

ANNUNZIATA GOULD,

Petitioner,

v.

DESCHUTES COUNTY,

Respondent,

and

THORNBURGH RESORT COMPANY, LLC,

Intervenor-Respondent.

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THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

1955

RESEARCH REPORT

BY

JOHN D. COOPER

AND

ROBERT L. BAKER

Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy

Department of Chemistry

University of Chicago

Chicago, Illinois

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I. STANDING OF PETITIONER GOULD

Petitioner Annunziata Gould (hereinafter "Petitioner Gould") appeared personally and in writing before Respondent Deschutes County during the proceedings leading to the challenged decision. Petitioner Gould has filed a timely Notice of Intent to Appeal pursuant to ORS 197.830 and, thus, has standing to appeal pursuant to ORS 197.830(2).

II. STATEMENT OF THE CASE

A. NATURE OF THE LAND USE DECISION

The appealed decision of the County involves a Final Master Plan application for a destination resort. The County's quasi-judicial decision approving this proposed development is a final land use decision subject to review by the Land Use Board of Appeals ("LUBA"). The Decision adopted by the Hearings Officer for Deschutes County on October 8, 2008, approving the development is found at Record ("Rec.") 11, and is attached this Petition for Review at Appendix ("App.") 2. The Decision of the Board of County Commissioners refusing to hear an appeal of the Hearings Officer's Decision is found at Rec. 3 and App. 1. Relevant portions of the Deschutes County Code are found at App. 32. A map and other excerpts from the Record are attached beginning at App. 45.

B. RELIEF SOUGHT

Petitioner Gould respectfully requests that LUBA reverse or remand the County's Decision.

C. SUMMARY OF ARGUMENTS

The central focus of the Hearings Officer's determinations on the Thornburgh Destination Resort FMP was on the County Code criteria requiring that any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.

The Hearings Officer erred in her interpretation of the Code standards, her failure to provide mitigation for water quality impacts to Whychus Creek, the lack of adequate findings and conditions of approval to ensure compliance with these Code standards and the failure to address critical issues raised by the Petitioner.

Despite the special terms in the Code, such as "any negative impact," "completely mitigated," "no net loss or net degradation" and "the resource," the Hearings Officer in her interpretation of the Code gave them essentially no meaning and failed to even address some of them. This is despite the requirement that a jurisdiction provide an interpretation of its Code provisions and despite the fact that the Court of Appeals had already taken recognition of the use of these special terms in the Deschutes County Code.

The Hearings Officer improperly interpreted the Code as allowing mitigation for species and habitat other than those impacted though the Code requires mitigation for "the resource," as allowing mitigation results of less than a 1:1 ratio though the standard requires that impacts be "completely" mitigated, as being limited to habitat though the broader term "resources" is used and as allowing financial contributions to agencies and studies rather than on-the-ground or in-the-water mitigation.

The Hearings Officer did find that the Applicant's proposed development would impact water quality in Whychus Creek, a tributary to the Deschutes River which provides critical habitat for Endangered Species Act-listed bull trout and other sensitive species. The groundwater withdrawals by the resort's wells would affect groundwater-fed cold springs.

However, the Hearings Officer nevertheless found compliance with the Code standard by requiring a condition that funding be contributed toward 106-acre feet of water from an irrigation district being added to Whychus Creek. This decision should be reversed where the 106-acre feet was proposed for water quantity mitigation, the additional water would actually warm the Creek and no actual water quality mitigation was even proposed for this water quality problem.

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The Hearings Officer also did not make adequate findings and conditions of approval to ensure compliance with the County's fish and wildlife standards. The wildlife resource mitigation findings and conditions are inadequate where they do not require to be done what was identified in the findings as a basis for approval of feasibility, it is still not clear where the off-site mitigation will occur, they fail to identify exactly what plans and documents they rely upon, what plans are referenced contain inconsistent provisions, suggested "agreements" with the BLM and ODFW are not identified, no condition requires future compliance in perpetuity though ODFW specifies that condition, and no ultimate determination is to be made by the County on the adequacy of the plan once it is decided upon. The public is again denied the right to comment on the wildlife plan since its details and location are still not known.

Likewise, the fish resources conditions of approval are inadequate. The Applicant's mitigation plans are not identified or even required to be done, no Whychus Creek mitigation for stream temperatures is required, actual mitigation from Big Falls Ranch water is not required and no condition requires mitigation to be done with Central Oregon Irrigation District water. The Hearings Officer also failed to make actual findings that the Code's fish mitigation requirements are actually satisfied.

The Hearings Officer further erred in failing to address specific issues raised by the Petitioner regarding inadequacies of fish resource mitigation. The Hearings Officer did not address the Petitioner's arguments and evidence that the Applicant's groundwater consumption would be greater than predicted because sewer water was not going to be returned to the aquifer, that specific mitigation was needed for impacts to cool habitat patches, that COID water would not likely be available for mitigation where the irrigated lands are unlikely to be included within the Bend UGB expansion and that adding irrigation district water to Whychus Creek would actually increase water temperatures.

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Though the Code requires that the Applicant provide specific information regarding its proposal in its master plan, and though LUBA in an earlier case allowed the Applicant to defer providing specifics of its proposal from the CMP to the FMP, the Hearings Officer improperly failed to require that the Applicant identify the places to be managed as natural areas, specification of recreation facilities, the proposed uses of all buildings and all proposed commercial uses.

On a related issue, the Hearings Officer also failed to require compliance with the County Code criteria on the amount of expenditure for recreational facilities, changing the expenditure to "residential" purposes.

Finally, the Hearings Officer erred in considering the criteria of DCC 18.113.070(D in the context of the FMP where it had never been addressed as part of the CMP. This is directly contrary to the County's Code requirements for what must be addressed within the CMP.

1. First Assignment of Error.

The Hearings Officer erred in failing to correctly or adequately interpret the County's standard for fish and wildlife mitigation.

2. Second Assignment of Error.

The Hearings Officer's approval of the FMP should be reversed where she found that the DCC 18.113.070(D) standard would be violated without mitigation for water quality impacts on Whychus Creek and where no mitigation to correct the water quality violation was provided.

3. Third Assignment of Error.

The Hearings Officer's findings and conditions of approval do not ensure compliance with the County standards of DCC 18.113.070(D).

4. Fourth Assignment of Error.

The Hearings Officer failed to adequately address specific issues raised by Petitioner on inadequacies of fish resource mitigation.

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5. Fifth Assignment of Error.

The Hearings Officer erred in failing to require the Applicant to provide specific information on the proposed development as required by the Code.

6. Sixth Assignment of Error.

The Hearings Officer failed to require compliance with the statutory standard of providing \$7 million for recreational facilities.

7. Seventh Assignment of Error.

The Hearings Officer erred in considering the fish and wildlife standards as part of the final master plan without first doing so under the CMP and having a final CMP decision.

D. SUMMARY OF MATERIAL FACTS

1. The Subject Property and Proposed Development.

A description of the property and proposed destination resort is provided in the earlier LUBA decision of *Gould v Deschutes County*, 54 Or LUBA 205, 208-209, *rev'd in part and remanded*, 216 Or App 156, 171 P3d 1017 (2007):

"The subject property consists of about 1,970 acres of land and is located in Central Oregon east of Sisters, north of Tumalo and Bend and west of Redmond....The property is on the west and south flanks of Cline Buttes, a prominent geologic feature of the area....BLM lands adjoin the property on all sides except on the very north where there is private property....The developer proposes building a total of 1,425 dwelling units. There would be 1,375 single residential units with 950 of them as single-family dwellings and 425 of them as...residential units [that are] available for use as overnight accommodations. Additionally, there would be 50 hotel units."

2. Procedural History.

Petitioner Gould appealed the County's approval of the Conceptual Master Plan for this proposed destination resort. LUBA remanded the portions of the County's decision in *Gould v Deschutes County*, 54 Or LUBA 205 (2007) (*Gould I*). Petitioner Gould appealed portions of the LUBA decision to the Oregon Court of Appeals which reversed in part and remanded *Gould I*

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regarding the issue of compliance with the County's fish and wildlife mitigation standards.

Gould v Deschutes County, 216 Or App 156, 171 P3d 1017 (2007) (*Gould II*).

The County subsequently adopted findings in a decision in response to the remand of the Conceptual Master Plan. That County decision was appealed by Petitioner Gould and the decision was upheld by LUBA in *Gould v Deschutes County*, ____ Or LUBA ____ (2008), *aff'd*, 227 Or App 601, *recon denied*, ____ Or App ____ (2009).

At the same time as consideration and appeal of the Conceptual Master Plan, the Applicant applied for Final Master Plan approval which was granted by the Hearings Officer on October 8, 2008, (Rec. 11, App. 2) and on which the County Board declined review on October 20, 2008 (Rec. 3, App. 1).

III. LUBA'S JURISDICTION

The challenged land use decision is a statutory land use decision because it concerns a final master plan application for a destination resort. ORS 197.015(10)(a)(A)(iii). In addition to meeting the statutory definition of "land use decision," the application also qualifies as a land use decision under the "significant impact test" of *City of Pendleton v Kerns*, 294 Or 126, 133-134, 653 P2d 996 (1982). The challenged decision is a significant impact land use decision because it will allow a large development in a rural area.

LUBA had exclusive jurisdiction to review local government land use decisions pursuant to ORS 197.825(1).

IV. ARGUMENT

A. BACKGROUND OF ASSIGNMENTS OF ERROR ON FISH AND WILDLIFE RESOURCE ISSUES.

The first four assignments of error concern whether the County properly found that the Applicant had established compliance with its wildlife and fish mitigation standards in DCC 18.113.070(D) which provides:

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“18.113.070. Approval Criteria.

In order to approve a destination resort, the Planning Director or Hearings Body shall find from substantial evidence in the record that:

* * *

D. Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.”

The Applicant is inevitably going to argue that there is substantial evidence to support the Hearings Officer's decision and that she chose to rely on the Applicant's experts and letters from ODFW. Petitioner's assignments of error, however, do not rely on issues of evidence or credibility of witnesses. Rather, the assignments of error assert that the Hearings Officer erred in her interpretation of the Code standards, that no mitigation was provided for water quality impacts to Whychus Creek, that findings and conditions of approval are inadequate to ensure compliance with Code standards, and that the Hearings Officer failed to address critical issues raised by Petitioner.

The following is a brief review of the actual proposed mitigation plans and some issues of contention about the plans.¹

¹For whatever reason, the Applicant put in a minimal amount of effort to establish compliance with DCC 18.113.070(D) as part of the CMP process. Its approach was to get approval to do a fish and wildlife plan at some point in the future. This approach has resulted in appeals and substantial delay. Even when the CMP was remanded by the Court of Appeals for more evidence and findings, the Applicant elected to defer preparation of plans until the FMP stage. The Applicant apparently did not begin to address fish resource issues until the FMP process, nearly three years after the CMP application was originally filed.

The Applicant now touts these plans as the best that have been done for destination resorts in Deschutes County (Rec. 64) If there is damnation by faint praise, this is it. ODFW has described a result of net loss of fish and wildlife habitat from destination resorts. (Rec. 1433)

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B. WILDLIFE RESOURCE ISSUES.

The proposed resort is to be located on the west and south slopes of Cline Buttes. The ecological land form of the area is characterized by juniper woodland and sagebrush – shrub steppe plant communities. (Rec. 1075)

The Applicant prepared what it describes as a modified habitat effectiveness procedures (“modified HEP”) plan to mitigate for wildlife impacts. The rationale is that impacts caused by the resort will be adequately mitigated by habitat improvement work, such as juniper thinning, on nearby public land managed by the United States Bureau of Land Management (“BLM”). Impacts were calculated by utilizing six indicator species, including four types of birds, deer and a category called “small mammals.” The Applicant concluded that habitat improvement needed to be done on 4,501 acres and that it would provide BLM with \$883,190 in funding to finance it. (Rec. 31, App. 22)

Petitioner’s wildlife experts argued that an actual survey of wildlife and vegetation should have been done and that a broader selection of indicator species should have been chosen.² They also argued that wildlife populations and not just habitat needed to be assessed. (Rec. 301, 1077) They further pointed out that BLM policies which are requiring grazing on public lands would probably make the proposed mitigation measures ineffective. (Rec. 1861)

The Hearings Officer stated that ODFW had reviewed and approved the Applicant’s proposal.³ (Rec. 29, App. 20) She concluded that the Applicant’s plan was adequate with these acknowledged limitations:

² For example, the “small mammals” category encompasses “such disparate taxonomic and ecological groups of species as rodents and shrews – a combination that would be analogous to lumping together jack rabbits and pronghorn antelope, or bats and bison.” (Rec. 1860) Thornburgh attempted to portray Petitioner as calling for an impossible standard that no one could achieve, requiring study of every possible species. Petitioner rejected the idea of studying every species (Rec. 1075) but proposed that a necessary basis for determining what species to mitigate for was an on-the-ground standard survey for two field seasons. (Rec. 1859-60) Petitioner’s experts also proposed doing field work when the species would be present rather than rely, as did the Applicant, on a survey in the dead of winter when many of the affected bird species would not be present. (Rec. 291-292)

³ It should be noted that ODFW was not involved in the County proceedings following its mid-June 2008 correspondence. There is no evidence they reviewed or even read all of the reports that the Petitioner’s experts

"The applicant concedes that indicator species will not fully account for all of the many and varied species on the site and the effect the development will have on them....Further, the applicant asserts that while it is not certain that the 'if you build it, they will come' habitat restoration efforts will be completely effective, the academic evidence supports a finding that habitat improvements will attract species that are being squeezed out by development elsewhere....While the applicant's mitigation plan does rely on its program to make general habitat improvements on BLM land, it also acknowledges that BLM management priorities may reduce the success of those efforts." (Rec. 33, 35, App. 24, 26)

Finally, the Hearings Officer reasoned that "in the event the anticipated BLM improvements were not successful" that there could be "replacement mitigation." (Rec. 35, App. 26) The possible "replacement mitigation" was not identified.

C. FISH RESOURCE ISSUES.

The primary issue on negative impacts by the proposed resort on fish resources concerns groundwater withdrawals by the proposed resort that would negatively impact water quality (cold water temperatures), water quantity, springs and other unique cool water habitat, and certain fish populations dependent on cold water. A map of the resort and areas impacted on the Deschutes River and Whychus Creek is at Rec. 1094, App. 49.

The USGS has established that there is a connection between groundwater and surface flows in the area. The groundwater comes to the surface as springs, bringing critical cold water for fish habitat. ODFW has described the connection:

"The Oregon Water Resource Department and United States Geological Service's groundwater model indicates that groundwater in the Deschutes Groundwater Study Area is hydro-geologically connected to the surface water within the basin; therefore, any groundwater pumping within the study area will have an effect on local springs.

introduced between June and the close of the Record in September. There is also no evidence that ODFW reviewed or even read Thornburgh's "Off-Site Habitat Mitigation and Monitoring Plan" that it submitted to the County on August 12. There is only an e-mail showing that this plan was "sent" to ODFW by Thornburgh on August 20 and that it was "received." (Rec. 134) ODFW is also not an agency with the responsibility of regulating Thornburgh's actions, so it cannot be presumed to be reviewing everything and determining compliance with any standards.

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Springs and seeps are important groundwater dependent ecosystems in the Deschutes Groundwater Study Area providing unique habitat for a number of plant and animal species including fish. Springs provide a natural relative constancy of water temperature. Spring and seep flows especially in the summer and fall, are typically cooler than the water flowing in the main stream. This cooler water provides thermal refuge [sic] for salmonid which thrive in cooler water." (Rec. 900)

The reason that cold water is critical is because certain species such as bull trout are so dependent on it for spawning and rearing habitat and because significant stretches of the river systems in the area have elevated water temperatures. Much of Whychus Creek (formerly Squaw Creek), for example, has temperatures in the range of 24° to 26°C. (Rec. 1512) Rearing habitat for bull trout requires water temperatures at least at 12°C. (Rec. 1097) Only at Alder Springs just a couple miles from the confluence with the Deschutes River do the stream temperatures become suitable for bull trout because of the cold groundwater infusion. (Rec. 1512) Hydrogeologist Mark Yinger identified negative impacts from the Thornburgh groundwater pumping as going to occur on the Deschutes River and Whychus Creek, primarily in an area 7-10 miles north of the proposed destination resort. (Rec. 1464-65, 1570) See map of area at App. 49.

The Applicant, as noted by the Hearings Officer, acknowledged that the resort wells "will affect basin water flows." (Rec. 34, App. 25) To provide mitigation to attempt to satisfy the no net loss or net degradation standard, the Applicant proposed 1) that a landowner approximately six miles north of the resort would sell irrigation water rights that would allegedly result in the return of water to the Deschutes River, 2) that the Central Oregon Irrigation District ("COID") would sell mitigation credits to the Applicant that would also result in more Deschutes River flow and 3) that the Applicant would contribute funds to an ongoing thermal modeling study on Whychus Creek.

