247-22-000175-A

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Deschutes County CDD

COMMUNITY DEVELOPMENT

APPEAL APPLICATION – BOARD OF COUNTY COMMISSIONERS

FEE: $4991.60 ($2842 + $2149.60)

EVERY NOTICE OF APPEAL SHALL INCLUDE:

1. A statement describing the specific reasons for the appeal.
2. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons the Board should review the lower decision.
3. If the Board of County Commissioners is the Hearings Body and *de novo* review is desired, a request for *de novo* review by the Board, stating the reasons the Board should provide the *de novo* review as provided in Section 22.32.027 of Title 22.
4. If color exhibits are submitted, black and white copies with captions or shading delineating the color areas shall also be provided.

It is the responsibility of the appellant to complete a Notice of Appeal as set forth in Chapter 22.32 of the County Code. The Notice of Appeal on the reverse side of this form must include the items listed above. Failure to complete all of the above may render an appeal invalid. Any additional comments should be included on the Notice of Appeal.

Staff cannot advise a potential appellant as to whether the appellant is eligible to file an appeal (DCC Section 22.32.010) or whether an appeal is valid. Appellants should seek their own legal advice concerning those issues.

Appellant's Name (print): Annunziata Gould Phone: (541) 420-3325

Mailing Address: 19845 J W Brown Rd. City/State/Zip: Bend, OR 97703

Land Use Application Being Appealed: File No. 247-21-000948-A (Appeal of 247-21-000637-TP)

Property Description: Township _____ Range _____ Section _____ Tax Lot See Exhibit A, attached.

Appellant's Signature: Annunziata Gould Date: March 2 2022

★ Appellant's Attorney: Jeffrey L. Kleinman, 1207 SW 6th, Portland OR 97204 (503) 248-0808, KleinmanJL@aol.com ★

BY SIGNING THIS APPLICATION AND PAYING THE APPEAL FEE, THE APPELLANT UNDERSTANDS AND AGREES THAT DESCHUTES COUNTY IS COLLECTING A DEPOSIT FOR COSTS RELATED TO, PREPARING FOR, AND CONDUCTING A PUBLIC HEARING. THE APPELLANT WILL BE RESPONSIBLE FOR THE ACTUAL COSTS OF THE HEARING PROCESS. THE AMOUNT OF ANY REFUND OR ADDITIONAL PAYMENT WILL DEPEND UPON THE ACTUAL COSTS INCURRED BY THE COUNTY IN REVIEWING THE APPEAL.

Except as provided in section 22.32.024, appellant shall provide a complete transcript of any hearing appealed, from recordings provided by the Planning Division upon request (there is a $5.00 fee for each recording copy). Appellant shall submit the transcript to the planning division no later than the close of the day five (5) days prior to the date set for the *de novo* hearing or, for on-the-record appeals, the date set for receipt of written records.

NOTICE OF APPEAL

SEE EXHIBIT B, STATEMENT OF REASONS FOR APPEAL, ATTACHED HERETO.

(This page may be photocopied if additional space is needed.)

EXHIBIT A - PROPERTY DESCRIPTION

Map Number and Tax Lot	Address
15-12-7800	67555 CLINE FALLS RD, REDMOND, OR 97756

EXHIBIT B–STATEMENT OF REASONS FOR APPEAL OF ANNUNZIATA GOULD

As a preliminary matter, appellant Annunziata Gould hereby requests that the Board of County Commissioners review and reverse the decision of the hearings officer herein. For the reasons explained below, appellant requests a de novo public hearing of this appeal before the Board. DCC 22.32.027.

Appellant participated in each of the proceedings below. This appeal is timely filed, 12 days after the date of mailing of the appealed decision.

Statement of Reasons

A. Findings and Legal Conclusions Regarding "Collateral Attack".

The hearings officer erred in his findings and conclusions regarding Thornburgh's favorite issue, "impermissible collateral attack," set out at pages 7-8 of his decision.[1] Ms. Gould has not challenged or "attacked" the CMP or the FMP. It is Thornburgh which has contorted them and attempted to avoid its obligations under the FMP conditions of approval.

Further, under the conditions of approval which a prior board of commissioners had the foresight to adopt, each element of the resort for which an application is filed requires an independent showing of compliance with certain

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[1]It appears that the hearings officer agreed with Ms. Gould that the doctrine of "law of the case" does not apply here. To the extent that he held otherwise, he erred. *Durig v. Washington County*, 40 Or LUBA 1, 7-8, *aff'd.* 177 Or App 277 (2001).

conditions based upon the evidentiary record adduced at the time. The evidentiary record was reopened in this round, and Thornburgh must live with the consequences. Based upon the record before you, it has not met its burden, especially as to FMP Conditions 10 and 38.

In particular, the record shows that Thornburgh does not have the source of quasi-municipal water supply required by Condition 10. It had an operative permit at one time but no longer. Maybe it will someday, but that is doubtful. That is why it has applied to OWRD for different sources of water, not authorized by Condition 10. To the extent that Condition 10 is an "informational" requirement, the information in this record is that *Thornburgh does not have the water.* Period.

