



MEMORANDUM

TO: Board of County Commissioners

FROM: Caroline House, Senior Planner

DATE: January 4, 2023

RE: Appeals of a Hearings Officer’s denial of a Modification of the Thornburgh Destination Resort’s Fish & Wildlife Management Plan (“FWMP”) (Appeal Nos. 247-22-000984-A and 247-23-000003-A).

On January 11, 2023, the Board of County Commissioners (“Board”) will decide whether to hear two appeals of a Hearings Officer decision (ref. file no. 247-22-000678-MC) for the Thornburgh Destination Resort. As part of this decision, the Hearings Officer denied the Resort’s modification request to the Resort’s FWMP.

I. BACKGROUND

In Deschutes County, all destination resorts are required to develop and implement mitigation plans to demonstrate any negative impact on fish and wildlife resources, associated with a resort’s use, will be mitigated to ensure there is “no net loss” of habitat pursuant to Deschutes County Code (DCC) 18.113.070(D).

For the Thornburgh Resort (“Resort”), the County elected to defer review of DCC 18.113.070(D) to the Final Master Plan (“FMP”) review process. As part of the Resort’s FMP, the Resort developed several mitigation plans, including the following required plans:

1. 2008 Wildlife Mitigation Plan (“WMP”)
2. 2008 Mitigation and Monitoring Plan (“M&M Plan”)
3. 2008 FWMP
4. FMP Condition 39 – Whychus Creek Mitigation

The WMP and M&M Plan are the mitigation plans for impacts to terrestrial wildlife habitat, and the 2008 FWMP and FMP Condition 39 are the mitigation plans for fish habitat. The fish habitat

mitigation plans are required because there is a connection between the Resort's groundwater pumping and groundwater entering rivers and streams, which could have impacts on fish habitat. Given this connection, the Resort's mitigation plans for fish habitat commit the Resort to acquiring additional water rights to offset the impacts associated with the Resort's groundwater pumping on fish habitat. It is important to note the approved fish habitat mitigation plans are in addition to the Resort's water mitigation requirements through the Oregon Water Resources Department ("OWRD").

Lastly, staff notes the Resort's required mitigation requirements were not settled until 2018, more than 10 years after the FMP review process was initiated, due to numerous appeals and several remand proceedings.

II. SUBJECT APPLICATION

In August 2022, the developer of the Resort applied for a Modification to replace the 2008 FWMP with a new FWMP ("2022 FWMP"). As a part of this request, the applicant proposed several water conservation measures by reducing some water intensive amenities, and reducing irrigated landscaping for Resort facilities and individual homes. As a result, the Resort proposes to reduce its total water needs from 2,129 acre-feet ("AF") to 1,460 AF.

A public hearing before a Hearings Officer was held on October 24, 2022. The Hearings Officer denied the Resort's Modification request on December 19, 2022, based on the following two key issues:

1. The Hearings Officer found input on the 2022 FWMP from the Oregon Department of Fish & Wildlife ("ODFW") is a relevant *evidentiary consideration* in determining if the "No Net Loss" standard is met. However, the Resort did not provide ODFW enough time to review the 2022 FWMP and submit a meaningful response.
2. The 2022 FWMP does not contain clear, objective and enforceable compliance language, and for this reason, there can be no assurance that the 2022 FWMP is *likely or reasonably certain to succeed* at achieving the County's "No Net Loss" requirement.

As part of this decision, the Hearings Officer made a number of interpretative decisions that will likely impact future development of the Resort and potentially other land use applications in Deschutes County.

III. APPLICANT'S APPEAL

On December 30, 2022, the Applicant filed an appeal. As part of the Notice of Appeal, the Applicant identifies three appeal issues that the Applicant believes the Hearings Officer made incorrect findings on. The appeal issues are related to:

1. Interpreting the Procedures Ordinance – DCC 18.113.080, DCC 22.36.040, and Thornburgh FMP Condition 1;
2. Review of the “Not Net Loss” Standard; and
3. Requirements for the Published Notice for the Initial Public Hearing

The Applicant requests the Board review the appeal *on the record*.

IV. GOULD APPEAL

On January 3, 2023, Annunziata Gould (“Appellant”) filed an appeal. As part of the Notice of Appeal, the Applicant identified 18 appeal issues that the Hearings Officer made incorrect findings. Gould’s Notice of Appeal is attached. The Appellant requests the Board review the appeal *de novo*.

V. STAFF RECOMMENDATION

Staff recommends the Board hear both appeals *de novo*.

VI. BOARD OPTIONS

First, the Board must decide if it wishes to hear the appeals. In determining whether to hear the appeals, the Board may only consider:

1. The record developed before the Hearings Officer;
2. The notices of appeal; and
3. Recommendation from staff

Option 1: Hear the Appeals:

If the Board decides to hear the appeals, the Board must make a decision on the scope of the review. As noted above, the Applicant and Appellant have filed different requests for the scope of the review. Per the DCC, the Board has two choices for the scope of the review:

1. On the Record
 - This means parties can only present their arguments and the Board must rely on the record developed before the Hearings Officer. No new evidence can be submitted.
2. De Novo
 - This means parties can submit new evidence and present their arguments.

Next, the Board may wish, but is not required, to limit the issues it will consider as part of the Board’s review.

Lastly, the Board may want to establish time limits for testimony at the appeal hearing.

Option 2: Not Hear the Appeals:

If the Board decides the Hearings Officer's decision represents their perspective on this application, the Board should decline to hear the appeals. This results in the Hearings Officer's decision becoming the final decision of the County. Upon the mailing of the Board's decision to decline review, the parties appealing may continue their appeals as provided under the law.

VII. 150-DAY LAND USE CLOCK

The 150th day on which the County must take final action on these applications is March 12, 2023. If the Board decides to hear the appeals there will be 60 days, from January 11, 2023, for the Board to issue a decision.

VIII. RECORD

The record for the subject application and appeals is as presented at the following Deschutes County Community Development Department website:

<https://www.deschutes.org/cd/page/247-22-000678-mc-thornburgh-destination-resort-modification-cmpfmpfwmp>

Attachments:

1. DRAFT Board Order 2023-004 Accepting Review (De Novo)
2. DRAFT Board Order 2023-004 Accepting Review (On the Record)
3. DRAFT Board Order 2023-004 Declining Review
4. Notice of Appeal – Applicant (Appeal No. 247-247-22-000984-A)
5. Notice of Appeal – Gould (Appeal No. 247-23-000003-A)
6. Hearings Officer Decision – 247-22-000678-MC
7. 2022 FWMP