



## COMMUNITY DEVELOPMENT

# HEARINGS OFFICER HEARING - LAND USE: THORNBURGH RESORT MODIFICATION

6:00 PM, MONDAY, OCTOBER 24, 2022

Barnes Sawyer Rooms - Deschutes Services Bldg - 1300 NW Wall St - Bend

(541) 388-6575 | [www.deschutes.org](http://www.deschutes.org)

## AGENDA

### MEETING FORMAT

This meeting will be conducted electronically, by phone, in person, and using Zoom.

Members of the public may view the meeting in real time via the Public Meeting Portal at [www.deschutes.org/meetings](http://www.deschutes.org/meetings).

Members of the public may listen, view, and/or participate in this meeting using Zoom. Using Zoom is free of charge. Using this option may require you to download the Zoom app to your device. To login to the electronic meeting online using your computer, copy this link:

<https://us02web.zoom.us/j/87635238412>

Members of the public can access the meeting via telephone, dial: 1-669-900-9128. When prompted, enter the following Webinar ID: 876 3523 8412.

Prior to the public hearing being closed, written comments can be emailed to [caroline.house@deschutes.org](mailto:caroline.house@deschutes.org) or mailed to Deschutes County Planning Division, Attn: Caroline House, PO Box 6005, Bend OR 97708. Note: All written comments must be received by the Planning Division prior to the record being closed.

### PUBLIC HEARING

1. A land use action review to amend the Final Master Plan (FMP) for the Thornburgh Destination Resort by amending the Fish and Wildlife Management Plan (FWMP) and imposing limitations on the scope of development and water use allowed by the Thornburgh Destination Resort.



Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please call (541) 617-4747.

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COMMUNITY DEVELOPMENT

**NOTICE OF PUBLIC HEARING**

**HEARING FORMAT**

The Deschutes County Hearings Officer will conduct the public hearing described below by video and telephone. If participation by video and telephone is not possible, in-person testimony is available. Options for participating in the public hearing are detailed in the Public Hearing Participation section.

**PROJECT DESCRIPTION**

**FILE NUMBER:** 247-22-000678-MC

**SUBJECT PROPERTIES:** The entirety of the Thornburgh Destination Resort located at:

Address	Deschutes Co. Assessor Map & Tax Lot Number
11800 Eagle Crest Blvd, Redmond, OR 97756	15-12-00, TL 5000
11810 Eagle Crest Blvd, Redmond, OR 97756	15-12-00, TL 5001
11820 Eagle Crest Blvd, Redmond, OR 97756	15-12-00, TL 5002
67205 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7700
67705 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7701
67555 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7800
67525 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7801*
67545 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7900
67400 Barr Rd, Redmond, OR 97756	15-12-00, TL 8000**

\* A portion of this tax lot is not included in the FMP.

\*\* Portions of this tax lot are not included in the FMP.

**OWNERS/APPLICANTS:** Central Land & Cattle Company, LLC  
Kameron DeLashmutt  
Pinnacle Utilities, LLC

**REQUEST:** A land use action review to amend the Final Master Plan (FMP) for the Thornburgh Destination Resort by amending the Fish and Wildlife Management Plan (FWMP) and imposing limitations on the scope of development and water use allowed by the Thornburgh Destination Resort.

**HEARING DATE:** October 24, 2022

**HEARING START:** 6:00 pm

**STAFF CONTACT:** Caroline House, Senior Planner  
Phone: 541-388-6667  
Email: [Caroline.House@deschutes.org](mailto:Caroline.House@deschutes.org)

**RECORD:** Record items can be viewed and downloaded from:  
<https://www.deschutes.org/cd/page/247-22-000678-mc-thornburgh-destination-resort-modification-cmpfmpfwmp>

Scan this code using a smartphone camera and a direct link to the website listed above will load.



**STANDARDS AND APPLICABLE CRITERIA:**

Deschutes County Code (DCC)

- Title 18, Deschutes County Zoning Ordinance:
  - Chapter 18.04, Title, Purpose & Definitions
  - Chapter 18.113, Destination Resorts Zone
- Title 22, Deschutes County Development Procedures Ordinance:
  - Chapter 22.04, Introduction & Definitions
  - Chapter 22.08, General Provisions
  - Chapter 22.20, Review of Land Use Action Procedures
  - Chapter 22.28, Land Use Action Decisions
  - Chapter 22.36, Limitation on Approvals

**PUBLIC HEARING PARTICIPATION**

- If you wish to provide testimony during the public hearing, please contact the staff planner by 4 pm on October 21, 2022. Testimony can be provided as described below.
- Members of the public may listen, view, and/or participate in this hearing using Zoom. Using Zoom is free of charge. To login to the electronic meeting online using your computer, copy this link: <https://us02web.zoom.us/j/87635238412>. Using this option may require you to download the Zoom app to your device.

- Members of the public can access the meeting via telephone, dial 1-669-900-9128. When prompted, enter the following Webinar ID: 876 3523 8412.
- Written comments can also be submitted to the record. Please see the Document Submission section below for details regarding written submittals.
- If participation during the hearing by video and telephone is not possible, the public can provide testimony in person at 6 pm in the Barnes and Sawyer Rooms of the Deschutes Services Center, 1300 NW Wall Street, Bend.

All documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost at the Deschutes County Community Development Department (CDD) at 117 NW Lafayette Avenue. Seven (7) days prior to the public hearing, a copy of the staff report will be available for inspection at no cost at CDD and on the websites listed above. Copies of all documents, evidence and the staff report can be purchased at CDD for (25) cents a page.

**ALL INTERESTED PERSONS MAY APPEAR, BE HEARD, BE REPRESENTED BY COUNSEL, OR SEND WRITTEN SIGNED TESTIMONY. ANY PARTY TO THE APPLICATION IS ENTITLED TO A CONTINUANCE OF THE INITIAL EVIDENTIARY HEARING OR TO HAVE THE RECORD LEFT OPEN IN ACCORDANCE WITH SECTION 22.24.140 OF THE DESCHUTES COUNTY CODE.**

Failure to raise an issue in person at a hearing or in writing precludes appeal by that person to the Land Use Board of Appeals (LUBA), and that failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to LUBA based on that issue.

Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please contact the staff planner identified above.

### **DOCUMENT SUBMISSION**

Any person may submit written comments on a proposed land use action. Documents may be submitted to our office in person, U.S. mail, or email.

#### **In Person**

We accept all printed documents.

#### **U.S. Mail**

Deschutes County Community Development  
 Planning Division, Caroline House, Senior Planner  
 P.O. Box 6005  
 Bend, OR 97708-6005

## Email

Email submittals should be directed to [Caroline.House@deschutes.org](mailto:Caroline.House@deschutes.org).

## Limitations

- Deschutes County does not take responsibility for retrieving information from a website link or a personal cloud storage service. It is the submitter's responsibility to provide the specific information they wish to enter into the record. We will print the email which includes the link(s), however, we will not retrieve any information on behalf of the submitter.
- Deschutes County makes an effort to scan all submittals as soon as possible. Recognizing staff availability and workload, there is often a delay between the submittal of a document to the record, and when it is scanned and uploaded to Accela Citizen Access (ACA) and Deschutes County Property Information (DIAL).
- To ensure your submission is entered into the correct land use record, please specify the land use file number(s).
- For the open record period after a public hearing, electronic submittals are valid **if received by the County's server** by the deadline established for the land use action.
- IF YOU WISH TO BE NOTIFIED OF ANY DECISION RELATED TO THIS APPLICATION, YOU MUST PROVIDE A MAILING ADDRESS.

**NOTICE TO MORTGAGEE, LIENHOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST PROMPTLY BE FORWARDED TO THE PURCHASER.**

This Notice was mailed pursuant to Deschutes County Code Chapters 22.20 and 22.24.



STAFF REPORT

FILE NUMBER: 247-22-000678-MC

SUBJECT PROPERTY: The entirety of the Thornburgh Destination Resort located at:

Address	Deschutes Co. Assessor Map & Tax Lot Number
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67545 Cline Falls Rd, Redmond, OR 97756	15-12-00, TL 7900
67400 Barr Rd, Redmond, OR 97756	15-12-00, TL 8000**

\* A portion of this tax lot is not included in the FMP.

\*\* Portions of this tax lot are not included in the FMP.

OWNERS/APPLICANTS: Central Land & Cattle Company, LLC  
Kameron DeLashmutt  
Pinnacle Utilities, LLC

APPLICANT'S ATTORNEYS: J. Kenneth Katzaroff – Schwabe Williamson & Wyatt, PC  
Liz Fancher

REQUEST: Amend the Final Master Plan (FMP) for the Thornburgh Destination Resort by amending the Fish and Wildlife Management Plan (FWMP), and imposing limitations on the scope of development and water use allowed by the Thornburgh Destination Resort.

STAFF CONTACT: Caroline House, Senior Planner  
Phone: 541-388-6667  
Email: [Caroline.House@deschutes.org](mailto:Caroline.House@deschutes.org)

**RECORD:**

Record items can be viewed and downloaded from:  
<https://www.deschutes.org/cd/page/247-22-000678-mc-thornburgh-destination-resort-modification-cmpfmpfwmp>

**I. APPLICABLE CRITERIA**

Deschutes County Code (DCC)

- Title 18, Deschutes County Zoning Ordinance:
  - Chapter 18.113, Destination Resorts Zone
- Title 22, Deschutes County Development Procedures Ordinance:
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  - Chapter 22.08, General Provisions
  - Chapter 22.20, Review of Land Use Action Procedures
  - Chapter 22.28, Land Use Action Decisions
  - Chapter 22.36, Limitation on Approvals

**II. BASIC FINDINGS**

**LOT OF RECORD:** The subject property has been verified as a legal lot(s) of record in previous land use decisions.

**LOCATION:** The Thornburgh Destination Resort ("Resort") is comprised of a large tract of land +/- 1,970 acres in size and includes several tax lots as shown in *Table 1* and *Figure 1* below.

*Table 1 - Thornburgh Destination Resort Location*

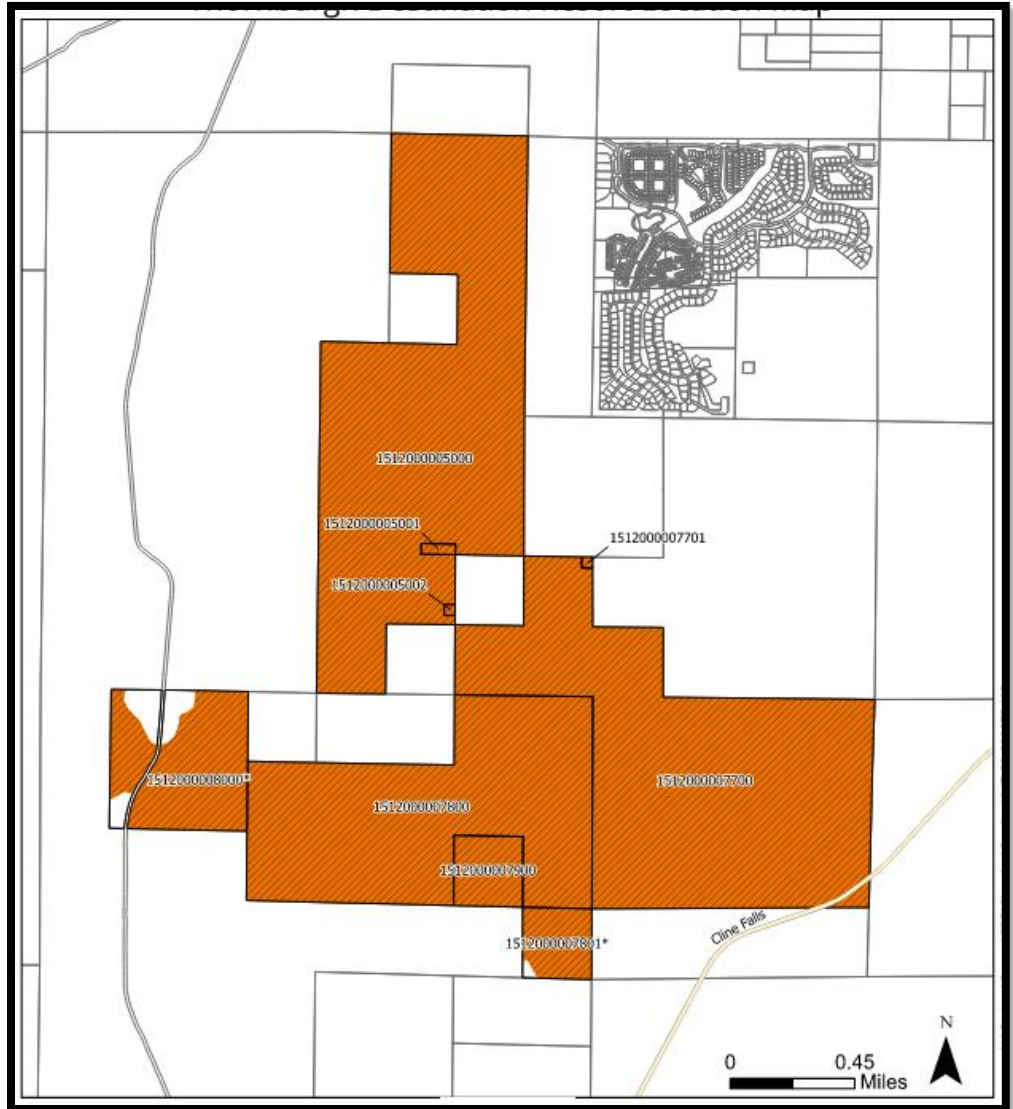
Map Number & Tax Lot	Address
15-12-5000	11800 Eagle Crest Blvd.
15-12-5001	11810 Eagle Crest Blvd.
15-12-5002	11820 Eagle Crest Blvd.
15-12-7700	67205 Cline Falls Rd.
15-12-7701	67705 Cline Falls Rd.
15-12-7800	67555 Cline Falls Rd.
15-12-7801 <sup>1</sup>	67525 Cline Falls Rd.
15-12-7900	67545 Cline Falls Rd.
15-12-8000 <sup>2</sup>	67400 Barr Rd.

<sup>1</sup> Staff notes a portion of this tax lot is not included in the Final Master Plan (FMP) approval.

<sup>2</sup> Staff notes portions of this tax lot are not included in the Final Master Plan (FMP) approval.



Figure 1 - Thornburgh Destination Resort Location Map



**SITE DESCRIPTION:** The subject property is approximately 3 miles west-southwest of the City of Redmond. The subject property includes variable topography, native vegetation, rock outcroppings and ridge tops. At this time, the subject property is largely undeveloped land. However, the applicant has started construction of access roads, other infrastructure improvements (e.g. community water system, community sewer system, etc.), and a golf course pursuant to prior land use approvals. In addition, the applicant has applied for building permits for utility facilities<sup>3</sup> and overnight lodging units (OLUs). The southeastern corner of the subject property is bisected by Cline Falls Road and Barr Road bisects the southwest corner of the Resort tract.

**SURROUNDING USES:** The surrounding lands, not including other tax lots within the Resort, are primarily comprised of tracts owned by the Federal Government, State of Oregon, or Deschutes County. Most of this public land is part of the Cline Buttes Recreation Area and is zoned Exclusive

<sup>3</sup> Staff notes these building permits are ready for issuance, but have not been issued at the time this staff report was written.

Farm Use – Sisters/Cloverdale Subzone (EFU-SC) or Open Space & Conservation (OS&C). Further northeast is the Eagle Crest Destination Resort, and a property with an approved Surface Mining site (Site No. 252) and Wireless Telecommunication Facility. To the east-northeast are Rural Residential (RR10) zoned lots that are generally five (5) to ten (10) acres in size. Most of these properties are developed with a single-family dwelling and related accessory structures.

**RESORT LAND USE HISTORY:** Below is a summary of the land use history for the Resort:

Conceptual Master Plan (File No. CU-05-20): On February 16, 2005, Thornburgh Resort Company, LLC (“TRC”) applied for the Resort Conceptual Master Plan (CMP) approval for the Thornburgh Destination Resort. The application was denied by the Hearings Officer on November 9, 2005. The Board of County Commissioners (“BOCC”) issued Order Nos. 2005-143 and 2006-016 to call-up the Hearings Officer decision for review. On May 11, 2006, the BOCC approved the CMP. Annunziata Gould (“Gould”) and Steve Munson (“Munson”) appealed the BOCC decision to the Land Use Board of Appeals (LUBA / LUBA Nos. 2006-100 & 2006-101). LUBA remanded the BOCC decision on May 14, 2007 (*Gould v. Deschutes County*, 54 Or LUBA 2005 (2007)). The LUBA decision was appealed to the Court of Appeals. On November 7, 2007, the Court of Appeals reversed and remanded LUBA’s decision (*Gould v. Deschutes County*, 216 Or App150, 171 P3d 1017 (2007)). The result was the BOCC decision in CU-05-20 approving the CMP was remanded to the County for further proceedings.