Similarly, Condition 38 with respect to the Fish and Wildlife Mitigation Plan (FWMP) is applied to each application put forth by Thornburgh. As LUBA stated in *Gould v. Deschutes County*, ___ Or LUBA ___, LUBA No. 2020-095 (Final Opinion and Order, June 11, 2021) slip op 12-13,

> The FWMP requires intervenor to replace the water consumed by the resort with water of sufficient quantity and quality to maintain fish habitat, especially cold water thermal refugia. FMP Condition 38 requires intervenor to "abide by" the FWMP and "submit an annual report to the county detailing mitigation activities that have occurred over the previous year." Record 34. Satisfaction of the no net loss standard is ensured through compliance with Condition 38, not Condition 10.

(Emphasis added.)

The record before you demonstrates two key points:

• Thornburgh does not in fact have the cold spring water placed or to be placed instream in Deep Canyon Creek under the FWMP.

• The alternative groundwater supplies Thornburgh seeks will require new and different types of mitigation, throwing the FWMP out the window and requiring Thornburgh to go back through the master planning process.

In addition, as LUBA noted in the golf course case, Ms. Gould did not raise an argument as to Condition 38. Thus, to the extent that LUBA specifically discussed that condition in its decision, its discussion comprises dicta and is not binding.

To the extent that the hearings officer relies upon this board's "evidentiary review and legal analysis" in the golf course case, he is again in error. This is a different case with a different record and a separate burden of proof which the applicant tried but failed to meet. The hearings officer erred in rejecting Ms. Gould's evidence and arguments in *this* case as to the bullet-pointed issues listed at page 8 of his decision. He also erred in being "persuaded" by the board and LUBA decisions in the golf course case.

The simple fact is that Thornburgh lacks both the required source of water supply and the required mitigation water. Under the conditions imposed by the board of commissioners when it approved the Final Master Plan, Thornburgh is not entitled to proceed with Phase A-2.

We further incorporate by reference here our separate discussion of FMP Conditions 10 and 38, below.

B. ORS 197.445.

Based upon the evidentiary record in this case, the hearings officer erred in rejecting the arguments of Judge Lipscomb and Central Oregon LandWatch under this statute. Phase A-2 is new and requires an independent showing which the applicant was unable to make.

C. Lot of Record.

The hearings officer erred in rejecting the arguments of Ms. Gould and Central Oregon LandWatch on the "lot of record" issue presented at length and in detail by COLW. The lot of record status of parcel TL 7800 changed in the summer of 2021 when the applicant removed 0.5 acres from the parcel via deed recorded as Fee No. 2021-44813 and sold it to Pinnacle Utilities, LLC in exchange for $299,918.

The applicant has applied for the within land use permit on the newly created TL 7800. DCC 22.04.040(B)(1) unequivocally requires that EFU parcels must be lots of record before a land use permit may be approved. The legal question erroneously decided by the hearings officer is whether TL 7800 is a lot of record in the present, as it must be to qualify for a land use permit in the present. The hearings officer erred in granting a land use permit for parcel TL 7800 because

it is not a lot of record. The applicant has not submitted an application to have it verified as a lot of record, and if the applicant did, TL 7800 would not qualify. DCC 18.04.030.

The hearings officer erred in accepting Thornburgh's argument that the effects of the July 30, 2021 conveyance can be "undone" or "corrected" by subsequent deeds. There is no procedure to obtain lawfully created status for TL 7800. The statute to restore lawfully created status to a parcel unlawfully created by deed is limited to parcels unlawfully created by deed prior to 2007. ORS 92.176(6) ("A county or city may not approve an application to validate a unit of land under this section if the unit of land was unlawfully created on or after January 1, 2007.") The TL 7800 parcel was unlawfully created by deed in 2021.

Oregon's land use system protects farmland in accordance with the state's agricultural land use policy by controlling land uses on EFU lands based on the manner and timing of EFU parcel creation. *See LandWatch Lane County v. Lane County*, 79 Or LUBA 111 (2019) (Bassham LUBA Referee, dissenting). The objective and the purpose of ORS 92.176 would be undermined if unlawfully

divided parcels like TL 7800 could be used to qualify land for development approvals. *Id.* Deschutes County code prohibits unlawfully divided parcels like TL 7800 from qualifying for development approval through DCC 22.04.040(B)(1). TL 7800 is not a lot of record and no application has been filed with the county to determine that it is.

The lot of record status of a parcel depends on how the parcel was created. DCC18.04.030. TL 7800 was created through a flurry of conveyances in the summer of 2021. Its current boundaries were created by deed on August 30, 2021, at a time when creation by deed was unlawful. It is not a lot of record. DCC 18.04.030. Pursuant to DCC 22.04.040(B)(1), the Hearings Officer cannot issue the requested land use permit for TL 7800, an EFU parcel, because is not a lot of record. The hearings officer erred in deciding to the contrary.

D. "Inextricably Linked".

The original tentative plan and site plan for this subphase ("Phase A-1") of the Thornburgh Resort remain under review. The proposed site plan herein is inextricably linked to the above Phase A-1 application. It is entirely dependent upon the ultimate outcome of the proceedings in question and cannot be adjudicated now.

Specifically, the county's approval of Phase A-1 in File Nos. 247-18-000386-TP, 247-18-000454-SP, and 247-18-000592-MA, Order No.

