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JAN 03 2023

Deschutes County CDD
COMMUNITY DEVELOPMENT

247-23-00003-A

APPEAL APPLICATION - BOARD OF COUNTY COMMISSIONERS

FEE: \$3,344.00

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 Road City/State/Zip: Bend, OR 97703
 Email Address: Nunzie@pacifier.com jbragar@tomasilegal.com
 Land Use Application Being Appealed: 247-22-000678-MC
 Property Description: Township 15 Range 12 Section 00 Tax Lot See List on Following Page
 Appellant's Signature: Annunziata O Gould Date: Jan 3, 2023

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

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January 3, 2023

BY HAND DELIVERY

Deschutes County Board of County Commissioners
c/o Caroline House
Deschutes County Community Development Department
117 NW Lafayette Avenue
Bend, OR 97708-6005

Re: Appeal of Hearings Officer's Decision on File Number:
247-22-000678-MC

Dear Chair Adair and Commissioners:

This office represents Annunziata Gould ("Appellant") who lives at 19845 J W Brown Road, Bend, Oregon 97703. This letter is submitted in support of Ms. Gould's appeal application for the above-referenced file and the Hearings Officer Decision dated December 19, 2022 ("Decision"), with mailed notice sent by the County on December 20, 2022. The application submitted by Central Land & Cattle Company, LLC, Kameron DeLashmutt, and Pinnacle Utilities, LLC (collectively, the "Applicant") referenced as County File No. 247-22-00678-MC, and involves the property located at Assessor's Tax Map 15-12-00, Tax Lots 5000, 5001, 5002, 7700, 7701, 7800, a portion of 7801, 7900, and a portion of 8000 ("subject property"). Please include this appeal in the record for the above referenced file.

While the Appellant agrees with the outcome reached by the Hearings Officer that the Applicant cannot meet the no net loss/degradation of fish and wildlife resources under DCC 18.113.070(D), there are additional grounds for denial. The County should clarify that much more work needs to be done in order for the Applicant to obtain approval, if such approval is even possible considering the status of the resort approvals and steps necessary to consider this application to modify the Thornburgh Destination Resort Conceptual Master Plan ("CMP"), Final Master Plan ("FMP"), and the Fish and Wildlife Mitigation Plan ("FWMP") (collectively, the "application").

Appellant requests de novo review by the Board under DCC 22.32.027 because the Hearings Officer's findings about the applicable criteria are inconsistent, inadequate, are not supported by substantial evidence, fail to adequately support a choice among conflicting evidence or where conflicting evidence was weighed, such weight was unreasonable in light of the

competing evidence, and/or involve an incorrect interpretation of the law. The de novo review will allow Appellant an opportunity to confront the mitigation plan, rather than suffer through a piecemeal incomplete submittal. Had the Applicant submitted its full and complete 2022 FWMP with all supporting technical documents in August 2022, the Appellant's course of actions would have been different. But, that failure by the Applicant should not be rewarded with a limited hearing before the Board of County Commissioners. The appeal should be granted to prepare an Order denying the application on these additional grounds:

- A new CMP application is required because the original CMP has not been initiated. The Hearings Officer's findings on this issue are conclusory and unsupported, and misconstrue *Central Land and Cattle Co. v. Deschutes County*, 74 Or LUBA 236 (2016). Appellant correctly analyzed LUBA's holding, and provided her accurate discussion of these matters in the Appellant's November 7, 2022 Open Record Letter. As argued to the Hearings Officer below, all of Appellant's other appeal grounds are in the alternative (i.e. assuming *arguendo*, the CMP has been initiated).
- The Hearings Officer erred in allowing the Applicant to narrowly define and take a piecemeal approach to review of the application by ignoring substantial evidence that the FWMP symbolized, implied, and its approval would otherwise involve significant changes to the approved CMP and FMP.
- A new CMP and a new FMP are required because the application materially affects findings of fact on which the original approvals were based, as summarized in pages 18-28 of the Appellant's November 7, 2022 Open Record Letter,¹ explaining the applicability of DCC 18.113.080, DCC 22.36.040, LUBA's holding in the OLU Modification case, and Condition 1 of the CMP and FMP. Condition 1 in the CMP can only contextually be referencing a new CMP application as it is a standalone condition of the CMP and no other generic application. Similarly, Condition 1 of the FMP can only contextually be referencing a new FMP application as it is a standalone condition of the FMP. Both the CMP in its Condition 37, and the FMP in Condition 38 independently address the FWMP approval process, which is not implicated in Condition 1. Relatedly, staff was correct that all CMP approval criteria must be considered, and the Hearings Officer was incorrect in concluding otherwise.
- The Hearings Officer erred in ruling that no participant identified original findings that would be materially affected. Appellant identified the following such findings:
 - The Applicant possesses no water right to meet DCC 18.113.070(K) and the FWMP cannot be modified without water being available for the resort's consumption.
 - The economic analysis and findings for compliance with DCC 18.113.070(C) would be materially affected. The Hearings Officer also erred in failing to make

