

**MEMORANDUM**

TO: Board of County Commissioners

FROM: Angie Brewer, Senior Planner

DATE: October 20, 2021 for October 27 Board Session

RE: Board Order 2021-059

Decision whether to hear appeal of Hearings Officer's approval of an application on remand from LUBA and Oregon Court of Appeals to establish Phase A-1 of the Thornburgh Destination Resort

On October 27, 2021, the Board of County Commissioners (Board) will consider whether to hear appeal 247-21-000937-A of Hearings Officer remand decision 247-21-000731-A. The Hearings Officer decision addresses a limited scope of issues on appeal and approves the first phase of the Thornburgh Destination Resort on remand from the Oregon Land Use Board of Appeals (LUBA 2018-140) and the Oregon Court of Appeals (A171603).

Decision 247-21-000731-A clarifies and implements applications 247-18-000386-TP (Tentative Plan (TP) for Phase A-1 of the Thornburgh Destination Resort subdivision), 18-000454-SP (Site Plan Review (SP) for associated utility facilities including a well, well house, pump house, reservoir, and interim subsurface sewage disposal system), and 18-000542-MA (Modification of Application (MA) for the Site Plan Review).

I. BACKGROUND

Deschutes County Planning Division referred the case to the Deschutes County Hearings Officer for a decision based on the remand directives provided by LUBA and the Oregon Court of Appeals. The Hearings Officer remand decision concisely summarizes the case in the following excerpt:

This Hearings Officer's remand decision is the latest in a long line of applications, hearings, decisions, and appeals involving a proposed destination resort ("Thornburgh Resort") in Deschutes County ("County"). The County destination resort approval process involves multiple steps (i.e., DCC 18.113). The first step is an application for Conceptual Master Plan ("CMP") approval. The second step is an

application for Final Master Plan ("FMP") approval. Additional steps, including applications for tentative plan(s) ("TP") and site plan(s) ("SP"), are also part of the County destination resort approval process. Applicant, on or about 2006, received approval of its CMP; various appeals followed. Applicant, on or about 2008, received County approval for its FMP. Eventually, following the resolution of multiple appeals, the FMP was upheld/approved. An important part of the FMP is the Fish and Wildlife Mitigation Plan (Thornburgh Resort Fish and Wildlife Mitigation Plan Addendum Relating to Potential Impacts of Ground Water Withdrawals on Fish Habitat – the "FWMP" and hereafter referred to as the "Mitigation Plan").

On or about May of 2018 Applicant sought TP and SP approval for Thornburgh Resort Phase A-1 ("Phase A-1"). A County land use hearings officer ("TP Hearings Officer") approved with conditions Applicant's TP and SP applications for Phase A-1. Gould appealed the TP Hearings Officer's Phase A-1 decision.

On June 19, 2019 the Oregon Land Use Board of Appeals ("LUBA") remanded the TP Hearings Officer's Phase A-1 decision. Annunziata Gould v. Deschutes County, LUBA No. 2018-140 (2019) (hereafter referred to as the "LUBA Remand Decision"). Various appeals followed the LUBA Remand Decision which, while important to the parties, are not directly relevant to this Hearing's Officer remand decision. A hearing was scheduled for August 20, 2021 [August 24, 2021] ("Remand Hearing") to consider the LUBA Remand Decision. Testimony was received at the Remand Hearing and additional evidence and argument was submitted during an open-record period.