2018-073, was returned to the county on remand from LUBA in LUBA No. 2018-140. Following remand, it was decided by the county hearings officer under File No. 247-21-000731-A. That decision was appealed to the board of commissioners, who declined to hear the appeal. A further appeal is now pending before LUBA in LUBA No. 2021-109.

The proposed welcome center, gate house, club house, and community hall (collectively, "structures") are proposed to be situated on farmland and cannot be approved independently of a destination resort and its approved master plan. A freestanding recreational development would be impermissible. Until the issues pending in the new LUBA appeal are fully resolved and there is a finally approved phase or subphase of the resort of which the structures are a part, the proposed site plan cannot be approved.

Proceeding any earlier would effect a substantial change in the CMP and FMP. Under DCC 18.113.080, the development of the structures on lots created or existing outside the framework of any phase or "subphase" of the resort, especially on EFU land, would be a substantial change to the approved Conceptual Master Plan and must "be reviewed in the same manner as the original CMP."

The hearings officer erred in finding to the contrary. Neither his golf course decision nor that of LUBA is controlling here.

E. Final Master Plan Conditions 10 and 38.

The hearings officer erred in rejecting the position of Ms. Gould and other opponents and making the determinations set out at pages 17-25 of his decision. We incorporate by reference here our discussion of "Findings and Legal Conclusions Regarding 'Collateral Attack'," above.

FMP Condition 10 requires proof of compliance for each phase of the resort development, and Condition 38 requires a continuous showing of the developer's abiding 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. These conditions state:

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

Please note that Conditions 10 and 38 are not independent but are intertwined. The documents described in Condition 38 are in fact those that set out the "full amount of mitigation, as required under the water right" under Condition

10. The "August 2008 Supplement" to the Wildlife Mitigation Plan *is* in fact the "Thornburgh Resort Fish and Wildlife Mitigation Plan Addendum Relating to Potential Impacts of Ground Water Withdrawals On Fish Habitat," dated April 21, 2008. This is the document setting out Thornburgh's agreement with ODFW as to preservation of anadromous fish habitat, including the requirement to place the right to the cold spring water in Deep Canyon Creek permanently instream.

By the express terms of Conditions 10 and 38, challenges to purported compliance may be raised as to new or different phases of the resort as they are put forward for consideration. To hold otherwise would serve to nullify these essential conditions in the face of changing circumstances on the ground. The issues in question were not settled by the CMP and the FMP. Rather, they *could not* be fully settled at that time. That is why the requirement of regular future showings of compliance was installed in Conditions 10 and 38. *This is how affected state agencies, the county, and the public are supposed to be assured that the difficult problems of availability of water for consumption and cold water for mitigation as to anadromous fish habitat are resolved at each relevant point in time. And the burden of proof always lies on the applicant. And the county must "drill down" to make sure that it is met, and not rely upon glib assurances or the incorrectly applied crutch of "impermissible collateral attack" in order to assist the applicant.*

LUBA described Condition 10's requirement as to "updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase" in its decision in *Gould v. Deschutes County*, 79 Or LUBA 561, 573-74 (2019), which involved a tentative plan and site plan for Phase A-1, the preceding and still contested "subphase" of this resort:

> The Oregon Water Resources Department (OWRD) granted the water right upon finding that intervenor is responsible for providing 1,356 total acre-feet of mitigation water: 836 acre-feet from Deep Canyon Creek irrigation rights that were granted to Big Falls Ranch, and the remaining mitigation water from the Central Oregon Irrigation District (COID). [footnote omitted]
>
> The resort's consumptive use of groundwater is anticipated to impact an offsite fish-bearing stream, Whychus Creek, by reducing instream water volumes and increasing water temperatures. The mitigation plan requires intervenor to replace the water consumed by the resort with volumes and quality of water that will maintain fish habitat, especially cold water thermal refugia. The county found that the mitigation plan will result in no net loss/degradation to fish and wildlife resources.

(Emphasis added.)

In the county's 2018 proceeding in that case, the hearings officer recognized some of these concerns, finding that the applicant had failed to show availability of the sources of mitigation water promised in the approved Fish and Wildlife Mitigation Plan:

> The June 13, ODFW letter references COID [Central Oregon Irrigation District] water and that "flows from COID during the irrigation season provide a net benefit in instream flows for the Deschutes River". It seems to focus primarily on the Big Falls Ranch, however, stating that

"During the irrigation season when ODFW is most concerned about impacts to springs and flows in the Deschutes River, the mitigation water from the springs in Deep Canyon Creek exceeds the flows needed to mitigate from spring and seem impacts."

The FMP also references both water sources, primarily the Big Springs Ranch and that "the remaining mitigation water is to be obtained from" COID. (Page 22 and 24).

It appears to me, therefore, that both ODFW and the Hearings Officer relied on those sources [COID water and Big Falls Ranch water] in reaching their respective conclusions that mitigation was adequate. While it may be that a change to another source within the General Zone of Impact will satisfy both quality and quantity mitigation, that is speculative on this record. It may be that the impact of the 192 homes that the tentative plat would permit would be compensated for by other sources and not be significant enough to implicate these sources but that also is speculative. Further, if the applicant proceeds with providing water to these homes but cannot get water for the balance of Phase 'A' (meaning the Phase 'A' of the Phasing Plan) *i.e.*, what Mr. Dewey refers to as the "core facilities" then the opponents are correct that we may have a "sagebrush subdivision" that the statutes, Code and FMP are intended to prevent.

