Pursuant to ORS 192.640, this agenda includes a list of the principal subjects anticipated to be addressed at the meeting. This notice does not limit the ability of the Board to address additional subjects. Meetings are subject to cancellation without notice. This meeting is open to the public and interested citizens are invited to attend.

Work Sessions allow the Board to discuss items in a less formal setting. Citizen comment is not allowed, although it may be permitted at the Board’s discretion. If allowed, citizen comments regarding matters that are or have been the subject of a public hearing process will NOT be included in the official record of that hearing. Work Sessions are not normally video or audio recorded, but written minutes are taken for the record.

CALL TO ORDER

ACTION ITEMS

1. Veterans' Service Office - Increased State Funding - Erik Kropp, Deputy County Administrator

2. Discussion and Consideration of Commenting on Nomination of the Central Oregon Canal for National Register of Historic Places - Matthew Martin, Senior Planner

3. Thornburgh Resort / Remand Proceedings / Order - Peter Gutowsky, Planning Manager

4. Possible Marijuana Production Appeal - Cynthia Smidt

EXECUTIVE SESSION

5. Executive Session under ORS 192.660 (2) (e) Real Property Negotiations

At any time during the meeting, an executive session could be called to address issues relating to ORS 192.660(2)(e), real property negotiations; ORS 192.660(2)(h), litigation; ORS 192.660(2)(d), labor negotiations; ORS 192.660(2)(b), personnel issues; or other executive session categories.

Executive sessions are closed to the public; however, with few exceptions and under specific guidelines, are open to the media.
OTHER ITEMS

These can be any items not included on the agenda that the Commissioners wish to discuss as part of the meeting, pursuant to ORS 192.640.

ADJOURN

Deschutes County encourages persons with disabilities to participate in all programs and activities. To request this information in an alternate format please call (541) 617-4747.

FUTURE MEETINGS:

Additional meeting dates available at www.deschutes.org/meetingcalendar

(Please note: Meeting dates and times are subject to change. All meetings take place in the Board of Commissioners’ meeting rooms at 1300 NW Wall St., Bend, unless otherwise indicated. If you have questions regarding a meeting, please call 388-6572.)
AGENDA REQUEST & STAFF REPORT

For Board of Commissioners Work Session of October 4, 2017

DATE: September 19, 2017

FROM: Peter Gutowsky, Community Development, 541-385-1709

TITLE OF AGENDA ITEM:
Thornburgh Resort / Remand Proceedings / Order

RECOMMENDATION & ACTION REQUESTED:
Staff respectfully requests the Board of County Commissioners issue Order 2017-036 to allow a Hearings Officer to receive additional testimony required to comply with a LUBA remand pertaining to Thornburgh Destination Resort and their Final Master Plan (FMP). Staff understands that the remand issue associated with Lower Whychus Creek is the last unresolved item pertaining to the FMP.

ATTENDANCE: Peter Gutowsky, AICP, Planning Manager

SUMMARY: Thornburgh Resort initiated a Land Use Board of Appeals (LUBA) remand.
Memorandum

TO: Deschutes County Board of Commissioners
FROM: Peter Gutowsky, AICP, Planning Manager
DATE: September 19, 2017
SUBJECT: Thornburgh Resort / LUBA Remand / Remand Proceedings / Order 2017-036

I. REQUEST

On September 18, 2017, Thornburgh Resort initiated a Land Use Board of Appeals (LUBA) remand (file no. 247-17-000761-A). Staff respectfully requests the Board of County Commissioners (Board) issue Order 2017-036 to allow a Hearings Officer to receive additional testimony required to comply with a LUBA remand pertaining to Thornburgh Destination Resort and their Final Master Plan (FMP). Staff understands that the remand issue associated with Lower Whychus Creek, discussed in detail below, is the last unresolved item pertaining to the FMP.

Deschutes County Code (DCC) 22.34.040, Proceedings on Remand, grants the Board discretion on remand to:

- Reopen the record in instances in which it deems to be appropriate;
- Enable a remanded application for a land use permit to be modified to address issues involved in the remand to the extent that such modifications would not substantially alter the proposal and would not have a significantly greater impact on surrounding neighbors; and,
- Allow parties to raise new, unresolved issues that relate to new evidence directed toward the issue on remand if additional testimony is required to comply with it.¹

II. LUBA REMAND

On December 2, 2015, a Hearings Officer denied approval of the Thornburgh Destination Resort FMP, concluding that there is insufficient evidence in the record to conclude that the 106 cubic feet per second (cfs) of added water to Whychus Creek offsets the .01dC temperature change associated with groundwater pumping and the possible impacts on refugia. The Board declined to exercise discretionary review and Thornburgh Resort appealed to LUBA. LUBA issued a