¹ Appellant is represented by this office, Jeffrey Kleinman, and Karl Anuta. References to Appellant's letters herein are to this office's submittals unless otherwise indicated.

findings regarding Appellant's arguments about the shortfalls of the economic analysis that would result from the application.

- The Water System Mater Plan and Sewer System Master Plan approved in the CMP and FMP would need to change before water usage impacts could be assessed for a modification of the FWMP. The Hearings Officer erred in failing to make findings analyzing Appellant's substantial evidence, instead relying on whether the Applicant literally proposed changes to its sewage disposal obligations, which the Applicant did not, as part of its piecemeal strategy. Once again Applicant commits its own error in undertaking this backward approach.
- The OWRD process for an approved water right to make water available for resort consumption (or any mitigation) has not been completed and no replacement of the CMP-identified water source has been submitted or approved.
- The Hearings Officer erred in interpreting away the phrase "substantial change" by "harmonizing" the code provisions with the conditions of approval in a way to limit the changes he would consider under the test. The Hearings Officer ignored substantial evidence in the record by narrowly construing the Applicant's ask as simply lowering the amount of annual water use at the resort, and changing the source of FWMP mitigation water. But, it is impossible to change the source of FWMP mitigation water without first knowing where the resort will permanently source its water consumption supply through a completed OWRD review process. That critical question can only be examined through a new CMP that satisfies DCC 18.113.070(K). Characterizing Applicant's 2022 FWMP as a "change in the source of FWMP mitigation water" is an oversimplification of what is really a veiled selection of a new water source. The Applicant seeks to achieve a *fait accompli* to have County approval for a new water consumption supply source through this piecemeal approach. By ignoring this ruse, the Hearings Officer would allow a false mitigation plan to be used later to justify any change in water consumption source without water being available now, and without a full examination of the habitat impacts of use of such new water source.
- In addition, even if the decision were characterized as only amending the FMP, which would be error, the changes proposed here require amendments to the CMP that have not been submitted. See discussion of DCC 18.113.100 in the Appellant's November 7, 2022 Open Record Letter.
- For similar reasons stated in the previous bullet points and all Appellant's other arguments that describe this application as a new proposal, the Hearings Officer erred in concluding that the application is not a substantially new proposal requiring a new application and as such, is prohibited from being processed as a modification under DCC 22.36.040(B). In addition, as set forth herein, the significant additional impacts on surrounding properties also disqualify this application from being processed as a modification under DCC 22.36.040(B). As a result, under DCC 22.36.040(C), the application should be treated as a new proposal and the Hearings Officer erred in reaching a contrary conclusion.