On April 15, 2008, the BOCC issued its decision on remand, again approving the CMP (Order No. 2008-151). Gould and Munson appealed the BOCC remand decision to LUBA on May 6, 2008 (LUBA No. 2008-068). On September 11, 2008, LUBA affirmed the BOCC decision (*Gould v. Deschutes County*, 57 Or LUBA 403 (2008)). That decision was appealed to the Court of Appeals (A140139). On April 22, 2009, the Court affirmed LUBA’s decision (*Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009)). On October 9, 2009, the Oregon Supreme Court denied review (*Gould v. Deschutes County*, 347 Or 258, 218 P3d 540 (2009)). On December 9, 2009, the Court of Appeals issued its appellate judgement and the CMP received final approval as of December 9, 2009.

CMP Initiation of Use (File No. DR-11-8): On November 1, 2011, TRC applied for a Declaratory Ruling to demonstrate the CMP had been timely initiated. The Hearings Officer found the CMP was timely initiated. The BOCC declined to hear the appeal and Gould filed a LUBA appeal. On appeal, LUBA remanded that decision (LUBA No. 2012-042). LUBA’s decision was affirmed by the Court of Appeals, without opinion (*Gould v. Deschutes County*, 256 Or App 520, 301 P3d 978 (2013)). On remand, the Hearings Officer found the CMP was not timely initiated. TRC appealed the Hearings Officer’s decision to the BOCC. The BOCC issued a decision finding the CMP was initiated before the two-year deadline expired. Gould appealed the BOCC decision to LUBA. On appeal, LUBA remanded this decision back to the BOCC decision on January 30, 2015 (LUBA No 2015-080). However, LUBA’s decision was appealed and the Court of Appeals reversed and remanded stating that the express language of the County Code requires Defendant to substantially exercise the permit conditions as a whole, and any failure to initiate development by fully complying with the conditions should not be the fault of the applicant, a determination of which must be based on more than just the complexity of the process. The Court also held that the County could not interpret the County Code contrary to a prior LUBA order in this same litigation, as the lower tribunal was bound to follow the appellate Court’s Ruling (*Gould v Deschutes County*, 272 Or App 666 (2015)). Later, as part of the

submitted application materials for the Golf Course Site Plan review, the applicant included the following clarification on the status of the remand:

*“Loyal Land has not initiated a review on remand. This application is moot, however, because the Resort’s Final Master Plan (FMP) incorporates and satisfies all conditions of the CMP and has received final approval.”*

Final Master Plan (File Nos. M-07-2/MA-08-6): Thornburgh Resort Company filed for approval of the Resort Final Master Plan (FMP) in 2007, which was later amended in 2008. The application was approved by the County, appealed by Gould, and subsequently remanded by LUBA to address issues regarding the Thornburgh Wildlife Mitigation Plan (*Gould v. Deschutes County*, 59 Or LUBA 435 (2009)). The LUBA decision was appealed to the Court of Appeals. The Court affirmed LUBA’s decision (*Gould v. Deschutes County*, 233 Or App 623, 227 P3d 759 (2010)). In 2015, on remand, the County denied approval of the FMP. Central Land and Cattle Company, LLC (“Central”) successfully appealed the denial and LUBA remanded the County decision (*Central Land and Cattle Company v. Deschutes County*, 74 Or LUBA 326 (2016)). The Court of Appeals affirmed LUBA’s decision without opinion (A163359). On the second remand, the FMP was approved by the County. The County decision was appealed by Gould. The County’s approval was affirmed by LUBA (LUBA No. 2018-008, August 21, 2018) and the FMP is now final.

Tentative Plan & Site Plan - Phase A-1 Residential/OLU Lots & Utility Facilities (File Nos. 247-18-000386-TP/247-18-000454-SP/247-18-000592-MA): In May 2018, Central filed for approval of its Phase A-1 Tentative Plan and Site Plan review for utility facilities authorized by the CMP and FMP. The Hearings Officer approved the request with conditions. The BOCC declined review of an appeal (Order No. 2018-073). Gould filed an appeal to LUBA (LUBA No. 2018-140). LUBA remanded the County’s decision on the following issue:

*“On remand, the county must consider whether, without TP Condition 17, the tentative plan for Phase A-1 satisfies the no net loss/degradation standard and whether a change in the source of mitigation water constitutes a substantial change to the FMP approval, requiring a new application, modification of the application, or other further review consistent with FMP and DCC destination resort regulations.”*

The LUBA remand decision was appealed to the Court of Appeals (A171603), but the appeal was dismissed based on the filing deadline. The Court of Appeals denied reconsideration of said order of dismissal. The Oregon Supreme Court accepted review of Court of Appeals order denying reconsideration of the order-dismissing petition for review (S067074). The Supreme Court agreed with Gould and instructed the Court of Appeals to hear that matter. The Court of Appeals subsequently affirmed LUBA’s decision in LUBA No. 2018-140 (A171603). In August 2021, Central initiated a second a remand application (file no. 247-21-000731-A). The Hearings Officer issued a remand decision approving 247-21-000731-A (the Tentative Plan for Phase A-1 of the Thornburgh Destination Resort), thus clarifying and affirming the County’s past approval of 247-18-000386-TP, 18-000454-SP, and 18-000542-MA. The BOCC declined review of an appeal (Order No. 2021-059). The County’s decision was appealed to LUBA by Gould and LUBA affirmed the County’s decision (LUBA No. 2021-112). A petition for judicial review has been filed to the Oregon Court of Appeals.

Site Plan – Phase A Golf Course (File No. 247-19-000881-SP): In December 2019, Central filed for Site Plan approval for a golf course authorized by the CMP and FMP. In April 2020, the Deschutes County Planning Division administratively approved the application. The BOCC called up an appeal filed by Gould and Central Oregon LandWatch (Order No. 2020-016). The BOCC affirmed the administrative approval on August 31, 2020. The County decision was appealed to LUBA and LUBA affirmed (LUBA No. 2020-095). The LUBA decision was appealed by Gould to the Court of Appeals (A176353). The Court of Appeals affirmed and the Oregon Supreme Court declined review (S069050). Therefore, the Site Plan approval for the golf course is final.

Site Plan – Phase A 80 OLUs (File No. 247-21-000508-SP): In May 2021, Central filed for site plan approval for 80 overnight lodging units authorized under the CMP and FMP. In September 2021, the Deschutes County Planning Division administratively approved the site plan. An appeal was filed by Gould, and the Hearings Officer denied the issues on appeal (file no. 247-21-000849-A) and approved the site plan. The BOCC declined review of an appeal (Order No. 2022-002). The County's decision was appealed to LUBA by Gould and LUBA affirmed the County's decision (LUBA No. 2022-013). The Court of Appeals affirmed LUBA's decision. It is unknown at this time if a petition for review has/will be filed to the Oregon Supreme Court.

Site Plan - Phase A-1 Resort Facilities (File No. 247-21-000537-SP): In May 2021, Central filed for Site Plan approval for a Welcome Center, Gatehouse, Golf Clubhouse and Community Hall authorized under the CMP and FMP. In November 2021, the Deschutes County Planning Division administratively approved the Site Plan. An appeal was filed by Gould, and the Hearings Officer denied the issues on appeal (file no. 247-21-001009-A) and approved the site plan. The BOCC declined review of an appeal (Order No. 2022-012). The County's decision was appealed to LUBA by Gould and LUBA affirmed the County's decision (LUBA No. 2022-026). A petition for judicial review has been filed to the Oregon Court of Appeals.

Modification of FMP – OLU Ratio (File No. 247-21-000553-MC): In June 2021, Central filed a Modification to amend the ratio of OLUs per single-family dwelling unit (from 2:1 to 2.5:1) and related bonding requirements. In October 2021, the Deschutes County Planning Division administratively approved the modification. An appeal was filed by Gould, and the Hearings Officer denied the issues on appeal (file no. 247-21-000920-A) and approved the Modification. The BOCC declined review of an appeal (Order No. 2022-003). The County's decision was appealed to LUBA by Gould and LUBA affirmed the County's decision (LUBA No. 2022-011). A petition for judicial review has been filed to the Oregon Court of Appeals.

Tentative Plan - Phase A-2 Residential Lots (File No. 247-21-000637-TP): In June 2021, Central filed for Tentative Plan approval for 108 single-family dwelling lots authorized under the CMP and FMP. The total development area included in the request encompasses 135 acres and the single-family dwelling lots on the tentative plan drawings identify the lots as lot numbers 193-300. In October 2021, the Deschutes County Planning Division administratively approved the application. An appeal was filed by Christine Larson, and the Hearings Officer denied the issues on appeal (file no. 247-21-00948-A) and approved the Tentative Plan. The BOCC declined review of an appeal (Order No. 2022-011). Gould has filed an appeal to LUBA (pending LUBA No. 2022-025).

Site Plan – Phase A 70 OLU's (File No. 247-21-001111-SP): In December 2021, Central filed for Site Plan approval for 70 overnight lodging units. This application is pending review.

**PROPOSAL:** The applicant's Burden of Proof (pgs. 1-4) includes the following proposal description:

Application: Amend the Final Master Plan for the Thornburgh Destination Resort by Amending the Fish and Wildlife Management Plan for the Thornburgh Destination and Imposing Limitations on the Scope of Development and Water Use Allowed by the Resort

I. PROPOSAL TO AMEND FWMP

Thornburgh Resort seeks to revise the Final Master Plan for the Thornburgh Destination Resort. In particular, the applicant seeks to revise the FWMP to impose a limitation on the amount of water use that may occur annually at the Resort and to enhance the quality of mitigation measures promised by the plan by relying on the transfer of specified, existing water rights to supply most of the Resort's water needs in addition to OWRD mitigation, if needed.

The revised FWMP, the 2022 FWMP, proposes to do the following to assure that the Resort's water use will result in no net loss or degradation of fish resources<sup>1</sup>:

- 1. Reduce the resort's water use from 2129 AF to an estimated 1460 AF per year; less than 68.6% of the Resort's approved water use. Thornburgh will achieve this reduction by limiting the amount of water used by Resort lakes and irrigation systems and by agreeing not to build the second tournament-size, 18-hole golf course in the Tribute area of the resort. Only the first Tribute 18-hole golf course is required by the CMP/FMP<sup>2</sup>.
- 2. Purchase water rights that provide mitigation benefits to Whychus Creek, the Deschutes River and/or the Crooked River for use by the Resort. These rights are:
  - a. LeBeau, Certificate 95746 200 AF (50 acres)
  - b. Tree Farm, Certificate 94948 327.5 AF (.453 cfs)
  - c. Big Falls Ranch, Certificates 96190 and 96192 614.4 AF<sup>3</sup> (153.6 acres)
  - d. Big Falls Ranch, Certificate 87558 25.6 AF (6.4 acres)
  - e. Dutch Pacific, Certificate 89259 49.5 AF (16.5 acres)

The status of the Resort's ownership, transfers, and use of these certificated water rights will be reported to Deschutes County under FMP Condition 10 during the review of site plan and tentative plan applications. FMP Condition 10 will remain, as written, an informational requirement.

- 3. Transfer the above water rights, except the Dutch Pacific rights, to the Resort property for use by the Resort. In the event a water right transfer to the Thornburgh property is not approved, the right will be used to provide mitigation for groundwater permits appropriating water from wells at the Thornburgh Resort by i) cancelling the water right

in-lieu of mitigation or alternatively, by transferring the right to instream use to obtain mitigation credits (where allowed) under OWRD's Deschutes Basin Program.

4. Cancel the Dutch Pacific water rights associated with Certificate 89259 in lieu of mitigation for a Thornburgh groundwater permit.
5. Comply with Condition 39 of the FMP re TSID mitigation for Whychus Creek.
6. Mitigate for any additional Resort water use, other than exempt well use allowed by this FWMP, according to the terms of OWRD's groundwater mitigation program. Mitigation water will come from one of the following sources:
  - a. Big Falls Ranch surface water rights (Deep Canyon Creek)(with current right of appropriation from groundwater)
  - b. Big Fall Ranch groundwater rights
  - c. Central Oregon Irrigation District mitigation credits
  - d. Other ground or surface water source, or mitigation credits in the general zone of impact established by OWRD that discharges into, or leaves water in either the Deschutes River or Crooked Rivers. This will not include credits or water that is the result of piping projects.
7. The purpose of this paragraph 7 is to clarify what constitutes compliance with FMP Condition 38, whether during the review of Resort land use applications, as reported as part of annual monitoring, or for any other purpose. Once the Resort's water provider<sup>4</sup> has purchased water rights to be used for pumping or mitigation and pumping at the point of diversion or appropriation of the certificate has been discontinued, compliance with Conditions 3, 4 and 6 shall be found to be met in the manner discussed in this paragraph 7. As noted below, compliance will occur differently for water appropriated from a surface water Point of Diversion versus a groundwater Point of Appropriations or for a mitigation credit that is acquired as follows:
  - a. Point of Appropriation-Groundwater: Compliance occurs upon submittal to OWRD of any of the following: an assignment of the water right to Thornburgh, an application that seeks OWRD approval of a transfer to pump at the Resort property, or cancellation in-lieu of mitigation so long as any use of the particular water right by farmers discussed below, if any, has been discontinued.
  - b. Point of Diversion-Surface Water: Compliance occurs upon submittal to OWRD, and OWRD approves any of the following: an application that transfers to pump at the Resort property, application that transfers the water to an in-stream lease, cancellation in-lieu of mitigation, or transfer to obtain mitigation credits, so long as any use of the particular water right by farmers discussed below, if any, has been discontinued.
  - c. Mitigation Credit: In the event that Thornburgh acquires mitigation credits, compliance occurs when Thornburgh provides proof of ownership or proof of submittal to OWRD of an application to transfer water in-stream.

The applicant will also agree to the following measures to provide mitigation benefits over

and above the benefits achieved by the mandatory measures described above. Noncompliance with these measures shall not, however, be grounds for declining approval of a Resort development permit because these measures are not required to meet any Resort approval criterion, including the no net loss standard:

- 8. Prior to the completion of the Phase A-1 tentative plan, discontinue the use of and abandon the three exempt wells located on the Resort property.
- 9. Discontinue the use of all purchased water rights listed in Paragraphs 2 above until they are used by the Resort as a transferred water right or as mitigation for pumping groundwater for Resort uses. The following exceptions apply: (1) purchased rights may be pumped if necessary to avoid forfeiture; and (2) purchased rights may be transferred for use by farmers, including those in the North Unit Irrigation District or other party if used for farm use purposes as defined by ORS 215.203 (whether in an exclusive farm use zone or otherwise), if OWRD authorizes a temporary transfer to help address the needs of farmers. Currently, such transfers may be allowed by Executive Order of the Governor declaring a State of Drought Emergency.
- 10. The Resort has also committed in its FMP to remove and/or thin thousands of acres of Juniper trees from the Resort property and BLM lands to enhance wildlife habitat values. The thinning and removal of Juniper trees can have a dramatic reduction on the consumption of water.

<sup>1</sup> The applicant has filed a 2022 FWMP document. It retains some of the text and requirements of the 2008 FWMP and, if approved, will replace the document in its entirety.

<sup>2</sup> The BOCC decision approving the CMP found that “at least one golf course, the restaurant and meeting rooms and facilities are required to be constructed in Phase A, which is slated to be in the Tribute Village.” Page 8, BOCC Decision.

<sup>3</sup> The applicant will purchase water rights from Big Falls Ranch that are being pumped from groundwater. Whether these water rights are BFR groundwater rights or its Deep Canyon Creek surface water rights that are being pumped from groundwater the mitigation benefit of discontinuing pumping these rights from groundwater will be the same.

<sup>4</sup> Pinnacle Utilities, LLC is the Resort’s current water provider.

Since denial of permits is the primary method of County enforcement of approval requirements, Staff is unclear if these mitigation measures are binding or enforceable. Staff asks the Hearings Officer to make express finding on the status of the applicant proposed mitigation measures 8, 9, and 10 and what consideration, if any, they should be given as part of this decision.