In short, the applicant demonstrated at the FMP stage that mitigation was feasible and identified specific sources. Opponents now have raised sufficient evidence to call into question whether obtaining water from those sources remains feasible. On the other hand, demonstrating that the applicant has rights from Big Springs Ranch [Big Falls Ranch] and COID should be straight-forward. The Big Springs Ranch rights appear to be the more important given the emphasis put on them by ODFW. COID water appears to relate more to quantity, although ODFW stressed that providing mitigation water during the irrigation season is important. I find that failure to obtain the ODFW [Big Falls Ranch] and COID water referenced in the Mitigation Plan and FMP decision may constitute a substantial modification to the FMP approval.

H.O. Decision, 10/29/18, 29-30. (Emphasis added.)

The evidence to which the hearings officer referred included "an August 28, email from Matt Singer, general counsel for COID, stating that it is COID's position that there are no current or active agreements with Thornburgh * * *."

Id., 29.

Beyond that, the hearings officer noted:

> "Mr. Dewey also cites to an excerpt of a document suggesting that Big Falls Ranch proposed and OWRD proposes to approve a transfer of surface water points of diversion to groundwater points of appropriation which Mr. Dewey asserts was to be used for mitigation by Thornburgh * * *."

Id.

Documentation that the transfer *away* from Deep Canyon Creek has now actually occurred is contained in a memorandum from attorney, Karl Anuta, filed in this proceeding. That memo also explains the ramifications of that transfer.

The prolonged litigation regarding the CMP and the FMP achieved a very delicate balance between the resort's consumption of groundwater and the provision of adequate cold water to mitigate for the impacts upon anadromous fish habitat which would be caused by said consumption. On the consumption side, the approval of the resort depends upon a now-challenged OWRD permit designating specific wells. The county's approval herein requires the abandonment of certain other wells. Based upon the location and depth of the wells to be operated under the OWRD permit, specific impacts upon fish habitat in Whychus Creek (and hence the Deschutes) were analyzed and evaluated and specific sources of cold

water for mitigation in this sub-basin of the Deschutes watershed were identified. Thus, a change in the source of quasi-municipal supply, or a failure to supply the specific, approved mitigation water, would thoroughly disrupt the balance methodically assembled over the years of legal disputes. This is compounded by the pervasive drought conditions now prevailing year after year in Deschutes County.

We turn now to the actual language of the underlying agreement with ODFW which allowed the master plan for the resort to be approved in the first place. This is the "Thornburgh Resort Fish and Wildlife Mitigation Plan Addendum Relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat," dated April 21, 2008 ("FWMP"). It was actually prepared by *Thornburgh's* engineer, David Newton. We reproduce the relevant language here:

> The mitigation to be provided in connection with the Thornburgh water right will serve as a major component of the mitigation measures for this Addendum. As described below, coupled with additional measures recommended by ODFW, the flow replacement plan developed by Thornburgh will address both flow and temperature concerns and is expected to fully mitigate for any negative impacts so that there is no net loss of habitat quantity or quality for fishery resources. The measures will also provide additional benefits to habitat resources.
>
> * * *
>
> *Big Falls Ranch Water Rights*
>
> The Resort also has entered into an agreement to purchase existing surface water rights from Big Falls Ranch located near Lower Bridge, within the General Zone of Impact. The 464.9 acres of irrigation water rights are

expected to generate a total of 836.82 AF per year of mitigation water when transferred to instream water rights. Thornburgh is currently working with Big Falls Ranch on transfer applications for the first 175 acres of water rights to be acquired under the agreement and transferred to instream use. The instream water right would protect flow from a point near Lower Bridge downstream to Lake Billy Chinook. This initial transfer is expected to result in 315 AF of mitigation water.

The first 175 acres of Big Falls Ranch water rights that are proposed for transfer are located in Sections 8, 9 and 17, Township 14 South, Range 12 East, as shown on Figure 3, a map prepared for the water right transfer application. These water rights are designated as "FROM" acres on Figure 3. The source of water for these rights (and the total of 464.9 acres of irrigation) is Deep Canyon Creek. The authorized point of water diversion from the creek is shown on Figure 3.

Deep Canyon Creek is a tributary of the Deschutes River. The confluence between the creek and the Deschutes River is at about River Mile 131. Deep Canyon Creek flows are derived from springs in the canyon. The spring discharge point is shown on the USES Cline Falls, Oregon. Quadrangle map (as shown on Figure 3) at a location about 0.56 miles upstream from the creek's confluence with the Deschutes River.

Over time, erosional down-cutting has incised the Deep Canyon Creek channel into ground water bearing geologic strata, resulting in the ground water discharge that creates the creek flow. Although the USES quadrangle map depicts a single spring, ground water discharge actually occurs at other points along the creek channel.

The point of diversion for the Big Falls water rights is located at the confluence of the creek and the Deschutes River as shown on Figure 3. When the initial 175 acres of irrigation water rights are transferred to instream flow for Phase A mitigation, up to 2.07 cubic feet per second of flow that would otherwise be diverted from the creek for irrigation will remain in the creek as an instream water right. This additional flow will be protected instream from the authorized diversion point on the creek to the Deschutes River near River Mile 132.8, and downstream in the Deschutes River to Lake Billy Chinook near River Mile 120, a distance of nearly 13 miles.