- All of the Hearings Officer's analysis to limit or not consider DCC 22.36.040(C) review based only on the Applicant's characterization of the application "ask" is flawed for all the reasons discussed previously and in Appellant's submittals regarding the failure to analyze the implications of the approval requested without a permanent authorized water supply including, but not limited to understanding where and how wastewater will be handled, and impacts to surrounding property. The Hearings Officer has improperly shifted the burden to Appellant and the public, but even so, Appellant successfully shifted the burden back to show that there is substantial evidence that a new application should be required, and that the new separate applications needed are for a CMP, an FMP, and then an FWMP.
- The Hearings Officer erred in not requiring the proposed FWMP to comply with FMP Condition of Approval 38 that expressly requires removal of certain wells that are now proposed to be used for the resort water system; and in not fully analyzing the impact of additional wells required for use of the proposed but not available water from the water rights summarized in the 2022 FWMP. Further, there is no substantial evidence of the location and use of the wells in connection with the 2022 FWMP, and there is no current Water System Master Plan. Relatedly, the Applicant's proposal would put it out of compliance with CMP Condition of Approval 11.
 - The Applicant's inability to obtain a permanent water supply that includes identification, analysis, and examination of well impacts means that the no net loss standard cannot be fully analyzed, nor can the impact of those wells on surrounding property owners' wells.
- The Applicant's proposed actions in the 2022 FWMP directly conflict with the current FWMP, agreed to by the Oregon Department of Fish and Wildlife ("ODFW"), by making one of the mitigation sources unavailable. The 2022 FWMP is a farce because the Applicant proposes to use the Deep Canyon Creek water directly by way of transfer to the resort for consumption and still pretend that they will mitigate for their groundwater permit consistent with the no net loss/degradation standard. The current FWMP required this very same Deep Canyon Creek water as the source of mitigation for resort's groundwater extraction under its CMP and FMP that rely solely on the groundwater in G-17036. Applicant continues to rely upon Water Rights Permit G-17036 but does not demonstrably provide mitigation water for this approved water source in the CMP and FMP. The Applicant cannot consume the same water at the resort and use it for mitigation for the resort's consumption at the same time. This is yet another reason that a new CMP application, followed by a new FMP application, and a new FWMP application are required.
- The Hearings Officer erred in not requiring the Applicant to reach agreement with the ODFW before submittal of the 2022 FWMP or even during the review process. Notably, the Applicant completely refused to allow extra time that ODFW requested for its continued review of Applicant's materials. Condition 38 expressly requires the Applicant to reach agreement with ODFW regarding mitigation of impacts of its water consumption on anadromous fish habitat and other wildlife. Under Condition 38, Applicant had the

burden to unequivocally establish agreement with ODFW—and the only logical way to do so would be by giving ODFW the full amount of time to review all technical material in advance of the submittal. But, Applicant's approach is to inch forward with piecemeal approvals based on half-baked technical reports submitted during the County's public review process to prevent any party, including ODFW, from fully participating because of Applicant's self-imposed timeline. As a result, the Applicant did not comply with Condition 38 to reach agreement with ODFW.

- The Hearings Officer erred in not requiring the Applicant to obtain BLM's agreement with the 2022 FWMP, a direct conflict with FMP Condition of Approval 38.
- The Hearings Officer erred in too narrowly defining surrounding property under DCC 22.36.040. As Mr. Anuta and multiple people testified on this record, many nearby but nonadjacent property owners have had to deepen wells on their property for drinking and farm uses. In any event, it is impossible to assess impacts to surrounding property because the Applicant failed to submit all its materials in the record or to undertake the necessary assessments to analyze such impacts on any surrounding properties without regard to the scale (missing materials are summarized throughout Appellant's submittals in the record by her counsel and E-PUR).
- Appellant's expert testimony from Mr. John Lambie, PE, Mr. Anuta, and others so undermines the Applicant's expert that no reasonable person could rely on the Applicant's expert testimony to reach the conclusions that the Hearings Officer reached regarding:
 - The record evidence shows it is incontrovertible that there is no water available as required by DCC 18.113.070(K). As extensively discussed by myself, Mr. Anuta, and Mr. Lambie, and as Oregon Water Resources Department ("OWRD") has unequivocally stated, the ground water right identified in the CMP and in the current FWMP is not a viable source of water because it has expired and OWRD has proposed to deny an extension of time to perfect the right.² Absent an extension, even the Applicant admits it cannot pump water under the right.
 - The Hearings Officer erred in concluding the Applicant's commitment to make annual reports to limit pumping of water under the 2022 FWMP is supported, when the Applicant unequivocally made the entire FWMP optional in its application submittal. An optional plan does nothing to ensure the no net loss/degradation standard will be met, let alone that the 2022 FWMP could be deemed reasonably certain of success.
 - The Applicant repeatedly claims that its only source of water is the Deschutes Formation Aquifer, but this is incorrect. Applicant's own materials show that the their water right transfer application under T-14074 would transfer Deep Canyon Creek surface water, rather than groundwater. In addition, the Applicant's proposed

² See OWRD's May 4, 2022 letter included in Appellant's November 7, 2022 Open Record Letter, Attachment 16, pp. 16, and other denials described by Mr. Anuta in Attachment 16.

LeBeau transfer T-13857 would utilize a surface water source, the Little Deschutes River. Moreover, neither of these transfer applications has been (or is likely to be) approved. In reality, none of this water is available to the resort.