The Hearings Officer actually did not decide that the proposed mitigation would satisfy the approval criteria. She only concluded that the OWRD mitigation requirement addresses

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water quantity. She required additional mitigation for water quality on Whychus Creek but did not address water quality on the Deschutes River. (Rec. 34, App. 25)

V. FIRST ASSIGNMENT OF ERROR

The Hearings Officer erred in failing to correctly or adequately interpret the County's standard for fish and wildlife mitigation.

In determining what is required to satisfy the standards of DCC 18.113.070(D), the Hearings Officer not only failed to examine the actual language of the standards but interpreted the standards in ways directly contrary to the Code language.

Under ORS 215.416(9), a county decision must include a statement that "explains the criteria and standards considered relevant to the decision." LUBA has also held that a county must explain its interpretation of undefined terms. *Just v Lane County*, 50 Or LUBA 399, 409 (2005). In the case at bar, none of the terms and the standards are defined in the Code.

The Hearings Officer's interpretation of the Code and use of terms not found in the Code reduces what is required for compliance to general and vague standards of improvement, measurement, contribution, and participation rather than complete mitigation. The Hearings Officer's interpretation renders DCC 18.113.070(D) essentially meaningless. To amend legislation or to subvert its meaning in the guise of interpretation is not permissible. *Goose Hollow Foothills League v City of Portland*, 117 Or App 211, 218, 843 P2d 992 (1992).

This is not a case where a local government's interpretation of its code is entitled to deference since only a hearings officer's interpretation is involved. A prerequisite for application of the deferential standard of review under ORS 197.829(1) is a written decision by a governing body containing an interpretation of a local provision that is adequate for review. *West Coast Media v City of Gladstone*, 44 Or LUBA 503, 519 (2000).

Also, no deference is even due to a governing body's interpretation where that interpretation is contrary to the plain meaning of the words of the Code. *Greenhalgh v Columbia*

County, 54 Or LUBA 626, 645 (2007). The legitimacy of an interpretation of a code depends on its consistency with the terms of the provision, its context and the purpose or policy behind it.

Church v Grant County, 187 Or App 518, 525, 69 P3d 759 (2003).

DCC 18.113.070(D) provides:

“18.113.070. Approval Criteria.

In order to approve a destination resort, the Planning Director or Hearings Body shall find from substantial evidence in the record that:

* * *

D. Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.”

Petitioner emphasized to the Hearings Officer that the specific terms of the Code must be followed, pointing out that the standards require consideration of “[a]ny negative impact” (Rec. 784), that the terms “fish and wildlife resources” and “the resource” include populations and not just habitat (Rec. 1428), that impacts must be “completely mitigated” rather than just “mitigated” (Rec. 784), that there be “no net loss” or “degradation” (Rec. 785), and that the “no net loss or net degradation” standards must be applied to “the resource” affected rather than allow substitution of species or consideration of overall effects to all resources averaged together (Rec. 1427, 1428). (Emphasis added.)

Petitioner also pointed out that the Oregon Court of Appeals had already recognized that the Code has stringent requirements on this issue. The Court itself emphasized the terms “any” and “completely mitigated” by putting those terms in italics:

“The county development code requires that the conceptual master plan application include the ‘methods employed to mitigate adverse impacts on [wildlife] resources.’ DCC 18.113.050(B)(1). That requirement allows little speculation.... The code requirement set out the necessary foundation for a determination that ‘[a]ny negative impact on fish and wildlife resources will be

completely mitigated so that there is no net loss or net degradation of the resource.’ DCC 18.113.070(D) (emphases added).” 216 Or App at 163.

Despite this guidance from the Court of Appeals and despite the repeated use of strict terms in the Code such as “any negative impact,” “completely mitigated,” “no net loss” and “no...net degradation,” the Hearings Officer generally concluded:

“The standard requires an analysis of species on the site, the likely impacts of development, and the applicant’s plan to address those impacts.” (Rec. 29, App. 20)

She also merely stated that the “no net loss” mitigation standard is difficult to quantify, that it does not require the on-site specificity and review as argued by opponents and that it does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio. (Rec. 29, App. 20)

These findings are incorrect where the County’s standards do not only require an “analysis” of species and impacts and a plan which merely “addresses” those impacts. Also, the Hearings Officer’s statements of what the Code is “not” is not accurate or complete. The Hearings Officer’s entire statement of interpretation of DCC 18.113.070(D) is as follows:

"1. What is required to satisfy DCC 18.113.090(D)"⁴?

The applicant argues that the standard requires a general assessment of the habitat on the site, the species that exist within those habitats, an identification of the impact of the development on the habitats and species, and a plan to ensure that fish and wildlife resources overall will not be degraded or lost. The applicant concedes that for some species, development on the site will eliminate or degrade their habitat, but argues that its proposal, overall, will provide habitat for new species, will improve terrestrial habitat in the area, and will protect fish species. The applicant notes that it has proposed to improve habitat on local public lands, will contribute financially to programs to measure and improve habitat quality and will participate in longitudinal studies to evaluate the effectiveness of the mitigation over time. Those proposals have been reviewed and accepted by the BLM and ODFW. The applicant argues that conditions can be imposed to require additional or alternative mitigation if the proposed mitigation is not sufficient to protect fish and wildlife.

The opponents argue that this standard requires a much more specific analysis of the animal species on the site, and a similarly specific program to mitigate the development's impact on those species. The opponents argue that the applicant's plan is seriously deficient because it relies on one on-site survey, and studies addressing property to the north (Eagle Crest III) and superficial assumptions about development on indicator species to identify the animals on the site and how the development will affect them. In addition, the opponents argue that the applicant's proposal is not sufficient to *completely* mitigate those impacts, in part because the final location for off-site mitigation has not yet been identified, and in part because it assumes public agencies and private land owners will commit to implementing the plan over time. Finally, opponents argue that the applicant's commitment to remedy deficiencies in the plan is not credible because the applicant and the agencies have yet to adopt a methodology to evaluate and quantify success/failure.

While the "no net loss" mitigation standard is difficult to quantify, given the range of species that could occupy the site and be affected by development, the hearings officer concludes that it does not require the on-site specificity and review that opponents suggest is necessary. The standard requires an analysis of species on the site, the likely impacts of development, and the applicant's plan to address those impacts. It does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio. Such a requirement would be difficult, if not impossible to satisfy. In addition, to the extent that conditions of approval are necessary to ensure that the plan is implemented as proposed,

⁴ The Hearings Officer erred in identifying this provision as .090 rather than .070.

conditions can provide both accountability and flexibility to address changes in habitat needs and approaches to mitigation over time.

Having explained what DCC 18.113.070(D) requires, the question turns to whether the applicant's evidence demonstrates that the standard is satisfied. The applicant's wildlife mitigation plan, the mitigation and monitoring plan and the proposed conditions of approval are adequate to demonstrate that the proposal is likely and reasonably certain to succeed." (Rec. 29-30, App. 20-21) (*italics original*) (underlining added)

The above interpretation is inconsistent with the language and function of the standards of the Code in at least the following ways:

1. **The standards do not use the term "overall" or suggest that all fish and wildlife resources can be lumped together to assess satisfaction of the standards.**

The major theme of the Applicant, adopted by the Hearings Officer, is that the Code's protection is only for fish and wildlife resources "as a whole." (Rec. 63) There is simply no basis for this interpretation where the County standard does not refer to the resources "overall" or "as a whole." This interpretation by the Hearings Officer substantially weakens protection afforded by the Code which actually requires complete mitigation for impacts to "the resource."

2. **The standards do not contemplate substitution of existing species with new species or providing mitigation to species other than the ones affected.**

Related to the above interpretation that the resources can be assessed "as a whole," the Applicant argued that one species can be substituted for another under the Code standards. (Rec. 130) The Hearings Officer agreed in approving the Applicant's mitigation plans which will result in starlings replacing other birds (Rec. 34-35, App 25-26; Rec. 1864) and with impacts to bull trout and steelhead being mitigated by improving habitat elsewhere for mountain whitefish. (Rec. 1081) Aquatic biologist Chuck Huntington testified:

"Creation or expansion of a cool habitat patch near Deep Canyon Creek as a result of the Thornburgh mitigation plan can be expected to benefit resident redband trout and mountain whitefish found above Big Falls, but are outside the

geographic distributions of some of the species of fish that may be found in the habitat within the main stem below Big Falls or in lower Whychus Creek: bull trout and reintroduced anadromous redband trout (steelhead) or spring Chinook salmon. These below-falls species will apparently experience incrementally warmer stream-wide temperatures in the mainstem and in lower Whychus Creek, incrementally reduced availability of cool habitat patches in these areas, and no thermally beneficial mitigation." (Rec. 1081)

The Hearings Officer's interpretation of the Code that mitigation can be for species other than those affected by a development is inconsistent with the strong language and requirement of the Code for protection of "the resource." (Emphasis added) If songbirds can be replaced with starlings, or if impacts to cold water Endangered Species Act-listed bull trout can be mitigated with improved habitat for whitefish, then this mitigation standard essentially has no meaning. No mitigation would be required under the Code to encourage invasive species to fill niches of displaced sensitive species since that is what happens anyway. Also, even if a species is not invasive, providing mitigation for it rather than for the one affected fundamentally changes the meaning of "completely mitigating" for impact to "the resource."

The context of the destination resort code is also on reducing or mitigating impacts to the resources and area affected (such as transportation, agriculture, etc.). DCC 18.113.050(1), (2) and (9); 18.113.070(F), (G), (M) and (N). It would be incongruous to allow mitigation for such impacts to occur elsewhere or for different kinds of resources. Any mitigation must be for the species and habitat that are affected.

3. Mitigation cannot result in less than a 1:1 ratio.

The Hearings Officer's conclusion that mitigation as defined in the Code "does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio" is inconsistent with the "completely mitigate" and "no net loss or net degradation" standards. In fact, anything less than meeting an equivalence standard of 1:1 means that there is not complete mitigation and means that there has been some net loss or degradation. Even the

Applicant acknowledged that there at least had to be an "equivalent gain" to one species for a loss to another. (Rec. 63)

4. The standard is not satisfied by mere "improvement" of "habitat."

The standard requires "complete" mitigation, not just "improvement," and it addresses "resources," not just "habitat." The Code does not refer to fish and wildlife "habitat" but to fish and wildlife "resources." The broader term "resources" includes fish and wildlife populations, not just habitat. (Rec. 301, 1077)

The Hearings Officer refers to "'no net loss' of the wildlife habitat on the site," (Rec. 31, App. 22) and concludes that "the impact of the development on fish and wildlife habitat results in no net loss." (Rec. 35, App. 26) (Emphasis added.) This narrow focus on habitat is not justified under the County Code⁵ and changes the terms of the Code.

5. A mere proposal to "contribute financially" or "to participate" in studies or programs does not constitute mitigation; there must be actual mitigation on the land or in the water.

These terms in quotes that are used by the Hearings Officer are entirely new terms not included in the Code and substantially reduce what is required for compliance. The Code language of resource impacts being "completely mitigated" requires actual mitigation on the ground or in the water so there is no net loss or degradation of the resource. Funding studies about an issue or making contributions to ODFW and BLM (not to be confused with funding actual additional mitigation work) cannot equate to actual mitigation. For example, part of the Applicant's mitigation to satisfy this standard is to give funds to ODFW to fund "an ongoing thermal modeling project on Whychus Creek" which the Hearings Officer included as a specific mitigation measure in her conditions of approval. (Rec. 40, App. 31) While such a modeling

⁵ ODFW made clear that its habitat approach to mitigation is based on its "Fish and Wildlife Habitat Mitigation Policy" (emphasis added) specified by OAR 635-415-0000 to 0025. (Rec. 899) That agency's rules should not, however, define this county standard which uses different terms.

study may be scientifically worthwhile, that cannot be considered as mitigation that results in no net loss or net degradation of the resource here. Indeed, were the funding of studies interpreted to constitute mitigation then no actual mitigation work might ever be done on the ground or in the water.

6. Funding habitat improvement work on federal land or ODFW mitigation programs that the government was already going to do cannot constitute mitigation for impacts on this private land.

Where the government is allegedly already proposing to do habitat improvement work on public land, it is not appropriate to consider financial contributions to that work as constituting mitigation for development impacts on this private land under the Code. Otherwise, this County mitigation standard which specifically requires complete mitigation for impacts to the affected resource is reduced to a simple requirement that a developer just made contributions to government agencies with no attendant additional mitigation for the developer's actual impacts.

The August 20, 2008, BLM letter actually does suggest that some additional work could be accomplished with the Applicant's money (Rec. 321), but any credit due the Applicant for its contributions should be limited to the actual additional mitigation that is the result of the contribution. If the contributions do not fund additional work that would otherwise not be done, then no true mitigation is being provided for those impacts.

The proposal to give funds to ODFW as mitigation is even more attenuated. The Hearings Officer's approval of "funding replacement mitigation programs through ODFW" (Rec. 35, App. 26) is inappropriate where additional actual mitigation work for the resource affected is not involved or identified. Just giving money to the government for general mitigation work, without requiring that it result in additional mitigation for the affected resource cannot completely mitigate for the impacts to the wildlife resource as required by the Code.

7. **It is the County's responsibility; not ODFW's or BLM's, to interpret the Code.**

It should also be noted that the Hearings Officer's reference to the proposals having been reviewed and accepted by the BLM and ODFW cannot be construed or used as a substitute for the County defining its own standards. The Applicant acknowledges that the County, not ODFW, has the ultimate responsibility to apply the Code and that ODFW's approval of a plan is not dispositive. It argues, however, that ODFW's opinion can justify the County approval. (Rec. 65) That is not the case where the County has the responsibility to define its own standards, did not in fact provide a definition to ODFW and ODFW also did not define the standards.

VI. SECOND ASSIGNMENT OF ERROR

The Hearings Officer's approval of the FMP should be reversed where she found that the DCC 18.113.070(D) standard would be violated without mitigation for water quality impacts on Whychus Creek and where no mitigation to correct the water quality violation was provided.

The Hearings Officer, even under her very limited interpretation of the requirements of the Code, clearly found that DCC 18.113.070(D) would be violated where there would be degradation of water quality in Whychus Creek⁶:

"The OWRD mitigation requirement adequately addresses water quantity; it does not fully address water habitat quality. Its assumptions regarding the benefits of replacing more water during the irrigation season than is consumed on an average daily basis by the resort does not account for the higher water consumption that will likely occur during the summer months. Therefore, the hearings officer concludes that the additional mitigation offered through the Three Sisters Irrigation District restoration program is necessary to assure that water temperatures in Whychus Creek are not affected by the proposed development." (Rec. 34, App. 25)

⁶ There is no dispute but that the Thornburgh groundwater withdrawal would negatively impact the water quality of Whychus Creek such that mitigation is necessary to meet the .070(D) standard. The Hearings Officer so found and the Intervenor did not appeal that decision. A separate assignment of error is presented for this issue because it requires a reversal rather than a remand where no actual water quality mitigation was proposed for the water quality impact found by the Hearings Officer.

Accordingly, the Hearings Officer required as a condition of approval that 106 acre-feet of water be returned to instream uses in Whychus Creek by the Three Sisters Irrigation District. (Rec. 40, App. 31)

This additional mitigation through the Three Sisters Irrigation District, however, addresses only water quantity and actually would further harm water quality. The problem is that the Hearings Officer failed to require mitigation to correct the water quality degradation.

Hydrogeologist Mark Yinger explained the problem with adding this irrigation water to Whychus Creek:

"In Martha Pagel's letter dated August 11, 2008, it is proposed that Thornburgh could provide mitigation for loss of groundwater discharge to lower Whychus Creek due to the pumping of its proposed wells. The mitigation would consist of 106 acre feet of water provided by Three Sisters Irrigation District through transfer of irrigation water to instream flow. This will not mitigate impact to Whychus Creek because it replaces cold groundwater with warm water from upstream during the irrigation season. It is the cold groundwater discharge at Alder Springs that is the defining and essential factor that makes the lower reach of Whychus Creek critical habitat for native bull trout, redband trout and reintroduced steelhead trout and Chinook salmon.

The pumping of Thornburgh wells will reduce cold groundwater discharges. Replacing this lost flow of 106 acre feet by reducing upstream irrigation diversions would result in more hot water mixing with the cold water of the lower reach of Whychus Creek. The proposed mitigation is harmful to critical fish habitat in two ways: first it would allow the reduction of cold groundwater discharge to the stream, and second it would increase the flow of warm water into the cold lower reach of the stream.

