



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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STAFF REPORT

DATE: December 16, 2015
TO: Board of County Commissioners
FROM: Peter Gutowsky, Planning Manager
RE: Hearings Officer Decision (File No. 247-15-000529-A; M-07-02/MA-08-6) and Orders No. 2015-057 to Hear the Appeal or Decline Review

The Community Development Department received two appeals on December 14, 2015 relating to a Hearings Officer decision denying approval of the Thornburgh Destination Resort Final Master Plan remand (File No. 247-15-000529-A; M-07-02/MA-08-6; Attachment 1). The appellants are:

- Kameron DeLashmutt, Central Land and Cattle Company, LLC, represented by Liz Fancher; and,
- Nunzie Gould, represented by attorney Paul Dewey.

I. Appellants

DeLashmutt, Central Land and Cattle Company, LLC

Kameron DeLashmutt respectfully requests the Board of County Commissioners (Board) hear its appeal on these issues in the following manner (Attachment 2):

1. The mitigation issue of potential impacts of the resort's peak use of water during the summer on Whychus Creek de novo as allowed by Deschutes County Code (DCC) 22.32.027(B)(2). He asks that the Board reopen the record to accept evidence on this issue as allowed by DCC 22.34.040(A) and (C).
2. Review the Hearings Officer's resolution of Nunzie Gould's claims related to the Conceptual Master Plan and to do so based on the record.
3. In the event an appeal is filed by another party on other issues, he requests that they decline review of those issues. The hearings officer accepted and considered evidence on all other issues so a de novo hearing is not needed to gather evidence. If the opponents ask the Board to reopen the record to consider new issues or "changed conditions," he requests that the Board decline to do so.

Gould

Paul Dewey on the other hand, respectfully requests the Board not hear the appeal. However, if the Board decides to do so, he asks that in consideration of de novo review on any Central Land appeal issues, that they also allow such review on their appeal issues (Attachment 3). This recognizes that their substantial rights would be significantly prejudiced without de novo review.

Dewey states the following issues need to be included in the appeal:

1. The Final Master Plan (FMP) remand proceeding should not be allowed to occur given that the underlying conditional use permit expired in 2011.
2. The Hearings Officer erred in suggesting that an August 2011 email from Kameron DeLashmutt ostensibly asked for initiation of the FMP remand.
3. Neither that 2011 email nor the current application for initiation of remand by Central Land satisfied the requirements of DCC 22.08.010(B) or 22.08.020 that the application be complete and be with written authorization of the owners.
4. Appellant Gould was prejudiced by Central Land's filing of an incomplete application and late submittal of its remand argument and materials since she was given inadequate time to respond.
5. Central Land is not the proper applicant of the FMP remand as required by ORS 215.435 and DCC 22.34 as it is not the successor-in-interest to Thornburgh. Thornburgh is also not a proper applicant where it was dissolved four years ago.
6. Regarding the Wildlife Management Plan, the Hearings Officer erred in failing to address our suitability objections to the land and mitigation measures regarding proposed wildlife mitigation, as required by the Court of Appeals, including unsuitability of lands for mitigation due to grazing and motorized use impacts.
7. The Hearings Officer's proposed condition providing that the County may further condition the Applicant after five years to conduct further mitigation recognizes the uncertainty of the currently-proposed mitigation. However, the condition is inadequate, too vague and unenforceable and does not respond to the unsuitability factors. It is not explained how new conditions can be imposed after a decision becomes final.
8. Regarding the adequacy of mitigation for Whychus Creek, we do not believe it is appropriate to reopen the Record or to allow new evidence since the 2008 Record on the issue of mitigation for impacts on Lower Whychus Creek, given LUBA's direction only for "additional findings."
9. If the County reopens the Record and issues on Whychus Creek, then it should also do so on the adequacy of the proposed mitigation on the Deschutes River by the Big Falls Ranch Deep Canyon Creek water.
10. If the Board is going to allow updated or new evidence, then it should also do so on other aspects of the destination resort approval criteria.