* * *

Implementation of Thornburgh's water right mitigation plan would result in a total of 1,356 AF annual mitigation at full build-out. Approximately 836.82 AF per year and 5.5 cfs of flow during the irrigation season would come from Deep Canyon Creek as a result of transferring the Big Falls Ranch water rights to instream flow rights. * * *

The Big Falls mitigation water offers the additional temperature benefit of providing relatively cool waters from Deep Canyon Creek.

* * *

IV. Fish Habitat Potentially Affected by Ground Water Use

During the consultation process, ODFW identified two specific concerns with respect to potential impacts of ground water pumping on fish habitat: First, the potential for flow reduction due to hydraulic connection that could impact flows necessary for fish and wildlife resources in the Deschutes River system; and second, the potential for an increase in water temperature as a result of flow reductions from ground water pumping. Six species of fish were identified that could potentially be impacted: Redband Trout, Bull Trout, Brown Trout, Mountain Whitefish, Summer Steelhead and Spring Chinook. The general distribution of these fish species is shown on Figure 6.

* * *

In early correspondence on this issue, ODFW identified concerns about impacts on cold water springs and seeps in the Whychus Creek sub-basin as a result of Thornburgh ground water use, and indicated that the potentially affected resources would be classified as "Habitat Category I" under the ODFW Fish and Wildlife Habitat Mitigation Policy("ODFW Mitigation Policy", OAR Chapter 635, Division 414.) (Letter from Glen Ardt to Thornburgh, dated January 31, 2008.) Under the ODFW Mitigation Policy, Habitat Category 1 means the affected habitat is irreplaceable. In response to the letter, Thornburgh provided additional information to ODFW documenting the OWRD findings regarding the location of impact from Thornburgh wells in the Main Stem Deschutes River. Additionally, ODFW met with staff from OWRD and the Department of Environmental Quality

concerning the potential Thornburgh impacts. As a result of this process and further internal review, ODFW revised its preliminary determination regarding the type of habitat potentially affected by the Resort, concluding the habitat would be classified as Habitat Category 2, not Habitat Category 1. This conclusion was based on ODFW's determination that temperature impacts to stream flow, if present, can be mitigated with appropriate actions.

As used in the ODFW Mitigation Policy, "Habitat Category 2" describes essential habitat for a fish or wildlife species. Mitigation goals for this category of habitat are no net loss of either habitat quantity or quality and to provide a net benefit of habitat quantity or quality. OAR 635-414-0025(2).

Based on input from ODFW during the consultation process, Thornburgh has identified the following mitigation and enhancement measures designed to ensure no net loss of habitat quantity or quality and to provide a net benefit for fish habitat. The measures reflect findings by OWRD that the Thornburgh project is expected to affect flow in the Main Stem Deschutes River. * * *

V. Mitigation and Enhancement Measures

The proposed mitigation measures identified in consultation with ODFW are designed to ensure no net loss of habitat quantity or quality and net benefits to the resource: (A) compliance with OWRD mitigation requirements; (B) inclusion of the Big Falls Ranch water rights as part of the OWRD mitigation program to provide additional cold water benefits; (C) removal of an existing instream irrigation pond in connection with the transfer of Big Falls water rights * * *.

B. Specific Mitigation from Big Falls Ranch

Thornburgh will fully exercise the option for purchasing 464.9 acres of water rights under its existing option agreement with Big Falls Ranch, Inc. in fulfilling its mitigation obligation under the OWRD water right. By making this commitment, Thornburgh ensures that nearly two-thirds of its total mitigation water (expected total 836.82 AF per year) will come from a source that contributes cold spring-fed water to the Deschutes River above the Thornburgh location of impact. By retiring an existing irrigation water right, this measure will also result in restoration of 5.5 cfs of cold surface

water flow to the Deschutes River from Deep Canyon Creek during the irrigation season.

C. Elimination of Existing Irrigation Pond

In connection with the instream transfer of the Big Falls Ranch irrigation water right rights, Thornburgh will work with the landowner to eliminate the existing instream impoundment used as part of the irrigation system. This is expected to provide a temperature benefit by eliminating temperature increases due to ponding effects.

* * *

Approximately 836.82 AF per year of the mitigation water will come from Deep Canyon Creek as a result of transferring the Big Falls Ranch water rights to instream flow rights. The elimination of the existing diversion of Deep Canyon Creek with water originating from ground water springs, is expected to provide additional flow and temperature control benefits to the Deschutes River during the critical irrigation season. Removal of the Deep Canyon Creek impoundment will further benefit water temperatures in the Deschutes River by eliminating the pond where water temperatures would increase during warm periods. * * *

VII. CONCLUSION

DCC 18.113.070.D requires that any negative impact on fish and wildlife resources be completely mitigated so that there is no net loss or net degradation of the resource. This Addendum to the Thornburgh Wildlife Mitigation Plan addresses potential impacts to fishery resources as a result of ground water pumping and identifies specific mitigation measures. The plan was developed in consultation with ODFW to address two specific areas of concern regarding the potential for negative impacts: the potential for a loss of habitat due to reduced surface water flows in the area of impact and the potential for loss of habitat due to increased temperature from reduced stream flow or loss of inflow from springs.