Using the thermal mass balance equation, the calculated the [sic] increase in stream temperature at Alder Springs due to the pumping of the Thornburgh wells would be 0.07° C. The calculated change in stream temperature due to both the reduction in cold groundwater discharge and the increased stream flow due to the propose [sic] mitigation would result in even a greater stream temperature increase of 0.12° C at Alder Springs. It is clear that the proposed mitigation for Thornburgh's impact to Whychus Creek would only increase the impact to critical cold water habitat that native and reintroduced fish are dependent on." (Rec. 312)

Additionally, Petitioner argued to the Hearings Officer:

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"The Applicant in its August 12 materials for the first time proposes the addition of 106 acre feet of water to Whychus Creek to make up for water withdrawal impacts to the Creek.... This is apparently in response to our argument that there needs to be some mitigation provided for Whychus Creek. Unfortunately, what is proposed would actually compound the problem by increasing temperatures in the creek. Adding warm surface water into the creek does not compensate for withdrawals of cold groundwater." (Rec. 281)

The Applicant in its rebuttal evidence and argument did not respond to this point. This is despite the fact that the Applicant submitted the last evidence in the Record and did its final argument. The only final argument on this issue was that supplying 106 acre-feet should not be necessary. (Rec. 79) In fact, the Applicant never provided evidence by its hydrogeologist or fish biologist that this was a good idea for the water quality in the first place. The idea only came from the Applicant's attorneys who first suggested adding this 106 acre-feet on August 11, 2008, near the close of the Record in this case. This suggested mitigation was also only mentioned in terms of providing additional "flow," not water quality. The attorneys at Schwabe Williamson argued:

"Therefore, we are providing evidence to demonstrate that it would be feasible for Thornburgh to provide additional flow of 106 acre-feet per year in Whychus Creek, if needed to meet the county approval standard." (Rec. 379)

Given the Hearings Officer's appropriate conclusion that water quality on Whychus Creek would be negatively impacted by the proposed development such that mitigation would be necessary to meet the .070(D) standard and given uncontroverted evidence from an expert witness that the proposed mitigation would not mitigate the harm, plus the Applicant's failure to propose mitigation that would address the harm, the County's approval of the FMP must be reversed.

Note that this is not a case where there is just a lack of substantial evidence to support a finding, but rather a case where the only proposed mitigation did not address the identified

problem: No water quality mitigation for Whychus Creek was actually proposed to address the water quality problem found by the Hearings Officer.

VII. THIRD ASSIGNMENT OF ERROR

The Hearings Officer's findings and conditions of approval do not ensure compliance with the County standards of DCC 18.113.070(D).

The Hearings Officer made findings that the Applicant satisfied the standard of .070(D), not just on the basis of wildlife mitigation plans but also on the basis that "the proposed conditions of approval are adequate to demonstrate that the proposal is likely and reasonably certain to succeed." (Rec. 30, App. 21) She also referred to the Applicant's mitigation plan "as conditioned" is "reasonably likely to success [sic]." (Rec. 35, App. 26)

The Hearings Officer ended up providing these conditions in order to satisfy the approval criteria:

"38. The applicant shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of off-site mitigation efforts. Consistent with the plan, the applicant shall submit an annual report to the county detailing mitigation activities that have occurred over the previous year. The mitigation measures include removal of existing wells on the subject property, and coordination with ODFW to model stream temperatures in Whychus Creek.

39. The applicant shall provide funding to complete a conservation project by the Three Sisters Irrigation District to restore 106 acre-feet of instream water to mitigate potential increase in stream temperatures in Whychus Creek. The applicant shall provide a copy of an agreement with the irrigation district detailing funding agreement [sic] prior to the completion of Phase A." (Rec. 40, App. 31)

These conditions are inadequate where they do not require to be done what was identified in the findings as the basis for approval or feasibility, they fail to identify exactly what plans and documents they rely upon, the referenced plans contain provisions inconsistent with the Code, and they fail to provide for any follow-up determinations by the County.

Adequate findings and conditions of approval are necessary to sustain an approval on the basis that a proposal is "likely and reasonably certain to succeed" or that it is "feasible." See, *Hodge Oregon Properties LLC v Lincoln County*, 46 Or LUBA 290, 194 Or App 50, 55, 93 P3d 93 (2004). In *Meyer v City of Portland*, 67 Or App 274, 278-79, n4, 678 P2d 741, rev denied, 297 Or 82 (1984), very specific conditions of approval required detailed geotechnical studies. LUBA has also recently held in *Central Oregon LandWatch v Deschutes County*, 56 Or LUBA 280, 292-293 (2008), that conditions of approval are necessary to ensure that findings of feasibility are actually carried out:

"We agree with petitioner that the hearings officer erred by failing to include a condition of approval to ensure that the secondary access she found is necessary to comply with DCC 17.36.260 will be constructed....So long as it is feasible to approve the other pending applications to secure the needed right of way, the hearings officer could adopt findings to establish that approval of those pending applications is feasible. *Rhyne v Multnomah County*, 23 Or LUBA 442, 447-48 (1992). If those findings are possible, then the hearings officer could enter an appropriate condition of approval to ensure that the needed secondary access is in place before the final partition plat is approved and recorded. *Id.*

Without a condition of approval to ensure that the secondary access that is required by DCC 17.36.260, there is no way to know that that secondary access will be provided in the future."

A. THE WILDLIFE RESOURCES FINDINGS AND CONDITIONS OF APPROVAL.

The Hearings Officer's findings and conditions of approval are not adequate to ensure compliance with the County's fish and wildlife mitigation standards where:

1. **None of the referenced plans/agreements identify where the off-site mitigation will actually be or require that it actually be carried out on local BLM land.**

Though the April and August 2008 plans are clearly premised on the mitigation occurring on nearby BLM land and despite the Hearings Officer's decision finding that terrestrial habitat will be improved "in the area" and that habitat will be improved "on local public lands" (Rec.

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29-31, App. 20, 22), there is no condition requiring that the improvements actually be in the area or on local public lands. In fact, the Applicant in its April 2008 report provides:

"If sufficient offsite mitigation areas are not available for mitigation actions at the time they are needed, the funding for implementing mitigation shall be placed in an account dedicated only to that purpose and the mitigation will be undertaken as soon as the land is available. In the event that the mitigation is not implemented by TRC [Thornburgh Resort Company] when the land becomes available, this funding shall be available to ODFW to meet the intent of DCC 18.113.70D [sic], which could include measures other than what are found in the mitigation plan, such as purchasing property or purchasing conservation easements within Deschutes County." (Emphasis added.) (Rec. 2619)

The Hearings Officer acknowledged the real possibility that BLM mitigation land will not be available:

"The applicant also notes that it has accounted for circumstances where the BLM mitigation land is not available, by funding replacement mitigation programs through ODFW." (Rec. 35, App. 26)

This condition is clearly not adequate where the mitigation programs of ODFW are not identified at all. The Hearings Officer also did not identify where the ODFW mitigation would be. The Applicant only generally proposed required mitigation "within Deschutes County." (Rec. 2619) Since the types of wildlife and habitat can be substantially different in various parts of the County, there is no assurance that the mitigation would be for the same species and habitat which are affected by the Thornburgh Resort.

In summary, the Applicant has proposed possibilities of a mitigation plan, but without assurance that it will be done for the area for which it was designed or that the agency managing the land will carry it out or that if the plan is done elsewhere it would be done for the same species and habitat.

Where the design of this plan is subject to future determination by BLM (which the County will not even review for compliance with the Code standards), the County has drafted

inadequate findings and conditions. As stated by the Court of Appeals in *Gould II*, 216 Or App at 161, where the design of the plan is subject to future determination, a finding of compliance with decisional standards is not appropriate. The application should be denied or made more certain by appropriate conditions of approval.

2. **The above conditions also do not specifically identify what "agreements with the BLM and ODFW for management of off-site mitigation efforts" they are referring to and again improperly leave it up to those agencies to decide what to do.**

The Hearings Officer's conditions of approval for wildlife are inadequate to ensure compliance where, as was the situation in the case of *Sisters Forest Planning Committee v Deschutes County*, 198 Or App 311, 315-319, 108 P3d 1175 (2005), the conditions do not clearly identify referenced documents and requirements.

Petitioner is not aware of any "agreement" with ODFW in the Record. There are only letters from ODFW commenting on the Applicant's plans. A condition of approval that relies on unidentified "agreements" cannot be sustained.

The only agreement with BLM that Petitioner is aware of is a 2005 Memorandum of Understanding ("MOU") between Thornburgh and BLM. (Rec. 2894) That document, however, does not address the current plans and commits Thornburgh only "up to" \$350,000 in expenditures (Rec. 2895), not the \$893,190 that is supposedly necessary. It also does not identify the management for the off-site mitigation. Thornburgh's August 2008 off-site mitigation plan merely states that future treatments have yet to be determined. (Rec. 422) In fact, the August 2008 plan states that BLM, "stakeholders" and others will determine what treatments will be used some time in the future. (Rec. 422) There are also no obligations by BLM to carry out the plans. The BLM letter of August 20, 2008, (Rec. 321) does not constitute a contract or "agreement" in any sense of the term.

The Applicant's wildlife impact mitigation plan is limited and fails once again, as described by the Court of Appeals in *Gould II*, 216 Or App at 159-160, where "the particulars of the mitigation plan were to be based on a future negotiation, not a county hearing process." Not only will the particulars depend on what BLM decides to actually do, but the BLM has no obligation to do anything.

The Hearings Officer's failure to clearly identify what "agreements" are referenced here makes this condition of approval inadequate. Furthermore, the prospect of an agency deciding at some point in the future what treatments will occur is merely a repeat of what the Court of Appeals has already determined in this case to be inadequate.

3. There is no condition requiring future compliance in perpetuity or showing that such mitigation is feasible.

ODFW clearly qualified its support letter on the basis that certain mitigation efforts must be "in perpetuity."

"Mitigation will be conceptual until measures are implemented, some of which will need to be maintained in perpetuity." (Rec. 901) (Emphasis added.)

The Hearings Officer also acknowledged that additional or alternative mitigation may be needed if the proposed mitigation is not sufficient. (Rec. 35, App. 26)

However, the Applicant's only plans for monitoring of the effectiveness of mitigation is an annual report for the first five years which is "the common monitoring period." (Rec. 430) Any further monitoring "will be reconsidered with BLM and ODFW." (Rec. 430-431)

The Hearings Officer states that after the mitigation is established "the Applicant will provide continuing funding for the lifetime of the development through a real estate transfer fee." (Rec. 32, App. 23) In proposing that real estate transfer fee, the Applicant stated:

"TRC shall have a transfer fee collected in perpetuity from both the seller and the buyer of real estate for each real estate transaction. This transfer fee will be \$1,000, shared equally by buyer and seller at the time that the transaction closes.

The transfer fee proceeds will be applied as needed to discharge in full TRC's obligation for ongoing mitigation." (Rec. 430)

There is no condition requiring collection of this fee, no identification of what expected transfers will occur and no finding on whether it is feasible to raise the needed money by this means. The Applicant estimates a cost of \$41,000 for maintenance and monitoring per year (Rec. 431) but with no basis for that calculation or that there will be enough real estate transactions in perpetuity to fund that. Juniper thinning accounts for \$675,150 of the \$883,190 to be spent on mitigation. (Rec. 2623) There is no explanation how this thinning will then be maintained in perpetuity since the trees will naturally grow back and need to be thinned again. ODFW also did not identify what "measures" it thought needed to be done "in perpetuity."

Where ODFW's approval of the Applicant's mitigation plan is explicitly conditioned on the mitigation measures being implemented, "some of which will need to be maintained in perpetuity" (emphasis added), and the Hearings Officer relied on ODFW's opinion in finding approval, the Hearings Officer erred in failing to require such maintenance in perpetuity and showing how such maintenance is accomplished.

The Hearings Officer also did not identify a source of funding for "replacement mitigation" in case the BLM improvements are not successful. She describes the Applicant's plan:

"While the applicant's mitigation plan does rely on its program to make general habitat improvements on BLM land, it also acknowledges that BLM management priorities may reduce the success of those efforts. Its plan includes monitoring and alternatives to provide replacement mitigation in the event the anticipated BLM improvements are not successful." (Rec. 35, App. 26)

However, where the Applicant's original donation would have been already spent on the BLM improvements that were not successful, a new source of funds would be needed for the "replacement mitigation."

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4. The Applicant's plans contain internal inconsistencies as well as inconsistencies with the County Code.

The Court of Appeals in *Sisters Forest Planning Committee v Deschutes County*, 198 Or App at 315-319, held that it is inappropriate to include as a condition of approval that there be compliance with a document which includes imprecise, hypothetical or inconsistent provisions. Specificity and clarity are needed in conditions of approval.

The plans also contain inconsistencies. Exhibit A to the April 2008 plan is a 2005 Wildlife Report which requires as mitigation that domestic livestock grazing be removed in the off-site mitigation area. (Rec. 2651, 2653) However, the August 2008 plan makes it clear that grazing is in fact planned for the off-site mitigation area. (Rec. 131)

The April 2008 plan provides that ODFW, BLM and Thornburgh are to decide on specific areas for mitigation (Rec. 2620), but the August 2008 plan clearly places all responsibility on the BLM. (Rec. 418, 422) Neither plan places responsibility with the decision-maker in this case, Deschutes County. Reports are to be provided to the County but with no required follow-up decisions by the County.

5. No ultimate determination is to be made by the County.

A basic premise for a determination of approval based on a finding of feasibility is not only that something additional must be done but that the County eventually makes a determination on its adequacy. LUBA in *Gould I*, 54 Or LUBA at 215, described its decision in *Rhyne v Multnomah County*, 23 Or LUBA at 447, where feasible solutions were allowed as conditions of approval but the ultimate choice was at least to occur in a technical or administrative review process by county planning and engineering staff. The same was the case in *Meyer*, 67 Or App at 278-79, n4, where the City of Portland had to review detailed geotechnical studies on landslides. Here, no provision is made for the County to approve whatever BLM decides is adequate or, if the mitigation is to occur elsewhere, whether that is

adequate. The County cannot leave to agencies what is necessary to comply with the County's own standards. *Kaye/DLCD v Marion County*, 23 Or LUBA 452, 474-475 (1992).

6. The public is again denied the right to comment on the wildlife mitigation plan.

Because of all of the possible variables in what the Applicant's wildlife mitigation plan may turn out to be, where it might be done, and who might implement it, it is inappropriate not to require public comment when the specifics are finally brought to the County. The Court of Appeals in *Gould II*, 216 Or App at 159-163, made clear that that is what is required where the actual plan to be implemented is indefinite. Just because the Applicant has now done a hypothetical detailed plan does not get rid of public review for whatever plan is finally to be implemented.

B. THE FISH RESOURCES FINDINGS AND CONDITIONS OF APPROVAL.

The Hearings Officer also failed to include adequate findings⁷ and conditions of approval to ensure compliance with the Code standard requiring complete mitigation and no net loss or net degradation of fish resources. The Hearings Officer's only conditions of approval related to fish resources state:

"38. ...The mitigation measures include removal of existing wells on the subject property, and coordination with ODFW to model stream temperatures in Whychus Creek.

39. The applicant shall provide funding to complete a conservation project by the Three Sisters Irrigation District to restore 106 acre-feet of instream water to mitigate potential increase in stream temperatures in Whychus Creek. The applicant shall provide a copy of an agreement with the irrigation district detailing funding agreement [sic] prior to the completion of Phase A." (Rec. 40, App. 31)

These conditions are inadequate for a number of reasons.

⁷ See also Petitioner's Fourth Assignment of Error which specifically addresses the inadequacy of findings where the Hearings Officer has failed to respond to arguments raised by Petitioner.

1. The Applicant's mitigation plans are not identified, found to establish compliance or even required to be done.

Unlike with the Applicant's wildlife plans (where the Hearings Officer in her conditions of approval at least attempted to identify the plans to be followed), the Hearings Officer did not identify any fish mitigation plans or require compliance with them in her conditions of approval. Any plans relied upon must be required in conditions of approval. It cannot just be assumed that everything mentioned in a land use application will be done. See the discussion in *Central Oregon LandWatch v Deschutes County*, 53 Or LUBA 290, 305-307 (2007).

She also made no findings of compliance with the standards for fish resources, other than just saying that the OWRD mitigation requirement addresses water quantity and that additional mitigation is needed for water quality on Whychus Creek. (Rec. 34, App. 25) She made no findings on water quality for the Deschutes River or on impacts to fish species in Whychus Creek and the Deschutes River.

2. No Whychus Creek mitigation for stream temperatures is required to be done.

As discussed above, the proposed condition of approval on Whychus Creek is meant to correct an increase in stream temperatures. However, the actual condition of approval which adds warm irrigation surface water actually doesn't address the mitigation need. The condition also does not require that the mitigation actually be done by the irrigation district. It only requires funding and an agreement on funding. (Rec. 40, App. 31)

3. Actual mitigation from Big Falls Ranch water is not required.

The Hearings Officer explained that the Applicant argued that groundwater impacts to the Deschutes River would be mitigated by the acquisition of "irrigation water rights that will return water to Deep Canyon Creek." (Rec. 34, App. 25) She also concluded that there is substantial evidence in the Record to support a finding that the Applicant has the authority to use water from Deep Canyon Creek. (Rec. 34, App. 25, n10) The Hearings Officer notes that "[t]he applicant

proposes to obtain 836 acre-feet from Deep Canyon Creek irrigation rights that were granted to Big Falls Ranch." (Rec. 32, App. 23)

Despite these determinations, the Hearings Officer provided no condition of approval actually requiring that the necessary water be returned to Deep Canyon Creek, or finding that it is feasible to do so.⁸

Also, though the Hearings Officer states that removal of dams will be necessary (Rec. 32, App. 23), she fails to require such removal as a condition of approval.