- The Applicant claims that the resort could pump winter water from the Dutch Pacific water right (Cert. 89259). However, a transfer of that water right to the resort was already summarily denied.³ Even if a new transfer application were to be filed, and thereafter approved (which is highly unlikely given the prior denial), winter pumping would not be allowed. This water is also unavailable to the resort.
- The Applicant must be required to revise the CMP's Sewer System Master Plan as its piecemeal planning is no longer consistent with the CMP. Specifically, the CMP's Sewer System Master Plan's Tables 1, 2 and 7 for the southern basin where Phase A is located must be brought up to date and this can only occur through a decision by Deschutes County. The County is the only jurisdiction that has authority to comprehensively plan for overall sewage capacity under DCC 18.113.070(L). The Applicant's projected sewage flows in Tables 1 and 2 must be revised to account for the Applicant's increased density of development by equivalent dwelling unit ("EDU"). Table 7 does not account for the Applicant's lost area for sewage dispersal due to elimination of a golf course, and the Applicant does not demonstrate a revised dispersal area with capacity to discharge the projected sewage flow for either Phase A or full development. Based upon the areas for sewage dispersal identified in this record, the Applicant has not committed sufficient area for sewage dispersal consistent with Table 7 and thus the Sewer System Master Plan must be revised. Further, the mode of dispersal needs to be revised. Based on the evidence in this record, the resort does not have enough room in Phase A for a larger sewer treatment area. Current statements by the Applicant indicate that it intends to only use water for drip irrigation and not treatment in lakes, and this must be reflected in the Sewer System Master Plan. Further, the Sewer System Master Plan does not reflect dispersal by irrigation to match the seasonality of such irrigation, and the prohibition to irrigate in winter months. The Sewer System Master Plan must address capacity to handle wastewater in winter months. Nothing submitted so far seeks to amend this portion of the CMP to ensure compliance with DCC 18.113.070(L). The Applicant has not provided any technical evidence of inaccuracies in Mr. Lambie's analysis of the inconsistency of the 2022 FWMP with the CMP's Sewer System Master Plan. Notably, minimally treated effluent cannot be applied as general above-ground irrigation water despite the assertion of the Applicant in its rebuttal and final written argument. Moreover, the burden cannot be shifted to Appellant and the public to disprove the operability of the sewer system and impacts to surrounding properties until the Applicant submits a complete application with a revised Sewer System Master Plan.

³ See Attachment D to Attachment 38 to Appellant's November 7, 2022 Open Record Letter, and Attachment 38's discussion of this water right.

- The Water System Master Plan has to be updated from the 2008 FMP since a reduction in water use is what the Hearings Officer expects to occur. The Applicant's math does not make any sense when it argues that the resort's water use for three golf courses would change from 717 AF to 501 AF for only two golf courses; the Applicant has increased the projected consumption of water per golf course in the application.
 - The water supply requires resiliency, which means that the resort (like any municipality) has a water supply with water available for a minimum of 10 years. This is documented through a Water Management Conservation Plan ("WMCP"). The Applicant's 2022 WMCP admits that the groundwater right (G-17036) that it actually holds is expired and an extension would need to be granted by OWRD for that permit to be used.⁴ The 2022 WMCP also admits that the Applicant has only "applied for" other water rights.⁵ Moreover, Appellant filed a Petition for Reconsideration of the resort 2022 WMCP (the "2022 WMCP under reconsideration"). Notwithstanding this status, the amendment to the FWMP is also inconsistent with the 2022 WMCP under reconsideration. At best the Applicant has pending applications for temporary water transfers that could (perhaps) allow for a *temporary* 5-year water supply with no automatic or available extensions without a new application. This is inadequate to meet the water availability criteria for the CMP, let alone, stand as a basis for the amendment of the FWMP. The Applicant must have a permanent water supply solution. The Hearings Officer erred in failing to make findings as to the Appellant's arguments regarding the water supply resiliency requirements or the FWMP's inconsistency with the 2022 WMCP (or any other WMCP) in the record.
 - Appellant's and the Applicant's experts both agree that almost all of the water rights identified in the 2022 FWMP are going to impact flows in the Crooked River. OWRD has indicated repeatedly in its ground water reviews that such impacts are unacceptable and no new water rights are available in the Crooked River basin. The resort has not established that water is available to serve the resort under DCC 18.113.070(K).
 - The Applicant concedes that it does not have enough acquired water certificates for the proposed consumption in the FWMP, but even the partial amount it has obtained cannot be considered a feasible supply because OWRD recommends denial of so many of the Applicant's proposed transfers of water rights.
- The Hearings Officer erred in failing to make findings regarding Appellant's arguments under DCC 22.20.015.