The potential for loss of habitat due to reduced surface water flows was quantified in connection with the OWRD review of Thornburgh's application for a water right. Under OWRD rules, Thornburgh will fully mitigate for consumptive use associated with the Resort development.

Consumptive use represents the amount of water not otherwise returned to the Deschutes River system after initial diversion. Although the OWRD program is necessarily based on estimates of impact and modeling, the program is specifically intended to replace stream flows lost due to ground water use. As an added measure, Thornburgh agrees that it will not rely on projects involving canal lining or piping to supply mitigation water and will provide all mitigation through the conversion of existing irrigation water rights to protected instream flow.

By committing to fully utilize the Big Falls Ranch water rights as part of its OWRD mitigation requirement, Thornburgh will provide additional benefits to stream flow and temperature by restoring cold water inflow from the Deep Canyon Spring area. This project will also include the elimination of an instream irrigation pond that currently contributes to temperature increases.

In addition to complying with the OWRD mitigation requirements, Thornburgh will abandon three existing domestic wells and terminate exempt ground water uses on the property. Although these uses represent a relatively small annual volume of water, they provide additional mitigation in the form of ground water offset, beyond the quantity required by OWRD. This action will result in restoration of about 3.65 acre-feet per of ground water per year that has historically been pumped from the Thornburgh location. * * *

Collectively, the mitigation and enhancement measures demonstrate that any potential negative impacts to fish habitat resources as a result of the Thornburgh resort will be completely mitigated so there is no net loss or net degradation of the resource as required by the County code.

After the adoption of the above addendum, ODFW became concerned that the removal of one impoundment on Deep Canyon Creek would be insufficient to provide the required flow of cold water. Accordingly, by letter from Thornburgh's attorney dated August 11, 2008, Thornburgh agreed to an additional condition requiring removal of a second impoundment, not controlled by BFR. That letter

states in material part:

> Following Thornburgh's submission of its Addendum Relating to Ground Water Withdrawals in April, 2008 ("Addendum"), ODFW requested modification of the plan to include removal of two existing dams/ impoundment structures on Deep Canyon Creek. The April Addendum described plans for removing only one dam in connection with acquisition of the water rights from Big Falls Ranch for mitigation purposes. In reviewing and commenting on the Addendum, ODFW requested that Thornburgh seek authorization to remove a second dam located just upstream of the Big Falls Ranch dam, on property owned by other parties.
>
> During the public hearing process on Thornburgh's Final Master Plan, Thornburgh indicated its willingness to remove the second dam as part of its Fish and Wildlife Mitigation Plan. This letter confirms that intention and so modifies the Addendum. Thornburgh is also submitting into the hearing record documentation of its agreement with the owners of the second dam to authorize the dam removal.

Today, 14 years later, neither has been removed. Thornburgh talks about removing the sluice gate in the lower impoundment, but even that drops the level of the pond in question only 40-50 percent. The remainder of the impoundment keeps in place a pond which would still allow overheating of the creek's "cold" water.

As we can see from the above documents which resulted in the creation of FMP Conditions 10 and 38, OWRD and ODFW worked together closely on the fish and wildlife mitigation issues, and the reference to mitigation in Conditions 10 includes the mitigation referenced in Condition 38.

With respect to the absence of the required groundwater for consumption and the applicants' failure to prove up the required cold water for permanent

placement instream in Deep Canyon Creek for the preservation of anadromous fish habitat, we direct your attention to the highly detailed materials filed herein by Messrs. Anuta and Lambie.

Thornburgh intends to secure the mitigation water for this subphase of the resort solely from Big Falls Ranch. This is cold spring water feeding Deep Canyon Creek. The springs in question arise only one-half mile upstream from the Deschutes. The primary problem here is that BFR has already transferred the subject water right from surface water in Deep Canyon Creek to groundwater up on the ranch itself. As Mr. Anuta explained in the Phase A-1 remand proceeding on August 23, 2021:

> * * * [T]he water rights that the Resort promised and that the County required for that mitigation **have subsequently been transferred to another location**. They have been moved to ground water, by the holder of those rights - Big Falls Ranch.
>
> In 2018, as part of Transfer T-12651, Big Falls Ranch requested a "Permanent Water Right Transfer" to move the surface water rights in Deep Canyon Creek to ground water. That request was granted, by OWRD Special Order dated November 21, 2018.
>
> That transfer means that the cold spring surface water flows in Deep Canyon Creek - the flows specifically required to offset the impacts of the Resort G-17036 Permit - are no longer currently available as potential instream flow mitigation for the Resort.
>
> In theory, up until or on November 20, 2023, a request to have Transfer T-12651 "unwound" - in other words the water moved back to surface water - could be submitted. That date is 5 years from the date the transfer was approved. The transfer Order on T-12651 recognized (as is normal for such transfers in the Deschutes Basin) that if an application to

transfer the right back to surface water was submitted within 5 years from date of the transfer approval, such an application would normally be approved.

How long such an approval that would take [to] complete, is anyone's guess. Regardless, there is no evidence that such an application has to date even been submitted. There is certainly no approval that would allow the use of the Deep Canyon Creek water in the manner required under the Mitigation Agreement.