4. No condition requires actual mitigation by Central Oregon Irrigation District water.

Despite the fact that the Hearings Officer finds that Central Oregon Irrigation District ("COID") mitigation water "is to be obtained" (Rec. 32, App. 23), there is no condition of approval requiring its acquisition or use. There is also no finding of feasibility. As discussed in the Fourth Assignment of Error, the Hearings Officer also failed to address an issue raised by the opponents regarding whether the COID water would be available.

VIII. FOURTH ASSIGNMENT OF ERROR

The Hearings Officer failed to adequately address specific issues raised by Petitioner on inadequacies of fish resource mitigation.

The Hearings Officer erred in failing to address with adequate findings several key issues which Petitioner raised regarding impacts to and proposed mitigation for fish resources. It is a basic requirement that a decision-maker address the issues raised in a proceeding. *LeRoux v Malheur County*, 30 Or LUBA 268, 271 (1975). Adequate findings must address a party's evidence and issues. *Central Oregon LandWatch*, 53 Or LUBA at 313.

⁸ It is not an answer to the lack of a showing of feasibility and conditions of approval for the Big Falls Ranch and COID mitigation water that OWRD will be requiring mitigation for groundwater permits and that no legal impediment is shown to a OWRD determination. OWRD will be requiring mitigation, but not necessarily this mitigation which is being proposed here specifically for fish and wildlife mitigation, not just to satisfy OWRD requirements. OWRD will be making no determinations to satisfy these county fish and wildlife standards.

There are four issues raised by Petitioner which the Hearings Officer failed to address in her Decision.

1. The Hearings Officer failed to address Petitioner's arguments on the amount of water consumed by the report.

The Hearings Officer did not address arguments that the consumptive use of groundwater that should be calculated to determine impacts on fish and surface water should be based on the record in this case and that it should be in the amount of 90% consumption as argued by Petitioner rather than 60% as argued by the Applicant. The Applicant asserted that a 60% consumption calculation determined by OWRD in 2007 should control here, but Petitioner introduced new evidence apparently not considered by OWRD that showed the actual consumption will be 90%.

The Applicant's argument that the consumption rate would only be 60% was based on sewer water from the resort being used to recharge the aquifer. (Rec. 313) Based on a final DEQ permit for the sewer plans, however, this assumption is not correct. Hydrogeologist Mark Yinger testified:

"As a condition of the Thornburgh resort's Water Pollution Control Facility Permit (WPCF Permit No. 102900) issued by the ODEQ, the resort must stop the subsurface disposal of sewage when the sewage flow reaches 15,000 gallons per day (gpd) and place in operation a sewage treatment plant and land application system (permit attached). At full resort development, the effluent will be 326,000 gpd and the resort will have a waste water treatment plant. The effluent will be surface applied by sprinklers at the agronomic rate during the irrigation season and stored in lagoons during the non-irrigation season. The intent of the DEQ permit is to prevent the effluent from percolating to groundwater and impacting its quality. This is achieved by promoting evaporation of the effluent. At the agronomic application rate, plants will uptake all of the effluent. Therefore, there will be no groundwater recharge resulting from the discharge of effluent." (Rec. 1145)

He also concluded:

"The reason the terms of the WPFC permit are important is that the objective is to prevent sewage effluent from reaching groundwater, and therefore, Thornburgh should not be counting sewage effluent as recharging groundwater." (Rec. 313)

Nevertheless, the Applicant argued that the determination of consumptive use by OWRD is controlling here. Petitioner responded that this land use proceeding is a separate fact-based process that is based on its own factual record, just as the OWRD process is. Also, different issues are involved where OWRD was determining water rights while Deschutes County was assessing fish and wildlife impacts. A determination of water use impacts by the County will not disturb the OWRD water rights rulings.

Despite this argument, the Hearings Officer neither acknowledged nor resolved it. She merely noted that opponents disputed the 60% figure (Rec. 33, App. 24) and included this footnote in her decision:

"The Oregon Water Resources Department (OWRD) calculated the needed mitigation water based on a 60% consumptive use, meaning that 60% of the resort water supply will not be returned to the aquifer through golf course irrigation or other surface applications. The opponents dispute that ORWD [sic] used the appropriate consumption rate." (Rec. 32, App. 23, n7)

This is not a correct statement of the issue presented here. Whether or not OWRD used the right consumption rate in its proceedings, the factual issue in this case is what are the impacts of the resort on fish and wildlife. The Hearings Officer needed to make that determination based on the facts in the Record in this case.

2. The Hearings Officer did not address the need to mitigate for impacts to cool habitat patches.

Petitioner raised as a specific habitat impact the loss of existing localized cool habitat patches (by 0.6% in the mainstem Deschutes) and pointed out that there was no mitigation for this impact. (Rec. 1081) Aquatic biologist Charles Huntington testified:

"Issue 3. The stream-wide effects on summer water temperatures estimated for the project by TtEC (2008b, 2008c, and 2008d) do not consider the localized

consequences of reduced groundwater inputs, specifically the reductions of cool habitat patches and of the coldest water in the affected stream sections at that time of year. This is something about which I gave oral testimony in Bend on 15 July. As was described in that testimony, TtEC's mass-balance analyses are at a coarse spatial scale that obscures these localized effects because the thermal consequences of Thornburgh-related reductions in groundwater inputs are being examined only after the cold groundwater has fully mixed with warmer water. The analyses do not account for the value of the cold groundwater, and the size of associated cool habitat patches, prior to such mixing. Per page 10 of my memorandum of 15 July (Huntington 2008), logic embedded in mass-balance analyses described by TtEC (2008d) suggests that the Thornburgh Resort's impact on cool habitat patches within the affected sections of the mainstem Deschutes would be to reduce existing patches by about 0.6%. The significance of this effect would be expected to increase as additional groundwater pumping within areas contributing to the affected sections of stream accumulated." (Rec. 1080-1081) (Original emphasis.)

The Applicant never provided a response to this cool patch habitat impact issue and the Hearings Officer did not address it in her findings. All that was addressed by the Applicant was the overall blended water temperature that would result from the Applicant's proposed mitigation, not the loss of this specific habitat.

3. The Hearings Officer did not address Petitioner's arguments that COID water would likely not be available for mitigation.

As discussed above under the Second Assignment of Error, the Hearings Officer made no finding of feasibility and did not include any condition of approval requiring that proposed COID mitigation water actually be available and used. Petitioner specifically questioned whether the COID water would be available given that it was apparently conditioned on whether or not irrigated COID lands would be included in the proposed expansion of the Bend urban growth boundary. Petitioner argued that that was not a likely scenario given that irrigated farmlands are a low priority for UGB expansion. (Rec. 1424)

4. **The Hearings Officer did not address Petitioner's arguments that adding irrigation district water to Whychus Creek would increase the water temperature.**

Again, as discussed in the Second Assignment of Error, Petitioner argued that the proposal to provide 106-acre feet of irrigation district water to Whychus Creek would actually increase water temperature and further degrade water quality. Despite this argument and the Applicant's failure to respond to it, the Hearings Officer did not address it in her decision.

IX. FIFTH ASSIGNMENT OF ERROR

The Hearings Officer erred in failing to require the Applicant to provide specific information on the proposed development as required by the Code.

On its initial appeal to LUBA of the CMP approval, the Petitioner challenged the lack of detail provided in the Applicant's CMP. The Applicant argued, however, that the detail would be provided at the FMP stage. LUBA described the arguments and issue:

"[P]etitioners argue a significant amount of detail and accuracy is required in the CMP to allow the CMP to fulfill the role that DCC 18.113 envisions for that important document.... Given the relationships between the CMP and the FMP, and the FMP and site design and subdivision stages of approval, Thornburgh argues it is entirely appropriate to wait until the FMP stage to supply details and correct any minor discovered inaccuracies in the CMP.... Some standards and approval criteria may require a fair amount of detail in the CMP while others may permit a more conceptual proposal in the CMP that will be rendered more precise in the FMP." (54 Or LUBA at 211-213)

Despite that direction and despite the Code requirements for specifics on various elements of the development for a final master plan, the Hearings Officer failed to require that the Applicant provide the information. These inadequacies include:

1. **The Applicant failed to identify the use and location of the open space that is to be managed as natural areas or in its natural condition.**

Such identification is required by DCC 18.113.090(A):

"It shall be the responsibility of the applicant to provide a Final Master Plan (FMP) which includes text and graphics explaining and illustrating:

A. The use, location, size and design of all important natural features, open space, buffer areas and common areas."

Though the Applicant states that 897 acres will be kept natural as part of its wildlife mitigation plan (Rec. 30, App. 21) and though CMP Condition 34 requires restoration of native vegetation in "open space areas that are to be retained in its substantially natural condition," the Applicant does not identify where these natural areas are.

2. The Applicant failed to specify the recreation facilities.

Condition 13 of the County CMP approval required a specification of recreation facilities. Condition 13 stated:

"Applicant shall specify all recreational facilities within the proposed resort as part of final master plan approval." (Emphasis added.)

The Hearings Officer found this condition to be satisfied because the Applicant "specified the recreational facilities" (Rec. 22, App. 13) but all that the Applicant actually did was give a long list of what recreational facilities "that would be allowed," not what is actually to be there. (Rec. 2498-2501) This list is attached at App. 45-48.

3. The Applicant failed to show the use of all buildings.

Similarly, though DCC 18.113.090(B) requires text and graphics showing "the use and general location of all buildings," the Applicant only presented a list of possible building uses. (Rec. 15-16, App. 6-7) It showed just the general location of buildings without identifying the uses for them.

4. The Applicant failed to describe all commercial uses.

Likewise, DCC 18.113.090(G) requires a description of all commercial uses with approximate size and floor area, but the Applicant again just gave a list of potential commercial uses and overall square footage estimates. (Rec. 2498-2501, App. 45-48)

A critical requirement of both the statutes and Code is that \$2 million (1984 value) be spent on recreation facilities. That is central to the statutory definition of a destination resort. Where the Applicant failed to specify these facilities in the CMP and a specific condition of approval required they be specified as part of the FMP, it is error for the County to approve the FMP where the Applicant failed to provide the specifics.

X. SIXTH ASSIGNMENT OF ERROR

The Hearings Officer failed to require compliance with the statutory standard of providing \$7 million for recreational facilities.

ORS 197.445(3) requires:

"At least \$7,000,000 must be spent on improvements for on-site developed recreational facilities and visitor-oriented accommodations exclusive of costs for land, sewer and water facilities and roads. Not less than one-third of this amount must be spent on developed recreational facilities."⁹

Despite this requirement, the Hearings Officer required in Condition 33D:

"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 facilities." (Rec. 39, App. 30) (Emphasis added.)

That requirement apparently came from DCC 18.113.060(A)(4) which provides:

"The destination resort shall, in the first phase, provide for and include as part of the CMP the following minimum requirements:

⁹ This figure is apparently an update of an earlier \$2 million figure (1984).

* * *

4. At least \$2,000,000 (in 1984 dollars) shall be spent on developed recreational facilities." (Emphasis added.)

Instead of requiring this expenditure for recreation facilities, the County only required that the expenditure be for residential facilities. While ORS 197.445(3) does allow some of the \$7 million expenditure to be spent on accommodations, the stricter County Code requires that it all be spent on recreation facilities and in the first phase.

XI. SEVENTH ASSIGNMENT OF ERROR

The Hearings Officer erred in considering the fish and wildlife standards as part of the final master plan without first doing so under the CMP and having a final CMP decision.

The Hearings Officer erred in considering the Code requirement of DCC 18.113.070(D) only in the context of the final master plan rather than at the mandated conceptual master plan stage. (Rec. 14, App. 5) The Code specifically requires that it be determined as part of the CMP. DCC 18.113.050(B)(3). The framework of the County Code also requires that a complete CMP be done so that the FMP can be judged for consistency with it. DCC 18.113.040(B). The Hearings Officer should not have addressed the FMP without first having a complete and final CMP decision. Though DCC 18.113.040(A) requires that a CMP application, and thus all the criteria under it, be processed as a conditional use permit, the Hearings Officer failed to so process the approval of DCC 18.113.070(D).

It is fundamentally inconsistent for the County to have approved the CMP as a land use permit (CUP) while deferring mandatory approval criteria without feasibility findings that compliance is "likely and reasonably certain to succeed" under *Meyer*, 67 Or App at 280 n5. However, the County's CMP approval decided to defer consideration of the standard to the FMP stage. Petitioner appealed this decision to LUBA (Petition at Rec. 3139) and the Court of

Appeals which affirmed the County decision. *Gould III* and *Gould IV*. A petition for review to the Supreme Court is being filed.

XII. CONCLUSION

Petitioner respectfully requests that LUBA reverse or remand the Hearings Officer's Decision. She failed to accurately or completely interpret the Code standards, failed to require necessary mitigation measures for Whychus Creek, and failed to adopt adequate findings and conditions of approval to ensure compliance with DCC 18.113.070(D). The Hearings Officer also erred in failing to require necessary details on the requirements for destination resorts and FMPs.

DATED this 29th day of June, 2009.

Respectfully submitted,



PAUL DEWEY, OSB #78178
Attorney for Petitioner Gould


CERTIFICATE OF FILING

I hereby certify that on June 29, 2009, I filed the original of **PETITIONER GOULD'S PETITION FOR REVIEW**, plus four copies, with the Land Use Board of Appeals at this address:

Land Use Board of Appeals
550 Capitol Street, NE, Ste. 235
Salem, OR 97301-2552

by first class mail.

DATED this 29th day of June, 2009.


Paul D. Dewey, OSB# 78178
Attorney for Petitioner Annunziata Gould


CERTIFICATE OF SERVICE

I certify that on June 29, 2009, I served a true and correct copy of **PETITIONER GOULD'S PETITION FOR REVIEW** by first class mail on:

Laurie E. Craghead
Deschutes County Legal Counsel
1300 NW Wall Street, Suite 200
Bend, Oregon 97701-1960

Peter Livingston
Schwabe, Williamson & Wyatt, P.C.
1211 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204-3795

DATED this 29th day of June, 2009.

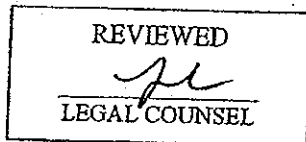

Paul D. Dewey, OSB# 78178
Attorney for Petitioner Annunziata Gould

CERTIFICATE OF SERVICE AND FILING

INDEX TO APPENDIX

ORDER OF BOARD OF COMMISSIONERS.....	App. 1
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1. The first part of the report is a general
introduction to the subject of the study.
2. The second part is a detailed description
of the methods used in the study.
3. The third part is a discussion of the
results of the study.
4. The fourth part is a conclusion and
summary of the findings.



For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Denying Review of Hearings Officer's
Decision in File No. M-07-2 and MA-08-6

*
*

ORDER NO. 2008-083

WHEREAS, Nunzie Gould appealed the Deschutes County Hearings Officer's Decision on Application No. M-07-2 and MA-08-6; and

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

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

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

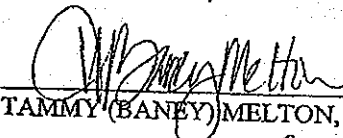
Section 1. That it will not hear on appeal Application A-08-19 pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. Pursuant to DCC 22.32.015, there shall be a refund of \$2,517.00.

DATED this 20th day of Oct, 2008.

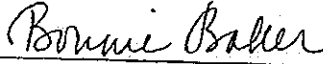
BOARD OF COUNTY COMMISSIONERS


DENNIS R. LUKE, Chair


TAMMY (BANEY) MELTON, Vice Chair


MICHAEL M. DALY, Commissioner

ATTEST:


Bonnie Baker
Recording Secretary

ORDER NO. 2008-083 (10/08/08)

App. 1

LUBA #2008-203

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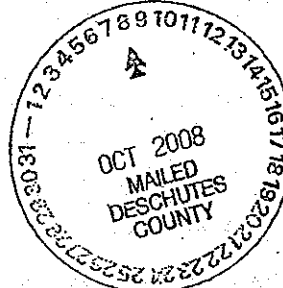
DECISION OF THE DESCHUTES COUNTY HEARINGS OFFICER

THORNBURGH RESORT COMPANY FINAL MASTER PLAN

FILE NUMBER: M-07-2; MA-08-6

**APPLICANT/
OWNER:** Thornburgh Resort Company
PO Box 264
Bend, OR 97702

**APPLICANT'S
REPRESENTATIVE:** Schwabe, Williamson & Wyatt, PC
Peter Livingston, Attorney at Law
1211 SW Fifth Avenue, Suite 1600
Portland, OR 97204



REQUEST: The Applicant requests approval of a Final Master Plan (FMP) and a Modification of Application (MA) for a 1,970-acre Destination Resort located near Cline Buttes, west of Redmond.