⁴ See Appellant's November 7, 2022 Open Record Letter, Attachment 16, pp. 9, and 29-61, particularly p. 40 (i.e. Anuta 11-4-22 Exhibit #3, 2022 WMCP p. 16, § 5.02 attached thereto).

⁵ See Appellant's November 7, 2022 Open Record Letter, Attachment 16, p. 9 and 29-61, particularly 45 (i.e. Anuta 11-4-22 Exhibit #3, 2022 WMCP p. 21, § 5.04 attached thereto).

- The Hearings Officer erred in finding that the Applicant is not filing the application in lieu of an appeal. These matters were well briefed and explained in Appellant's November 7, 2022 Open Record Letter, pp. 9-13. While the Oregon Supreme Court has denied review in two of these cases in the site plan for 80 OLU's (322 Or.App. 11, *rev den* S069882) and the modification of the OLU ratio case (322 Or.App. 383, *rev den* S069813), several other cases remain pending Supreme Court Review.
- The Appellant was substantially prejudiced by the Applicant's submittal process and decision to have the application deemed complete without providing all technical support for its proposal until the open record period. The Hearings Officer did not resolve the prejudice by extending the statutory open record period by 14 days, as the County staff did not have the opportunity to review, or to provide a professional opinion about the information submitted to the Hearings Officer (who deemed himself a layperson, and stated he was confused by the Applicant's submittals).
 - One element of the County's Goal 1 Citizen Involvement Plan is stated as follows:

"Technical Information – Assure technical information is available in an understandable form.

 - Clearly written staff reports assure all information is available and comprehensible."

As evident from the Hearings Officer's decision, the application was not provided in a complete manner to assure that technical information was available in an understandable form or allowed staff to prepare a written staff report that assured all information was available and comprehensible. Further, as evidenced in the Appellant's submittals in this record, the County did not comply with Goal 1 of its Comprehensive Plan, including implementation of Policy 1.2.3, because of staff's delay in posting the application materials by 17 days (and what would have been longer if Appellant's counsel had not inquired with County staff).

- The proposed use, operating characteristic, intensity, scale, site layout and other matters criticized by Appellant could not be fully explored, set forth, or summarized since the Applicant did not submit the technical reports associated with the application until the hearing date on October 24, 2022, and beyond. Moreover, Applicant submitted integral correspondence with ODFW during the rebuttal period. thereby improperly foreclosing a public response.
- The Appellant and public continue to be substantially prejudiced by the County's inaccurate Notice of Hearings Officer's Decision and its description of the Applicant's request. The Notice of Hearings Officer's Decision states:

"Amend the Final Master Plan (FMP) for the Thornburgh Destination Resort by amending the Fish and Wildlife Management Plan (FWMP), and imposing

limitations on the scope of development and water use allowed by the Thornburgh Destination Resort."

However, the application materials are clear that the Applicant sought to "Amend Thornburgh Resort CMP/FMP/FWMP." The County's limited notice of decision as only amendment of the FMP and FWMP is a mischaracterization of the application.

Should the Board decide to hear the appeal on the record, then the foregoing appeal grounds should be included in the scope of the review.

Appellant requests a waiver of the transcript requirement, under DCC 22.32.024(D), for efficiency purposes because the entire hearing was recorded. If, however, the parties wish to direct the Board to portions of the hearing, or to transcribe select portions of the hearing related to this application, such direction and/or partial transcripts can be provided as attachments to written argument submitted to this Board. Appellant reserves the right to file further written argument under DCC 22.32.027. Please provide a response as soon as possible regarding the requested waiver of the transcript requirement because, if it is necessary, the Appellant needs enough time to prepare it prior to the Board's hearing.

Finally, Appellant requests a courtesy e-mail to her counsel (jbragar@tomasilegal.com) setting forth the date that the Board of County Commissioners intends to hold a work session on this appeal request.

Enclosed, please find the appeal fee of \$3,334.00 and appeal form. If no appeal is granted to any party, Appellant requests a refund of the appeal fee. Thank you.

Sincerely,



Jennifer M. Bragar

Enclosures

cc: (by e-mail)
client
Carol Macbeth