To the contrary, rather than a request to transfer the water back, Big Falls Ranch has instead submitted a Claim Of Beneficial Use (COBU) at the new groundwater location. That COBU is an effort to try to turn the T-12651 transfer Order into a new Certificated right, at that new groundwater location. That COBU was submitted on 9-30-20.

(Footnotes omitted. In the original letter, the footnotes direct the reader to specific supporting exhibits.)

We would reemphasize here the following dates:

• November 21, 2018. OWRD approves the application of Big Falls Ranch to move the surface water rights in Deep Canyon Creek which are required to be permanently protected *instream,* to groundwater instead. When moved to groundwater (drawn from wells), the water in question is no longer available instream for fish habitat mitigation purposes.

• September 30, 2020. Big Falls Ranch submits its Claim of Beneficial Use at the new location at which it draws groundwater, in order to turn OWRD's Order approving the transfer into a new certificated right at that location. If OWRD determines that the permit conditions have been met, a water right certificate will be issued to BFR; this will be the "certificated right."

Thornburgh's position as to the required mitigation water has only become weaker over time. It was error for the hearings officer to find compliance with FMP Conditions 10 and 38.

This is not the golf course case, and the county cannot rely upon the decision in that case here. To the extent that the FMP conditions of approval require continuous, ongoing compliance, or an independent showing of compliance as with Conditions 10 and 38, Thornburgh must demonstrate compliance *in this proceeding*. It failed to do so here.

Again, with respect to the dams/impoundments, these have not been removed. Their removal is required in order to comply with the FWMP and ODFW agreements referenced in Condition 38.

We also direct your attention to the letter in the record from ODFW dated January 3, 2022. ODFW expressed its concerns regarding compliance with Conditions 10 and 38 in far stronger terms than we have seen before, stating in part:

> ODFW would like to acknowledge that water right permits in the Deschutes Study Area will be mitigated through OWRD's Deschutes Groundwater Mitigation Program, but also reiterate that the County has approved a Mitigation Plan for the Resort that, in combination with OWRD's mitigation, is intended to result in no net loss or net degradation of fish and wildlife habitat quantity and quality and provide a net benefit to the resource. This Mitigation Plan was developed in consultation with ODFW over a decade ago and is outlined in the Resort's Final Master Plan, with impacts to fishery resources specifically addressed in the 2008 Thornburgh Resort Fish and Wildlife Mitigation Plan Addendum Relating to Potential Impacts of GroundWater Withdrawals on Fish Habitat (Addendum).

> ODFW's support of the 2008 Addendum was based on many expectations becoming reality. In particular, ODFW put much weight on the Big Falls Ranch mitigation providing a sufficient quantity of cold, spring-fed water from Deep Canyon Creek that will be legally protected into the Deschutes River down to Lake Billy Chinook. * * *

ODFW letter 1/3/22 at 1-2.

> Given our expectations for successful mitigation resulting in legal protection of actual cold streamflow, it is unclear at this time if there remains a clear nexus between the numerous water right applications, Phase A-1 and Phase A-2 development, the County's and OWRD's mitigation requirements, and ODFW's concerns for fish and wildlife habitat. In addition, it is becoming increasingly unlikely that the mitigation agreed upon in 2008 will offset the loss or net degradation of fish and wildlife habitat quantity and quality and provide a net benefit to the resource due to ongoing declines in groundwater and streamflow. There is concern for the present and future viability of the Deep Canyon spring to provide the intended flow volume and temperature benefit for mitigation and meet the no net loss standard.

Id. at 2.

> With uncertainties surrounding potential water use for Phase A-1 and Phase A-2, recent water right applications, and groundwater/surface water declines in the Deschutes Basin, ODFW requests a meeting with the County and OWRD to further discuss the following * * *.

Id. at 3.

> The Mitigation Plan for the Resort outlines that mitigation must be in place prior to the use of water, generally for each phase of the development. Regardless of the water right(s) utilized for quasi-municipal uses in the end, the use must be mitigated per the intent of the agreement, and the mitigation must result in no net loss or net degradation of fish and wildlife habitat quantity and quality and provide a net benefit to the resource. If there are additional water right applications or mitigation is found to no longer be available, OWRD and the County should reassess mitigation needs to ensure Phase A-1 and Phase A-2 development (and future proposed phases) results in no net loss or net degradation of fish and wildlife habitat quantity and

> quality and provide a net benefit to the resource. ODFW would need a better understanding of the proposed uses and associated mitigation in order to assess whether they align with the agreed-upon mitigation or if additional mitigation is needed. Until such time as we can meet to discuss and resolve these concerns, ODFW requests the record be left open. * * *

Id. at 5.

In a nutshell, ODFW took the position that at this point, 14 years after adoption of the FWMP and the resort's final master plan, things have changed materially. New sources of water supply are being sought. The requisite cold water for fish habitat mitigation may not be there. ***In other words, Thornburgh has not met its burden of proof.***

ODFW proposed that its concerns be addressed through meetings facilitated by holding the record open. For various reasons, this was not a feasible approach in this case. The upshot, though, is that Thornburgh's burden remains unmet. This application must be denied, and the hearings officer erred in approving it.