STAFF CONTACT: Ruth Herzer, Associate Planner

HEARING DATES: June 17, 2008, continued to July 15, 2008
Record held open for written submittals until September 11, 2008
Final written legal argument submitted September 17, 2008

DECISION ISSUED: October 6, 2008

I. APPLICABLE CRITERIA:

Title 18, Deschutes County Code, County Zoning Ordinance
Chapter 18.113.090, .100, .110

Title 22, Deschutes County Land Use Procedures Ordinance
Title 23, The Deschutes County Comprehensive Plan

CU-05-20 CMP, issued by the Board of County Commissioners on May 11, 2006,
and revised on remand from the Oregon Court of Appeals on April 9, 2008

Oregon Revised Statutes (ORS) Chapter 197.435 to 197.467

II. BASIC FINDINGS:

- A. LOCATION:** The subject property consists of approximately 1,970 acres of land located west of Redmond, Oregon, on the south and west portions of a geologic feature known as Cline Buttes. The property is bordered on three sides by BLM land, and is also in close proximity to Eagle Crest, another destination resort development. The subject property is identified on County Assessor's Index Map 15-12, as tax lots 5000, 5001, 5002, 7700, 7701, 7800, 7801, 7900 and 8000.¹

¹ The applicant also has leased inholding parcels from the Department of State Lands for buffer and access roads. See August 12, 2008 rebuttal testimony, Ex. F-2.

- B. **ZONING:** The subject properties are zoned Exclusive Farm Use (EFU-TRB). The subject properties are also mapped within the Destination Resort (DR) overlay zone for Deschutes County.
- C. **SITE DESCRIPTION:** The resort site is located on an approximately 1,970-acre parcel located adjacent to Cline Buttes. This parcel was formerly a large ranch and has a varied terrain which includes rock outcroppings and drainage washes. On the upper portion of the property there are panoramic views of the Cascade Mountains. Vegetation consists of Juniper woodland with many old growth juniper trees. Three dwellings are located on the property along with the associated roads/driveways. Access to these dwellings is via Cline Falls Highway.
- D. **SURROUNDING LAND USES:** The site is surrounded by public land. Over seventy five percent of surrounding property is managed by the US Bureau of Land Management (BLM). A central section is managed by the Oregon Department of State Lands (DSL). The applicant has acquired lease rights for the DSL property. Eagle Crest destination resort is located close to the northern portion of the proposed development.
- E. **PROPOSAL:** The applicant is requesting Final Master Plan (FMP) approval for the 1,970-acre destination resort. The applicant has amended the Final Master Plan application to include the Wildlife Mitigation Plan as required by the remand decisions from the Court of Appeals and the Land Use Board of Appeals (LUBA).
- F. **LAND USE HISTORY:**

CONCEPTUAL MASTER PLAN:

The Conceptual Master Plan application was approved by the Board of County Commissioners (BOCC) on May 11, 2006 (file no. CU-05-20). The decision was appealed to LUBA and portions of that decision were further appealed to the Court of Appeals. *Gould v. Deschutes County*, 54 Or LUBA 205 (*Gould I*), *rev'd and remanded* 216 Or App 150, 171 P3d 1017 (*Gould II*). These courts remanded the decision back to Deschutes County. The BOCC held a remand hearing on March 19, 2008. On April 9, 2008, the BOCC signed a decision that adopted much of the initial decision, and included additional findings and conditions. (*Gould III*.) The BOCC decision on remand was appealed to LUBA, which affirmed on September 11, 2008 *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No. 2008-068, September 11, 2008), *Court of Appeals review pending* (*Gould IV*.)

FINAL MASTER PLAN:

An application for Final Master Plan approval was submitted on August 1, 2007 (file no. M-07-2). The application was deemed complete and accepted for review on August 31, 2007. On September 18, 2007 the applicant tolled the deadline for a final decision for 45 days. On December 14, 2007, the applicant again tolled the deadline for 45 days. A hearing was scheduled for February 12, 2008, and interested parties were notified of the hearing on January 4, 2008. The February 12, 2008 hearing was canceled at the applicant's request.

In response to the *Gould III* decision, the applicant submitted a Modification of Application on April 21, 2008 which re-started the 150 day clock. This application was

deemed complete on May 21, 2008. The 150th day in which the County has to make a final decision regarding this application is October 20, 2008.

- G. **AGENCY COMMENTS:** The Planning Division mailed notice of the proposed land use to the following agencies: Redmond Fire Department, Deschutes County Assessor, Deschutes County Building Division, Deschutes County Environmental Health, Deschutes County Road Department, Property Address Coordinator, Watermaster, Central Electric Co-op, Pacific Power and Light, Qwest, Redmond School District, Department of Environmental Quality, Division of State Lands, Oregon Department of Transportation, Bureau of Land Management, U.S. Forest Service, Oregon Health Division, Deschutes County Senior Transportation Planner, Central Oregon Parks and Recreation and the Oregon Department of Fish and Wildlife.

The June 10, 2008 staff report summarizes the agency responses and they are not reiterated here. To the extent those comments pertain to applicable approval criteria, they are addressed in the findings below.

- H. **PUBLIC COMMENTS:** The Planning Division mailed notice to property owners within 750 feet of the subject property and to other interested parties. Many of those parties submitted written testimony or testified at the hearing. Relevant comments are addressed in the findings below.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. INTRODUCTION

As is typical for a complex development proposal, the applicant submitted written evidence at different times, and the opponents' testimony and evidence responds to those waves of evidence. To simplify references to the various materials, the hearings officer offers the following shorthand citations:

The revised conceptual master plan conditions of approval: CMP COA # ___. Unless otherwise noted, the COA # corresponds to the numeric listing in this decision.

M 07-2 and supplemental exhibits: M 07-2, Ex. ___

MA 08-6 and supplemental exhibits: MA 08-6, Ex. ___

Applicant's August 12, 2008 rebuttal: August 12, 2008 rebuttal, Ex. ___

The applicant's Wildlife Mitigation Plan, including addenda: WMP (and page references, if appropriate)

Correspondence is referenced by agency/author and date, e.g., Gould, June 17, 2008 submittal; ODFW 6/17/08 email

The BOCC and appellate decisions: *Gould I, II, III or IV*, as appropriate.

B. PRELIMINARY MATTERS

Paul Dewey, representing Nunzie Gould, raised several issues pertaining to the timeliness, scope and sufficiency of the FMP application. Gould, June 17, 2008 submittal. They include:

1. Applicable Approval Standards. Ms. Gould argues that DCC 18.113.060 and 18.113.070 include approval standards that apply to each step of the destination resort approval process, and not just to the CMP stage. DCC 18.113.060 and .070 include standards for

destination resorts. For the most part, those standards were considered and addressed in the CMP phase, and where appropriate, conditions of approval were imposed to ensure that the applicant would comply with the criteria through subsequent land use reviews. Here, the BOCC deferred compliance with DCC 18.113.070(D), but otherwise found that the applicable approval standards had been satisfied. The hearings officer cannot ignore those findings, because they form the basis for the conditions of approval that must be applied to the FMP. See DCC 18.113.040(A) and (B), which explain the relationship between the CMP and FMP processes. The hearings officer concludes that the staff report sets out the applicable review standards for the FMP application.

2. CMP is not a final decision. As noted above, the BOCC's decision on remand has been appealed to the Court of Appeals. Ms. Gould argues that the county cannot rely on a CMP decision that is not yet final to provide review standards for the FMP. The matters at issue in *Gould IV* are rather narrow, in that they challenge the BOCC's decision to defer compliance with DCC 18.113.070(D) to the FMP stage, which would include proceedings and evidence presented to the hearings officer, rather than to the planning director. Ms. Gould argued that the BOCC's deferral must first include a finding that shows that it is feasible for the standard to be met before deferring actual findings of compliance to the latter stage. LUBA rejected that argument, concluding that nothing in the Court of Appeals decision in *Gould II* required a feasibility finding when a determination of compliance was deferred to a later proceeding, infused with the same procedural safeguards offered through the initial proceeding. *Gould IV*, slip op 13. This is the latter proceeding where the issue of compliance with DCC 18.113.070(D) is addressed. The hearings officer finds no impediment to addressing compliance with the standard in this proceeding, as it has not yet been addressed in the CMP process.

In addition, Ms. Gould challenged the BOCC's findings with respect to compliance with overnight lodging ratios, internal access phasing, and road crossings over Barr Road. These issues can be addressed through clarifying findings and conditions in the FMP; they need not wait until the CMP appeals are completed. Even if the hearings officer errs in addressing these issues in this proceeding, it is not clear how that error prevents the applicant and the hearing officer from relying on the findings and conditions of approval in that decision to provide the framework for decision making in this application.

3. Specificity of Submittals and Identification of Modifications. Ms. Gould argues that the FMP evidence is not sufficiently specific to demonstrate (1) that the proposal is consistent with the CMP approval and (2) that the proposal satisfies FMP criteria. In addition, Ms. Gould argues that unless each aspect of the CMP application that is being modified in this decision is identified in this application, the hearings officer has no basis to conclude that the application implements the CMP, and that the FMP is not a substantial modification that requires plenary review as a new CMP.

The hearings officer agrees with Ms. Gould that in most instances, it is much easier to make a determination as to whether the proposal is generally consistent with the initial approval when the applicant identifies the changes that are being made from one phase to the next. With that said, the hearings officer has reviewed the materials that have been cited as being different than the original proposal, and concludes that none of the changes, either alone or cumulatively, are significant enough to warrant either a modification to the FMP application or a new CMP approval.

Turning to the specificity of the evidence, the hearings officer concludes that the evidence provided by the applicant is specific enough to demonstrate that the applicable approval criteria are satisfied.

Other parties submitted testimony and arguments that challenge the need for and appropriateness of the Destination Resort Overlay designation for the site, or request that a decision on the application be postponed until legislative and administrative rule amendments are adopted. The hearings officer concludes that these arguments are outside the scope of these proceedings, and do not provide a basis for delaying or denying the application. With respect to arguments that the applicant needs to demonstrate that the proposal is consistent with the Endangered Species Act (ESA), the hearings official concludes that the ESA is not an approval criterion for FMPs, although it may apply to the applicant's proposal. Therefore, compliance with the ESA is not addressed in this decision.

C. CHAPTER 18.113, DESTINATION RESORTS

1. 18.113.090 Requirements for Final Master Plan

It shall be the responsibility of the applicant to provide a Final Master Plan (FMP) which includes text and graphics explaining and illustrating:

A. ***The use, location, size and design of all important natural features, open space, buffer areas and common areas;***

FINDING: The applicant's exhibits explain and illustrate the use, location, size and design of all important natural features, open space, buffer and common areas. According to the applicant, *"there are no natural streams, watercourses, or wetlands on the property. The site does not contain any significant natural features * * * which define the topography of the area. The site is characterized by bunchgrass. The site contains scattered areas of rock outcroppings. There are no threatened or endangered, or designated Goal 5 habitat areas on the site, as explained in the Wildlife Evaluation approved by the CMP Decision."*

The applicant's exhibits depict approximately 1,293 acres of open space. These are divided into three categories: golf open space (approximately 632 acres,) common open space (approximately 569 acres) and buffer open space (approximately 92 acres.) This buffer is a 50 foot wide strip abutting the perimeter of the resort. The open space totals 66 percent of the gross developed acreage. The evidence refines and clarifies the more general depictions set out in the CMP materials.

The applicant's submittals satisfy DCC 18.113.090(A).

B. ***The use and general location of all buildings, other than residential dwellings and the proposed density of residential development by location;***

FINDING: The applicant submitted a map (MA-08-6 Ex. A3.1) depicting the location of all buildings other than residential dwellings and the proposed density of residential development by location. The applicant states, *"Building associated with the resort infrastructure (including maintenance buildings, shops, substation, pump houses, reservoirs, and sewer treatment building, as well as others) will be located in the areas designated for "infrastructure" on the Master Development Plan. The resort will also include buildings associated with the significant recreational amenities provided. These structures will include: two golf clubhouses, a recreation*

center, a spa and fitness center, a boat club house, game rooms, libraries, a golf learning center, a pro-shop, tennis pro-shop and learning center, swimming pools and associated structures, and sports facilities" Proposed visitor-oriented facilities include restaurants, convention facilities, business center, art gallery and cultural center. The overall residential density of the development will not exceed 0.72 dwelling units per acre (see Burden of Proof, MA-08-6, page 4, and Ex. A-8d).

DCC 18.113.090(B) is satisfied.

C. Preliminary location of all sewer, water, storm drainage and other utility facilities and materials, and specifications and installation methods for water and waste water systems;

FINDING: The applicant submitted revised maps (MA 08-2, Exhibit B2.1 and B1.1) depicting the proposed sewer and water easements, and a map showing where the utilities will be located within the resort roadways. Storm drainage from individual lots will be contained and disposed of on each lot. Treatment and disposal of drainage within roadways will involve the use of treatment swales, retention ponds or other means. DCC 18.113.090(C) is satisfied.

D. Location and widths of all roads, streets, parking, pedestrian ways, equestrian trails and bike paths;

FINDING: The applicant has submitted a map depicting the location of all roads, parking areas and trails located within the resort. All on-site streets will be privately owned and maintained. Accordingly, the streets will comply with the private road standards set out in DCC Title 17. In addition, a significant network of trails is depicted within the resort. These trails generally follow the proposed interior road system. The path system will accommodate pedestrians and bicycles in a multi-use design. These trails will be constructed to the standards set out in DCC Title 17.48.140. DCC 18.113.090(D) is satisfied.

E. Methods to be employed to buffer and mitigate potential adverse impacts on adjacent resource uses and property;

FINDING: Most of the land surrounding the resort is owned by the BLM. The applicant has negotiated a Memo of Understanding (MOU) with the BLM to mitigate offsite impacts that the resort may have on the public lands. The applicant has included the signed MOU dated September 28, 2005. In accordance with this MOU, the applicant has agreed to:

- Participate in all phases of the Cline Buttes Recreation Area planning process
- work with BLM to determine appropriate mitigation measures for the protection of the Tumalo Canal Area of Critical Environmental Concern (Canal ACEC).
- adhere to the specific "Protective Treatment Measures" outlined in MA 08-6, Ex. C3. These measures include additional setbacks from the historic resource, fence construction standards, measures for the screening of the resource, the rehabilitation of existing ATV trails in the area and the curtailment of livestock grazing in the immediate vicinity of the resource. Based upon the agreed mitigation measures, BLM has determined that development of the resort will have "no adverse effect on the historic property."

- construct and maintain cattle guards and/or gates on all access roads and entry points to insure the resort development does not impact livestock grazing.

With respect to abutting DSL property, the applicant has acquired leases to use the property consistent with DSL rules, and the development proposal. DCC 18.113.090(E) is satisfied.

F. *Building elevations of visitor-oriented accommodations, recreational facilities and commercial services sufficient to demonstrate the architectural character of the proposed development;*

FINDING: The applicant submitted building elevations of visitor-oriented accommodations, recreational facilities and commercial services. See M-07-2 Ex. D1, depicting conceptual designs and elevations for the community center, the welcome center, cottages and townhomes. The welcome center will contain real estate sales offices. The community center will include physical fitness and swimming pool facilities. DCC 18.113.090(F) is satisfied.

G. *A description of all commercial uses including approximate size and floor area;*

FINDING: The applicant has indicated that the commercial activities, including specialty retail and real estate related uses, will include 20,000 square feet and 15,000 square feet, respectively. The applicant grouped dining, eating areas and hotel (and related services) into Commercial Facilities/Visitor Oriented Accommodations. These structures include approximately 75,000 square feet. The commercial uses are likely to include, but are not limited to, the types of uses described in the Amenities Description included in M 07-2 Ex A8d. DCC 18.113.090(G) is satisfied.

H. *The location of or distance to any emergency medical facilities and public safety facilities;*

FINDING: The applicant provided maps showing the proximity of the Deschutes County Sheriff, Redmond Fire Station Nos 1 and 2, St. Charles Hospital, Redmond Police, and the Cline Falls Fire Station, (see M 07-2, Ex. F1). The applicant also included a Wildfire/Natural Hazard Protection Plan (M 07-2, Ex. F2), a map showing the fire evacuation routes (M 07-2, Ex. F.7.1), and a letter from former County Sheriff Les Stiles, (M 07-2, Ex. F6) finding the evacuation plan is adequate for this stage of the development. In its modified application, the applicant provided a revised fire evacuation map (M 08-6, Ex. F7.1), and a letter from Tim Moor, Deschutes County Rural Fire Protection District #1 (M 08-6, Ex. F8). Finally, the applicant submitted a September 10, 2008 letter from the Redmond Fire and Rescue, stating that the internal roads are adequate to accommodate emergency vehicles.

DCC 18.113.090(H) is satisfied.

I. *When a phase includes a residential subdivision, a general layout of the subdivision shall include the number of lots, minimum and maximum lot sizes, and approximate location of roadways shall be included:*

FINDING: The CMP site plan shows that the Resort will be developed in seven phases, A through G, (see M 07-2, Ex. G1.1b). A general layout of the residential subdivisions, including the number of lots, minimum and maximum lot sizes, and approximate location of roadways is shown on the Residential Development Plan (M 07-2, Exhibit G1.1b). According to that exhibit,

the resort will consist of 950 lots ranging in size from 3,200 square feet to 97,300 square feet. The applicant proposes to submit a more precise layout for each lot through subsequent subdivision applications. DCC 18.113.090(I) is satisfied.