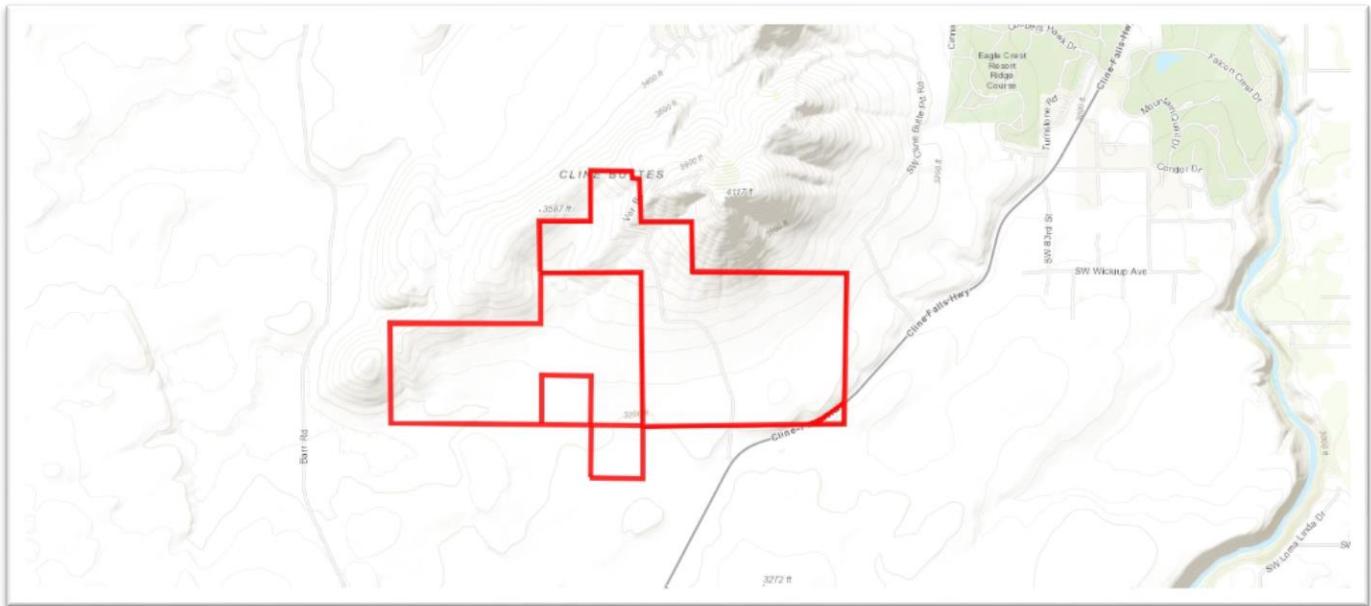
The Hearings Officer also finds the bold highlighted section established the scope (limits) of the current remand process. The Hearings Officer finds that LUBA directed the Hearings Officer, in this case, to do the following:

LUBA Remand Directive #1: DETERMINE IF, WITHOUT CONDITION 17, APPLICANT'S PHASE A-1 PLAN SATISFIES THE NO NET LOSS/DEGRADATION STANDARD; and

LUBA Remand Directive #2: WHETHER A CHANGE IN THE "SOURCE" OF MITIGATION WATER [IF PROPOSED] FOR PHASE A-1 CONSTITUTES A Substantial Change to the FMP Approval.

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Figure 1: Subject Property



II. HEARINGS OFFICER DECISION

As noted above, LUBA directives limit the Hearings Officer Remand Decision to the following:

- Determine if, without condition 17, applicant's Phase A-1 Plan satisfies the no net loss/degradation standard; and
- Whether a change in the "source" of mitigation water [if proposed] for Phase A-1 constitutes a substantial change to the FMP approval.

A public hearing was held August 24, 2021; additional argument and evidence was provided during the open record period. Public comment received during this time largely focused on the availability of water and the impacts of the proposed use on area residents and farmers that rely on existing wells and water rights. The Hearings Officer addressed the comments received but notes the remand decision addresses water only as directed by the LUBA and Court of Appeals remand, thus limiting the decision to water requirements of the previously approved Wildlife Mitigation Plan.

The Hearings Officer remand decision concludes the following:

The Hearings Officer, based upon the evidence in the record, determined that Applicant's proposed use of BFR water rights to satisfy Mitigation Plan mitigation water obligations for Phase A-1 did not constitute a change of "source" of the mitigation water. The Hearings Officer also found that since there was no change of "source" of mitigation water for Phase A-1 then Applicant's Phase A-1 proposal did not constitute a change to the FMP or Mitigation Plan. The Hearings Officer found that

the no net loss/degradation standard was satisfied for Phase A-1 by Applicant's use of BFR water rights.

