADE PART HEREOF.

TRUSTEE`S DEED

T.S. No.: 10-01473-4 OR
Loan No.: 158000245 Parker Group

In constructing this instrument and whenever the context so requires, the masculine gender includes the feminine and the neuter and the singular includes the plural; the word "grantor" includes any successor-in-interest to the grantor as well as each and all other persons owing an obligation, the performance of which is secured by said Deed of Trust; the word "trustee" includes any successor trustee, the word "beneficiary" includes any successor-in-interest of the beneficiary first named above, and the word "person" includes corporation and any other legal or commercial entity.

IN WITNESS WHEREOF, the undersigned trustee has hereunto set his hand; if the undersigned is a corporation, it has caused its corporate name to be signed and its corporate seal to be affixed hereunto by its officers duly authorized thereunto by order of its Board of Directors.

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, AND SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009. THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, AND SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009.

[SIGNATURE PAGE FOLLOWS]

TRUSTEE'S DEED

T.S. No.: 10-01473-4 OR
Loan No.: 158000245 Parker Group

August 31, 2011

FIDELITY NATIONAL TITLE INSURANCE COMPANY

James Gips, Authorized Signature

State of California }ss.
County of San Francisco }ss

On August 31, 2011 before me, Elida Rosado, a Notary Public in and for said county, personally appeared James Gips, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

ELIDA ROSADO
COMM. #1882764
Notary Public-California
SAN FRANCISCO COUNTY
My Comm. Exp. MAR. 14, 2014

Elida Rosado # 1882764
My Commission Expires March 14, 2014

(Seal)

PDX_DOCS:470915.2 [33119.00100]

EXHIBIT A

LEGAL DESCRIPTION

PARCEL 1:
The Southeast Quarter of the Southeast Quarter (SE1/4SE1/4) of Section Twenty-nine (29), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon.

PARCEL 2:
The Northwest Quarter of the Southeast Quarter (NW1/4SE1/4) of Section Twenty-nine (29), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon.

PARCEL 3:
In Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, Deschutes County, Oregon, Section Twenty-nine (29): Northeast Quarter, East Half of the Southeast Quarter, Southeast Quarter of the Northwest Quarter, Southwest Quarter of the Northwest Quarter, Northeast Quarter of the Southwest Quarter and the Northwest Quarter of the Southwest Quarter (NE1/4, E1/2 SE1/4, SE1/4 NW1/4, SW1/4 NW1/4, NE1/4 SW1/4, NW1/4 SW1/4).

EXCEPTING THEREFROM the Southeast Quarter of the Southeast Quarter (SE1/4SE1/4).

TOGETHER WITH:

In Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, Deschutes County, Oregon, Section Thirty (30): The Southeast Quarter of the Northeast Quarter (SE1/4NE1/4) and the Northeast Quarter of the Southeast Quarter (NE1/4SE1/4).

PARCEL 4:
The East Half of the Northwest Quarter (E1/2NW1/4), the South Half of the Southwest Quarter (S1/2SW1/4) and the West Half of the East Half (W1/2E1/2) of Section Seventeen (17):

The Northwest Quarter (NW1/4), the West Half of the Northeast Quarter (W1/2NE1/4), the North Half of the Southwest Quarter (N1/2SW1/4), the Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian.

EXCEPTING THEREFROM:

TRACT A:
Beginning at the center one-quarter (1/4) corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, the true point of beginning; thence North 88°44'26" West along the center line 653.40 feet, thence North 00°06'54" East 200.00 feet. Thence South 88°44'26" East 653.40 feet to the North-South center line; thence South 00°06'54" West 200.00 feet to the true point of beginning.

TRACT B:
Beginning at the South center one-sixteenth (1/16) corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12) East of the Willamette Meridian, thence North 00°06'54" East along the North-South center line 179.75 feet to the true point of beginning: Thence North 89°53'06" West 208.71 feet. Thence North 00°06'54" East 208.71 feet; thence South 89°53'06" East 208.71 feet to the said center line; thence South 00°06'54" West along said center line 208.71 feet to the true point of beginning.

LEGAL DESCRIPTION

PARCEL 5:
The Northeast Quarter of the Southeast Quarter (NE1/4SE1/4) and the South Half of the Southeast Quarter (S1/2SE1/4) of Section Twenty (20); the Southwest Quarter of the Southwest Quarter (SW1/4SW1/4) of Section Twenty-one (21); the North Half (N1/2) and the North Half of the South Half (N1/2S1/2) of Section Twenty-eight (28), all in Township Fifteen (15) South, Range Twelve (12), East, of the Willamette Meridian, Deschutes County, Oregon.

EXCEPTING:

TRACT C:
Beginning at the East 1/4 corner of Section Twenty (20), Township Fifteen (15) South, Range Twelve (12), East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence South 00°06'37" West along the East line of said Section 20, 208.71 feet; thence North 88°44'26" West, 208.71 feet; thence North 00°06'37" East, 208.71 feet to the East-West centerline of said Section 20; thence South 88°44'26" East along said centerline, 208.71 feet to the true point of beginning.

PARCEL 6:

TRACT A:
Beginning at the center 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence North 88°44'26" West along the centerline, 653.40 feet; thence North 00°06'54" East, 200.00 feet; thence South 88°44'26" East, 653.40 feet to the North-South centerline; thence South 00°06'54" West, 200.00 feet to the true point of beginning.

TRACT B:
Beginning at the South center 1/16 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon; thence North 00°06'54" East along the North-South centerline, 179.75 feet to the true point of beginning; thence North 89°53'06" West, 208.71 feet; thence North 00°06'54" East, 208.71 feet; thence South 89°53'06" East, 208.71 feet to the said centerline; thence South 00°06'54" West along said centerline, 208.71 feet to the true point of beginning.

TRACT C:
Beginning at the East 1/4 corner of Section 20, Township 15 South, Range 12, East of the Willamette Meridian, Deschutes County, Oregon, the true point of beginning; thence South 00°06'37" West along the East line of said Section 20, 208.71 feet; thence North 88°44'26" West, 208.71 feet; thence North 00°06'37" East, 208.71 feet to the East-West centerline of said Section 20; thence South 88°44'26" East along said centerline, 208.71 feet to the true point of beginning.