- J. A description of measures taken, with copies of deed restrictions, CC&R's and rental contracts, to implement the measures identified in DCC 18.113 assuring that individually-owned lodging units considered to be overnight lodgings for at least 45 weeks per calendar year through a central reservation and check-in service.**

FINDING: The applicant has submitted copies of the deed restrictions, CC&R's and rental contracts (MA 08-6, Ex. H3a, H3b.1, H4.1, and H5b). DCC 18.113.090(J) is satisfied.

- K. A description of measures taken, with copies of deed restrictions and a final management plan, to implement the open space management plan required by DCC 18.113.**

FINDING: The CMP decision concludes that the applicant's open space proposals are sufficient to maintain more than 50 percent open space through all phases of the development. Condition #14 ensures that the 50 percent open space requirement is maintained in perpetuity. The delineation of open space required by condition 14 (A) is included in the FMP application as Exhibit A1 (Open Space Plan), which is substantially similar to the open space plan submitted as Ex. 9, B-14 of the "Memorandum of Applicant" dated September 25, 2005. In addition, the CC&Rs have been amended in accordance with Condition 14 (B) to provide that land designated as open space on the plat shall be used and maintained as such in perpetuity. The applicant has also prepared deed restrictions requiring the perpetual maintenance of open space areas, as required by Condition 14 (C). DCC 18.113.090(K) is satisfied.

- L. The status of all required off-site roadway improvements.**

FINDING: A Memorandum of Understanding (MOU) with the Oregon Department of Transportation (ODOT), dated September 25, 2005 (Exhibit 14) requires the applicant to make a substantial contribution of funds towards the construction of a grade separated interchange at the Highway 20/Cook Avenue intersection in Tumalo.² The MOU with ODOT also requires the applicant to construct to ODOT standards, a westbound left-turn lane and an eastbound right-turn lane on Highway 126 at Eagle Crest Blvd. at the time ODOT issues an approach permit to Thornburgh. The applicant has obtained a right of way grant from the BLM authorizing a connection between Oregon Highway 126 and the northern resort access point in Section 17. This road has been constructed. The right-of-way grant is included with the application materials as Exhibit 12. The applicant also intends to construct turn lanes on the Cline Falls Highway at the southern resort entrance.

Opponents argue that these proposals are inadequate to assure that necessary road improvements are implemented prior to or concurrent with development. They note that several intersections in the Tumalo area are at or near failure, and that the additional trips on these roads will exacerbate traffic, pedestrian and bicycle safety concerns. They argue that additional traffic studies must be conducted to address changes in road conditions since the application

² The applicant is obliged to contribute in proportion to the impact the development will have on nearby roads. At the hearing, the applicant's representative testified that the applicant's intended contribution will likely exceed its proportionate share.

was initially approved in 2006, and additional conditions of approval should be imposed to ensure that the traffic from the proposed development will not significantly impede road capacity and safety.

The applicant responds that its proposal is fully consistent with the MOU, and that its documented actions since the MOU became effective demonstrate the applicant's commitment to minimizing the resort's impact on local transportation systems. However, the applicant emphasizes, it is not obliged to fully remedy existing system deficiencies. The applicant argues that the FMP application provides evidence regarding the status of all required off-site roadway improvements sufficient to satisfy DCC 18.113.090(L). The hearings officer agrees.

M. *Methods to be employed for managing automobile traffic demand.*

FINDING: The applicant states that the resort will construct the transportation improvements proposed in the Transportation Impact Analysis and approved in the CMP. Applicant will adhere to the requirements of its MOU with ODOT. Internal roadways within the resort development will be developed and constructed consistent with the Access, Circulation and Trail Plan and DCC Title 17. In addition, the hearings officer adopts the findings set out in DCC 18.113.090(L) to support a finding that DCC 18.113.090(M) is satisfied as well.

N. *A copy of a WPCF permit issued by DEQ consistent with the requirements of DCC 18.113.070(L).*

FINDING: A copy of the Water Pollution Control Facilities Permit (WPCF) has been submitted with the application. (M-07-2, Ex. J1.) DCC 18.133.090(N) is satisfied.

2. 18.113.100 Procedure for Approval of Final Master Plan

A. *The FMP shall be submitted in a form approved by the County Planning Director consistent with DCC Title 22 for a development permit. The Planning Director shall review the FMP and if the Planning Director finds that all standards of the CMP have been met, the FMP shall be approved in writing without notice. If approval the FMP involves the exercise of discretion, the FMP shall be treated as a land use action and notice shall be provided in accordance with DCC Title 22;*

FINDING: The CMP approval included 37 conditions of approval. Some of the conditions of approval must be satisfied prior to final FMP approval. Others carry through to specific development proposals that must be submitted for each phase of development. In this decision, the hearings officer sets out findings for each condition, concluding whether it applies to FMP approval in the first instance and, if so whether the condition of approval is fully satisfied. For those conditions that cannot be satisfied prior to FMP approval, the hearings officer adopts FMP conditions that are intended to ensure compliance throughout the development process, and in some cases, through the life of the development itself.

1. Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application.

FINDING: The FMP substantially conforms to the plan approved in the BOCC's remand decision, and a condition of approval is imposed to maintain conformity throughout the development process.

2. All development in the resort shall require tentative plat approval through Title 17 of the County Code, the county Subdivision/Partition Ordinance, and/or Site Plan Review through Title 18 of the County Code, the Subdivision Ordinance.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

3. Applicant shall provide a signed grant right of way from the US Department of the Interior-Bureau of Land Management for an access easement connection to US Highway 126, prior to submission of a Final Master Plan application.

FINDING: The applicant has submitted the signed right-of-way agreement which allows the applicant to construct, operate, maintain, and terminate a paved access road and bike path, and 8 inch sewer pipeline, an 8-12 inch water pipeline and two signs on public lands. COA 3 is satisfied.

4. Subject to US Department of the Interior- Bureau of Land Management (BLM) approval, any secondary emergency ingress/egress across the BLM-owned land or roadways shall be improved to a minimum width of 20 feet with all-weather surface capable of supporting a 60,000-lb. fire vehicle. Emergency secondary resort access roads shall be improved before any Final Plat approval or issuance of a building permit, whichever comes first.

FINDING: The above mentioned MOU allows for access easements in sections 8, 9, 28, 29 and 30 in T. 15, S. R. 12, E. This allows for both a northern and southern access from Cline Falls Highway. The applicant testified that the northern road has been constructed. To ensure that this condition is satisfied and a southern access road is constructed, it is made a condition of FMP approval.

5. The developer will design and construct the road system in accordance with Title 17 of the Deschutes County Code (DCC). Road improvement plans shall be approved by the Road Department prior to construction.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

6. All easements of record or right-of-ways shall be shown on any final plat. Plans shall be approved by the road Department prior to construction.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

7. All new proposed road names must be reviewed and approved by the Property Address Coordinator prior to final plat approval.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

8. Plan review and approval of water supply plans for phase 1 will be required by Oregon Department of Human Services-Drinking Water Program (DHS-DWPO) prior to Final Master Plan approval.

FINDING: The applicant has received approval from the Oregon Department of Human Services for the Final Master Plan for Thornburgh Resort. It has been approved as a "Master Plan" by DHS-DWPO and therefore will not require further review at the different levels of development so long as they work with a registered professional engineer.

9. Applicant shall designate the location of all utility lines and easements that burden the property on the FMP.

FINDING: The applicant has submitted a map with the Modification of Application showing the location of all utility lines and easements that currently burden the property.

10. Applicant shall comply with all applicable requirements of state water law as administered by OWRD for obtaining a state water right permit and shall provide documentation of approval of its application for a water right permit prior to approval of the final master plan. Applicant shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase.

FINDING: The applicant obtained approval of a water right application. See MA 08-6, Ex. K2. It will become final upon a showing that the required mitigation has been provided for. A condition of approval is imposed to require documentation that mitigation and a water rights permit has been issued for each development phase.

11. At the time of submission for Final Master Plan (FMP) approval, Applicant shall include a written plan for entering into cooperative agreements with owners of existing wells within a two-mile radius of Applicant's wells. The plan shall include a description of how Applicant will provide notice to affected well owners and of the terms and conditions of an option for well owners to enter into a written agreement with Applicant under which Applicant will provide indemnification to well owners in the event of actual well interference as a result of Applicant's water use. The plan shall remain in effect for a period of five years following full water development by Applicant.

FINDING: The applicant has submitted its written plan for entering into cooperative agreements with owners of existing wells within a two-mile radius of the resort. The plan describes how the applicant will provide notice to affected well owners including the terms and conditions under which well owners may enter into an indemnification agreement with Thornburgh in the event of

actual interference as a result of the resort's water use. The specific terms and conditions of the plan were developed in cooperation with County staff and the Oregon Water Resources Department. COA 11 is satisfied.

12. Commercial, cultural, entertainment or accessory uses provided as part of the destination resort shall be contained within the development and shall not be oriented to public roadways. Commercial, cultural and entertainment uses allowed within the destination resort shall be incidental to the resort itself. As such, these ancillary uses shall be permitted only at a scale suited to serve visitors to the resort. Compliance with this requirement shall also be included as a condition of FMP approval.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

13. Applicant shall specify all recreational facilities within the proposed resort as part of final master plan submittal.

FINDING: The applicant has specified the recreational facilities within the proposed resort. They have also shown locations of recreational facilities along with the layout of trail heads, trails and viewpoints. COA 13 is satisfied.

14. Applicant and its successors shall do the following to ensure that all open space used to assure the 50% open space requirement of Section 18.113.060 (D) (1) is maintained in perpetuity:

- A. Applicant shall submit for approval, as part of the Final Master Plan, a delineation of the Open Space that is substantially similar to the area shown in the Open Space Plan submitted as Ex. 9, B-14 to the "Memorandum of Applicant, in a response to public comments dated September 28, 2005, Open Space shall be used and maintained as "open space areas" as that term is used in DCC 18.113.030 (E).

FINDING: The applicant has proposed approximately 1,293 acres of open space (Exhibit A1.1 of MA-08-6). This is divided into three categories, golf open space, common open space and buffer open space. The acreage that is included as open space constitutes approximately 66% of the entire acreage of the resort. The map submitted as part of the Modification of Application is substantially the same as the Open Space map that was approved as part of the CMP. COA 14A is satisfied.

- B. The CC&R's, as modified and submitted to the County on December 20, 2005, shall be further revised such that, Section 3.4 retains the first two sentences, but then the balance of 3.4 is replaced with the following:

At all times, the Open Space shall be used and maintained as "open space areas." The foregoing sentence is a covenant and equitable servitude, which runs with the land in perpetuity and is for the benefit of all of the Property, each Owner, The Declarant, and the Association, and the Golf Club. All of the foregoing

entities shall have the right to enforce covenant and equitable servitude. This Section 3.4 may not be amended except if approved by affirmative vote of all Owners, the Declarant, the Golf Club and the Association.

FINDING: The applicant has submitted CC&R's which contain the above referenced language. See M07-2, Ex. H4. COA 14B is satisfied.

- C. All deeds conveying all or any part of the subject property shall include the following restriction:

This property is part of the Thornburgh Resort and is subject to the provisions of the Final Master Plan for Thornburgh Resort and the Declaration of Covenants, Conditions and Restriction of Thornburgh Resort. The final Master Plan and the Declaration contain a delineation of open space areas that shall be maintained as open space areas in perpetuity.

FINDING: The proposed deeds contain this statement. See M07-2, Ex. H3a and H5b. A condition of approval is imposed to ensure the standard is met throughout the life of the project.

- D. All open space areas shall be clearly delineated and labeled on the Final Plat.

FINDING: The applicant has submitted maps which clearly delineate the open space. As a condition of any approval, the applicant should be required to clearly delineate and label open space areas on subsequent plats. A condition of approval is imposed to ensure this condition is satisfied through full build-out.

- E. Any substantial change to the open space approved under this decision will require a new land use permit.

FINDING: The applicant asserts that the open space areas depicted on the FMP site plan is identical to the open space drawings referred to in Condition 14A. If the applicant proposes to revise the open space areas in future development proposals, the open space requirements will be submit to new land use approval. This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

15. Applicant shall obtain an approved Water Pollution Control Facility (WPCF) permit (as described in DCC 18.113.070 (L) prior to application for Final Master Plan.

FINDING: The applicant has obtained the necessary permit from the Department of Environmental Quality. It is included in the application as Exhibit J1 and is permit number 102900. COA 15 is satisfied.

16. All temporary structures shall be limited to a maximum of 18 months on the resort site.

FINDING: The FMP proposal does not propose temporary structures. This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

17. All development within the proposed resort shall meet all fire protection requirements of the Redmond Fire Department. Fire protection requirements shall include all minimum emergency ingress/egress roadway improvements.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

18. No development shall be allowed on slopes of 25% or more on the site.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

19. Applicant shall implement a "Wildfire/Natural hazard Protection Plan" for the resort, as identified in Ex. 15, B-29 of the burden of proof statement. Prior to approval of the Final Master Plan and each subdivision and site plan, Applicant shall coordinate its evacuation plans through that development phase with the Deschutes County Sheriff's Office and the Redmond Fire Department. At the same time, Applicant shall also coordinate its plans for the movement of evacuees over major transportation routes with the Oregon State Police and the Oregon Department of Transportation.

FINDING: The applicant has submitted a revised fire evacuation plan which shows the fire evacuation routes during the various phases of the development. A letter from former Deschutes County Sheriff, Les Stiles, and a letter from Tim Moor, Fire Chief of the Deschutes County Rural Fire Protection District #1 is included, stating the evacuation plan is adequate for this stage of the development. A condition of approval is imposed to ensure that it is addressed in each development phase.

20. The cumulative density of the development at the end of any phase shall not exceed a maximum density of 0.72 dwelling units per acre (including residential dwelling units and excluding visitor-oriented overnight lodging).

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

21. Each phase of the development shall be constructed such that the number of overnight lodging units meets the 150 overnight lodging unit and 2:1 ratio of individually owned units to overnight lodging unit standards set out in DCC 18.113.060 (A) (1) and 18.113.060 (D) (2). Individually owned units shall be considered visitor oriented lodging if they are available for overnight rental use by the general public for at least 45 weeks per calendar year through one or more central reservation and check-in services. As required by ORS 197.445 (4) (b) (B), at least 50 units of overnight lodging must be constructed in the first phase of development, prior to the closure of sale of individual lots or units.

In addition to complying with the specific requirements of DCC 18.113.070 (U), 1-5, Applicant, its successors and assigns, shall at all times maintain

(1) a registry of the individually owned units subject to deed restriction under DCC 18.113.070 (U) (2), requiring they be available for overnight lodging purposes; (2) an office in a location reasonable convenient to resort visitors as a reservation and check-in facility at the resort; and (3) a separate telephone reservation line and website in the name of "Thornburgh Resort", to be used by members of the public to make reservations. As an alternative to or in addition to (3), Applicant may enter into an agreement with a firm (booking agent) that specializes in the rental of time-sharing of resort property, providing that Applicant will share the information in the registry required by (1) and cooperate with the booking agent to solicit reservations for available overnight lodging at the resort. If Applicant contracts with a booking agent, Applicant and the booking agent shall cooperate to ensure compliance with the requirements of DCC 18.113.070 (U) (5), by filing a report on January 1 of each year with the Deschutes County Planning Division.

FINDING: The applicant has agreed to comply with the above stated agreement at each phase of development. The applicant agrees to meet the 150 overnight lodging unit requirement in the first phase, as required by DCC 18.113.06 (A)(1). The applicant will meet the 2:1 ratio requirement of DCC 18.113.06 (D)(2).

22. Applicant shall submit final covenants, conditions and restrictions to the county prior to Final Master Plan approval. The final covenants, conditions and restrictions adopted by the developer and amendments thereto shall conform in all material respects to this decision and the requirements of the DCC.

FINDING: The applicant has submitted covenants, conditions and restrictions. The CC&R's comply with the requirements of the Deschutes County Code. A condition of approval is imposed to require conformance with the FMP CC&Rs through the life of this development.

23. No permission to use or improve Barr Road as access to the Resort is given or implied by this decision.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

24. Applicant shall complete annexation of the property in any area of development into Deschutes County Rural Fire Protection District No 1 before commencing combustible construction in the area.

FINDING: The applicant has submitted a letter from the Deschutes County Rural Fire Protection District No 1 stating that the property has been annexed to the district.

25. Applicant shall submit a detailed erosion control plan with the first Tentative Plat or Site plan, whichever comes first.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

26. Lot size, width (frontage), coverage, off-street parking and setbacks, including solar setbacks, are permitted as described in Applicant's Exhibit 8, B-24a in the Burden of Proof document, subject to review during the subdivision approval process to confirm that there will be safe vehicle access to each lot. Compliance with the dimensional standards shall be confirmed during subdivision approval for each development phase. All multi-family units, commercial structures, and other resort facilities are exempted from meeting the solar setback standards.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

27. Road width shall be consistent with the requirements set forth in the County's subdivision ordinance. DCC Chapter 17.36.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

28. Applicant shall demonstrate compliance with DCC 18.113.070 (D) by submitting a wildlife mitigation plan to the County as part of its application for Final Master Plan approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participatory rights as those allowed in the CMP approval hearing.

FINDING: This condition was remanded to the BOCC. The *Gould III* decision includes this as COA #38. It is discussed below.