¹ DCC 22.34.040, https://weblink.deschutes.org/public/0/doc/4133/Page1.aspx
remand on September 23, 2016 for a Hearings Officer's failure to consider relevant evidence in the Gould FMP record, misunderstanding the question to be resolved on remand, and refusing to consider new evidence. Specifically,

- The Hearings Officer needs to consider any evidence from the Gould FMP record that is called to his attention if it is relevant to the Whychus Creek remand issue.²

- The Hearings Officer needs to consider new evidence to the extent it was relevant to his inquiry regarding Lower Whychus Creek on remand.³

- The Hearings Officer failed to resolve the inconsistent positions by opponents' expert Yinger and the applicant's expert TetraTech. The Hearings Officer must provide a better explanation for why he found Tetra Tech's testimony unpersuasive. TetraTech took the position that even though the mitigation water may be slightly warmer than the lost spring flow at Alder Springs, the mitigation water is still cool water and would reduce Yinger's projected thermal impacts.

- The issue is limited to whether the increased water usage of the resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 106 acre-feet of additional in-stream flow.

Cross-Petition

On cross-petition for review before LUBA, Gould also asserted five cross-assignments of error and one single contingent cross-assignment of error. LUBA, and ultimately the Oregon Court of Appeals and Oregon Supreme Court rejected all of them.

1. Cross Assignment of Error – FMP Remand Proceedings should not have been initiated because the Conceptual Master Plan (CMP) approval has expired.

   Decision: All requirements of the Conceptual Master Plan (CMP) approval are now requirements of the county's FMP approval. The FMP approval has effectively incorporated and displaced the CMP approval. The error is denied.

2. Cross Assignment of Error – Petitioner DeLashmutt does not have standing to appeal to LUBA.

   Decision: DeLashmutt made the required personal appearance to have standing to appeal to LUBA. The error is denied.


³ Ibid. Page 26, line 15-18. "We conclude that the second hearings officer erred in concluding that LUBA's remand did not require that he consider new evidence to the extent it was relevant to his inquiry regarding Lower Whychus Creek on remand."
3. Cross Assignment of Error – Thornburgh did not initiate the remand proceedings.

Decision: DeLashmutt’s request was sufficient to initiate the remand proceedings. The error is denied.

4. Cross Assignment of Error – Central Land and Cattle Company (CLCC) is not a property party to initiate or pursue the FMP remand.

Decision: CLCC is entitled to pursue this matter on remand from LUBA as the successor in interest to the FMP applicant Thornburgh Resort. The error is denied.


Decision: Findings supported by substantial evidence and the arguments advanced in the fifth cross-assignment of error provide no basis for remand. The error is denied.


Decision: A change in ownership is not a change in the “approved plan.” Gould identifies no changes in the “approved” plan. The error is denied.

III. BACKGROUND

Land History

The Thornburgh Destination Resort has a long history. The conceptual master plan (CMP) application submitted by Thornburgh Resort Company, LLC (TRC) was denied by the Deschutes County Hearings Officer in a decision dated November 9, 2005 (CU-05-20). The Board initiated a review of the denial. That decision was also appealed by Nunzie Gould (hereafter Gould) and Steve Munson (Munson) to the Deschutes County Board of Commissioners (Board). (A-05-16). By a decision dated May 10, 2006, the Board approved the CMP. Gould and Munson appealed the Board’s decision to the Land Use Board of Appeals (“LUBA”). (Nos. 2006-100 and 101). LUBA remanded the Board’s decision on May 14, 2007. Gould v. Deschutes County, 54 Or LUBA 2005 (2007). Opponent and Munson appealed LUBA’s decision to the Court of Appeals seeking a broader remand scope. (A135856). On November 7, 2007, the Court of Appeals reversed and remanded LUBA’s decision. Gould v. Deschutes County, 216 Or App 150, 171 P3d 1017 (2007). The result of this decision was that the Board’s decision in CU-05-20 approving the CMP was remanded to the county for further proceedings.

Based on the Board’s April 15, 2009 decision approving the CMP for the Thornburgh Destination Resort, TRC submitted an amended application for approval of the final master plan (FMP) on April 21, 2008 (M-07/MA-08-6). By a decision dated October 8, 2008, the Hearings Officer approved the FMP. Gould and Munson appealed to the Board, who declined to hear it. Gould and Munson then appealed that decision to LUBA (No. 2008-203). On September 9, 2009 LUBA remanded the County’s decision for further proceedings. Gould v. Deschutes County, 59 Or LUBA 435 (2009). TRC appealed LUBA’s decision to the Court of Appeals (A143430). On February 24, 2010 the Court of Appeals affirmed LUBA’s decision. Gould v. Deschutes County, 233 Or App 623, 227 P3d 759 (2010). LUBA issued its notice of appellate judgment on August 17, 2010 remanding the County’s decision. On August 15, 2011, the review on remand of the FMP was initiated by TRC.

On November 1, 2011, Loyal Land Company sought a declaratory ruling that the April 15, 2008 CMP had been timely initiated. The hearings officer found the CMP was timely initiated. The Board declined to exercise discretionary review and the opponent appealed to LUBA. On appeal, LUBA remanded that decision (LUBA No 2012-042, January 8, 2013). LUBA’s decision was affirmed by the Court of Appeals, without opinion. Gould v. Deschutes County, 256 Or App 520, 301 P3d 978 (2013). On remand, the hearings officer found the CMP was not timely initiated. TRC appealed the hearings officer’s decision to the Board, which issued a declaratory ruling that the April 15, 2008 CMP decision was “initiated” before the two-year deadline for doing so expired. Gould appealed the decision to LUBA. On appeal, LUBA remanded the declaratory ruling of the Board that a CMP for destination had been “initiated” within the county code’s time limitations. (LUBA No 2015-080, January 30, 2015). Gould appealed to the Court of Appeals, contending that LUBA erred by deferring to the county’s implausible interpretation of a code provision that addressed whether a CMP had been “initiated.” The Court reversed and remanded stating that the express language of the county code requires Defendant substantially exercise the permit conditions as a whole, and any failure to initiate development by fully complying with the conditions should not be the fault of the applicant, a determination of which must be based on more than just the complexity of the process. The Court also held that the County could not interpret the county code contrary to a prior LUBA order in this same litigation, as the lower tribunal was bound to follow the appellate court’s ruling. (A158835).

On September 25, 2015, Central Land and Cattle Company, LLC asked Deschutes County to conduct proceeding on remand of its approval of the Thornburgh Destination Resort Final Master Plan in application 247-15-000529-A; M-07-2; MA-08-6. The hearings officer denied approval of the Thornburgh Destination Resort Final Master Plan. The Board declined to exercise discretionary review and Central Land and Cattle Company, LLC appealed to LUBA. On appeal, LUBA remanded that decision (LUBA No 2015-107, September 23, 2016). It also determined that the FMP approval effectively incorporates and displaces the CMP approval. Gould appealed to the Court of Appeals. LUBA’s decision was affirmed by the Court of Appeals, without opinion. Central Land and Cattle Company, LLC et al v. Deschutes County and Gould, 283 Or App 286, A163359, (2016). Gould appealed to the Oregon Supreme Court. The Court of Appeals decision was affirmed by the Oregon Supreme Court, without opinion (S064684, 2017).

Attachment
Order 2017-036
BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Allowing a Hearings Officer to Consider New Evidence Relevant to LUBA No. 2015-107 and File No. 247-17-000761-A

ORDER NO. 2017-036

WHEREAS, the Land Use Board of Appeals ("LUBA") issued a final opinion and order, LUBA No. 2015-017, remanding Thornburgh Destination Resort ("Thornburgh") Final Master Plan ("FMP"); and

WHEREAS, LUBA issued a remand for a Hearings Officer's failure to consider relevant evidence in the original FMP record, misunderstanding the question to be resolved on remand, and refusing to consider new evidence related to Lower Whychus Creek; and

WHEREAS, Kameron DeLashmutt, the applicant, initiated the LUBA remand in File No. 247-17-000761-A; and

WHEREAS, Section 22.34.040(A) of the Deschutes County Code allows the Board of County Commissioners ("Board") discretion to reopen the record in instances in which it deems to be appropriate; and

WHEREAS, LUBA has directed the County to answer the following question on remand: "[W]hether the increased water usage of Thornburgh Resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 106-acre feet of additional in-stream flow." Central Land and Cattle Co. v. Deschutes County, ___ Or LUBA ___ (LUBA No. 2015-107, 9/23/2016) at lines 4-8, page 23 of LUBA’s slip opinion.

WHEREAS, the Board wishes to allow the parties to present new evidence related to question on remand set out above; now, therefore,

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

Section 1. The Board hereby reopens the record of the Thornburgh FMP application to allow parties to submit and its hearings officer to consider new evidence related to the issue whether the increased water usage of Thornburgh Resort during the summer months will result in a violation of the no net loss/degradation standard in Lower Whychus Creek below Alder Springs, or be fully mitigated by the 106 acre-feet of additional in-stream flow.

Section 2. The hearings officer on remand shall not accept evidence on any other issues unless allowed by DCC 22.34.040(C).
Dated this _____ of ________, 2017

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

TAMMY BANEY, Chair

ATTEST:

ANTHONY DEBONE, Vice Chair

Recording Secretary

PHILIP G. HENDERSON, Commissioner