Among the hearings officer's errors in this case, we note the following:

1. Neither the commissioners' decision nor LUBA's decision in the golf course case is controlling here.

2. The cited portion of LUBA's initial Phase A-1 decision conflates the Wildlife Mitigation Plan and the Fish and Wildlife Mitigation Plan Thornburgh negotiated at length with ODFW in order to obtain approval of its Final Master Plan. The record in *this* case shows that none of the required mitigation water is in

fact available. This is not a matter of Thornburgh amending its mitigation plan. It just does not have the water.

3. The hearings officer's legal interpretations with respect to Conditions 10 and 38 are in error. Among other things, his reliance upon ORS 174.010 in order to misconstrue the meaning of the first sentence of Condition 38 is misplaced. That sentence is part of an applicable approval standard for each phase of this project. The hearings officer erred in deciding otherwise.

F. ODFW Letter.

The hearings officer erred in finding the above-cited ODFW letter to be irrelevant. It is highly relevant to compliance with the FMP conditions of approval for the reasons we have set out. He also erred in appearing to accept Thornburgh's contention that the "FWMP is not an agreement with ODFW." That contention is false.

G. Dams and Impoundments.

The hearings officer erred in holding that the requirement that dams and impoundments be removed pursuant to agreement with ODFW is met by the mere existence of the FWMP without actual removal. To the contrary, it would be met by allowing cold water to flow freely as mitigation for loss of anadromous fish habitat due to the resort's consumption of groundwater.

H. DCC 17.16.105.

The hearings officer erred in finding that access requirements will be met in the absence of Thornburgh's ownership of a key inholding owned by the Department of State Lands, over which the north-south resort road is to run. Having a temporary leasehold which may not be renewed further will not cut it.

I. FMP Condition 1.

Contrary to the hearings officer's finding, for the reasons presented to him by Ms. Gould, the evidence shows that Thornburgh must apply for modification of its master plan pursuant to Condition 1. This condition states:

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

J. FMP Condition 21.

This condition provides:

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

The underlying decisions upon which the hearings officer relies are on appeal to LUBA. Most particularly, Thornburgh's effort to substitute a 2.5:1 ratio for the 2:1 ratio described in Condition 21 and to reduce the minimum number of

weeks OLUs must be available to the public is unlawful. Ms. Gould's argument was set out with sufficient specificity for the hearings officer to respond to it.

K. FMP Condition 28.

For the reasons set out above as to Conditions 38 and 39, Thornburgh has not complied with Condition 28.

L. FMP Condition 33.

As explained above, Thornburgh's effort to employ a higher ratio of non-OLU single family residences gives rise to noncompliance with Condition 33. This is simple enough, and was set out with sufficient specificity for the hearings officer to respond. It is not satisfied by means of this hearings officer's prior adoption of the OLU decision and the modification decision, both now on appeal before LUBA.

M. DCC 18.113.080.

For all the reasons explained above and on the record, especially with regard to Thornburgh's (1) need for and efforts to obtain alternative sources of water supply, (2) inability to provide cold springwater instream in Deep Canyon Creek, and (3) attempted modification of the OLU ratio and minimum number of weeks of availability as OLUs, Thornburgh is effectively making substantial changes in the approved master plan, compelling review "in the same manner as the original CMP" under DCC 18.113.080. The hearings officer erred in holding otherwise.

He also erred in his alternative finding that Ms. Gould's argument lacked sufficient specificity. One need not be a hearings officer to discern the specifics on this issue raised on the record herein.

N. Additional Water Right Transfers.

This issue is discussed above, and addressed in great detail in the materials submitted by Karl Anuta. Simply stated, strained naivete does not provide a sustainable basis for finding that the applicant has met its burden of proof. Thornburgh does not have the legal authority or ability to supply any part of its resort with water by means of the OWRD permit described in Condition 10. It does have the right to seek whatever other water it wishes for any and all reasons it may wish to expound, but new/replacement sources will violate Condition 10 and send Thornburgh back to Square One on its master plan. As explained by Mr. Anuta, what is going on here is quite clear, indeed, transparent. Thornburgh would not be running around frantically shopping for new sources of supply if it had access to the source designated in Condition 10. 2+2=?

Ms. Gould's arguments before the hearings officer were absolutely clear and specific. The hearings officer erred in holding otherwise.

O. Applicant Requested "Corrections".

As explained with respect to the "modification" case, now on appeal to LUBA, Thornburgh is not entitled to amendments to the FMP conditions of

approval which require compliance with the originally approved 2:1 ratio. Thus, it was error for the hearings officer to approve the so-called "corrections" with respect to FMP Conditions 21, 33, and 35. (Condition 35 relates to the reduction in the minimum number of weeks per year OLUs must be available for overnight rental.) What happens to these "corrections" if Ms. Gould prevails in her challenge to the modification decision? Thornburgh seeks a free ride regardless.

It was error for the hearings officer to approve these changes 'unconditionally.'

P. <u>Matters the Hearings Officer Incorporated by Reference</u>.

On several occasions, the hearings officer incorporated into his individual findings other findings made elsewhere in his decision. We in turn incorporate by reference here our previously set out challenges to those incorporated findings, in each instance in which the hearings officer relies upon them.

CONCLUSION AND DECISION

For all the reasons set out above, the hearings officer's conclusions and decision are in error. The appeal before you should be allowed. The within application should be denied by the Board of Commissioners.