In the Applicant’s Response to Issues Raised in Incomplete Application Letter, the applicant’s request was updated to the following:

APPLICANT REQUEST:            Modify Final Master Plan (“FMP”) by Amending the Fish and Wildlife Mitigation Plan (“FWMP”) for Thornburgh

Applicant seeks no “on the ground” changes to the FMP. Instead, Applicant seeks to modify a portion of the FMP.

STAFF COMMENT: It is unclear to staff if the proposed changes result in “on the ground changes” to the FMP and/or CMP. For example, the applicant proposes to “not build” a golf course. What happens to the areas previously approved for golf course development in the FMP and CMP? Does this issue need to be evaluated as part of this review? Staff notes Exhibit 1 of the Applicant’s Response to Issues Raised in Incomplete Application Letter identifies new uses<sup>4</sup> in areas that have not been reviewed as part of a formal land use process and do not appear to be proposed in the written narratives submitted by the applicant as part of this request.

Staff asks the Hearings Officer to make a determination if sufficient information has been provided to understand the scope of the applicant’s request and make clear findings on what changes are being evaluated as part of this request.

**PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice on August 24, 2022, and September 30, 2022, to several public agencies and received the following comments:

Central Oregon Irrigation District (COID)

*Please be advised that Central Oregon Irrigation District (COID) has reviewed a land use action review to amend the Final Master Plan (FMP) for the Thornburgh Destination Resort by amending the Fish and Wildlife Management Plan (FWMP) and imposing limitations on the scope of development and water use allowed by the Thornburgh Destination Resort. COID has no facilities or water rights on the subject property (TAXLOT: 5000, 5001, 5002, 7700, 7701, 7800, 7801\*, 7900, 8000\*\*)*

*The land use application references COID water in multiple places. COID does not have a present or active agreement with the current developer of this project and does not, at the present time, have any agreements in place to provide mitigation water or credits for this project.*

Deschutes County Building Division, Randy Scheid

*NOTICE: The Deschutes County Building Safety Divisions code mandates that Access, Egress, Setbacks, Fire & Life Safety, Fire Fighting Water Supplies, etc. must be specifically addressed during the appropriate plan review process with regard to any proposed structures and occupancies.*

*Accordingly, all Building Code required items will be addressed, when a specific structure, occupancy, and type of construction is proposed and submitted for plan review.*

Deschutes County Senior Transportation Planner, Peter Russell

*I have reviewed the transmittal materials for file 247-22-000678-MC to modify the Final Master Plan (FMP) and its Fish and Wildlife Management Plan (FWMP) for the Thornburgh destination resort at 15-12-00, Tax Lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900, and 8000.*

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<sup>4</sup> See areas identified as Future Residential Development Area, Future Development Tract A, etc.



*The proposed FMWP modification will not change the trip generation results of the previously approved traffic study and thus no additional transportation analysis is required.*

*Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$5,080 per p.m. peak hour trip. However, as the proposed FWMP modification will not result in any trips and thus will not consume any road capacity as that term is commonly understood, no additional SDGS are triggered.*

Oregon Department of Fish & Wildlife (ODFW)

August 30, 2022 – Comments from Jerry George, District Fish Biologist

*The Oregon Department of Fish and Wildlife (ODFW) requests additional time to review and provide comments on the Revised Fish and Wildlife Management Plan for the Thornburgh Resort, received August 24, 2022. The new mitigation plan would supersede the 2008 mitigation agreement between the developer and ODFW. New sources of mitigation are proposed and a substantial amount of new material including new modeling of the Upper Deschutes River is presented in the Addendum and Technical Memorandum, which along with updated information on existing water resources in the basin and climate change will require extensive staff time to review. ODFW will need adequate time to review the new plan, likely an additional 30 days, to determine if the mitigation proposed meets the no net loss standard. If you are unable to accommodate an extension on the comment period let us know as we will submit a letter on Friday indicating that we will work with the County and Thornburgh on any necessary revisions to the plan.*

September 30, 2022 – Danette Faucera, Water Policy Coordinator

*ODFW has been coordinating with the applicant to better understand the proposal. We have asked several follow up questions and requested additional information regarding some initial concerns with the new plan but will not be meeting for further discussion until mid-October. Can you advise us on any updated County timelines and when you would need to receive initial comments from ODFW, if warranted?*

STAFF COMMENT: In response to ODFW's timeline question, Deschutes County Principal Planner Anthony Raguine notified ODFW "we've scheduled a public hearing for Monday, Oct 24th. Any comments received up to the date/time of the hearing will be included in the record. I suspect we'll also have a post-hearing written open record period – although I can't guarantee that."

Oregon Department of State Lands (DSL), Lynne McAllister

*Wetland/Waterway/Other Water Features*

*√ The National Wetlands Inventory shows wetland, waterway or other water features on the property.*

*√ It is unlikely that there are jurisdictional wetlands or waterways on the property based upon a review of wetland maps, the county soil survey and other available information.*

*Your Activity*

*√ A state permit will not be required for the proposed project because, based on the submitted site plan, the project avoids impacts to jurisdictional wetlands, waterways, or other waters.*

*Applicable Oregon Removal-Fill Permit Requirement(s)*

*√ A state permit is required for 50 cubic yards or more of fill removal or other ground alteration in wetlands, below ordinary high water of waterways, within other waters of the state, or below highest measured tide.*

*Closing Information - Additional Comments*

*The submitted materials included a document of almost 300 pages, and a site plan for this project was not found. Therefore, the entire tax lot 8000 was investigated for this response.<sup>5</sup> It does not appear that there are state regulated waters or wetlands on this parcel. The National Wetlands Inventory mapped several streams and a canal, but none of these connect to a downstream water supporting fish.*

*This is a preliminary jurisdictional determination and is advisory only.*

*This report is for the State Removal-Fill law only. City or County permits may be required for the proposed activity.*

Redmond Fire and Rescue, Tom Mooney

Redmond Fire and Rescue submitted several comments into the record regarding annexation of the Resort into the Redmond Fire Protection District and associated taxation. Staff incorporates these comments herein by reference.

The following agencies did not respond to the notice: BLM – Prineville District, Deschutes County Assessor, Deschutes County Environmental Health, Deschutes County Environmental Soils Division, Deschutes County Property Address Coordinator, Deschutes County Road Department, Oregon Department of Transportation (ODOT) Region 4 Planning, Oregon Department of State Lands – Land Management, Oregon Water Resources Department, Swalley Irrigation District, Three Sisters Irrigation District, Tumalo Irrigation District, Upper Deschutes Watershed Council, U.S. Fish & Wildlife Service, and Watermaster - District 11.

**PUBLIC COMMENTS:** The Planning Division mailed a Notice of the Application on August 24, 2022, and a Notice of Public Hearing on September 30, 2022, to all property owners within 750 feet of the subject property and all other parties. Additionally, the applicant submitted a Land Use Sign Affidavit on September 8, 2022, to demonstrate compliance with the posted notice requirements under DCC 22.24.030(B). Staff notes public comments were submitted with concerns regarding the posting of the Land Use Sign. For this reason, staff asks the Hearings Officer to determine if the applicant has complied with the posted notice requirements of DCC 22.24.030(B).

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<sup>5</sup> Staff notes the electronic notice submitted to DSL did not include all of the tax lots for the subject property. Staff followed up with DSL on this issue, but has not received a response.

Several public comments have been submitted and below staff has summarized issues that have been raised:

- Concerns regarding the location of the posted Land Use Sign.
- Concerns the subject application is a substantial change to the CMP and/or FMP.
- Concerns the proposed changes impact the approved drawings for the resort and will require changes to the approved location of the residential lots and road system.
- Concerns on whether “agreements with the BLM and ODFW for management of off-site mitigation efforts” are required for FMP Condition 10.
- Concerns the proposed changes require a new application under FMP Condition 1.
- Concerns the proposed 2022 FWMP alone constitutes a substantial change.
- Concerns the proposed water right purchases and transfers are speculative and require approval from OWRD.
- Concerns the terrestrial Wildlife Mitigation Plan referenced in FMP Condition 10 and FMP Condition 38 must be reevaluated due to the scope of the proposal.
- Concerns the use of different water right sources will create new impacts in different places.
- Concerns the elimination of a golf course does not comply with the destination resort criteria for open space and developed recreational facilities.

Staff identifies these concerns under the applicable section in the staff report below. Staff asks the Hearings Officer to address the public comments in his review.

**REVIEW PERIOD:** The subject application was submitted on August 17, 2022. On September 16, 2022, the County mailed an incomplete letter to the applicant requesting additional information necessary to complete the review. The applicant provided responses to the incomplete letter on September 22, 2022, and notified the County that no additional information would be submitted. For this reason, the application was deemed complete and a public hearing before a Hearings Officer was scheduled for October 24, 2022. The County mailed a Notice of a Public Hearing to all parties on September 30, 2022, and published a Public Notice in the Bend Bulletin on October 4, 2022. The 150<sup>th</sup> day in which the County must take final action on the subject application is February 19, 2022.

**STAFF COMMENT:** Staff notes the hearing will occur on the 20<sup>th</sup> day<sup>6</sup> from when the Public Notice was published in the Bend Bulletin. DCC 22.24.030(C) requires notice of an initial hearing shall be published in a newspaper of general circulation in the County at least 20 days prior to the hearing. Staff asks the Hearings Officer to confirm if the notice requirements of DCC 22.24.030 have been met.

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<sup>6</sup> DCC 22.08.070. Time Computation. Except when otherwise provided, the time within which an act is required to be done shall be computed by excluding the first day and including the last day, unless the last day is a Saturday, Sunday, legal holiday or any day on which the County is not open for business pursuant to a county ordinance, in which case it shall also be excluded.

### III. FINDINGS & CONCLUSIONS

#### Preliminary Issues

#### 1. **CMP & FMP Required Open Spaces and Recreational Facilities**

Public comments in the record argue the applicant's proposal does not comply with the open space and developed recreational facilities requirements for a destination resort. As part of the incomplete letter, staff requested additional clarification from the applicant regarding the open space and recreational facilities requirements. Below are some of the arguments presented in the applicant's submitted materials:

#### Applicant Responses on the Open Space Requirements:

#### *Applicant's Response to Issues Raised in Incomplete Application Letter, Pgs. 9-10:*

Hearings Officer Dan Olsen also addressed this issue in his decision approving the Phase A-1 tentative plan. He found that the changes made to the open space by the Phase A-1 tentative plan approval did not constitute a substantial change of the FMP and he approved the locations shown on the tentative plan. The hearings officer found that the exact location and size of open space tracts was not a key consideration in approving the FMP. See page 35 of 81 of Olsen Phase A-1 tentative plan decision.

The BOCC followed suit when it approved the Phase A golf course. It approved a course that spans the two areas where golf courses are shown on the FMP maps with additional open space areas in an amount exceeding that required by the CMP/FMP. Details of these approved open space areas were provided on the Open Space site plan SP 4.1. By agreeing not to build a golf course in The Tribute section of the Resort, no change in the approved open space plan is required because the required open space has already been provided in the required amount in the correct general area of the Resort.

The golf course open space site plan (SP 4.1) that is a part of the golf course site plan has received final approval from the County, LUBA and Oregon Court of Appeals. The open space issue related to not building a golf course where precisely shown on the CMP and FMP maps, therefore, is settled and may not be challenged by the County at this late date. *Gansen v. Lane County*, \_\_Or LUBA \_\_ (LUBA No. 2020-074, February 22, 2021).<sup>7</sup>

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<sup>7</sup>The open space issue has also been addressed by the Phase A-2 tentative plan as well

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pg. 13:*

The findings<sup>7</sup> cited by staff, above, provide a general description of the CMP proposal. They are findings related to informational requirements that are not relevant approval criteria. They, therefore, are not material findings.

As discussed earlier, while the Applicant received approval to build three golf courses it was not required to build all three. Furthermore, the specific acreage of open space is not fixed. The code requires 50% open space. The CMP estimated that approximately 69% of the total subject property would be open space (1358 acres). The FMP approved Exhibit A1.1 of MA-08-6 as the open space map and found that it provides approximately 66% open space (1293 acres). The Applicant has provided approximately 70% open space to date and will continue to meet open space requirements as it proceeds with additional Resort Development.

We have already explained why the Applicant's agreement not to build a golf course is allowed by the FMP and is not an amendment thereof.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pg. 17:*

It appears that the drafter of the Incomplete Letter is either unaware of or does not consider the fact that the CMP open space plan was changed by approval of the FMP. The letter does not address the FMP decision at all. As with many criteria raised by staff, Applicant simply does not understand how this provision applies to this modification.

More importantly, the Applicant has already obtained final County approval of changes in the location of the open space for the area encompassing the Phase B golf course on the FMP open space map approved by Hearings Officer Briggs in 2008, Exhibit A1.1 of MA-08-6 (page 12, 2008 FMP Decision). The Applicant is not proposing any change to the open space management plan and none is necessitated by the Applicant's request to amend the FWMP.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pg. 18:*

It is unclear why the Incomplete Letter believes this informational requirement<sup>8</sup> is relevant to the Applicant's modification request. Changes to the location of open space do not impact on the Open Space Management plan measures.

Open space issues were raised and addressed during the review of the Phase A-1 tentative plan, golf course, and Phase A-2 tentative plan decisions. The protected natural areas are shown on the Sheet 3.1 of the golf course site plan, Sheet 2.1 of the Phase A-1 tentative plan,

<sup>7</sup> See finding for DCC 18.113.050(A)(10) in BOCC Decision CU-05-20 / Document No.2006-151.

<sup>8</sup> See DCC 18.113.050(B)(5):

5. An open space management plan which includes:
  - a. An explanation of how the open space management plan meets the minimum standards of DCC 18.113 for each phase of the development;

and Sheet 2.2 of the Phase A-2 tentative plan. The reduced water use proposed by the modified FWMP and commitment to proceed with less than allowed development authorized by the FMP, does not require any update to this plan (nor does the finding cited by staff require any changes). Reducing water used by the Resort will have positive impacts. It will not negatively impact natural resources.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pgs. 27-28:*

Applicant is unclear as to why staff continues to review and rely upon the CMP decision, only; it is **not** the governing document for the Resort. The CMP/FMP is the governing document.

The FMP incorporates and alters the CMP, as intended by the BOCC's CMP decision. The FMP decision includes the following findings regarding open space:

"The CMP decision concludes that the applicant's open space proposals are sufficient to maintain more than 50% open space through all phases of the development. Condition 14 ensures that the 50 percent open space requirement is maintained in perpetuity. \*\*\*

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."

Pages 8 and 12, Decision for M-07-2, MA-08-8 FMP.

The relevant approval criterion for open space, DCC 18.113.060(D) requires that 50% of the Resort be maintained as open space. Nothing in this criterion requires that the open space be open space of a particular type, making findings on this topic *immaterial*.

Additionally, the BOCC's findings provided by staff above simply relate the fact that the Applicant plans to provide these two types of open space, in addition to "buffer" open space. The proposed amendment of the FWMP and decision not to build one golf course does not mean that the Applicant will no longer have developed and undeveloped open space areas in the Resort. The apparent confusion on this issue evident in the Incomplete Application is unwarranted. These open space areas have been identified on the approved tentative plans for Phase A-1 and A-2 and on the golf course site plan.

Applicant Responses on the Recreational Facilities Requirements:

*Burden of Proof, Pg. 2, Paragraph 1:*

Only the first Tribute 18-hole golf course is required by the CMP/FMP.<sup>2</sup>

<sup>2</sup> The BOCC decision approving the CMP found that “at least one golf course, the restaurant and meeting rooms and facilities are required to be constructed in Phase A, which is slated to be in the Tribute Village.” Page 8, BOCC Decision.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pgs. 6-8:*

- 5. In the *LUBA OLU Modification* decision, LUBA commented that Ms. Gould had not pointed to any findings of fact from the original approval materially affected by modification of the CMP/FMP. The appealed decision also applied DCC 18.113.080. It says that a substantial change is an alteration “in the type, scale, location, phasing or other characteristics of the proposed development such that findings of fact on which the original approval was based would be **materially affected.**” Emphasis added. *Gould v. Deschutes County*, \_\_ Or LUBA \_\_ (LUBA No. 2022-011, June 16, 2022). The findings of fact of the CMP were based upon the BOCC’s understanding that the Applicant would be required to build just **one** championship golf course and would be allowed (but not required) to build up to two additional courses.