The Hearings Officer finds that Condition 17 of the Hearings Officer's Decision in Deschutes County File Numbers Deschutes County File Numbers 247-18-000386-TP / 454-SP / 592-MA is not valid and must be removed/deleted. The Hearings Officer finds that, without Condition 17, the Hearings Officer's Decision in Deschutes County File Numbers Deschutes County File Numbers 247-18-000386-TP / 454-SP / 592-MA should be affirmed.

DECISION

1. The Hearings Officer's Decision for Deschutes County File Numbers 247-18-000386-TP / 454-SP / 592-MA is affirmed excepting that Condition 17 is deleted/removed; and
2. The Mitigation Plan mitigation water source, as proposed by Applicant in Deschutes County File Numbers 247-18-000386-TP / 454-SP / 592-MA, is in conformance with the Thornburgh Resort Final Wildlife Mitigation Plan (FWMP); and
3. The no net loss/degradation standard is met/satisfied, if Condition 17 is removed/deleted, by Applicant's Phase A-1 application and the Hearings Officer's Decision for Deschutes County File Numbers Deschutes County File Numbers 247-18-000386-TP / 454-SP / 592-MA.

III. APPEAL

The appellant, Annunziata Gould provide the following statement of reasons for the appeal:

- The hearings officer erred in denying appellant's September 13, 2021 request to reopen the record for the limited purpose of rebuttal, and September 20, 2021 request to respond to a submittal by the applicant's counsel. Under ORS 197.763(6) and (7), appellant was entitled to place the requested rebuttal and response in the record.

The appellant requests the Board hear this matter to review and reverse the Hearings Officer remand decision. The appellant requests a de novo hearing before the Board.

IV. BOARD OPTIONS

There are two versions of Order No. 2021-059 attached to this memo, one to hear the appeal and one to decline to hear the appeal. In determining whether to hear an appeal, the Board may consider only:

1. The record developed before the Hearings Officer;
2. The notice of appeal; and
3. Recommendation of staff¹

In addition, if the Board decides to hear the appeal, it may consider providing time limits for public testimony.

Reasons not to hear:

- The Hearings Officer's decision is reasoned, well written, and could be supported, as the record exists today on appeal to LUBA.
- Statutory remand timelines require a final local decision by November 27, leaving very little time for the Board to sufficiently hear, deliberate, and decide upon the matter.
- The applicant agrees with the Hearings Officer's decision and thus requests that the Board not hear the appeal.

Reasons to hear:

- The Board may want to take testimony and make interpretations relating to the Hearings Officer's decision. The Board may also want to reinforce or refute some or all of the decision findings/interpretations prior to Land Use Board of Appeals (LUBA) review.
- The appellant recommends the Board hear this matter.

If the Board chooses to hear this matter, the appellant requests the hearing be heard de novo. The applicant has not stated whether they would like the hearing before the Board be heard de novo, limited de novo, or on the record. Under DCC 22.32.027(B)(3) the Board may choose to hear a matter de novo at their sole discretion.

If the Board decides that the Hearings Officer's remand decision shall be the final decision of the county, then the Board shall not hear the appeal and the party appealing may continue the appeal as provided by law. The decision on the land use applications becomes final upon the mailing of the Board's decision to decline review.

V. STAFF RECOMMENDATION

Staff recommends the Board not hear this appeal because staff believes that the appellants were able to present all relevant evidence at the hearing before the Hearings Officer. Staff agrees with the Hearings Officer's analysis and decision. Staff also notes that there is not adequate time in the 120-day remand review clock.

¹ Deschutes County Code (DCC) 22.32.035(B) and (D)

VI. 150-DAY LAND USE CLOCK

The 120th day on which the County must take final action on these applications is November 27, 2021.

VII. RECORD

The record for appeal File 247-21-000937-A (247-21-000731-A) is as presented at the following Deschutes County Community Development Department website:

<https://www.deschutes.org/cd/page/247-21-000937-deschutes-county-board-commissioners-decision-whether-hear-appeal>

Attachments:

Document	Item No.
2021-10-20 DRAFT Board Order 2021-059 Accept to Hear	1
2021-10-20 DRAFT Board Order 2021-059 Decline to Hear	2