29. Applicant shall abide at all times with the MOU with ODOT, regarding required improvements and contributions to improvements on ODOT administered roadways (Agreement Number 22759, dated 10/10/05).

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

30. Applicant shall submit a detailed traffic circulation plan, delineating resort access roads, resort internal circulation roads and resort secondary emergency ingress/egress roads, prior to Final Master Plan approval.

FINDING: The applicant has submitted the required plan. COA 30 is satisfied.

31. All exterior lighting must comply with the Deschutes County Covered Outdoor Lighting Ordinance per Section 15.10 of Title 15 of the DCC.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

32. No permission to install helicopter landing zone (helipad) at the Resort is given or implied by this decision.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

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

- A. At least 150 separate rentable units for visitor-oriented lodging.
- B. Visitor-oriented eating establishments for at least 100 persons and meeting rooms which provide eating for at least 100 persons.
- C. The aggregate cost of developing the overnight lodging facilities and the eating establishments and meeting rooms required in DCC 10.113.060 (A) (1) and (2) shall be at least \$2,000,000 (in 1984 dollars).
- D. At least \$2,000,000 (in 1984 dollars) shall be spent on developed residential facilities.
- E. The facilities and accommodations required by DCC 18.113.060 must be physically provided or financially assured pursuant to DCC 18.113.110 prior to closure of sales, rental or lease of any residential dwellings or lots.

FINDING: This condition applies through Phase A. Accordingly, it is made a condition of FMP approval.

34. Where construction disturbs native vegetation in open space areas that are to be retained in a substantially natural condition, Applicant shall restore the native vegetation. This requirement shall not apply to land that is improved for recreational uses, such as golf courses, hiking or nature trails or equestrian or bicycle paths.

FINDING: This condition applies throughout the development process. Accordingly, it is made a condition of FMP approval.

35. The contract with the owners of units that will be used for overnight lodging by the general public shall contain language to the following effect: "[Unit Owner] shall make the unit available to [Thornburgh Resort/booking agent] for overnight rental use by the general public at least 45 weeks per calendar year through a central reservation and check-in service."

FINDING: The revised Rental Management Agreement between Thornburgh Resort Company and the owners of overnight lodging units contain the required wording. A condition of approval is imposed to ensure that it is implemented through the life of the project.

36. Applicant shall coordinate with the Sheriff's Office and its designated representative to address all public safety needs associated with the resort and the development process.

FINDING: A letter from the Deschutes County Sheriff's Office has been submitted at attachment F6. The applicant has coordinated public safety planning for the resort with the Sheriff's Office through the "Public Safety Protection Report for Thornburgh Destination Resort" attached as Exhibit F5.

37. (COA #36 in *Gould III*) Applicant shall modify the Overnight and Density Calculations chart presented to the Board at the appeal hearing on December 20, 2005 by replacing it with the Overnight and Density Calculations chart included at page 25 in Applicant's final legal argument, dated January 3, 2006, as shown below. The 75 units of overnight lodging shown in the December 20, 2005 Overnight and Density Calculations table to be developed in Phase C will actually be developed in the Phase B, for a total of 150 units in Phase B. The Overnight and Density Calculations table will be corrected to show the 50 hotel units will be developed in Phase D, where the Phasing Plan, attached to the Memorandum of Applicant in Response to Public comments, Ex. 13, Revised B-1.8, already shows the hotel will be developed. Additionally the legend in the Phasing Plan will be corrected to show hotel and residential overnight lodging uses in Phase D. Applicant shall present the corrected Phasing Plan and Overnight and Density Calculations chart, consistent with this condition, during the Final Master Plan approval process.

FINDING: The corrected Phasing Plan and Overnight and Density Calculations chart has been submitted as part of the FMP application. COA 37 is satisfied.

38. (COA #37 on remand). Applicant shall demonstrate compliance with DCC 18.113.070 (D) by submitting a wildlife mitigation plan to the County as part of its application for Final Master Plan approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participatory rights as those allowed in the CMP approval hearing.

FINDING: In its CMP proposal, the applicant provided evidence regarding existing habitat, the types of animal species that inhabit the site, and provided documents from ODFW and the BLM that asserted that a plan to address fish and wildlife impacts could be crafted and implemented to the satisfaction of those agencies. The county relied on that evidence and testimony to conclude that DCC 18.113.070(D) could be satisfied with conditions that required the applicant to work with the state and federal agencies to provide appropriate mitigation, primarily on federal land. LUBA affirmed that conclusion in *Gould I*.

In *Gould II*, the Court of Appeals disagreed with the county and LUBA. The court noted that the county had relied on evidence that the applicant, its experts, the BLM and ODFW would work together to craft a plan to mitigate the impact of the development on fish and wildlife, but that the evidence showed that some of the mitigation alternatives proposed by the application were not acceptable to those agencies. The court held that the county's findings (1) were inadequate to describe what was needed to satisfy DCC 18.113.070(D); (2) lacked a sufficient description of the applicant's wildlife plan; and (3) lacked an explanation as to why the county believed DCC 18.113.070(D) had been met. Further, the court found that the county could not rely on conditions to satisfy the standard, because the particulars were based on a future negotiation among the agencies and applicant, and not a county hearing process. In the absence of findings explaining the applicant's proposal, and how conditions could be imposed to ensure that the mitigation measures were likely and reasonably certain to succeed, the court found that the conditions alone did not provide the opportunity for public review and comment required by the statutes and case law.

In its decision on remand, the BOCC deferred a finding of compliance with this standard to the FMP. *Gould III*, Condition 37, page 10. Thus, the meaning of the standard, and the sufficiency of the evidence to address it was the major focus of the parties in the FMP proceedings. The applicant provided a wildlife mitigation plan that had been reviewed by the BLM and ODFW, and both agencies endorse the applicant's identification of likely impacts on fish and wildlife, and conclude that the applicant's plan addresses the impact of the development on those resources such that the "no net loss" standard of DCC 18.113.070(D) is satisfied. The opponents challenge the approach used by the applicant to identify resources, the estimate impact the resort development will have on fish and wildlife, and the adequacy of the plan to mitigate the impacts on the identified resources.

1. What is required to satisfy DCC 18.113.090(D)?

The applicant argues that the standard requires a general assessment of the habitat on the site, the species that exist within those habitats, an identification of the impact of the development on the habitats and species, and a plan to ensure that fish and wildlife resources overall will not be degraded or lost. The applicant concedes that for some species, development on the site will eliminate or degrade their habitat, but argues that its proposal, overall, will provide habitat for new species, will improve terrestrial habitat in the area, and will protect fish species. The applicant notes that it has proposed to improve habitat on local public lands, will contribute financially to programs to measure and improve habitat quality and will participate in longitudinal studies to evaluate the effectiveness of the mitigation over time. Those proposals have been reviewed and accepted by the BLM and ODFW. The applicant argues that conditions can be imposed to require additional or alternative mitigation if the proposed mitigation is not sufficient to protect fish and wildlife.

The opponents argue that this standard requires a much more specific analysis of the animal species on the site, and a similarly specific program to mitigate the development's impact on those species. The opponents argue that the applicant's plan is seriously deficient because it relies on one on-site survey, and studies addressing property to the north (*Eagle Crest III*) and superficial assumptions about development on indicator species to identify the animals on the site and how the development will affect them. In addition, the opponents argue that the applicant's proposal is not sufficient to *completely* mitigate those impacts, in part because the final location for off-site mitigation has not yet been identified, and in part because it assumes public agencies and private land owners will commit to implementing the plan over time. Finally, opponents argue that the applicant's commitment to remedy deficiencies in the plan is not credible because the applicant and the agencies have yet to adopt a methodology to evaluate and quantify success/failure.

While the "no net loss" mitigation standard is difficult to quantify, given the range of species that could occupy the site and be affected by development, the hearings officer concludes that it does not require the on-site specificity and review that opponents suggest is necessary. The standard requires an analysis of species on the site, the likely impacts of development, and the applicant's plan to address those impacts. It does not require that each species be maintained or replaced with an equivalent species on a 1:1 or better ratio. Such a requirement would be

difficult, if not impossible to satisfy. In addition, to the extent that conditions of approval are necessary to ensure that the plan is implemented as proposed, conditions can provide both accountability and flexibility to address changes in habitat needs and approaches to mitigation over time.

Having explained what DCC 18.113.070(D) requires, the question turns to whether the applicant's evidence demonstrates that the standard is satisfied. The applicant's wildlife mitigation plan, the mitigation and monitoring plan and the proposed conditions of approval are adequate to demonstrate that the proposal is likely and reasonably certain to succeed.

2. The applicant's wildlife mitigation plan³

The site includes approximately 2,000 acres. Of that total, 426 acres will be devoted to residential development, 316 acres will be devoted to resort facilities, including roads, 589 acres will be developed with golf courses, and 45 acres will be developed with artificial watercourses, streams and lakes. According to the applicant, approximately 897 acres of native vegetation will be retained in yards, buffer areas, common areas, and golf course "rough" areas.

The applicant's wildlife expert identified three major existing habitat areas on the site: juniper woodland (1,715 acres); sagebrush steppe (215 acres) and juniper woodland/outcrop (35 acres.) There are no existing wetlands, water resources, or riparian areas on the site. Further, no threatened, endangered, or sensitive species (plant or animal) or habitats have been identified on site. While the site has been identified as a deer and elk winter range by the BLM, the county has not included the site in its Goal 5 winter range habitat inventory.

After development, the applicant estimates that 615 acres will be managed grassland, juniper shrub-steppe, or golf course. This includes approximately 159 acres of retained native vegetation, of which 61 acres will be temporarily disturbed and need re-vegetation and/or restoration. The remaining 98 acres will include mature juniper and native shrubs and herbs. The applicant proposes to improve habitat by removing invasive plant species and young junipers. Habitat within the residential areas will be maintained on approximately 170 acres, of which 43 acres will need re-vegetation and/or restoration. The remaining 127 acres of native vegetation will have young junipers removed and understory vegetation, consistent with "Fire-wise community" standards.⁴ Approximately 568 acres will be retained in native condition, of which approximately 69 acres will need re-vegetation and restoration. The 69 acres will be restored by planting native grasses, herbs, shrubs and trees.

The applicant evaluated the impact of resort development on wildlife resources by using a modified Habitat Evaluation Procedures (HEP) analysis. The HEP analysis was developed by the US Fish and Wildlife Service in the early 1990s, and Central Oregon wildlife management

³ The summary of the applicant's wildlife plan is based on MA 08-6, Ex. 12, the applicant's August 12, 2008 rebuttal evidence, and supplemental evidence provided by Tetra Tech, the applicant's wildlife consultant.

⁴ "Fire-wise communities" are developments that conform to special fire suppression avoidance standards. According to the applicant, conformance with Fire-wise standards will also improve habitat quality by removing invasive underbrush.

agencies have used it to evaluate development impacts since 1993. The applicant explains the HEP analysis as follows:

"HEP is an accounting method, in which the value of each habitat type for each of a series of evaluation species is expressed in terms of habitat units (HU). These are calculated as the number of acres of that habitat multiplied by an index of its quality, expressed as a number between 0 and 1, which is termed the Habitat Suitability Index (HSI). One HU is the equivalent of one acre of the best habitat available for a species. Two acres of habitat half as good would also equal one HU, and so on. In the HEP analysis, to make the process manageable, an 'evaluation species' is chosen to represent a number of species with similar lifestyles and habitat requirements." MA 08-6, Ex. 12 (L1), page 4 and August 12, 2008 rebuttal, Ex. B-10.

The applicant relied on a 2004 modified HEP analysis for Eagle Crest III (which is located to the north of the subject property) to estimate HSIs for baseline habitat quality and post-development habitat quality.⁵ The applicant's experts coordinated with ODFW to identify the evaluation species for this site, which include: northern flicker, American kestrel, red-tailed hawk, mountain bluebird, small mammals (generic), western fence lizard, and mule deer. The modified HEP results were used to estimate the off-site acreage that would be required to fully mitigate development impacts and result in "no net loss" of the wildlife habitat on the site and within one mile of the site boundaries. The plan includes mitigation for the impact of increased traffic volumes to wildlife movement on Cline Falls Highway. A table summarizing the impacts is set out in MA 08-6, Ex. 12 (L1), page 6.

According to the HEP analysis, 8,474 off-site HUs would be needed to mitigate the impacts of development, resulting in an estimated \$883,190.00 investment in off-site mitigation. The HUs would be located on public land managed by the BLM and would be established on an incremental basis to correspond with the phased development of the resort.

The applicant has agreed to restore 4,501 acres of juniper woodlands in the Cline Buttes sub-area to mitigate the loss of the 8,474 HUs.⁶ The specific BLM land on which the restoration is subject to the adoption of the Cline Buttes Recreation Area Plan (CBRAP), and has yet to be finally identified. However, the applicant and BLM have identified three areas where wildlife and habitat restoration is likely to occur under the CBRAP: the Canyons Region, the Deep Canyons Region, and the Maston Allotment. Restoration includes weed management, vegetation enhancement, reduction of unauthorized off-road motor vehicle use, creation of wildlife water sources ("guzzlers") and traffic speed monitoring devices. The specific activities and monitoring program for the BLM land are identified in an "Off-Site Habitat Mitigation and Monitoring Plan for the Thornburgh Destination Resort Project" (Tetra Tech, August 2008), included in the applicant's August 12, 2008 rebuttal, Ex. B3.

⁵ The applicant's use of the Eagle Crest III HEP was suggested by ODFW staff.

⁶ The applicant's modified HEP analysis concluded that approximately 4498.7 acres would be needed for off-site enhancement to satisfy the 8,474 HU requirement. Modified HEP analysis, August 5, 2008, page 8.

If, at the time of development, insufficient off-site areas are not available, the applicant proposes to provide funding for implementing mitigation in a dedicated fund for use by ODFW to use to improve or purchase mitigation sites within Deschutes County. After the mitigation is established, the applicant will provide continuing funding for the lifetime of the development through a real estate transfer fee.

3. The applicant's fish mitigation plan

The applicant obtained 2,129 acre-feet of water rights to support the proposed development year-round. The development's water supply is to be obtained from six wells that are proposed to be drilled on the property. The water rights were granted upon a finding that the applicant was responsible for providing 1,356 acre-feet of mitigation water.⁷ The applicant proposes to obtain 836 acre-feet from Deep Canyon Creek irrigation rights that were granted to Big Falls Ranch. The remaining mitigation water is to be obtained from the Central Oregon Irrigation District (COID).

With respect to the Deep Canyon Creek water, irrigation rights involve water flowing for six months of the year (mid-April through mid-October). Based on average daily consumption for the resort, the applicant asserts that the proposal will result in more mitigation water flowing into the creek during the summer months, that the average daily consumption of water from the development. To address water temperatures that affect salmonid habitat, the applicant has entered into an agreement with Big Falls Ranch to remove two diversion dams from the creek. As a result, water will flow directly from cold water springs and seeps into the creek, rather than be impounded above ground.⁸ In addition, the applicant proposes to abandon three on-site wells that pump approximately 3.65 acre-feet from the aquifer, and provide for thermal modeling on Whychus Creek. In the event the hearings officer concludes that the proposal will likely increase the creek water temperatures, the applicant provided evidence that it can purchase mitigation credits for 106 acre-feet of water from Three Sisters Irrigation District to increase instream water flows, and thereby mitigate the impact. The applicant asserts that the latter three measures have not been required by OWRD or ODFW, but are in addition to the required mitigation.

4. The Parties' Evidence

The applicant argues that the combination of on-site and off-site mitigation is sufficient to demonstrate that the proposal satisfies DCC 18.113.070(D), and continued compliance can be assured by the adoption of conditions that require continued monitoring of the habitat in the selected areas.

The opponents disagree. The opponents' evidence regarding impacts to wildlife can be reduced to three main points: (1) the applicant's use of the HEP analysis and choice of indicator species are inadequate to identify all of the impacts of development on fish and wildlife; (2) the applicant

⁷ The Oregon Water Resources Department (OWRD) calculated the needed mitigation water based on a 60 percent consumptive use, meaning that 60 percent of the resort water supply will not be returned to the aquifer through golf course irrigation or other surface applications. The opponents dispute that ORWD used the appropriate consumption rate.

⁸ The parties agree that surface water tends to be warmer than aquifer water during the summer months.

improperly identified the extent of impact of the proposed wells and underestimated its severity by assuming only 60 percent of the water used for the development would be consumed; and (3) the applicant has not adequately demonstrated that the proposed mitigation will compensate for the lost habitat or be successful in the long run. Further, the opponents argue that other alternatives, such as the purchase of impacted land and full restoration, are preferable to the more limited restoration efforts proposed for BLM land.

a. Indicator Species/HEP analysis v. Extensive On-site Ground Surveys

The opponents point out that the applicant heavily relied on species survey data from Eagle Crest III and on general habitat investigations performed in the area that were then evaluated in a modified HEP analysis. The opponents argue that these studies and the applicant's indicator species are inadequate to account for and address the complete biota on the site. They also contend that the applicant has failed to demonstrate that the modified HEP analysis adequately accounts for the impact of development on the site, suggesting that a full HEP analysis is the minimum necessary to address habitat impacts. They argue that the applicant's superficial survey is inadequate to provide essential baseline data from which to measure the success or failure of the applicant's mitigation plan. The opponents argue that at the very least, the applicant must provide a two-year survey of plant and animal specials, noting that a multi-year survey better accounts for the vast fluctuations in animal populations that can occur due to site conditions, weather and disease. Finally, opponents argue that even if the indicator species can adequately replicate habitat needs for a wider population, the applicant's studies do not address the cumulative impact of development in the Tumalo area.