The BOCC’s CMP decision makes it clear that additional recreational amenities, including the two additional golf courses are optional. It says, in its discussion of the informational requirement of DCC 18.113.050(A)(11), that the applicant identify “all proposed recreational amenities”:

*“The Tribute Village plan includes the following **possible** amenities:*

- *Two (2) championship golf courses*
  - *A state-of-the art golf teaching/practice area*
- \* \* \*

*At least one golf course, the restaurant and the meeting rooms and facilities are required to be constructed in Phase A, which is slated to be in the Tribute Village. These are required by DCC 18.113.060(E) in order to qualify Phase A as a destination resort because each phase, together with all previous phases must meet the criteria for a destination resort. Condition of Approval #33 is included to assure this requirement is met.*

*The Pinnacle Village plan includes the following **possible** amenities:*

- *One championship/resort golf course \*\*\**

*Applicant submitted the following list of uses that may be established on the subject property at some time during the project's life. \*\* The list includes activities that would be allowed at the proposed resort under current regulations; however, not all of the following will necessarily be built and the list does not include specific construction/development standards.*

1. *Golf.”*

The Board also found, in response to DCC 18.113.050(B)(8):

*“Applicant also intends to phase the development of recreational amenities and commercial facilities. A list of possible amenities or commercial facilities is provided above, in response to DCC 18.113.050 A.11. Those facilities will be constructed when they are warranted by the population base at the resort.”*

Page 24, BOCC Decision for CMP.

6. In this case, the Applicant’s agreement not to build one of three golf courses it is allowed—but not required to build—is not a change that materially affects the findings of fact because the CMP and FMP findings were based on the County’s understanding that only the Phase A golf course is required.

*Applicant’s Response to Issues Raised in Incomplete Application Letter, Pg. 9:*

With regards to Applicant’s statements about foregoing construction of a golf course, that is already permitted by the CMP/FMP, Applicant holds a right, but not an obligation, to build all three golf courses. The current FWMP and all supporting CMP/FMP documents provide mitigation based upon the impacts of building all three golf courses. The only thing that changes by not building mandatory infrastructure is that those additional impacts (which have already been planned for) need not be mitigated. This is the case whether or not the FWMP is or is not modified.

*Applicant’s Response to Issues Raised in Incomplete Application Letter, Pgs. 15-16:*

Applicant is not proposing to “eliminate” a golf course. DCC 18.113.060(E) establishes the requirements for the Resort’s investment in recreational amenities. No additional recreational amenities, including the second and third golf course, are required by the Resort code. Only the Phase A golf course is required to comply with relevant recreational amenities approval criteria. Findings related to that golf course, therefore, are material findings. Findings related to the approval and construction of the two other courses are not.

Additionally, the Incomplete Letter misunderstands the BOCC decision. The BOCC decision states that the Phase A golf course must be built to comply with DCC 18.113.060(E) and that other golf courses may or may not be built. The golf course that Applicant will forego is the Phase B golf course shown on page 7 of Staff’s letter dated September 16, 2022. Nothing requires Thornburgh to build that optional golf course.

We note that staff includes CMP maps. The correct master plan maps are those approved by the FMP that are a part of the CMP/FMP.



*Applicant's Response to Issues Raised in Incomplete Application Letter, Pg. 22:*

There are numerous comments in the BOCC's CMP decision that relate to the development of recreational amenities. Those comments reflect the BOCC's understanding that the development of specific recreational amenities is dependent on a sufficient population base to support them and market factors, etc. Elements of these statements were referred to in the Tentative Plan A-1 decision. Agreeing not to build a golf course (as well as reducing landscape and other water intensive areas) that were previously approved is certainly a refinement that was contemplated in the finding noted in the Incomplete Letter; the flexibility to do so because of market, economic, and population factors was also specifically envisioned by the BOCC and previous hearing officers. Indeed, CMP and FMP approval criterion contemplate generalized plans that can adapt as third-stage applications are made; they are not set in stone—if the plan was set in stone every application would have been required at the CMP stage. Indeed, neither the CMP nor the FMP criterion contemplate, require, or otherwise estimate the amount of land use applications that may later be required to actually develop a destination resort. Instead, a CMP is required to show overall feasibility, the FMP provides a more tailored guiding document, and then third-stage development applications refine and permit the required and optional development approved by the CMP/FMP.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pgs. 29-30:*

The BOCC's CMP findings<sup>9</sup> explicitly recognize its understanding that only one championship golf course is required and that the other two are optional. The findings quoted by staff reflect this fact. That should, end the inquiry.

The CMP findings say that construction in the southern part of the property (The Tribute Village) "**will** include the construction of a golf course" and that "later phases **provide for** the construction of two additional golf courses." The word "will" reflects the fact that construction of one golf course must occur and the use of the term "provide for" instead of the word "will" indicates that the construction of two additional golf courses is authorized but not mandated. The above language also indicates that the phasing may be modified in the future when refined by the FMP and third-stage development review.

The two additional courses were not required to meet Resort code criteria that assure compliance with Statewide Goal 8 and the intent and purpose of DCC 18.113. DCC 18.113.060(A) specifies the minimum requirements to establish a resort that complies with Goal 8 – all which must be met in the first phase and honored throughout the life of the resort. The code requires 150 separate rental units for visitor-oriented lodging, eating establishments and meeting rooms for at least 100 persons and the expenditure of \$2,000,000 (in 1984 dollars) on developed recreational facilities. The BOCC's CMP decision found that the recreational facility requirement would be met by construction of one championship golf course. The other two golf courses may or may not be constructed, but

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<sup>9</sup> See CMP BOCC decision (ref. file no. CU-05-20 / Document No. 2006-151, pg. 48).

the FMP mandates continued compliance with the open space requirements of the Resort code – requirements that have been honored by the Applicant on each and every approved Resort development application.

As is clear throughout this response, Applicant disagrees with the view of CMP plan documents stated in the Incomplete Letter. Thornburgh's CMP and associated conceptual plans authorized significant development and planned the mitigation for such development. The BOCC, consistent with the three-stage development process for destination resorts, understood that these plans change and provided specific tolerance for those changes. This is clearly apparent by the fact the CMP only requires certain amenities but allows others as optional. Nothing in the law requires Thornburgh to seek permission not to build optional amenities.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pgs. 31-32:*

Staff suggests that a single BOCC finding regarding compliance with DCC 18.113.070(C)(4) indicates that three golf courses are required. Staff is incorrect. These findings mention a single golf course that is located on the northern side of the property – the Pinnacle golf course – which is not impacted by this Application.

Further, given that the CMP decision's findings regarding recreational amenities makes clear that only a single championship golf course is required and that others are optional, this finding does not in any way establish that the BOCC findings relied on the construction of three golf courses to establish compliance with DCC 18.113.070(C)(4).

The Incomplete Letter also quotes findings from the Benefits Study. The quoted findings say only that golf is not typically economically viable as a stand-alone use and should be included in a resort. They state that golf—all golf—should not be eliminated from the Resort because championship caliber golf course is typically one of the top factors driving investment decision in the Resort and removing it would impact golf-oriented buyers.

The Incomplete Letter states that the Benefit Study “appears to rely on there being three golf courses.” Whether it did so or not, the BOCC's CMP decision was made with the clear understanding that only one championship golf course was required by its decision and information and could not possibly relied on optional facilities in finding compliance with this approval criterion.

The FWMP modification does not seek permission to eliminate golf from the Resort. In fact, a championship golf course has already been approved by the County and is under construction.

Based on the information in the record, staff believes there is a 50% open space requirement and only (1) golf course is required. Staff asks the Hearings Officer to make specific findings on these requirements and confirm whether the applicant's proposal satisfies these requirements. In addition, staff requests the Hearing Officer to make clear, if this application is approved, whether

construction of more than one golf course at the resort is precluded by the decision, unless subsequently modified.

**2. FMP Condition 1**

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

The requirements of FMP Condition 1 have been evaluated as part of several recent tentative plan, site plan, and modification approval requests. Below are some of the arguments presented in the applicant’s submitted materials:

*Burden of Proof, Pgs. 4-5:*

Deschutes County reviews applications for changes to Resort FMPs against the criteria of DCC 22.36.040. They supplement the authorization provided by FMP Condition 1 and DCC Chapter 18.113 to make substantial changes to an FMP. FMP Condition 1 says that substantial changes to the Resort require a new application and DCC 18.113.080 provides that the process for reviewing a substantial change is a review of the proposed change conducted in the same manner as the review of the CMP.

The Oregon Land Use Board of Appeals recently affirmed Deschutes County’s amendment of the FMP to revise requirements related to overnight lodging units. LUBA found:

“While FMP Condition 1 or DCC 18.113 do not expressly define ‘substantial change ’ as a change that will result in significant additional impacts on surrounding properties, the hearings officer did not err in interpreting those criteria as implying that analysis. See ORS 197.010 (“[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all. ”) In that context, the hearings officer did not err in concluding that the potential loss of 95 units of overnight tourist lodging is not a substantial change that would require a new application.”

*Gould v. Deschutes County*,\_\_\_ Or LUBA\_\_\_ (LUBA No. 2022-011, June 16, 2022).

In this case, the applicant is proposing an amendment to the FMP that will be reducing the impact of development on surrounding properties by: (a) reducing resort water use and its potential impacts on area wells; and (b) limiting golf course development to a maximum of two golf courses rather than the three allowed by the FMP. The proposed changes to the FWMP also provide a water use and mitigation program that will be more beneficial to distant rivers and streams.

*Burden of Proof, Pgs. 8-9:*

**Condition 1 of the FMP** says:

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

**DCC 18.113.080 provides:**

**Any substantial change, as determined by the Planning Director, proposed to an approved CMP shall be reviewed in the same manner as the original CMP. An insubstantial change may be approved by the Planning Director. Substantial change to an approved CMP, as used in DCC 18.113.080, means an alteration in the type, scale, location, phasing or other characteristic of the proposed development such that findings of fact on which the original approval was based would be materially affected.”**

DCC 18.113.080 applies to amendments of the Thornburgh CMP/FMP.<sup>9</sup> It allows substantial and insubstantial changes. If a change is insubstantial, it may be approved by the Planning Director. If it is substantial, it must be reviewed in the same manner as the original CMP. In this case, the FWMP was adopted as a part of and during the review of the FMP. This was due to the fact that the County Board of Commissioners’ approval of the CMP deferred a finding of compliance with the no net loss/degradation standard of DCC 18.113.070(D) until review of the FMP. The CMP and FMP, after approval of the FMP, are a single document. *Gould v. Deschutes County*, 74 Or LUBA 326 (2016).

Under the reasoning of LUBA’s recent approval of changes to OLU-related requirements of the FMP, the change proposed is not substantial because it will reduce the impacts of Resort development on surrounding properties. The applicant acknowledges that an amendment of the FWMP would materially affect findings of compliance with the “no net loss/degradation” standard but in a way that will reduce impacts. Additionally, a substantial change is defined by DCC 18.113.080 as one that is “an alteration in the type, scale, location, phasing or other characteristic of the proposed development.” The FWMP is not a development plan and the limitations proposed by the applicant simply restrict development and water use that is optional - at the discretion of the Resort developer.

The applicant suggests that the County find that the change proposed is not substantial but review the application using the same process it would apply to the review of a substantial change. That review process is a modification review as a land use action. In the case of the Thornburgh Resort, the County referred the CMP for review by its land use hearings officer as a land use action. While DCC 18.113.080 states that an insubstantial change “may” be approved by the Planning Director, it does not require that the Planning Director review the application.

According to DCC 18.113.100(A), if review of an FMP involves the exercise of discretion, the FMP review shall be treated as a land use action. This is the process that will be applied to the County’s review of the modification of the FWMP part of the FMP.

<sup>9</sup> Opponent Annunziata Gould asserted this legal position in her Statement of Reasons for Appeal of 247-21 -000553-MC, pp. 11-12 at LUBA Record 1858-1859, **Exhibit B**.

Several public comments in the record argue the applicant's proposal is a substantial change that requires a new application under FMP Condition 1. Jeffrey Kleinman submitted comments, on behalf of his client Annunziata Gould, related to this argument stating:

Condition 1 of the FMP provides:

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

(Emphasis added.)

The "approved plan" in this instance is the Final Master Plan itself. Thus, any substantial change "will require a new application" for a Final Master Plan for the resort. Condition 1 is distinct from and in addition to DCC 18.113.080, which provides:

**18.113.080** Any substantial change, as determined by the Planning Director, proposed to an approved CMP shall be reviewed in the same manner as the original CMP. An insubstantial change may be approved by the Planning Director. Substantial change to an approved CMP, as used in DCC 18.113.080, means an alteration in the type, scale, location, phasing or other characteristic of the proposed development such that findings of fact on which the original approval was based would be materially affected.

(Emphasis added.)

In this application, Thornburgh proposes to entirely replace the material portions of the FWMP based upon a purported reduction in the need to mitigate for impacts upon anadromous fish habitat under the no net loss standard. The replacement of the FWMP would itself be a substantial change to the approved plan under FMP Condition 1. It will require far more analysis and scrutiny on the part of ODFW and the public than would a mere "insubstantial change" under DCC 18.113.080. All the elements of this resort project are tied together. They cannot be picked apart and reviewed piecemeal, in isolation from one another.

Staff asks the Hearings Officer to make findings on whether the applicant's proposal is a substantial change under FMP Condition 1. Staff notes that the applicant-quoted section of LUBA No. 2022-011 goes on to say:

Substantial change to an approved CMP, as used in DCC 18.113.080, means an alteration in the type, scale, location, phasing or other characteristic of the proposed development such that findings of fact on which the original approval was based would be materially affected." DCC 18.113.080. Importantly, petitioner does not identify any "findings of fact on which the

original approval was based that would be materially affected by a decrease in the overall number of OLU's. DCC 18.113.080.

*Gould v. Deschutes County*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2022-011, June 16, 2022).

Staff understands LUBA's analysis to "import" DCC 18.113.080 criterion into the review of FMP Condition 1 to require a three-part inquiry in the case of a change:

- 1) Identify if the change is to the type, scale, location, phasing or other characteristic of the proposed development,
- 2) Identify the applicable findings of fact,
- 3) Determine if those findings are materially affected by the alteration.

Staff requests the Hearings Officer to make findings if the approved plan to provide water rights to and mitigation for the resort and/or the number and layout of golf courses is a "characteristic of the proposed development".

Staff also requests the Hearing Officer to make findings on what decision(s) should be reviewed to identify applicable findings of fact. Staff understands the applicant to argue that the CMP and FMP, after approval of the FMP, are a single document, citing to *Gould v. Deschutes County*, 74 Or LUBA 326 (2016).

Finally, staff requests the Hearings Officer to determine if "findings are materially affected by the alteration", based on the identification of the "characteristics" and applicable criteria.

### 3. Resort Well Locations

The submitted FWMP 2022 Addendum #2 states on page 3 "the original plan anticipated 6 groundwater wells would be installed. Presently, there are 8 potential groundwater wells. However, changes to Resort infrastructure may require additional well locations to be added or moved". It is unclear to staff if additional criteria apply to the proposed changes to the well locations beyond the "no net loss" requirements of DCC 18.113.070(D). It is also unclear to staff if the CMP and/or FMP approvals were based on specific well locations and/or if "refinements" have been approved as part of more recent approvals for the Resort. Below are some of the arguments presented in the applicant's submitted materials:

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pgs. 20-21:*

We are unclear why the Incomplete Letter lists a "FINDING"<sup>10</sup> or how this criterion [DCC 18.113.050(B)(7)] is implicated.

<sup>10</sup> Staff notes the incomplete letter erroneously identified some "Staff Comments" as "Findings".

The Applicant is not seeking approval of eight well sites and believes that such changes may be approved during development reviews because the wells will pump less water and draw from the same regional aquifer that is the source of water for the Resort. Furthermore, expert hydrogeologist David Newton has determined that changes in well locations do not change the impact of the Resort on area streams that is mitigated by the FWMP.

Contrary to the impression given by the Incomplete Letter, the location of Resort facilities is not fixed in the precise locations shown on the CMP maps provided in the Incomplete Letter (which have been amended both by adoption of the FMP and later approvals already discussed). The approved CMP provides that CMP plans may be refined through each step of the County's three-step review process. The FMP process (as discussed above) provides the same. Those plans and approvals have already refined the water system to serve the approved facilities.