II. Background

Central Land and Cattle Co., LLC requested a proceeding on remand of its approval of the Thornburgh Destination Resort Final Master Plan in application M-07-02/MA-08-6. On October 20, at a public hearing, the applicant requested the Hearings Officer:

- Make additional findings that recognize and address the conflict in evidence related to impacts on the lower part of Whychus Creek from Thornburgh's use of groundwater and Thornburgh's proposed Whychus Creek mitigation and to explain why the mitigation water from the Three Sisters Irrigation District will address the hearings officer's concerns that summer water use by the resort could have adverse thermal impacts on Whychus Creek; and
- The Terrestrial Wildlife Mitigation Plan and Off-Site Habitat Mitigation and Monitoring Plan be approved, with the exclusion of those provisions that provide for payments by Thornburgh to the Oregon Department of Fish and Wildlife (ODFW) for mitigation on lands other than BLM lands. The Oregon Court of Appeals and LUBA rejected this method of mitigation as causing the plan to be too uncertain to allow opponents to have an opportunity to confront the plan.

The written record was open until October 30. Parties were afforded a one-week rebuttal period until November 6. On December 2, Hearings Officer Dan Olsen denied the proceeding on remand. His findings and decisions are summarized below:

A. Initiation and Prosecution of Remand

Discussion: Gould objects to this remand proceeding on the grounds that it was not initiated by the proper person or entity and that the August 5, 2011 email was insufficient to initiate a remand.

Finding: The remand was properly initiated and is properly before me for a decision on the record herein. The objection is denied.

B. Initiation of the Conceptual Master Plan

Discussion: Gould argues that this Final Master Plan (FMP) remand may not be initiated because the Concept Master Plan (CMP) on which it is based has "expired" due to not having been timely "initiated".

Finding: The FMP was filed pursuant to a CMP that ultimately was affirmed. Under these circumstances, I conclude that the status of the CMP essentially is irrelevant, at least for purposes of this remand. The objection is denied.

C. Correction of typographical Error in FMP Approval

LUBA identified an apparent typographical error in the FMP approval. Gould V at 464. No objection to this correction has been raised and the correct wording is evident. Accordingly Condition No. 33 of the Hearings Officer decision dated Oct. 6, 2008 is amended to read:

33. The Resort shall, in the first phase, provide for the following: ...

D. At least \$2,000,000 (in 1984 dollars) shall be spent on developed ~~residential~~ recreational facilities.

D. Terrestrial Wildlife Management Plan (TWMP) and Off-Site Habitat Mitigation and Monitoring Plan (M&M Plan).

Discussion: LUBA stated: "We do not know the location of the 4,501 acres that will be restored to provide the required mitigation....Until those 4,501 acres are located we cannot know what kind of habitat those 4,501 acres provide, and we cannot know what the beginning habitat value of those 4,501 acres is...do not know what particular mix of restoration techniques will be provided...do not know that habitat value of those 4,501 acres will be after restoration.

Citing the Court of Appeals' decision in Gould II, LUBA ultimately held that there are "simply too many remaining unknowns in the Terrestrial WMP and M&M Plan to allow petitioner a meaningful chance to confront the adequacy of that plan."

Finding: Based on the foregoing and other materials in the record, I find that the weight of the evidence supports the conclusion that the off-site wildlife mitigation measures to be implemented in the Cline Butte Recreation Area are "likely and reasonably certain to succeed." The most important dispute appears to center on methodology, with opponents wanting a more static or fixed point approach and the applicant, ODFW and BLM favoring the HEP iterative process approach. I agree with the applicant and the agencies, but note that success of that approach is dependent on the parties continuing to perform and to make the adjustments the ongoing process suggests. The plan calls for a re-assessment annually and projects moving to a maintenance mode in year five. There is evidence in the record that some other approved resorts have been less than successful in actually obtaining the wildlife enhancements or mitigation promised. Accordingly, I find the following condition of approval is appropriate:

During the fifth year after commencement of habitat restoration/mitigation activities conducted or funded by applicant on property within the Cline Butte Recreation Area, the applicant shall submit to Deschutes County a report evaluating the habitat mitigation. Within 90 days of receipt of the report, Deschutes County shall conduct a public hearing pursuant to Chapter 22.24 (as amended) for purposes of evaluating whether the habitat mitigation has substantially met the objectives set forth in the Terrestrial Wildlife Management Plan (TWMP) and Off-Site Habitat Mitigation and Monitoring Plan, including providing the quantity and quality of HUA's proposed. If not, the County may further condition the applicant to conduct or fund further habitat restoration/mitigation efforts as reasonably necessary to address any substantial nonconformance with the approved plans.

