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DESCHUTES COUNTY
COMMUNITY DEVELOPMENT

APPEAL APPLICATION

FEE: $250

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.

Email: BrooksLarson1205@gmail.com

Appellant's Name (print): Christine Larson Phone: (503) 709-5572

Mailing Address: 20200 Marsh Rd., City/State/Zip: Bend, OR 97703

Land Use Application Being Appealed: 247-21-000637-TP (Central Land/DeLashmutt

Property Description: Township____ Range____ Section____ Tax Lot (See Exhib. F A.)

Appellant's Signature: Chut Larsn

EXCEPT AS PROVIDED IN SECTION 22.32.024, APPELLANT SHALL PROVIDE A COMPLETE TRANSCRIPT OF ANY HEARING APPEALED, FROM RECORDED MAGNETIC TAPES PROVIDED BY THE PLANNING DIVISION UPON REQUEST (THERE IS A $5.00 FEE FOR EACH MAGNETIC TAPE RECORD). 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.

Appellant's attorney is Jeffrey L. Kleinman, 1207 SW 6th Av., Portland, OR 97204.

(over)

NOTICE OF APPEAL

(See Exhibit B.)

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

Exhibit A-Property Description

Map and Taxlot: 15-12-7800

Address: 67555 CLINE FALLS RD., REDMOND, OR 9775

EXHIBIT B–STATEMENT OF REASONS FOR APPEAL

As a preliminary matter, appellant Christine Larson hereby requests a de novo hearing of this appeal before the county's land use hearing officer.

Statement of Reasons

1. **Findings page 5.** I understand that the "golf course and lakes" decision is the subject of a likely petition for review in the Oregon Supreme Court.

2. Findings pages 5-7 ("Impermissible Collateral Attack"). These findings are in error in several respects. Most importantly, Final Master Plan 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 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 "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 that:

> "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 the Phase A-1 remand case on August 23, 2021. 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.

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.)

I 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 staff to find compliance with FMP Conditions 10 and 38. With this in mind, I would point out the following specific errors on pages 6 and 7 of the decision.

First, this is not the golf course-and-lakes case, and the county cannot rely upon the decision in that case here. Second, 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 has not done so with respect to the matters listed in items 3, 4, 5, 6, 7 and 13 through 17.

With respect to the dams/impoundments referenced in item 6, these have not been removed. Their removal is required in order to comply with the FWMP and ODFW agreements referenced in Condition 38. I will address the "lot of record" issue referenced in item 16 at the end of this Statement.

3. Findings pages 10-11 (DSL Comments). Although DSL's comments are difficult to read, its concerns are readily discernible. Proposed Phase A-2 extends beyond the scope of development previously reviewed and approved; there

appear to be intermittent streams on the subject property; and further action will be required. The decision is in error in failing to address these issues.

4. Findings pages 16-17 (DCC 17.16.100.A). As discussed above, FMP Conditions 10 and 38 contain independent requirements with respect to streams, water, and fish and wildlife resources. To the extent that these findings purport to sign off on compliance with those conditions, they are in error for the reasons stated.

5. Findings page 22 (ORS 92.090(6)). It would appear that the subject property is within the boundaries of the Central Oregon Irrigation District. Thus the requirements of this section apply and have not been met.

6. Findings pages 47-50 (Final Master Plan Condition 1). These findings are in error. As explained in detail above, Thornburgh must meet its burden of proving compliance with FMP Conditions 10 and 38 whenever it files an application for a new phase of the resort, and has not made the required showing of compliance here. Thornburgh has filed several applications with OWRD for different, previously unreviewed sources of quasi-municipal water supply to make up for its expired OWRD permit. This will in turn result in materially different impacts upon fish and wildlife habitat, giving rise to substantial changes in the required mitigation and to the need for a new or revised WMP and FMWP and new, possibly unobtainable agreements with ODFW. By any measure, these are

substantial changes to the approved master plan under FMP Condition 1, and will require a new application.