For example, both the Hydrology Study of the CMP (Ex. 2, pg. 1) and the water system map of the FMP (Ex. 2, pg. 2) show 6 well locations. Only 2 of the locations are the same as shown on the CMP map referenced by the Incomplete Letter. Changing the location of those 4 wells did not require a modification to the CMP. Further, the Facilities Site Plan approved with the Phase A-1 Tentative Plan added a 7th well location not shown on either the CMP or the FMP. Adding this entirely new well #7 in a new location did not require a modification of the FMP or new CMP/FMP water system maps. Similarly, if or when Thornburgh adds an 8th well or changes the location of one of the existing wells it will not require amendment of the CMP/FMP either.

Further, the Oregon Department of Water Resources oversees the addition to or changes of well locations to be used in the water system. Thornburgh has an approved drinking water permit issued by the Oregon Health Authority ("**OHA**"). OHA oversees the design and delivery of water by the water system. The Deschutes County Road Engineer oversees and approves the design of the road and infrastructure system to ensure compliance with DCC.

Applicant's limited modification request does not necessitate a revision to the Water System Master Plan and or its map.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pg. 23:*

As was noted above, numerous changes have been made to well locations in CMP materials and plans, in the FMP plans, and on the site plan for the Phase A-1 well. Four of the six well locations noted in the Hydrology report filed with the CMP have been eliminated, while 5 new well locations have been added (a net gain of 1 well).

While that is the case, since all the wells are located within the confines of the Thornburgh property, under which exists a vast aquifer, the changes that have already taken place have not created any change to water use impacts. Further, FWMP 2022 recognizes that while additional wells might be proposed in the future, they will also have no impact stating:

“Due to minor adjustments in land planning and scheduling, potential well sites have increased to 8 possible well sites, all pumped from the same aquifer. As the wells are all within the boundaries of the Resort and are pumping from the same regional aquifer, there is no change to the potential effects of groundwater pumping relative to well locations”.

As there is no change to impact area there is nothing required.

Jeffrey Kleinman submitted comments, on behalf of his client Annunziata Gould, stating:

With respect to water supply, FMP Condition 10 ties this resort development to OWRD Permit G-17036. The FWMP in turn incorporates that permit by reference as its “Exhibit 1.” The FWMP is inextricably tied to the impacts of six specific wells previously approved as the source of quasi-municipal water supply for the resort. FMP Condition 38 requires Thornburgh to abide by the FWMP as well as the Wildlife Mitigation Plan arrived at with OWRD as noted in Condition 10, “and agreements with the BLM and ODFW for management of off-site mitigation efforts.”

Staff asks the Hearings Officer to make findings on the well location requirements for the Resort and to review the applicable criteria, if any, associated with changes to the location and/or number of wells for the Resort’s water supply.

#### **4. Required Illustrations & Graphics**

DCC 22.08.010(B) establishes that applications for development or land use actions shall include supporting information required by the zoning ordinance and that information necessary to demonstrate compliance with applicable criteria. Staff believes several illustrations and graphics that the CMP and FMP approvals relied on may need to be updated to incorporate the changes included in the applicant’s current request to demonstrate compliance with the applicable criteria.

The County has approved some refinements as part of recent Site Plan and Tentative Plan approvals. However, the net result of the subject request and approved refinements is the approved CMP and FMP illustrations and graphics appear to no longer align with the Resort’s latest proposal (see Figures 2, 3, 4, and 5 below). For example, the Applicant’s Response to Issues Raised in Incomplete Application Letter Exhibit 1, pg. 3, identifies several areas currently approved as golf course areas as “Future Residential Development Area”. However, the approved CMP and FMP illustrations (i.e. Phasing Plans, Open Space Plans, etc.) identify these areas as open space and/or recreational facilities areas. Staff asks for Hearings Officer to make clear findings on this issue.



Figure 2 - CMP Phasing Plan (CMP RM Ex. B-1.08) - Southern Area of the Resort

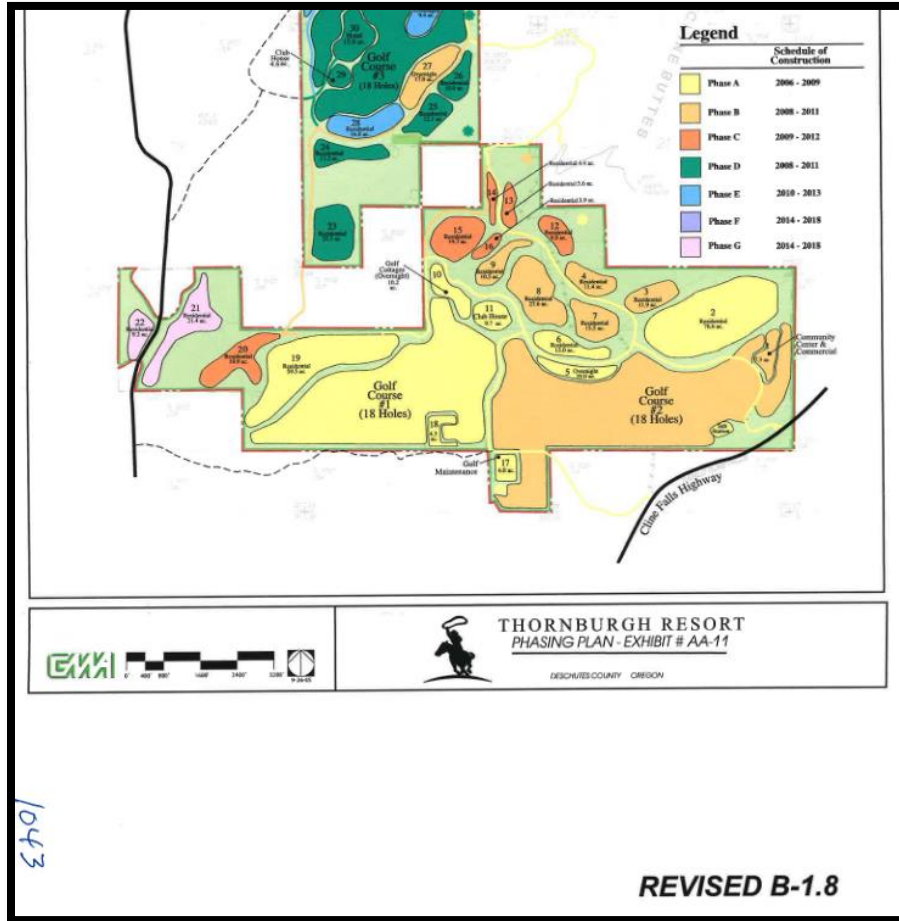


Figure 3 - CMP Recreation Amenities Plan (CMP BOP Ex. 2, A-11) - Southern Area of the Resort

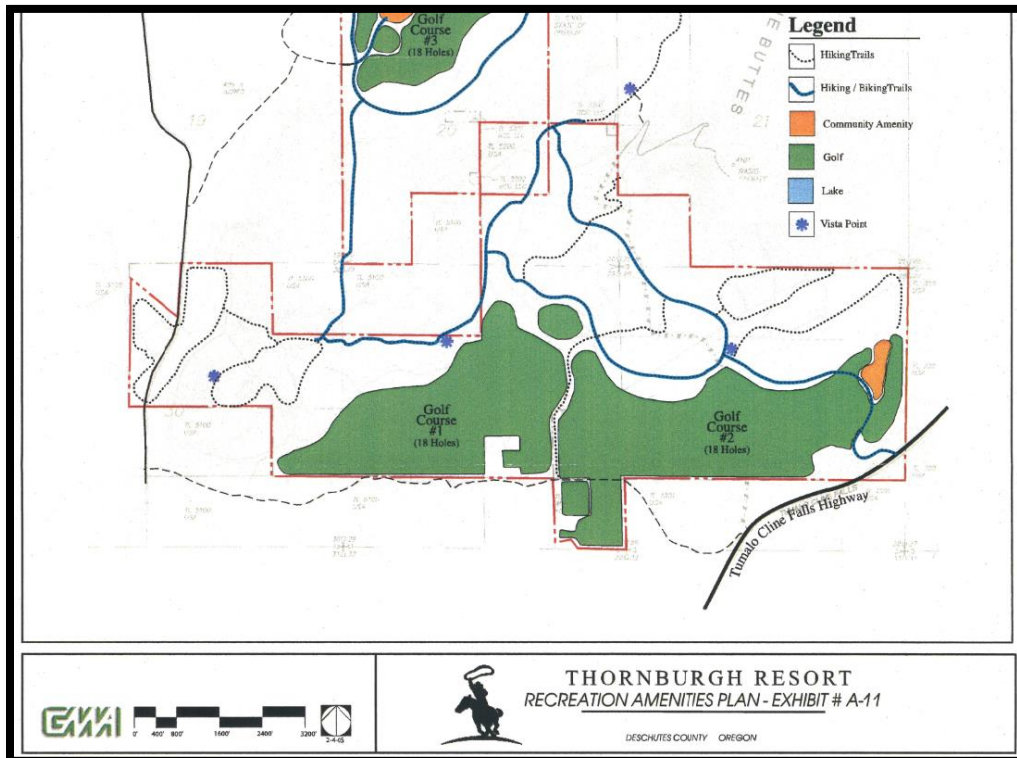


Figure 4 – FMP Open Space Plan (FMP Ex. A.1.1) – Southern Area of the Resort

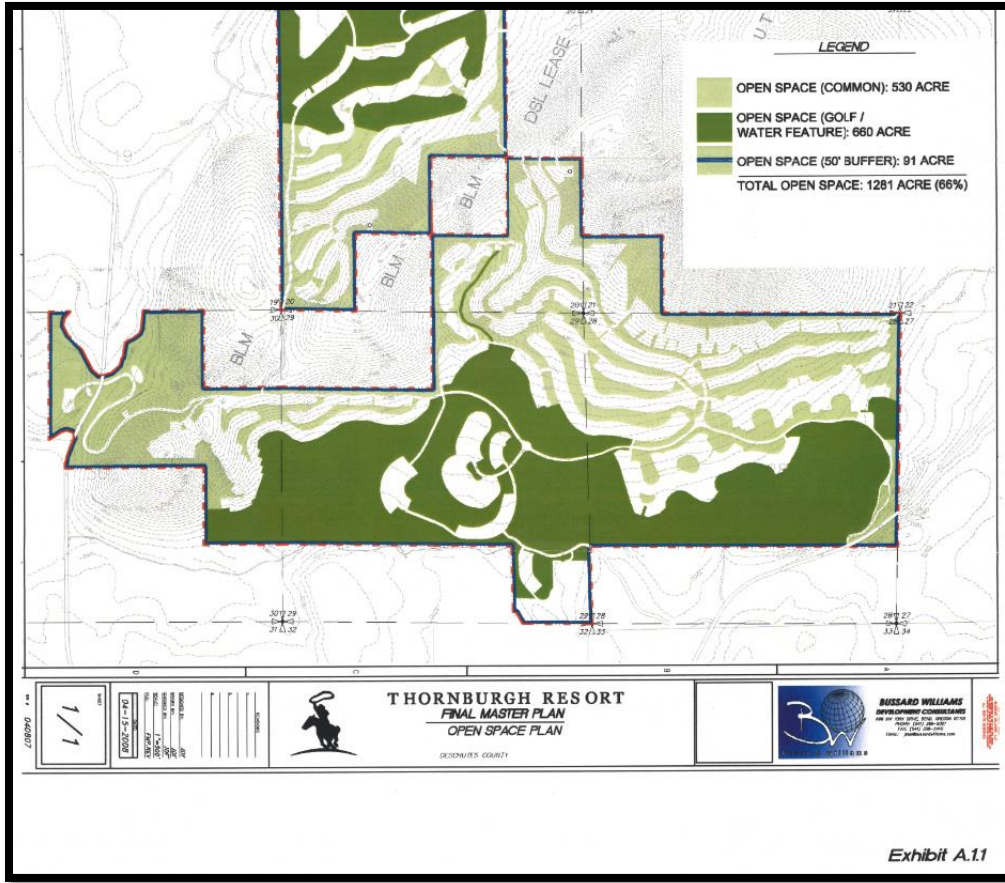


Figure 5 – Applicant’s Response to Issues Raised in Incomplete Application Letter - Exhibit 1, Pg. 3



Staff believes updated illustrations and graphics may be necessary, as part of the subject review, to ensure ongoing compliance with the CMP and FMP since these illustrations and graphics were relied upon as part of the County's approval of the CMP and FMP. Public comments in the record raise similar concerns. Staff believes to continue to piecemeal review the modifications and refinements without updated illustrations could result in the Resort becoming out of compliance with the CMP and FMP approval requirements. Staff notes updating illustrations does not necessarily constitute a substantial change of the CMP or FMP.

As part of the incomplete letter, staff requested the applicant provide updated illustrations and graphics. The applicant provided the following response:

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pgs. 8-10:*

Applicant disagrees with staff's comment related to this code section [DCC 18.113.050(A)]. Applicant agrees that DCC 18.113.050 includes application requirements for a CMP application. However, as already stated above, application requirements are not typically applicable approval criteria. See *Le Roux v. Malheur County*, 32 Or LUBA 124, 129 (1996). This is certainly the case for CMP illustrations. Further, it is an incorrect assumption that illustrations and graphics "to scale" cannot later be moved, and in fact section DCC 18.113.050.A.4 (cited below) clearly states that illustrations should be the "**general location**" of uses; these requirements cannot be read in isolation or picked out in a vacuum as staff appears to be doing.

More importantly, Applicant proposes to amend the FWMP only. The FWMP was required to comply with a CMP approval criterion (no net loss/degradation) but its review was deferred until review of the FMP. Applicant is not proposing to amend any other aspect of the Resort, including any map. With regards to Applicant's statements about foregoing construction of a golf course, that is already permitted by the CMP/FMP, Applicant holds a right, but not an obligation, to build all three golf courses. The current FWMP and all supporting CMP/FMP documents provide mitigation based upon the impacts of building all three golf courses. The only thing that changes by not building mandatory infrastructure is that those additional impacts (which have already been planned for) need not be mitigated. This is the case whether or not the FWMP is or is not modified.

The golf course Thornburgh is planning to forego, as stated in the Application, is the second Tribute golf course. This course is shown as being built in Phase B of the FMP Phasing Map, Revised B-1.8.

The Incomplete Letter overlooks the fact that the locations of specific Resort amenities have been determined by prior County development approvals. These approvals, as intended by the CMP (and FMP), refined the location of approved facilities.

In *Gould v. Deschutes County*, 54 Or LUBA 205 (2007), LUBA affirmed the CMP's allowance of modifications to the open space during FMP review and during subsequent subdivision and

site plan reviews – precisely what has occurred here. According to LUBA, “[t]hat statement simply recognizes the relationship between the CMP, FMP and subsequent subdivision/site plan stages, which allow refinement from stage to stage. These plans – not the FMP master plan maps – provide the precise locations of open space, including the required golf course, and other Resort development. The fact that the FMP is to be refined during development reviews is also evident because the FMP maps include two different designs for the golf courses and open space – one provided on most FMP maps and another based on the CMP (e.g. the Phasing Plan).

Hearings Officer Dan Olsen also addressed this issue in his decision approving the Phase A-1 tentative plan. He found that the changes made to the open space by the Phase A-1 tentative plan approval did not constitute a substantial change of the FMP and he approved the locations shown on the tentative plan. The hearings officer found that the exact location and size of open space tracts was not a key consideration in approving the FMP. See page 35 of 81 of Olsen Phase A-1 tentative plan decision.

The BOCC followed suit when it approved the Phase A golf course. It approved a course that spans the two areas where golf courses are shown on the FMP maps with additional open space areas in an amount exceeding that required by the CMP/FMP. Details of these approved open space areas were provided on the Open Space site plan SP 4.1. By agreeing not to build a golf course in The Tribute section of the Resort, no change in the approved open space plan is required because the required open space has already been provided in the required amount in the correct general area of the Resort.

The golf course open space site plan (SP 4.1) that is a part of the golf course site plan has received final approval from the County, LUBA and Oregon Court of Appeals. The open space issue related to not building a golf course where precisely shown on the CMP and FMP maps, therefore, is settled and may not be challenged by the County at this late date. *Gansen v. Lane County*, \_\_Or LUBA \_\_ (LUBA No. 2020-074, February 22, 2021).<sup>7</sup>

The Applicant is proposing no change other than ones already approved. It, therefore, is not required to demonstrate that its decision not to build one of two optional golf courses is not a substantial change because it is not a change at all. It is allowed by the approved CMP/FMP and is an action that merits approval by the County because it provides a broad benefit to the greater community by reducing the Resort’s use of groundwater.”