E. Impacts to Whychus Creek

Record: The distinction between 'Hearings Body' and 'Board' in the DCC is clear. One may argue that whether the DCC should preclude the hearings officer from receiving new evidence if it is thought appropriate, particularly in light of the 90 day period in which to act on remand. But my role is to apply the DCC as written, accordingly, my analysis will be based solely on the evidence in the record on appeal, and argument at the hearing related to that evidence. All new evidence relating to the impact of the mitigation, and to changed conditions, is excluded.¹

Discussion: It appears to me that the applicant seeks to expand the scope of the remand to include the beneficial impacts of increased flow on the upper reaches of Whychus Creek. There are numerous references in the record to the need to improve flows in Whychus Creek for fish habitat. My reading of the finding, and LUBA's remand, is that I am to consider whether the additional water will mitigate the impact of the .01dC temperature increase on lower Whychus Creek, i.e. from the point that the Alder Springs water enters to its mouth.

The only expert testimony/opinion directly addressing this issue I could find in the LUBA record is the August 27, 2008 analysis by Yinger. LUBA Rec. at 312-14. He concludes that it will not mitigate the thermal impact as it replaces cold groundwater with "warm" water from upstream. (My quotation marks). He asserts, and I think the record supports the conclusion that the cold groundwater discharge at Alder Springs is, at least to a fair extent, the "defining and essential factor" for fish – probably especially bull trout. He predicts a temperature increase of .12 d C "at Alder Springs". It is not clear whether this projected increase translates into warmer temperatures further down Whychus Creek but presumably that is his conclusion.

The applicant contends that one must assume that the Yinger analysis started with an assumption of 26.7 degrees, using his mass balance equation, to arrive at the impact he suggests. Fancher remand memo at fn. 15. The applicant concludes that the water temperature that is being added to the creek starts out at below 14 degrees and this is not hot water. The latter statement is true but since we do not know the temperature where it meets Alder Springs, it does not adequately address whether the .1Cd found to be problematic will be increased or decreased.

Finding: The bottom line is that the offer to increase flows in Whychus Creek was made too late, with too little evidentiary basis in light of Yinger's, admittedly cursory, contrary opinion. What is needed to solve this dilemma is the new evidence submitted at the hearing addressing the temperature of the 106cfs added flow when it reaches the Alder Springs area and its resultant impact on lower Whychus Creek. Also needed, and not

¹ DCC 22.34.040 d. 'Scope of Proceeding' provides:

A. On remand the Hearings Body shall review those issues that LUBA or the Court of Appeals required to be addressed. In addition, the Board shall have the discretion to reopen the record in instances in which it deems it to be appropriate....

C. If additional testimony is required to comply with the remand, parties may raise new, unresolved issues that relate to new evidence directed toward the issue on remand. Other issues that were resolved by the LUBA on appeal or that were not appealed shall be deemed to be waived and may not be reopened.

submitted, is evidence dealing with what, if any impact, this has on refugia or perhaps that the refugia would not be needed or needed as much.

Ultimately, given the constraints imposed by the LUBA remand and the DCC, I conclude that there is insufficient evidence in the record to conclude that the 106 cfs of added water to Whychus Creek offsets the .01dC and the possible impacts on refugia. For that reason, the application on remand must be denied.

III. 150-day Issuance of a Final Local Decision

The 150-day period for issuance of a final local decision for both applications under DCC 22.28.015 expires on December 24, 2015. The applicant has offered to toll the 150-day clock for an additional sixty days. The deadline for a final decision is February 22, 2016.

Below is a tentative schedule if the Board chooses to hear the appeals:

January 6	Work session
January 11	Public hearing
January 18	Written record period closes
January 25	Rebuttal period closes
February 1	Deliberation
February 8	Final Decision

IV. Board Options

Attachment 4 contains four versions of Order No. 2015-057. In determining whether to hear an appeal, the Board may consider only:

1. The record developed before the Hearings Officer;
2. The notices of appeal; and
3. Recommendations of staff (DCC 22.32.035(B) and (D)).