Contrary to staff's implication, these issues did not come before Hearings Officer Olsen or LUBA in the Phase A-1 proceeding. Several facts have changed since LUBA made its decision in the golf course-and-lakes case, as well. Based upon the facts that now exist–in other words, reality–the WMP, FWMP, and related agreements will necessarily change regardless of the proffered assumption that they will not. In addition, Thornburgh has not complied with, and the evidence will show that it *cannot* comply with, the required mitigation in Deep Canyon Creek. This too will effect a substantial change.

7. Findings pages 50-53 (FMP Condition 10). For the reasons explained at length above, Thornburgh has not demonstrated compliance with the requirements of this condition as to either its state water right or the required accounting for mitigation.

Under the now-existing facts, the county Board's findings in the golf course-and-lakes case are not controlling. The current "information" is that Ms. Gould's appeal of an extension of the OWRD permit described in Condition 10 is pending and the applicant now seeks different sources of water supply, in turn resulting in this condition *not* being met. In addition, the record will show that the mitigation water described in this portion of the findings is in fact unavailable. LUBA's

discussion in the golf course-and-lakes case does not assist Thornburgh's position here.

The decision also relies in part upon OWRD's past approval of Pinnacle's Water Management and Conservation Plan. However, Pinnacle has withdrawn that plan!

8. Findings pages 57-58 (FMP Condition 21). Ms. Gould has appealed staff's approval of Thornburgh's "modification" application. The appeal hearing has been scheduled. In the meantime, the requirements of Condition 21 apply, and the applicant has not demonstrated compliance.

At least as importantly, the decision is in error in finding compliance with Condition 21 because the status of Phase A-1 has not been resolved. Without a fully and finally approved Phase A-1, there are no Overnight Lodging Units and Thornburgh cannot comply with this condition.

9. Findings page 60 (FMP Condition 28). As explained, Thornburgh is not in compliance with the portion of Condition 28 relating to implementation of the mitigation plan developed in consultation with ODFW "throughout the life of the resort."

10. Findings page 62 (FMP Condition 33). For the reasons explained with respect to Condition 21, the required number of OLU units is not in fact provided.

11. Findings pages 63-64 (FMP Condition 38). For reasons explained at length above, Thornburgh has not demonstrated compliance with Condition 38, (and the evidence will show the impossibility of such performance). If not now, when will the applicant ostensibly prove compliance?

12. Findings page 64 (FMP Condition 39). Compliance with this condition mst be demonstrated in the course of a public process, not by flashing a piece of paper in front of staff at an indeterminate date. This is an essential element of the required mitigation of impacts upon anadromous fish habitat.

13. Findings page 65 (DCC 18.113.080). For the reasons explained above, especially as to water supply and mitigation issues, a substantial change in the approved CMP is in fact effected here. It was error for the Planning Director to decide otherwise.

14. Lot of Record Issue. Contrary to item 16 at page 8 of the decision, the "lot of record" issue, resolved at one time, is no longer resolved but has instead come undone. Under DCC 17.04.02, "[n]o person may subdivide or partition land within the County except in accordance with ORS 92 and the provisions of DCC Title 17." Under ORS 92.012, "[n]o land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.192."

At the end of July 2021, two parcels/lots were conveyed by deed out of one of the existing Thornburgh lots without partitioning or any other required process.

We do not know what the applicant really had in mind when it carried out the conveyancing in question. Regardless, the upshot is that the subject property is undevelopable under county regulations and state land use laws requiring EFU parcels to have been lawfully created in order to be developed.

The county is obligated to verify lot of record status for EFU lands prior to the issuance of any land use permit. DCC 22.24.040. The land use permit requested here has not been issued. The county lacks authority under DCC 22.24.040 to issue a land use permit for any parcel of EFU land that is not a lot of record at the time the permit is issued. The county further lacks authority under DCC 22.20.15(A) to make any land use decision for a property that is in violation of applicable land use regulations. The land use permit for EFU land requested herein must be denied.

15. Incorporation by Reference of Unattached Documents. I object to and assert error in the incorporation by reference of documents not actually attached to the decision. These documents appear in part irrelevant and in part not controlling in this case. However, unless they are attached, no one can be expected to respond to them.

CONCLUSION

The decision is in error for each of the reasons I have set out above. It is time for the county to take off the blinders, grab its own reins, and properly apply its approval standards to the facts as they actually exist.