<sup>7</sup> The open space issue has also been addressed by the Phase A-2 tentative plan as well.

*Applicant’s Response to Issues Raised in Incomplete Application Letter, Pg. 11:*

Applicant incorporates its response to DCC 18.113.050.A, above. The Incomplete Letter is, again, incorrect as to the scope of Applicant’s request. The Application does not propose to eliminate a golf course or otherwise adopt changes to approved maps for the Resort. The County has already approved development plans that provide golf course and other open

space for the area planned for two golf courses and cannot challenge those decisions now. *Gansen v. Lane County*, \_\_Or LUBA \_\_ (LUBA No. 2020-074, February 22, 2021).; *see also Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489, 500 (2004).

Nevertheless, for clarity, the Applicant provides staff the attached map, **Exhibit 1**, to provide guidance as to the existing approved decisions as they relate or correlate to the CMP/FMP. Page 1 shows the approved; i) TP A-1, ii) TP, A-2, iii) the Well, Reservoir, and Drainfield site plan and iv) the Golf Course and Lakes site plan, along with future development areas, including residential, the golf practice and central core areas. Page 2 overlays #1 onto the CMP Phasing Plan B1.08, and Page 3 has #1 overlaid onto the FMP Master Development Plan A3.1 dated 1/22/08.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pgs. 42-43:*

The Applicant has proposed *no change* to the layout of the Resort. The County has, in a number of previous decisions already discussed, already approved minor layout changes. Open space, natural features, buffer areas and common areas have all been determined and honored during those previous reviews.

The golf course site plan and tentative plans were approved based on plans that identified and honored CMP/FMP protected natural features and that provided over 50% open space, buffer areas and common areas. It is not unclear what use will occur in the general area of the Phase B golf course. Furthermore, the time for addressing that issue was during review of those third-stage development applications (namely the Phase A-1 tentative plan, golf course site plan, and Phase A-2 tentative plan). The Applicant is providing an illustration of the approved layout of the Resort but that is not a change that requires approval as a substantial modification because that would amount to an impermissible collateral attack on prior County land use approvals and decisions issued by LUBA.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pg. 45:*

Notwithstanding that Applicant is not "eliminating" a golf course, Applicant has not requested a change to roads, streets, parking, pedestrian ways, trails, or bike paths. The area where the second, optional, golf course is located remains in open space or will be developed as authorized by the existing approved golf course site plan and approved tentative plans. Applicant is choosing, in an effort to conserve water resources, to forego building an optional amenity. It is not seeking a modification to any other planned amenity at this time. This criterion [DCC 18.113.090(D)] does not apply and no further analysis is warranted.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pg. 46:*

Applicant has already responded to substantially the same issues raised by staff, above. No changes to the approved open space or CC&Rs are proposed or necessary at this time. Applicant is opting not to build an optional golf course in an effort to conserve water resources. Applicant more than meets the open space standards. Open space will be

managed consistent with the Open Space Plan which contains provisions that are not reliant on there being three golf courses in the Resort. No changes are sought or are necessitated by Applicant’s current request.

Staff asks the Hearings Officer to make findings on whether updated maps and illustrations are required as part of the County’s review of the subject application.

**Title 18, Deschutes County Zoning Ordinance**

**Chapter 18.113, Destination Resorts Zone**

Section 18.113.020. Applicability.

- A. *The provisions of DCC 18.113 shall apply to proposals for the development of destination resorts, as defined in DCC Title 18, in areas designated DR by the County zoning maps. The provisions of DCC 18.113 shall not apply to any development proposal in an area designated DR other than a destination resort.***

**FINDING:** Staff finds the subject property is designated Destination Resorts Zone (DR) by the County zoning maps and has been approved for the development of a destination resort. Therefore, the proposal is subject to the provisions of DCC 18.113.

Section 18.113.040. Application Submission.

***The authorization of a permit for a destination resort shall consist of three steps.***

- A. *Conceptual Master Plan and Conditional Use Permit for Destination Resort. A conceptual master plan (CMP) shall be submitted which addresses all requirements established in DCC 18.113.040. The CMP application shall be processed as if it were a conditional use permit under DCC Title 22, shall be subject to DCC 18.128.010, 18.128.020 and 18.128.030 and shall be reviewed for compliance with the standards and criteria set forth in DCC 18.113.***
- B. *Final Master Plan. The applicant shall prepare a final master plan (FMP) which incorporates all requirements of the County approval for the CMP. The Planning Director shall review the FMP to determine if it complies with the approved CMP and all conditions of approval of the conditional use permit. The Planning Director shall have the authority to approve, deny or return the FMP to the applicant for additional information. When interpretations of the Planning Director involve issues which are discretionary, the FMP approval shall be treated as a land use permit in accordance with DCC Title 22.***

**FINDING:** As detailed in the basic findings section, the Resort has a lengthy and complex land use history that has included numerous appeals, remands, and modifications. As part of the submitted materials the applicant has developed several legal arguments about the how the CMP and FMP

approvals should be evaluated as part of the subject application. Below are some of the arguments presented in the applicant's submitted materials:

*Burden of Proof, Pg. 9:*

The CMP and FMP are a single document. LUBA has recognized this fact by finding that the Thornburgh FMP incorporates the CMP. *Central Land and Cattle Co. v. Deschutes County*, 74 Or LUBA 326 (2016)<sup>11</sup>. According to DCC 18.113.040(B), the FMP "incorporates all requirements of the County approval for the CMP." Logically, only one review is needed to change a single document.

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pgs. 3-5:*

As an initial point, Applicant notes that application submittal requirements [DCC 18.113.040(A)] are not substantive applicable criteria. See *Le Roux v. Malheur County*, 32 Or LUBA 124, 129 (1996). Further, staff's letter is incorrect in its analysis of past case law; LUBA did not decide that "the CMP approval has become void." Instead, it said "[f]or purposes of this appeal we will assume **without deciding** that the CMP approval has become void under DCC 22.36.010(B)(1)." Emphasis added. LUBA also said "[a]ll requirements of the CMP approval are now requirements of the county's FMP approval." The final, approved Resort master plan is comprised of both the CMP and the FMP. For this reason, we typically refer to the FMP and CMP as the CMP/FMP and address requirements that apply to each.

LUBA's decision of this issue is also consistent with the decision of the Board of Commissioners ("**BOCC**") approving Loyal Land's initiation of use application. In that case, Loyal Land asked the County to find that the CMP had been initiated<sup>5</sup> The Board found:

"Approval of a CMP alone does not authorize any construction on the land subject to the CMP; all it authorizes is the right of the applicant to proceed to the FMP stage of the process. The FMP then incorporates all the requirements of the CMP and becomes the guiding approval document for the project pursuant to DCC 18.113.040.B." Exhibit 1, Page 9 of 20 Decision of the BOCC A-14-1.

The same is true for any Resort approval because DCC 18.113.040.B says that an FMP "incorporates all requirements of the County approval for the CMP." Based on a review of numerous destination resort modification applications for Pronghorn, Caldera Springs, Tetherow and Eagle Crest, Deschutes County has routinely allowed modifications of final FMPs both with and without reference to or modification of the underlying CMP. DCC 18.113.100 allows FMPs to vary from the CMP in ways that are not substantial. It also allows substantial modifications of the FMP but requires they be approved as a modification or amendment of the CMP, which in this case is the CMP/FMP.<sup>6</sup>**Error! Bookmark not defined.**

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<sup>11</sup> The full citation is *Gould v. Deschutes County*, 74 Or LUBA 326 (2016) *aff'd* without opinion 283 Or App 286, 388 P3d 739 (Table)(2016), *rev denied* 361 Or 311, 393 P3d 1165 (Table)(2017).

As an overarching comment, staff appears to misunderstand the application process of a destination resort or its three-stage development process. DCC 18.113.030 discusses the requirements for a CMP and states that a CMP “provides the framework for development of the destination resort and is intended to ensure that the destination resort meets the requirements of DCC 18.113.” This is akin to providing a 30,000-foot level view of the resort to be refined during each subsequent step in the Resort approval process.

As already discussed above, the step after CMP approval is approval of the FMP. DCC 18.113.090 includes requirements of the FMP. The FMP is meant to provide a 10,000-foot view of resort development but it does not preclude refinement or other changes; particularly where, as here, the CMP itself allows plan refinements during third-step development reviews. Gould CMP LUBA 1. With regards to FMP applications, the same is also true. For example, among other things, DCC 18.113.090 requires:

**“text and graphics explaining and illustrating:**

...

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

**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;**

...

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

...

**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;**

...”

*Emphasis added.*

What is clear is that the Code, and subsequently the FMP, does not require that the exact locations be identified in the FMP document or its maps. It is meant to be a more granular guide for use in reviewing third-stage development applications; namely tentative plans and site plans contemplated under DCC 18.113.040(C).

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<sup>5</sup> The County approved the application. It has been remanded to the County for further review that has not occurred. The quoted finding is valid, however, because it was not effectively challenged on appeal. This remand occurred prior to adoption by the State of Oregon of a limit on the amount time allowed to initiate a remand. New procedures that have a substantive effect, like this rule, do not apply retroactively. This, however, is not an issue in this FWMP modification because the CMP is valid and a part of the Resort’s FMP.



<sup>6</sup> DCC 18.113.100.B. provides that “[i]f the Planning Director finds evidence in the FMP of a substantial change from the CMP, the Planning Director shall advise the applicant to submit an application for modification or amendment of the CMP.”

*Applicant’s Response to Issues Raised in Incomplete Application Letter, Pg. 16:*

We note that staff includes CMP maps. The correct master plan maps are those approved by the FMP that are a part of the CMP/FMP.”

*Applicant’s Response to Issues Raised in Incomplete Application Letter, Pgs. 27-28:*

Applicant is unclear as to why staff continues to review and rely upon the CMP decision, only; it is **not** the governing document for the Resort. The CMP/FMP is the governing document.

The FMP incorporates and alters the CMP, as intended by the BOCC’s CMP decision.

*Applicant’s Response to Issues Raised in Incomplete Application Letter, Pg. 41:*

The CMP/FMP is *one* document that Applicant seeks to amend. The Applicant has requested the County to “belt and suspenders” the procedural approach to avoid error. This is done by Applicant consenting to the procedural requirements of DCC 18.113.080 and by setting this Application for a land use hearing. The CMP is not void; it is a part of the approved CMP/FMP because the CMP was incorporated into the FMP.

The two-step procedural review is the Resort’ master plan is the review of a CMP and subsequent review of the FMP to determine compliance with the CMP. The FMP review process is set out in DCC 18.113.100. Ms. Annunziata Gould has argued that such a review should occur for modifications of the CMP/FMP. In this case, because the CMP/FMP is one document and a review of it is a review of both plans. The Applicant has complied with DCC 18.113.100(B) by submitting an application for modification of the CMP/FMP which is the action required if a substantial change from the CMP.

What has been decided by the County’s hearing officer and LUBA is that the Code’s procedural requirements must be read together.

Staff asks the Hearings Officer to make findings on how the CMP and FMP approvals interact with applicant’s request.

Section 18.113.070. Approval Criteria.

***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.***

**FINDING:** To demonstrate compliance with this criterion the applicant has developed several fish and wildlife mitigation plans to ensure there is no net loss or net degradation of the resource. These mitigation plans are identified as:

1. The April 2008 Wildlife Mitigation Plan (WMP)
2. The August 2008 Supplement to the WMP
3. The Thornburgh Resort Fish and Wildlife Mitigation Plan Addendum Relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat dated April 21, 2008; and
4. The Memorandum - Whychus Creek Impact and Mitigation Analysis dated October 20, 2015.

These approved mitigation plans have shown the requirements of DCC 18.113.070(D) will be met and include ongoing conditions of approval to ensure compliance. As part of this request, staff understands the applicant is proposing to entirely replace<sup>12</sup> one of the four mitigation plans - The Thornburgh Resort Fish and Wildlife Mitigation Plan Addendum Relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat dated April 21, 2008 – with a new plan titled “Thornburgh Resort Fish and Wildlife Mitigation Plan, Addendum #2 (2022 FWMP)”. The proposed 2022 FWMP plan is based on the Resort reducing the resort’s water use from 2,129 AF to an estimated 1,460 AF per year, which thereby reduces the required mitigation associated with fish habitat.

The applicant provided the following response in their Burden of Proof, Pgs. 11-17, to demonstrate the proposed plan will ensure ongoing compliance with the requirements of DCC 18.113.070(D):

**Relevant Approval Criteria**

Thornburgh and Ms. Gould engaged in protracted litigation over the FWMP - a plan that mitigates off-site impacts of Resort development. The relevant approval standard is the “no net loss/degradation standard” set out in DCC 18.113.070(D) as follows:

**“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 Oregon Court of Appeals, in response to Annunziata Gould’s appeal of the FMP, explained that the “no net loss or degradation of the resource” language in the County’s code means no net loss or degradation of fish and wildlife habitat. It rejected Ms. Gould’s argument that the Resort was required to show that each individual species would be maintained or replace on a one-to-one basis to meet this legal standard. *Gould FMP*, 233 Or App at 633-634.

LUBA has also rejected Ms. Gould’s argument that the County must find that “every negative impact” from summer groundwater uses is completely mitigated saying:

<sup>12</sup> See Burden of Proof, Pg. 1, Footnote 1.

"We reject petitioner's premises underlying that argument. First, the applicable standard does not require mitigation prevent every potential negative impact. Instead, mitigation must result in no "net" loss/degradation. The term "net" is an adjective that modifies loss or degradation. In that context "net" means "3net \* \* \* 3 a: remaining after the deduction of all charges, outlay, or loss \* \* \* — opposed to gross." Webster's Third New Int'l Dictionary 1519 (unabridged ed 2002). In that context, "gross" means ""2gross \* \* \* 1 b: an overall exclusive of deductions\* \* \* : sum total." Id. at 1002. "Mitigation' means the minimizing or offsetting of impacts by the provision of on- or off-site improvement or compensation which benefits impacted property owners, resources and the public interest. \* \* \*" DCC 18.04.030.

DCC 18.113.070(D) requires any negative impact on fish resources be completely mitigated so that there is no net loss or net degradation of the resource. No net loss/degradation requires any negative impacts be minimized or offset—it does not mean that the resort creates no negative impacts. The hearings officer found that the impacts from Thornburgh Resort's summer pumping would be minimal and that those impacts would be offset by the instream mitigation water. The hearings officer was entitled to rely on the net effect of the instream mitigation."

*Gould v. Deschutes County*, 78 Or LUBA 118, 134 (2018)(*"Gould FMP Remand 2"*).

The factual background related to water use by the resort, its impacts and mitigation measures found to meet the no net loss is summarized by LUBA as follows:

"The main stem of the Deschutes River is located approximately [two] miles to the east of the eastern boundary of the proposed resort. 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.”

*Gould v. Deschutes County*, 59 Or LUBA 435, 454, aff'd 233 Or App 623, 227 P3d 758 (2010)(“Gould FMP LUBA”).

Ms. Gould challenged the sufficiency of the mitigation for a number of reasons, including: (1) it allowed an increase of .1 C to the temperature of the Deschutes River downriver of Deep Canyon Creek; and (2) no mitigation was provided for a very minor projected temperature increase in Lower Whychus Creek. In response, Thornburgh agreed to provide 106 acre-feet per year of flow in Whychus Creek by funding, in part, a TSID mitigation project. *Gould FMP LUBA*.

Ms. Gould's challenge to the sufficiency of the Deschutes River mitigation failed and the finding of compliance with the no net loss standard was found to be met by providing cool water mitigation slightly warmer than the temperature of the river to offset reductions in the discharge of cool groundwater to the Deschutes River and other warmer water upstream at COID's Bend point of diversion and along the Deschutes between Bend and Lower Bridge. All water used for mitigation was irrigation water which provides benefits seasonally; with no mitigation being provided other than during the irrigation season (“winter months”). The lack of mitigation during the winter months was determined to be inconsequential because river flows in the winter are far greater because the water used for irrigation remains in the rivers and streams during that time period. According to ODFW it was inconsequential “because flows are higher and stream temperatures lower during this time period, ODFW does not believe there will be an adverse impact to the fish and wildlife habitat during this time period.” See OWRD letter dated June 13, 2008, **Exhibit G**.