Reasons to hear:

- The Board may want to take testimony and make interpretative issues relating to the Thornburgh Final Master Plan. The Land Use Board of Appeals (LUBA) will be obligated to defer to the Board's interpretation if they are at least plausible. The Board may want to reinforce or refute some or all of the Hearing Officer's findings/interpretations prior to LUBA review.

Reasons not to hear:

- The Hearings Officer decision is reasoned, well written and could be supported as the record exists today on appeal.
- Both appellants may challenge the Hearings Officer's decision at LUBA.

If the Board decides that the Hearings Officer's decision shall be the final decision of the County, the appellants may continue the appeal as provided by law. The decision on the land use application becomes final upon the mailing of the Board's decision to decline review (DCC 22.32.035(B)).

Attachments

1. Hearing Officer's decision for File No. 247-15-000529-A; M-07-02/MA-08-6
2. Notice of Intent to Appeal - 247-15-000663-A (DeLashmutt)
3. Notice of Intent to Appeal – 247-15-000664-A (Gould)
4. Order No. 2015-057 (4 versions)

REVIEWED

LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Declining Review of Hearings Officer's
Decisions in File No. 247-15-000529-A

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ORDER NO. 2015-057

WHEREAS, Kameron DeLashmutt (Liz Fancher) and Paul Dewey separately appealed the Deschutes County Hearings Officer's Decision on Application No. 247-15-000529-A; and

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners ("Board") discretion on whether to hear appeals of Hearings Officer's decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. That it will not hear on appeal 247-15-000663-A and 247-000664-A pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. Pursuant to DCC 22.32.015, there shall be a refund of each appeal in the amount of \$2,720.

Dated this _____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DEBONE, Chair

ALAN UNGER, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner

REVIEWED

LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Accepting Review of Hearings Officer's
Decisions in File No. 247-15-000529-A

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ORDER NO. 2015-057

WHEREAS, Kameron DeLashmutt (Liz Fancher) and Paul Dewey separately appealed the Deschutes County Hearings Officer's Decision on Application Nos. 247-15-000529-A; and

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners ("Board") discretion on whether to hear appeals of Hearings Officer's decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. The Board will hear on appeal 247-15-000663-A and 247-000664-A pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. The two appeals shall be consolidated into a single proceeding.

Section 3. The two appeals shall be heard limited *de novo*, consistent with the Hearings Officer decision to correct findings regarding evidence to Whychus Creek mitigation and adequacy of the Terrestrial Wildlife Mitigation Plan and Off-site Habitat Mitigation and Monitoring Plan.

Section 4. Staff shall set a hearing date and cause notice to be given to persons or parties entitled to notice pursuant to DCC 22.32.030.

Dated this _____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DEBONE, Chair

ALAN UNGER, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner

REVIEWED

LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Accepting Review of Hearings Officer's
Decisions in File No. 247-15-000529-A

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ORDER NO. 2015-057

WHEREAS, Kameron DeLashmutt (Liz Fancher) and Paul Dewey separately appealed the Deschutes County Hearings Officer's Decision on Application Nos. 247-15-000529-A; and

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners ("Board") discretion on whether to hear appeals of Hearings Officer's decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. The Board will hear DeLashmutt's appeal, 247-15-000663-A pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. The appeal shall be heard limited *de novo and on the record*, consistent with DeLashmutt's notice of appeal identifying two issues.

Section 3. Staff shall set a hearing date and cause notice to be given to persons or parties entitled to notice pursuant to DCC 22.32.030.

Dated this _____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DEBONE, Chair

ALAN UNGER, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner

REVIEWED

LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Accepting Review of Hearings Officer's
Decisions in File No. 247-15-000529-A

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ORDER NO. 2015-057

WHEREAS, Kameron DeLashmutt (Liz Fancher) and Paul Dewey separately appealed the Deschutes County Hearings Officer's Decision on Application Nos. 247-15-000529-A; and

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners ("Board") discretion on whether to hear appeals of Hearings Officer's decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. The Board will hear Dewey's appeal, 247-000664-A pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. The appeal shall be heard *de novo*, consistent with Dewey's notice of appeal identifying ten issues.

Section 3. Staff shall set a hearing date and cause notice to be given to persons or parties entitled to notice pursuant to DCC 22.32.030.

Dated this _____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DEBONE, Chair

ALAN UNGER, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner