



APPEAL APPLICATION – BOARD OF COUNTY COMMISSIONERS

FEE: \$3,344

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.

Central Land & Cattle Company, LLC, Kameron DeLashmutt, and Pinnacle Utilities, LLC

Appellant's Name (print): Phone: 541-350-8479
Mailing Address: 2477 NW Canyon Drive Redmond, OR 97756
Email Address: Kameron1959@gmail.com

Land Use Application Being Appealed: File No. 247-22-000678-MC

Property Description: Township 15 Range 12 Section 00 Tax Lot See below

Appellant's Signature: Date: 12/30/2022

By signing this application and paying the appeal deposit, the appellant understands and agrees that Deschutes County is collecting a deposit for hearing services, including "whether to hear" proceedings. The appellant will be responsible for the actual costs of these services. 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

December 30, 2022

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Board of County Commissioners
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RE: Notice of Appeal - File No. 247-22-000678-MC
Our File No.: 135849-262760

Chair Adair, Commissioners DeBone and Chang:

Our office represents Central Land & Cattle Company, LLC, Kameron DeLashmutt, and Pinnacle Utilities, LLC (collectively “Applicant”) in File No. 247-22-000-678-MC (the “Application”). This Notice of Appeal letter is being filed with a completed Planning Division notice of appeal form and filing fee in the amount of \$3,344¹ to perfect an appeal of the hearings officer’s decision denying approval of the Application. The Application seeks to modify a discrete aspect of the Thornburgh Destination Resort’s (“Thornburgh” or the “Resort”) final master plan (“FMP”), the 2008 Fish and Wildlife Mitigation Plan (“2008 FWMP”), to accomplish two things:

1. Reduce authorized water use by roughly one third by reducing certain water intensive amenities and agreeing not to build an optional golf course, and
2. Modify the 2008 FWMP to an updated and revised 2022 Fish and Wildlife Mitigation Plan (“2022 FWMP”) that provides better and more systemic benefits to Central Oregon rivers and creeks while also meeting the County’s DCC 18.113.070.D “no net loss or degradation” standard (“NNL Standard”).

For the reasons described below, the Applicant requests that this Board accept this appeal of the hearings officer decision. Applicant also requests that the Board conduct the hearing on the record, as opposed to a *de novo* review process.

¹ The filing fee amount was calculated and provided by email from Senior Planner Caroline House on December 27, 2022.

The hearing below was more than four hours in length. Therefore, Applicant also requests that the Board waive the transcript requirement consistent with DCC 22.32.024.D.

I. REASONS TO CONSIDER APPEAL ON THE RECORD

Applicant requests that the Board review this appeal on the record and not *de novo*. This request is made for several reasons.

First, this Board has heard a number of Thornburgh matters in recent years. Most recently, the Board heard an appeal in 2020 regarding a site plan approval for Thornburgh's required golf course, which the Board approved. That case was affirmed by LUBA and the Court of Appeals and the Supreme Court denied review.

Second, this Board conducted an on the record review of a Thornburgh appeal in 2019 that was comprehensive and efficient. Since that time, the County has issued six additional land use decisions related to Thornburgh that addressed water and mitigation issues. Each of those six land use decisions was affirmed by LUBA and the Court of Appeals. As of the date of this appeal letter, three decisions were also challenged on Petitions for Review to the Supreme Court, which denied review.² The land use process to this point has been extensive. Opponents, primarily Ms. Gould, continue to raise issues that are rejected by LUBA, the Court of Appeals, and the Supreme Court. The opposition is ideological, not legally meritorious. An on the record appeal is warranted given these previous obstructionist appeals.

Third, the record established in this case—so far—is voluminous. For instance, perennial opponent Nunzie Gould and her lawyer Jennifer Bragar made a single record submittal during the post-hearing comment period that was over three thousand pages in length. That submittal included expert testimony and addressed all aspects of the Application. Thornburgh's response was also robust. The Hearings Officer found:

“The Hearings Officer finds that the Applicant's technical evidence was prepared by credentialed experts who provided an *extreme* level of analysis and detail. The Hearings Officer finds opponents [*sic*] expert evidence is not nearly as comprehensive as Applicant's. The Hearings Officer finds opponents [*sic*] expert evidence is less focused on the specific water sources proposed by Applicant and their impacts on fish habitat. The Hearings Officer finds opponents [*sic*] technical

² These decisions include the golf course site plan, overnight lodging unit site plan, modification of overnight lodging unit ratios and bonding requirements, phase A-1 tentative plan, welcome center site plan, and phase A-2 tentative plan. Each of these decisions has been affirmed through the Court of Appeals. The golf course site plan, overnight lodging unit site plan, and modification of overnight lodging unit ratios decisions were denied review by the Supreme Court.

evidence is less credible and persuasive than the technical evidence proved by Applicant.” Emphasis added. Hearings Officer decision, p. 36.

Besides Thornburgh, Applicant’s counsel has litigated multiple cases against Ms. Bragar. In each of those separate cases, Ms. Bragar attempts to “bury the opposing side” with paper. This tactic also results in burying the decision maker in paper, creating a lack of clarity regarding relevant issues, and creating additional administrative burden.³ Given that the record has already been so robustly established, there is no need to submit additional evidence and this Board should hear the appeal on the record as opposed to subjecting itself to wading through an additional 3,000+ page of new submittals.

Fourth, as is outlined in issues for appeal below, the “meat” of the appeal relates primarily to interpretive issues of the County’s procedural code. Although the Hearings Officer ultimately ruled in Thornburgh’s favor, these interpretive issues could create other problems down the line for the County’s other existing destination resorts. As they represent interpretative issues of the County’s procedures ordinance, no new evidence is necessary and legal briefing is sufficient.

Lastly, the amount of attention garnered by each Thornburgh application and process is significant. The Hearings Officer noted that several hundred persons weighed in at or before the hearing, and more than 100 filed additional comments during the open record period. The hearing below was also more than four hours in length. The public has had its say. If it wishes to participate again, it may do so in writing as described in DCC 22.32.030.A.

II. REASONS TO ACCEPT THE APPEAL

Thornburgh is grateful to the Hearings Officer for his consideration of the thousands of pages of documents already in this record. However, the Hearings Officer made a few key errors that led to the denial of the Application. Thornburgh requests that the Board correct those errors.

A. Interpreting the Procedures Ordinance – DCC 18.113.080, DCC 22.36.040, and Thornburgh FMP Condition 1

The Hearings Officer was tasked with the difficult task of interpreting DCC 18.113.080, DCC 22.36.040, and Thornburgh’s FMP Condition 1.⁴ While we agree with the outcome of the Hearings Officer’s interpretation, we believe that the interpretation may be inconsistent and is

³ It’s worth noting that this can create a significant burden for the County staff in preparing the LUBA record. Historically, Ms. Bragar has routinely objected to the record at LUBA as a delay tactic focusing on form over substance without making an honest effort to resolve record issues without filing an objection. In at least one Deschutes County case this has led to LUBA completely dismissing Ms. Bragar’s record objections.

⁴ DCC 18.113.100 is also relevant when determining the procedure to be followed when proposing a modification of a destination resort FWMP and should be considered by this Board.

likely to lead to additional problems in the future – for other destination resorts and not just for Thornburgh.

The Hearings Officer’s finding that “[s]ite plan or preliminary plan approval documents may well be dependent upon the CMP and/or FMP” is inconsistent with DCC 18.113.040(C). DCC 18.113.040(C) requires conformance with the FMP. The Hearings Officer’s finding is also inconsistent with the Board’s holding in DC Document No. 2014-431 (BOCC Loyal Land/Gould decision) that “[t]he FMP *** incorporates all the requirements of the CMP and becomes the guiding approval document for the project pursuant to DCC 18.113.040.B.” These inconsistencies should be addressed and resolved by the Board to eliminate confusion over whether the code or the hearings officer’s decision dictate the scope of review for Resort site plan, subdivision, and FMP modification applications.

Additionally, on page 20, the Hearings Officer found that while DCC 18.113.080 provided a way to modify a conceptual master plan (“CMP”) approval, it does not contain a process to modify a FMP. This finding is inconsistent with numerous County decisions that have viewed DCC 18.113.080 as a relevant approval criterion for modifications of Resort FMPs.⁵ This finding may also create confusion. DCC 22.36.040 provides a modification process for *all land use approvals* unless a more specific provision in the zoning ordinance provides a different process. It has been routinely applied by the County in its review of FMP modification applications. We ask the Board to clearly state that DCC 22.36.040 allows the approval of modifications to FMPs.

Further, although we agree with the Hearings Officer that the applicable law allows Thornburgh to modify the FWMP, we disagree with the required process. At page 20, the Hearings Officer determines that “any decision to change the FMP by changing the FWMP necessarily implicates the CMP.” We disagree. The CMP is only implicated when an element or elements of the CMP are changed that alter the “type, scale, location, phasing or other characteristic of the proposed [Resort] development such that the findings of fact on which the original approval [CMP decision] was based would be materially affected.” In this instance, the CMP *deferred* findings related to creation of a FWMP until the FMP stage. As a result, no findings in the CMP decision are affected by a revised FWMP. The CMP findings require a public hearing prior to approval of the FWMP – a requirement has been met for both the 2008 and 2022 FWMP. The FWMP, also, mitigates for Resort development – it is not a “characteristic” of the Resort development so it cannot be considered a “substantial modification” of the CMP. “Characteristics” are typically defined as “a feature or quality” [of Resort development] and not the mitigation for impacts of such features.

⁵ This includes at least one decision that was issued while this case was pending before the Hearings Officer. Therefore, the County has issued conflicting decisions regarding the same procedural code just within the last few months. This creates a ripe constitutional issue under *Village of Willowbrook v. Olech*, 528 US 562 (2000) (Equal Protection Clause protects individuals from disparate treatment by local government).

Thornburgh also agrees with the Hearings Officer's outcome related to DCC 22.36.040 and FMP Condition 1. However, in an attempt to harmonize DCC 18.113.080, DCC 22.36.040, and FMP Condition 1, the findings made by the Hearings Officer are confusing and hard to follow. We believe the findings can be simplified while still leading to the same outcome and providing better defensive posture for interpretation before LUBA.

Lastly, staff highlighted (as did the Applicant) that the County's destination resort procedure and modification ordinance has been applied unevenly and inconsistently. As such, it is reasonable to request the Board to reconcile and fully and finally interpret these provisions.

B. The NNL Standard

Despite finding that the Application "*potentially*" met the NNL Standard, the Hearings Officer denied Thornburgh's request to reduce water use and provide better mitigation – mitigation that will increase stream flow while reducing stream temperatures. This appears to be because, primarily, the Hearings Officer did not understand two key facts. First, Thornburgh owns the majority of the "mitigation" water needed. Second, Thornburgh is already providing the majority of the benefits proposed by owning and not pumping mitigation/transfer water, far in advance of Resort water use that may impact area rivers and creeks. This appears to have caused confusion over the clear and objective reporting and compliance measures proposed by Thornburgh. The Hearings Officer, at page 40, also raised concerns that existing FMP Condition 38 will be difficult to enforce. This concern may be resolved by simple revisions to clarify the 2022 FWMP enforcement mechanisms or by adding a condition of approval to the FMP to specifically address the issue of compliance with the 2022 FWMP. We believe this can be done in a closed record review by the Board.

The Hearings Officer also correctly found that an agreement with ODFW regarding the proposed mitigation measures was not necessary but failed to make a decision on the merits of ODFW's concerns based on the comprehensive response provided to all ODFW concerns by Thornburgh's experts. This is puzzling given that the Hearings Officer found that Thornburgh "provided a thoughtful response to ODFW comments." Hearings Officer Decision, p. 42. Ultimately, the Hearings Officer faults the applicant for not agreeing to toll the 150-day clock by more than three weeks to provide additional time for ODFW to respond to Thornburgh's expert evidence and finds ODFW "did not have an opportunity to respond to Applicant's *** comments." In fact, all but two of the issues ODFW raised in its November 7 letter were previously raised in its September 28 and October 21 letters and responded to by Applicant in its October 13 response to ODFW and the 15 technical documents providing ODFW extensive detailed analysis. Furthermore, ODFW had an equal opportunity to file its own comments regarding the same issues during the rebuttal period if it had continuing concerns but did not do so. As ODFW stated in its November 7, 2022 letter, Thornburgh began consulting with ODFW in July of 2022, which was before the Application was even submitted. Additional information was provided to ODFW up and until the open record period below was closed. ODFW stated that the proposal had "merit" but failed to provide any additional comments or questions to Thornburgh, presumably because – as the Hearings Officer noted – Thornburgh provided a "thoughtful response." The

Hearings Officer should have made a decision based upon the substantial evidence before him – evidence that he noted provided an “extreme” level of detail.

As noted by the Hearings Officer ODFW approval of the FWMP is not necessary. The NNL Standard is a County standard only. The issues raised by ODFW should have been resolved based on the evidence in the record. Thornburgh provided more than 15 technical reports that the Hearings Officer found to provide an “extreme” level of detail and a “comprehensive response” to ODFW issues. The Hearings Officer determined it was a “close call” – one that is not close when Thornburgh’s expert evidence is properly considered. Thornburgh, therefore, requests that the Board hear this appeal on the record and determine that Thornburgh has met the NNL Standard.

C. Published Notice

At page 10, the Hearings Officer found that notice of the land use hearing was not timely published based on misinterpretation of DCC 22.24.030 and DCC 22.08.070 to require a 21-day notice period rather than the 20-day notice period set by DCC 22.24.030. This interpretation should be corrected to provide clear direction to County staff that 20 days is the correct notice period for published notice of land use hearings.

III. CONCLUSION

For all of the foregoing reasons, we request that the Board accept Thornburgh’s appeal and hold and on the record hearing. This would require legal briefing of issues in the record only, thereby substantially simplifying the Board’ review process and administrative burden.

Very truly yours,

SCHWABE, WILLIAMSON & WYATT, P.C.



Kenneth Katzaroff

Enclosures

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