The TSID project has been completed. It leaves over 106 acre-feet per year of cool water flowing in Whychus Creek starting at the point of the TSID diversion south of Sisters. It has received final approval because it was shown to lower water temperatures, slightly, in Lower Whychus Creek. Geologist Mark Yinger had argued that the TSID cool water would, however, be “hot” water that would raise the temperature of Lower Whychus Creek because it will warm up before it reaches Lower Whychus Creek. This claim was, however, disproven by the Resort in 2017 when it answered the following question posed by LUBA:

“Having required the additional 106 acre-feet of mitigation to off-set the potential thermal impacts from additional summer water usage at Thornburgh, it remained for the first hearings officer to determine if the relatively warmer mitigation water would be effective to mitigate the loss of the relatively colder water at Alder Springs that would be diverted and used by the resort during summer months.”

*Gould FMP Remand 2*, 78 Or LUBA at 122.

Expert evidence showed that leaving cool water instream from the TSID point of diversion south of Sisters to its confluence with the Deschutes River reduces the heating of other water

in the creek due to increasing the thermal mass of the creek. Consequently, when the creek reaches Lower Whychus Creek it is cooler than it would be without the TSID mitigation water. When that water mixes with the large volume of cool water that enters Lower Whychus Creek at from Alder Springs and within the stream itself, the result of TSID mitigation is a slight reduction in the temperature of the water in Lower Whychus Creek. As explained by LUBA:

“The hearings officer found that the instream mitigation water will mitigate the potential and minute negative thermal impacts from the resort's summer pumping. As we understand it, the hearings officer reasoned that the mitigation water is relatively cold at the diversion point on Whychus Creek upstream of the point where Alder Springs water enters the creek, and that the volume of that relatively cold mitigation water creates a thermal buffer so that any negative thermal impacts from the resort's use of cold groundwater will be mitigated at Lower Whychus Creek.”

*Gould FMP Remand 2, 78 Or LUBA at 131-132.*

This conclusion was supported by expert testimony and mass balance calculations provided by geologist David Newton, PE and these calculations were relied on by the County's hearings officer who found:

“Newton both previously and in this proceeding has run numerous new mass balance calculations, representing various scenarios, primarily using [ [Upper Deschutes Watershed Council] UDWC streamflow and temperature data, and reran them with USGS data. Virtually all show that the mitigation, by cooling Whychus Creek as it flows into the Alder Springs area, results in slightly lower temperatures in lower Whychus Creek than without mitigation. This includes at rates that do not account for consumptive vs permitted use and otherwise appear to be conservative.”

*Gould FMP Remand 2, 78 Or LUBA at 132 (8/21/2018)*

We have included memoranda filed with Deschutes County that supported the hearing officer's finding that upstream mitigation will result in cooling the temperature of water in Lower Whychus Creek in the summertime as **Exhibit H** of this burden of proof and Exhibit 5 of the Cascade Geoengineering, LLC memorandum written by Jim Newton that is being filed with this application.

The applicant has proposed no change to the TSID mitigation. As this mitigation was shown to fully offset the impacts of Resort groundwater pumping of 2,129 AF, it will provide excess temperature and volume benefits for Whychus Creek at the reduced level of water use, 1460 AF, proposed by the 2022 FWMP. Furthermore, the 2022 FWMP will provide further cool groundwater mitigation by cancelling the Dutch Pacific groundwater rights. The cancellation will increase the discharge of cool water into Indian Ford Creek (which flows into Whychus Creek) and Whychus Creek near Sisters and increase flows downstream. This will further cool the temperature of water in Lower Whychus Creek and in fish habitat in the Deschutes River north of the confluence of the Deschutes River and Whychus Creek.

Given the fact that the issue of the adequacy of TSID mitigation for Lower Whychus Creek is settled, the focus of the efficacy of the 2022 FWMP on fish habitat is confined to impacts on the Deschutes River and Crooked River. In addition to this burden of proof and its exhibits, the applicant has filed a copy of the 2022 FWMP and supporting memorandum from geologist and professional engineer Jim Newton of Cascade Geoengineering, LLC. A copy of Mr. Newton's resume is provided as **Exhibit I** of this burden of proof. This information shows that the 2022 FWMP proposes a program that will improve the quality of the mitigation offered by the 2008 FWMP and, like the 2008 plan, result in causing no net loss or degradation of fish habitat.

The 2022 FWMP was developed under the guidance of Mr. Newton and has been discussed with ODFW. The applicant will continue to consult with ODFW during the County's review of this application. Mr. Newton has analyzed the plan and has determined that it, like the 2008 FWMP, meets the no net loss standard by providing mitigation through the purchase and transfer of water rights from upstream that are equal or superior to those required by the 2008 FWMP. This is the case for a number of reasons most appropriately explained by Mr. Newton. The following is a general list, in layperson terms, of some of the reasons:

- The LeBeau water rights will provide cool water mitigation starting at the Little Deschutes arm of the Deschutes River that will, like the TSID mitigation water, add thermal mass and cool river temperatures for a distance of approximately 137.7 miles from the point of diversion downstream to Lake Billy Chinook. Providing mitigation benefits over significant distances was important to ODFW. This downstream benefit began in 2021 when Thornburgh, after purchasing the water right, ceased pumping cool water from the river for irrigation and leased the water instream. The lease was terminated in 2022 so that Thornburgh could transfer it to provide temporary drought relief to farmers in the North Unit Irrigation District.
- The Resort will continue to use Big Falls Ranch water for a large part of its mitigation. The BFR water is pumped from groundwater. According to Ms. Gould's geologist John Lambie, one or more of these wells may be drawing cold water directly from the Deschutes River due to BFR well levels. Mr. Newton agrees the Deschutes River will benefit from the cessation of pumping, although he believes impacts would also be felt in Whychus Creek and the Crooked River. As Thornburgh discontinues pumping, cool groundwater will discharge directly into the area's river system, including the Deschutes River and Whychus Creek, cooling the important areas from Lower Bridge north in the Deschutes and in Lower Whychus Creek. Pinnacle Utilities, LLC acquired 360 acre-feet of the BFR water in 2021, after which all groundwater pumping stopped, providing all downstream benefits. The remaining 280 acre-feet will be acquired in 2022 and will no longer be pumped by BFR.<sup>7</sup>
- The 2008 FWMP relies on BFR surface water in Deep Canyon Creek that was heated prior to its entry into the Deschutes River. The 2022 FWMP relies on BFR groundwater

discharges that have greater capacity for thermal cooling which provides greater benefits to the area rivers.

- The Tree Farm groundwater is discharged into the Deschutes River around Bend. It is approximately the same temperature as the groundwater that is projected to be reduced in flow by Thornburgh's pumping from the regional aquifer. It will enter the river as cool groundwater discharges that will cool the river from that point downriver to Lake Billy Chinook and beyond. Increasing flow levels from Bend to Lower Bridge was one of the areas of concern to ODFW. Pumping of this water ceased in 2021 providing all downstream benefits since that time.
- The Dutch Pacific groundwater will provide additional cold-water benefits for Whychus Creek over and above those already provided by the TSID water conservation project required as a part of both the 2008 and 2022 FWMP. Pinnacle acquired this water in 2019, at which time pumping ceased, allowing groundwater to be discharged directly into both Indian Ford Creek, that flows into Whychus Creek, and Whychus Creek in an area above Lower Whychus Creek allowing all downstream benefits to be realized. Increasing flows into Indian Ford Creek was another area of concern to ODFW.

### **Advance Mitigation**

For the reasons discussed above, the 2022 FWMP meets the no net loss standard and fully mitigates for any impacts to the fisheries habitat from Thornburgh's groundwater pumping. That conclusion was based on steady state conditions, the point in time that full impacts of pumping (100% of future impacts on stream flow) of the maximum 1,460 AF of groundwater (100% of Resort use) were realized in the form of reduced streamflow. That conclusion does not account for, nor consider, the benefits provided from the time mitigation is provided (in advance of pumping for each phase of development) until the effects of pumping from Thornburgh are fully "felt" in the river. This means that the Resort will be providing significant excess or advance mitigation by leaving water instream and inground prior to it being needed to offset impacts. Thornburgh will provide excess mitigation for between 45-95 years prior to the time that Steady State conditions exist.<sup>8</sup> Not until steady state conditions are achieved will the streamflow reduction from Thornburgh's pumping be equal to the full amount of Thornburgh's maximum pumping of 1,460 AF of groundwater. For up to 95 years, the benefits Thornburgh will provide will be greater than the impacts caused by pumping groundwater for Resort uses. In the early years, the pumping impacts are very slight which results in a high percentage of excess mitigation. The excess mitigation will reduce over time as pumping impacts increase, until steady state conditions are achieved. At that time, and into the future, the 2022 FWMP will meet the no net loss standard.

To intentionally minimize the benefits Thornburgh will provide, Newton utilized the conservative estimate of 50 years to attain steady state conditions when calculating the amount of excess mitigation.<sup>9</sup> Even so, the accrued excess beneficial flows/mitigation grew to 24,654 AF by 2071 (all transfers/mitigation considered), which is equal to roughly 17 years

of the resort's full water use of 1,460 AF. Of that amount, over 17,000 AF (nearly 12 years of full pumping) will be cool groundwater discharges that will further lower stream temperatures in the affected reaches — all being in excess of impacts caused by Resort water use (transfers/mitigation from groundwater sources). See Newton Memorandum filed concurrently with this burden of proof. As noted above, the 2022 FWMP meets the “no net loss/degradation” test assuming Steady State conditions, without this excess mitigation. With it, significant positive benefits for fish habitat are provided for decades into the future.

Thornburgh's Wildlife Management Plan also commits Thornburgh to an extensive program of thinning juniper trees on its property and nearby public lands. Juniper trees consume a significant amount of water. The removal of these trees will provide benefits for area fish and wildlife that make it clear that the Resort's wildlife plans will meet and exceed the requirements of the no net loss/degradation standard.

### **Farming vs. Resort.**

As documented by the Newton memorandum, Thornburgh can use its water and land for farming. Farming is a use permitted outright. The use of 1,460 AF of water to farm the land will result in greater impacts to fisheries habitat than use of the same water by the Resort. In the Yinger 2008 and the 2008 FWMP, the calculations related to no net loss compared resort use to rangeland operations, not farming operations. As circumstances have changed and Thornburgh has purchased water rights that it can use for farming, the calculations related to the no net loss/degradation test should consider farming as a baseline use of the property without the Resort instead of rangeland. As farming results in greater impacts and development of the resort will preclude that use, there will be no loss or degradation that requires mitigation.

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<sup>7</sup> BFR, also, has discontinued pumping any of the surface water that continues to flow in Deep Canyon Creek. The creek continues to flow contrary to claims made by Ms. Gould and Mr. Lambie.

<sup>8</sup> The 2004 USGS Model estimated impacts were attained in 80 years after full pumping began. See Exhibit 6 to the Cascade Geoengineering, LLC memorandum prepared by Jim Newton.

<sup>9</sup> The 50-year period assumed 15 years for the resort to be fully developed and built out pumping 1,460 AF annually, then 35 years to attain Steady State conditions. See, Exhibit 6 of Cascade Geoengineering, LLC memorandum filed with this application.

Staff asks the Hearings Officer to evaluate the 2022 FWMP prepared by geologist David Newton, PE, and confirm this expert evidence can be relied upon to demonstrate the proposed changes comply with DCC 18.113.070(D). At this time, no substantive information has been submitted contesting the feasibility or effectiveness of the 2022 FWMP mitigation plan to meet the “no net loss/protection standards”.



Comments in the record from ODFW state “[t]he new mitigation plan would supersede the 2008 mitigation agreement between the developer and ODFW”. This statement, if correct, is noteworthy as it appears the applicant’s proposal may also require modifications to the April 2008 Wildlife Mitigation Plan (WMP) and/or August 2008 Supplement to the WMP. Based on this ODFW statement, staff asks the Hearings Officer to make findings on what parts of the approved mitigation plans are impacted by the applicant’s request.

Staff reviewed the CMP, FMP, and remand findings of compliance with DCC 18.113.070(D) and it appears Hearings Officers and the Board have frequently cited ODFW approval of the Resort’s mitigation plans as a basis for finding the requirements of DCC 18.113.070(D) will be met. Staff raised this issue in the incomplete letter and the applicant provided the following response:

*Applicant’s Response to Issues Raised in Incomplete Application Letter, Pg. 34:*

It is not necessary for ODFW to verify that the FWMP complies with DCC 18.113.070(D). DCC 18.113.070(D) is a County standard and the authority to determine compliance with such rests exclusively with Deschutes County. The Applicant is, however, actively consulting with ODFW so that they may comment on FWMP 2022. It is expected that comments will be forthcoming.

The Resort does not have a written agreement with ODFW. ODFW may view the 2008 FWMP as an “agreement” but it is not; it is the Resort’s approved mitigation plan and it is controlling on the Resort unless and until amended by Deschutes County. A new agreement is not required by any applicable criterion in the County code, any other agreement, or state law.

Staff asks the Hearings Officer to determine what review authority, if any, shall be given to the ODFW’s verification that the Resort’s proposal complies with DCC 18.113.070(D).

Additionally, as part of the subject application, it appears the applicant is requesting to modify FMP Condition 38 based on their response above “the Resort does not have a written agreement with ODFW” and as detailed in Paragraph 7 of the Burden of Proof.

FMP Condition 38 states:

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.

As part of the subject application, staff understands the applicant is requesting changes to what constitutes compliance with FMP Condition 38. Specifically, Paragraph 7 of the Applicant's Proposal to Amend the FWMP<sup>13</sup> states:

7. The purpose of this paragraph 7 is to clarify what constitutes compliance with FMP Condition 38, whether during the review of Resort land use applications, as reported as part of annual monitoring, or for any other purpose. Once the Resort's water provider<sup>4</sup> has purchased water rights to be used for pumping or mitigation and pumping at the point of diversion or appropriation of the certificate has been discontinued, compliance with Conditions 3, 4 and 6 shall be found to be met in the manner discussed in this paragraph 7. As noted below, compliance will occur differently for water appropriated from a surface water Point of Diversion versus a groundwater Point of Appropriations or for a mitigation credit that is acquired as follows:
  - a. Point of Appropriation-Groundwater: Compliance occurs upon submittal to OWRD of any of the following: an assignment of the water right to Thornburgh, an application that seeks OWRD approval of a transfer to pump at the Resort property, or cancellation in-lieu of mitigation so long as any use of the particular water right by farmers discussed below, if any, has been discontinued.
  - b. Point of Diversion-Surface Water: Compliance occurs upon submittal to OWRD, and OWRD approves any of the following: an application that transfers to pump at the Resort property, application that transfers the water to an in-stream lease, cancellation in-lieu of mitigation, or transfer to obtain mitigation credits, so long as any use of the particular water right by farmers discussed below, if any, has been discontinued.
  - c. Mitigation Credit: In the event that Thornburgh acquires mitigation credits, compliance occurs when Thornburgh provides proof of ownership or proof of submittal to OWRD of an application to transfer water in-stream.

The applicant will also agree to the following measures to provide mitigation benefits over and above the benefits achieved by the mandatory measures described above. Noncompliance with these measures shall not, however, be grounds for declining approval of a Resort development permit because these measures are not required to meet any Resort approval criterion, including the no net loss standard:

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<sup>4</sup>Pinnacle Utilities, LLC is the Resort's current water provider.

Staff asks the Hearings Officer to make findings on whether there must be an "agreement" with the BLM and ODFW for management of off-site mitigation efforts to comply with DCC 18.113.070(D) and FMP Condition 38.

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<sup>13</sup> See Burden of Proof, Pg. 3.

Lastly, staff notes due to the number of proposed permutations of compliance options associated with FMP Condition 38, it will be particularly difficult, if not impossible, for the County to monitor and ensure ongoing compliance with proposed Condition 38. For example, one of the proposed options under subsection (7)(a) appears to allow for FMP Condition 38 to be satisfied for a Point of Appropriation-Groundwater mitigation obligation “upon submittal to OWRD” of “an application that seeks OWRD approval of a transfer to pump at the Resort property”. What happens if the applicant withdraws the application or the submitted application is not approved by OWRD? Who would be responsible for monitoring and reporting this type of change? What authority does the County have to re-review compliance if FMP Condition 38 was previously found to be met? Considering these questions, staff asks the Hearings Officer to making findings on whether the proposed amendments on what constitutes compliance with FMP Condition 38 will ensure ongoing compliance with DCC 18.113.070(D).

Section 18.113.080. Procedure for Modification of a Conceptual Master Plan.

***Any substantial change, as determined by the Planning Director, proposed to an approved CMP shall be reviewed in the same manner as the original CMP. An insubstantial change may be approved by the Planning Director. Substantial change to an approved CMP, as used in DCC 18.113.080, means an alteration in the type, scale, location, phasing or other characteristic of the proposed development such that findings of fact on which the original approval was based would be materially affected.***

**FINDING:** The applicant presents the following argument on the requirements of this section:

*Burden of Proof, Pg. 10:*

DCC 18.113.080 requires only that a substantial modification of an FMP is to be reviewed in the same manner as the original CMP. It does not say that a modification is not allowed or that an applicant must seek approval of a new CMP. The manner of review for the original CMP is a review as a land use action with notice. A land use hearing will be held, just as it was for the CMP, to consider the proposed change to the FWMP. This level of review is more rigorous than required for the review of an FMP. FMPs are reviewed as a development permit without notice or, if they involve the exercise of discretion, an opportunity for public participation which may be an administrative decision subject to appeal. DCC 18.113.100.

Staff disagrees with the applicant’s argument and finds DCC 18.113.040(A) establishes the manner of review for a substantial change, under this section, as follows:

***.... The CMP application shall be processed as if it were a conditional use permit under DCC Title 22, shall be subject to DCC 18.128.010, 18.128.020 and 18.128.030 and shall be reviewed for compliance with the standards and criteria set forth in DCC 18.113.***

Whether the review of a substantial change under this section is processed administratively or referred to a public hearing is not what is being evaluated under DCC 18.113.080.

Nevertheless, based on the evidence in the record, the Planning Director finds the applicant's proposal to modify the FWMP is an insubstantial change of the CMP. The applicant does not propose any changes to the required development for the Resort. Given the narrow scope of the applicant's proposal, no findings of fact on which the original approval was based would be materially affected by the proposed changes. At this time, ODFW and OWRD have not submitted comments on the applicant's proposal. If new germane information is received showing the findings of fact on which the original approval was based would be materially affected, the Planning Director may determine a substantial change is proposed at a later date. Additionally, if new evidence is submitted that shows the applicant's proposal will change the type, scale, location, phasing or other characteristic of the required development for the Resort the Planning Director may determine a substantial change is proposed at a later date.

Section 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 subject request involves the exercise of discretion. Therefore, the applicant's request is being processed as a land use action and notice has been provided in accordance with DCC Title 22.

- B. If the Planning Director finds evidence in the FMP of a substantial change from the CMP, the Planning Director shall advise the applicant to submit an application for modification or amendment of the CMP.**

**FINDING:** The Planning Director finds that it is unclear if the proposed changes to the FMP and FWMP (agreeing to not build a golf course and changes to the source of mitigation water) are substantial changes from the CMP due to an interpretative question. "Substantial change" is not defined for changes to the FMP, as it is for the CMP under DCC 18.113.080. Staff requests the Hearings Officer to make specific findings on what constitutes a substantial change under this criterion. For example, is this criterion subject to a "materially affected" standard, as is required under DCC 18.113.080?

For clarity, staff requests the Hearings Officer to make findings under this criterion if the applicant is required to submit an application for modification or amendment of the CMP and if such application has been made.

The applicant provided the following response to how their proposal complies with this section:

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pg. 47:*

The Applicant will have complied with this code section, if applicable due to a future finding that the change proposed is substantial, by filing an application to modify the CMP/FMP. This code section specifically recognizes that substantial changes may be made to the CMP/FMP. Applicant believes that its reduction of water use and choice to not build an optional golf course is not a substantial change. This is because, among other reasons described herein, opting to not build a non-required or optional improvement cannot be a substantial change.

Further, this criterion relates to the procedure required for a modification but does not prohibit such modification. The highest level of review is that identified in DCC 18.113.080, which only requires that the modification be reviewed “in the same manner as the original CMP.” This means, before a hearings officer and a public hearing. Applicant has requested that type of review.

LUBA case law is clear, procedural error only leads to remand where a party can show substantial prejudice. Applicant has consented to a heightened process so that no prejudice can be asserted.

**Chapter 22.36, Limitations on Approvals**

Section 22.36.040. Modification of Approval.

**A. *An applicant may apply to modify an approval at any time after a period of six months has elapsed from the time a land use action approval has become final.***

**FINDING:** The applicant’s incomplete letter response states the applicant’s request is to:

Modify Final Master Plan (“FMP”) by Amending the Fish and Wildlife Mitigation Plan (“FWMP”) for Thornburgh Destination Resort.<sup>14</sup>

The Resort’s FMP approval became final on August 21, 2018 when the County’s final remand decision was affirmed by LUBA.

**B. *Unless otherwise specified in a particular zoning ordinance provision, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties.***

**FINDING:** The opening statement of DCC 22.36.040(B) establishes the requirements for filing a modification under DCC 22.36.040. The first clause states a particular zoning ordinance provision may

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<sup>14</sup> See “Applicant Request” on pg. 1 of the in the Applicant’s Response to Issues Raised in Incomplete Application Letter.

specify the grounds for filing a modification. The Destination Resorts Zone (DCC 18.113) establishes the grounds for filing a modification of the CMP. However, DCC 18.113 does not establish specific grounds for modifications of the FMP, which is what is being requested by the applicant. Therefore, staff finds the grounds for filing a modification are established in the second part of the first sentence of DCC 22.36.040(B), which states:

***...the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved.***

The applicant provided the following response on this part of the criterion:

*Burden of Proof, Pgs. 5-6*

A change of circumstances has occurred since the FMP and FWMP were approved by Deschutes County in 2008. The following are some of the changes:

1. Local awareness pertaining to issues related to water use, in part heightened by drought conditions in Deschutes County, merits a voluntary reduction of water use by the Resort.
2. Annunziata Gould delayed construction of the Resort by appealing an extension of the Resort's water rights permit. This permit required extension due to delay caused by Ms. Gould's numerous challenges to the CMP and FMP, including litigation over whether the CMP had expired or whether it had been initiated. The 2008 recession also delayed the construction of the Resort.
3. The delay and setbacks in obtaining an extension of the Resort water permit caused by Ms. Gould's water rights challenge required the applicant to take steps to assure that water will remain available for use by the Resort. It did so by filing a "back-up" water rights permit and by seeking to purchase water rights that can be transferred to the Resort and pumped under the certificate issued to that right by OWRD. The purchased water rights will leave cool water instream upriver from the Resort and offer greater benefits than offered by the mitigation promised by the 2008 FWMP.
4. Ms. Gould and her expert John Lambie have questioned whether the Deep Canyon Creek surface water can or will provide the cold-water mitigation intended to result from the purchase of BFR surface water rights. Given these challenges, the 2022 FWMP relies on an improved suite of water rights and/or mitigation sources that do not rely on stream flow restoration in Deep Canyon Creek to meet the no net loss/degradation standard. These rights are able to hold river temperature impacts to less than the .1 -degree Celsius increase projected to occur under the 2008 FWMP.
5. Ms. Gould's persistent collateral attacks on the sufficiency of the Resort's 2008 Mitigation Plan make it imperative to adopt a plan that sets out clearly what

must be done to achieve compliance with the plan. In this proposal, compliance will be achieved by the purchase and transfer of certain water rights to authorize pumping by the Resort and by compliance with the OWRD groundwater mitigation rules, when applicable.

6. Improved mitigation measures proposed by the Resort should provide a net benefit over previously required mitigation measures.

Staff finds this response shows there has been a change of circumstances since the issuance of the approval that makes it desirable to make changes to the proposal, as approved.

DCC 22.36.040(B) then goes on to establish three (3) instances in which a modification *shall not* be filed:

1. As a substitute for an appeal;
2. To apply for a substantially new proposal; or
3. A modification that would have significant additional impacts on surrounding properties.

The applicant provided the following response on this part of the criterion:

*Burden of Proof, Pgs. 6-7*

These changed conditions show that the applicant is not seeking approval of a modification as an alternative to filing an appeal of the FMP decision.

DCC 22.36.040(B) allows modifications unless the application is a “substantially new proposal or one that would have significant additional impacts on surrounding properties.” The proposed 2022 FWMP is not a new proposal for approval of a destination resort development. Instead, it is a proposal to reduce water usage and Resort development coupled with improvements in the plan to mitigate some of the impacts of full development of the resort. Like the FMP modification for the OLU, the reduction in the intensity of Resort development is not a substantial modification.

FMP Condition 1, DCC 18.113.080 and DCC 18.113.100(B) require County approval of substantial changes to the CMP/FMP. DCC 18.113.100(B) makes it clear that an application for “modification or amendment of the CMP” is required if a substantial change is proposed - not a new application for a new destination resort. The 2008 FWMP is a single, discrete plan that is a part of the Resort’s Wildlife Mitigation Plan that is a small part of the Resort development plan - its FMP. The 2008 FWMP serves a narrow purpose - to offset the impacts of a single aspect of the resort development - its water use. The 2008 FWMP does not specify how the resort will be developed. The proposed 2022 FWMP will place limits on rights granted to Thornburgh by the FMP but these limits do not constitute a new destination resort proposal. Furthermore, the Resort is not required by the FMP to make full use of its groundwater rights or to build three golf courses (only one is required). A modification of the FMP, therefore, is

not needed to allow Thornburgh to agree to not complete all development authorized on its property.

The modification proposal will not modify or authorize additional development so will not impose significant additional impacts on surrounding properties. The proposed change will reduce water needs and simply revise a mitigation plan to address even smaller temperature impacts of groundwater pumping by the Resort on distant rivers and streams.

When the full scope and complexity of the Resort FMP and CMP is considered, it is clear that revising the FWMP part the Wildlife Mitigation Plan to improve its efficacy and to reduce the amount of resort water use and golf course development does not result in a “substantially new [destination resort] proposal.” This is confirmed by a review of the relevant approval criteria that govern approval of the CMP and FMP and required plans for all aspects of the Resort. The proposed changes affect none of the following plans and documents that are a required part of a CMP (DCC 18.113.050):

- an open space management plan
- recreational amenities
- a resource protection plan
- an erosion control plan
- traffic study and mitigation plan
- design guidelines
- preservation of existing topography and vegetation
- standards for lots and setbacks and building heights
- deed restrictions
- water and sewer utility system plans
- analysis of impacts on adjacent lands
- plan for emergency medical and public service facilities and service
- water availability study by a hydrologist or engineering geologist or similar
- water conservation and wastewater report
- wildfire prevention, control and evacuation plans
- description of interim development
- plans for owners’ associations
- employee housing survey
- economic impact and feasibility analysis
- solid waste management plan
- OLU management plan
- Historic and cultural resources inventory

DCC 18.113.060 and 18.113.070 impose extensive and detailed standards and approval criteria for resort CMPs. The FWMP and proposed modification relate only to DCC 18.113.070(D) (“no net loss/degradation”).<sup>5</sup>



<sup>5</sup> DCC 18.113.050(B)(l)(j) requires a wildlife plan but does not impose approval criteria. Agreeing to limit already approved development that is allowed but not required by the plan does not merit revisiting any CMP or FMP approval criteria.

As part of the incomplete letter, staff requested the applicant clarify how the proposal “will not modify or authorize additional development” to ensure the proposal would have no significant additional impacts on surrounding properties. For example, the submitted materials indicate the original approval authorized six (6) wells, but now eight (8) are proposed and “changes to Resort infrastructure may require additional well locations to be added or moved”, which staff believes could be a proposal for additional development. The applicant provided the following response:

*Applicant's Response to Issues Raised in Incomplete Application Letter, Pg. 48:*

The Incomplete Letter comments quoted here present a “non-issue.” The Applicant has proposed to *reduce development* and restrict it by capping the total amount of water use authorized. Wells are not typically a use reviewed by the County – rather an issue of water law and water rights. This Application does not propose any new development at specific well sites, such as reservoirs or pump stations that were included in the previously approved facilities site plan and Phase A-1 utility facility site plan. The issue before the County is the use of water and whether its use is mitigated to achieve the no net loss/degradation standard in the Code. Applicant’s submittal of the FWMP 2022 ensures that it does. Further, the County has already authorized at least one additional well, as noted above. If the County requires, the Applicant will restrict wells to the seven currently approved. However, as described in detail above, both the CMP and FMP criterion, and the resulting FMP/CMP, is meant to be a guiding document that is refined through third-stage development review. With regards to well, DCC 18.113.090(C) only requires the “**preliminary location**” of water facilities. This contemplates movement and change.

The Incomplete Letter’s clarifying question regarding whether there are “significant additional impacts on surrounding properties” borders on the absurd. Applicant has proposed to reduce development by omitting an optional improvement and to reduce overall water use. The CMP and FMP, in no way, relied on a certain number of wells to find compliance with relevant approval criteria – it relied on the volume of water pumped from the regional aquifer to assess impacts. As discussed earlier, well locations and numbers have been modified throughout the three-step Resort review process. Applicant has routinely shown throughout that all planned water use is from the regional aquifer. It is illogical to assume that a reduction in this pumping creates significant additional impacts.

Clearly, the drought is a changed circumstance and Thornburgh wants to provide a proactive response that creates a net benefit to a wide range of water resources and water users.

Staff asks the Hearings Officer to make findings on the following issues:

1. Does the applicant’s proposal authorize additional development?

2. If yes, will the additional development have significant additional impacts on surrounding properties?

Staff is uncertain if the extent of “surrounding properties” has been interpreted in the context of this Resort. If this determination has not been made, the Hearings Officer will need to identify the surrounding properties. Staff notes that, in County Code, surrounding is differentiated from adjacent.

Typically, analysis of “surrounding properties” includes those properties impacted in some way by the Resort. In the case of basin-scale mitigation the number of properties impacted by the change in the FWMP, depending on which permutation of water source(s) are used for that mitigation, could be varied and as large as all properties downstream or down basin from the point in change of water pumping/use/allocation. To the extent the Hearings Officer finds that “surrounding properties” include river-adjacent properties, staff requests the Hearings Officer evaluate if the revised FWMP could have the effect of changing ground and surface water flow characteristics such as the volume, depth, velocity, temperature, and timing of flows in ways that impact flooding, erosion, and habitat quality that are property specific. Staff notes that FWMP changes that are neutral or beneficial to habit or flow characteristics on a basin-wide scale could be adverse on specific properties.

- C. ***An application to modify an approval shall be directed to one or more discrete aspects of the approval, the modification of which would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties. Any proposed modification, as defined in DCC 22.36.040, shall be reviewed only under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.***

**STAFF COMMENT:** The applicant’s Burden of Proof, Pg. 6 identifies one (1) discrete aspect of the approval that will be modified as described below:

The 2008 FWMP is a single, discrete plan that is a part of the Resort’s Wildlife Mitigation Plan that is a small part of the Resort development plan - its FMP. The 2008 FWMP serves a narrow purpose - to offset the impacts of a single aspect of the resort development - its water use. The 2008 FWMP does not specify how the resort will be developed. The proposed 2022 FWMP will place limits on rights granted to Thornburgh by the FMP but these limits do not constitute a new destination resort proposal. Furthermore, the Resort is not required by the FMP to make full use of its groundwater rights or to build three golf courses (only one is required). A modification of the FMP, therefore, is not needed to allow Thornburgh to agree to not complete all development authorized on its property.

Staff asks the hearings officer to make findings on whether the applicant’s proposal only modifies the FWMP.

This criterion requires the review to be “only under the criteria applicable to that particular aspect of the proposal”. Staff believes it would be helpful for the Hearings Officer to specifically list, under this finding, which criteria have been identified as applicable.

Several public comments in the record claim the applicant's proposal is a substantially new proposal and/or one that would have significant additional impacts on surrounding properties. Staff asks the hearings officer to make findings on this issue.

**IV. OUTSTANDING ISSUES**

Staff asks the Hearing Officer to focus his review on the issue areas identified by staff in this Staff Report.

**DESCHUTES COUNTY PLANNING DIVISION**



Written by: Caroline House, Senior Planner



Reviewed by: Will Groves, Planning Manager



**CERTIFICATE OF MAILING**

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I certify that on the 17<sup>th</sup> day of October, 2022 the attached document was mailed to the person(s) and address(es) set forth below.

Dated this 17<sup>th</sup> day of October 2022

**COMMUNITY DEVELOPMENT DEPARTMENT**

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