The applicant concedes that indicator species will not fully account for all of the many and varied species on the site and the effect the development will have on them. However, the applicant argues that such specificity is not needed to satisfy DCC 18.113.070(D). The applicant asserts that its analysis has been subject to extensive review and comment from ODFW, and is more extensive than plans for other destination resort developments in the area. The applicant argues that its assumptions are reasonable, and the modified HEP analysis adequately quantifies the impacts, and provides a workable methodology to compensate for the impact. With respect to cumulative impacts, the applicant argues that it considered and addressed reasonably foreseeable cumulative impacts. See August 12, 2008 rebuttal, Ex. B-14. The hearings officer agrees.

b. Adequacy of Fish Mitigation Plan

Opponents argue (1) the Deep Canyon Creek water is already pledged to mitigate development on another property or has been abandoned;⁹ (2) the amount of mitigation water required by

⁹ Opponents argue that the acquisition of water rights is not evidence that water will actually be returned to the rivers and streams as alleged. According to opponents, water rights are merely paper representations of water quantities and do not mean that the cool water needed to maintain instream temperatures will be available. The hearings officer understands the limitations of the water rights process, but concludes that under Oregon water law, the only way to adequately account for water in the streams is through the ORWD administration. Therefore, the hearings officer concludes that evidence

OWRD is inadequate to assure that surface water flows will be maintained year-round, as fish need more water early in the spring season; and (3) the use of surface water will degrade existing conditions by taking cold water out of the aquifer where it seeps into Whychus Creek and replacing it with warmer surface water.

The applicant acknowledges that the proposal requires the development of wells on the property that will affect basin water flows. However, the applicant argues that it has addressed those impacts by purchasing mitigation credits from COID, and by acquiring irrigation water rights that will return water to Deep Canyon Creek. They argue that both OWRD and ODFW have reviewed its proposal and have agreed that the proposal mitigates both water quantity and quality that will be removed from the aquifer due to the resort development. The applicant supplied a copy of an agreement between the owners of Deep Falls Ranch and the Daniels Group showing those owners have agreed to the removal of two dams that diverted flow from Deep Canyon Creek.¹⁰ In response to testimony from opponents that the proposed mitigation does not adequately address increases in water temperature in Whychus Creek, the applicant argues its proposal will have little or no impact on water temperatures on the creek. Even if water temperatures in Whychus Creek do increase incrementally, the applicant asserts that the increase can be addressed by requiring the applicant to fund a water conservation project sponsored by the Three Sisters Irrigation District to return 106 acre-feet of water to instream uses.

The OWRD mitigation requirement adequately addresses water quantity; it does not fully address water habitat quality. Its assumptions regarding the benefits of replacing more water during the irrigation season than is consumed on an average daily basis by the resort does not account for the higher water consumption that will likely occur during the summer months. Therefore, the hearings officer concludes that the additional mitigation offered through the Three Sisters Irrigation District restoration program is necessary to assure that water temperatures in Whychus Creek are not affected by the proposed development.

c. Adequacy and Likely Success of the Proposed Mitigation

The opponents generally dispute that the applicant's proposed mitigation plan will result in no net loss to fish and wildlife resources. The opponents argue that the plan assumes that terrestrial animals will adapt to the built environment on the site, or will be attracted to the improved habitat that is being provided off-site. The opponents argue that such assumptions do not take into account the fragmentation of habitat, or address species recovery from the changes in the habitat. Further, opponents argue that the proposal does little to address or combat the problem of invasive species, such as starlings, who are attracted to the environment

regarding the location and volume of water rights is substantial evidence as to the likely location and volume of water in the identified streams.

¹⁰ The Daniels Group owns a former strip mine that has recently been proposed to be redeveloped for residential uses. It is this entity that the opponents assert owns or has options to the Deep Canyon Creek water. However, the opponents have not provided evidence as to the nature and extent of the conflict. The hearings officer concludes there is substantial evidence in the record to support a finding that the applicant has the authority to use water from Deep Canyon Creek, and to remove dams that would impede flows from underground seeps and springs.

that will be developed on the property, and will compete for the limited habitat that remains on the site. With respect to long term habitat improvements, the opponents argue that the applicant is unreasonably optimistic about cheatgrass eradication, and CC&Rs that limit domestic animals to indoor or leashed pets. Finally, the opponents argue that the applicant's mitigation on BLM land does not adequately account for competing BLM priorities, such as grazing, off-road vehicle recreational use, that undermine the restorative goals of the mitigation plan.

The applicant responds that the HEP analysis considered habitat degradation, including habitat fragmentation and the introduction of new non-native species. As a result, the applicant proposes mitigation activities on approximately 4,500 acres to compensate for the loss of 1,000 acres of habitat on its site. Further, the applicant asserts that while it is not certain that the "if you build it, they will come" habitat restoration efforts will be completely effective, the academic evidence supports a finding that habitat improvements will attract species that are being squeezed out by development elsewhere. With respect to the success of its cheatgrass eradication program and competing BLM priorities, the applicant argues that it does not expect that cheatgrass will be fully eradicated, but has proposed a series of measures to minimize its growth and spread, including periodic chemical applications and the introduction of more acceptable competing plant species. In addition, the applicant concedes that the BLM may adopt programs that will cause the mitigation to be less successful than if the mitigation sites were completely off-limits to those competing uses, but argues that there is substantial evidence to support its reliance on the identification of special habitat restoration areas to compensate for those competing activities, and on its mitigation efforts within those areas, to compensate for the loss of habitat on this site. The applicant also notes that it has accounted for circumstances where the BLM mitigation land is not available, by funding replacement mitigation programs through ODFW.

While the applicant's mitigation plan does rely on its program to make general habitat improvements on BLM land, it also acknowledges that BLM management priorities may reduce the success of those efforts. Its plan includes monitoring and alternatives to provide replacement mitigation in the event the anticipated BLM improvements are not successful. The hearings officer concludes that the applicant has demonstrated that the mitigation plan, as conditioned is reasonably likely to success.

d. Alternative Mitigation Plans

The applicant's expert explained that the proposed mitigation is consistent with current wildlife habitat restoration practices, and that the opponents' alternatives, while potentially viable, are no more restorative than the applicant's proposal. The hearings officer has concluded that its plan is adequate to ensure that the impact of the development on fish and wildlife habitats results in no net loss. Therefore, the applicant need not address or consider alternatives that would work equally well or better.

For the reasons set forth above, the hearings officer concludes that, as conditioned, DCC 18.113.070(D) is satisfied.

V. DECISION:

For the reasons set out above, the hearings officer concludes that the proposal satisfies all applicable criteria, or that it is feasible to satisfy the criteria through the implementation of conditions of approval. Accordingly, M 07-2/MA 08-6 are approved, subject to the following conditions. To provide consistency among the decisions, the hearings officer retains the numerical listings included in the BOCC's CMP decision, noting by the word "satisfied" those conditions that no longer apply.

1. Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application.
2. All development in the resort shall require tentative plat approval through Title 17 of the County Code, the county Subdivision/Partition Ordinance, and/or Site Plan Review through Title 18 of the County Code, the Subdivision Ordinance.
3. Satisfied.
4. Subject to US Department of the Interior-Bureau of Land Management (BLM) approval, any secondary emergency ingress/egress across the BLM-owned land or roadways shall be improved to a minimum width of 20 feet with all-weather surface capable of supporting a 60,000-lb. fire vehicle. Emergency secondary resort access roads shall be improved before any Final Plat approval or issuance of a building permit, whichever comes first.
5. The developer will design and construct the road system in accordance with DCC Title 17. Road improvement plans shall be approved by the Road Department prior to construction.
6. All easements of record or right-of-ways shall be shown on any final plat. Plans shall be approved by the Road Department prior to construction.
7. All new proposed road names must be reviewed and approved by the Property Address Coordinator prior to final plat approval.
8. Satisfied.
9. Satisfied.
10. Applicant shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase.
11. Satisfied.
12. Commercial, cultural, entertainment or accessory uses provided as part of the destination resort shall be contained within the development and shall not be oriented to public roadways. Commercial, cultural and entertainment uses allowed within the destination resort shall be incidental to the resort itself. As such, these ancillary uses shall be permitted only at a scale suited to serve

visitors to the resort. Compliance with this requirement shall also be included as a condition of FMP approval.

13. Satisfied.
14. Applicant and its successors shall do the following to ensure that all open space used to assure the 50% open space requirement of Section 18.113.060 (D) (1) is maintained in perpetuity:
 - A. Satisfied.
 - B. Satisfied.
 - C. All deeds conveying all or any part of the subject property shall include the following restriction:

This property is part of the Thornburgh Resort and is subject to the provisions of the Final Master Plan for Thornburgh Resort and the Declaration of Covenants, Conditions and Restriction of Thornburgh Resort. The final Master Plan and the Declaration contain a delineation of open space areas that shall be maintained as open space areas in perpetuity.
 - D. All open space areas shall be clearly delineated and labeled on the Final Plat.
 - E. Any substantial change to the open space approved under this decision will require a new land use permit.
15. Satisfied.
16. All temporary structures shall be limited to a maximum of 18 months on the resort site.
17. All development within the proposed resort shall meet all fire protection requirements of the Redmond Fire Department. Fire protection requirements shall include all minimum emergency ingress/egress roadway improvements.
18. No development shall be allowed on slopes of 25% or more on the site.
19. Applicant shall implement a "Wildfire/Natural Hazard Protection Plan" for the resort, as identified in Ex. 15, B-29 of the CMP burden of proof statement. Prior to approval of each subdivision and site plan, Applicant shall coordinate its evacuation plans through that development phase with the Deschutes County Sheriff's Office and the Redmond Fire Department. At the same time, Applicant shall also coordinate its plans for the movement of evacuees over major transportation routes with the Oregon State Police and the Oregon Department of Transportation.

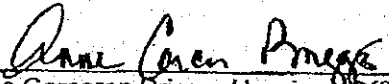
20. The cumulative density of the development at the end of any phase shall not exceed a maximum density of 0.72 dwelling units per acre (including residential dwelling units and excluding visitor-oriented overnight lodging).
21. Each phase of the development shall be constructed such that the number of overnight lodging units meets the 150 overnight lodging unit and 2:1 ratio of individually owned units to overnight lodging unit standards set out in DCC 18.113.060 (A) (1) and 18.113.060 (D) (2). Individually owned units shall be considered visitor oriented lodging if they are available for overnight rental use by the general public for at least 45 weeks per calendar year through one or more central reservation and check-in services. As required by ORS 197.445 (4) (b) (B), at least 50 units of overnight lodging must be constructed in the first phase of development, prior to the closure of sale of individual lots or units.
- In addition to complying with the specific requirements of DCC 18.113.070 (U), 1-5, Applicant, its successors and assigns, shall at all times maintain (1) a registry of the individually owned units subject to deed restriction under DCC 18.113.070 (U) (2), requiring they be available for overnight lodging purposes; (2) an office in a location reasonable convenient to resort visitors as a reservation and check-in facility at the resort; and (3) a separate telephone reservation line and website in the name of "Thornburgh Resort", to be used by members of the public to make reservations. As an alternative to or in addition to (3), Applicant may enter into an agreement with a firm (booking agent) that specializes in the rental of time-sharing of resort property, providing that Applicant will share the information in the registry required by (1) and cooperate with the booking agent to solicit reservations for available overnight lodging at the resort. If Applicant contracts with a booking agent, Applicant and the booking agent shall cooperate to ensure compliance with the requirements of DCC 18.113.070 (U) (5), by filing a report on January 1 of each year with the Deschutes County Planning Division.
22. The final covenants, conditions and restrictions adopted by the developer and amendments thereto shall conform in all material respects to this decision and the requirements of the DCC.
23. No permission to use or improve Barr Road as access to the Resort is given or implied by this decision.
24. Satisfied.
25. Applicant shall submit a detailed erosion control plan with the first Tentative Plat or Site plan, whichever comes first.
26. Lot size, width (frontage), coverage, off-street parking and setbacks, including solar setbacks, are permitted as described in Applicant's Exhibit 8, B-24a in the Burden of Proof document, subject to review during the subdivision approval process to confirm that there will be safe vehicle access to each lot. Compliance with the dimensional standards shall be confirmed during subdivision approval for each development phase. All multi-family units, commercial structures, and other resort facilities are exempted from meeting the solar setback standards.

27. Road width shall be consistent with the requirements set forth in the County's subdivision ordinance, DCC Chapter 17.36.
28. See conditions #38 and #39.
29. Applicant shall abide at all times with the MOU with ODOT, regarding required improvements and contributions to improvements on ODOT administered roadways (Agreement Number 22759, dated 10/10/05).
30. Satisfied.
31. All exterior lighting must comply with the Deschutes County Covered Outdoor Lighting Ordinance per Section 15.10 of Title 15 of the DCC.
32. No permission to install helicopter landing zone (helipad) at the Resort is given or implied by this decision.
33. The Resort shall, in the first phase, provide for the following:
 - A. At least 150 separate rentable units for visitor-oriented lodging.
 - B. Visitor-oriented eating establishments for at least 100 persons and meeting rooms which provide eating for at least 100 persons.
 - C. The aggregate cost of developing the overnight lodging facilities and the eating establishments and meeting rooms required in DCC 10.113.060 (A) (1) and (2) shall be at least \$2,000,000 (in 1984 dollars).
 - D. At least \$2,000,000 (in 1984 dollars) shall be spent on developed residential facilities.
 - E. The facilities and accommodations required by DCC 18.113.060 must be physically provided or financially assured pursuant to DCC 18.113.110 prior to closure of sales, rental or lease of any residential dwellings or lots.
34. Where construction disturbs native vegetation in open space areas that are to be retained in a substantially natural condition, Applicant shall restore the native vegetation. This requirement shall not apply to land that is improved for recreational uses, such as golf courses, hiking or nature trails or equestrian or bicycle paths.
35. The contract with the owners of units that will be used for overnight lodging by the general public shall contain language to the following effect: "[Unit Owner] shall make the unit available to [Thornburgh Resort/booking agent] for overnight rental use by the general public at least 45 weeks per calendar year through a central reservation and check-in service."
36. Applicant shall coordinate with the Sheriff's Office and its designated representative to address all public safety needs associated with the resort and the development process.
37. Satisfied.

38. The applicant shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of off-site mitigation efforts. Consistent with the plan, the applicant shall submit an annual report to the county detailing mitigation activities that have occurred over the previous year. The mitigation measures include removal of existing wells on the subject property, and coordination with ODFW to model stream temperatures in Whychus Creek.
39. The applicant shall provide funding to complete a conservation project by the Three Sisters Irrigation District to restore 106 acre-feet of instream water to mitigate potential increase in stream temperatures in Whychus Creek. The applicant shall provide a copy of an agreement with the irrigation district detailing funding agreement prior to the completion of Phase A.

Dated this 6th day of October, 2008.

Mailed this 8th day of October, 2008.


Anne Corcoran Briggs, Hearings Officer

THIS DECISION IS FINAL UNLESS APPEALED IN ACCORDANCE WITH THE PROVISIONS OF DCC TITLE 22.

Chapter 18.113. DESTINATION RESORTS ZONE - DR

- 18.113.010. Purpose.**
- 18.113.020. Applicability.**
- 18.113.025. Application to Existing Resorts.**
- 18.113.030. Uses in Destination Resorts.**
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18.113.010. Purpose.

- A. The purpose of the DR Zone is to establish a mechanism for siting destination resorts to ensure compliance with LCDC Goal 8 and the County Comprehensive Plan. The destination resort designation is intended to identify land areas which are available for the siting of destination resorts, but which will only be developed if consistent with the purpose and intent of DCC 18.113 and Goal 8.
- B. The DR Zone is an overlay zone. The DR Zone is intended to provide for properly designed and sited destination resort facilities which enhance and diversify the recreational opportunities and the economy of Deschutes County. The DR Zone will ensure resort development that compliments the natural and cultural attractiveness of the area without significant adverse effect on commercial farming and forestry, environmental and natural features, cultural and historic resources and their settings and other significant resources.
- C. It is the intent of DCC 18.113 to establish procedures and standards for developing destination resorts while ensuring that all applicable County Comprehensive Plan policies are achieved.
- D. It is the intent of DCC 18.113 to ensure that all elements of a destination resort which are proposed are financially secured in a manner which will protect the public's interest should the development not be completed as proposed.
- E. It is not the intent of DCC 18.113 to site developments that are in effect rural subdivisions, whose primary purpose is to serve full-time residents of the area.

(Ord. 92-004 §13, 1992)

18.113.020. Applicability.

- A. The provisions of DCC 18.113 shall apply to proposals for the development of destination resorts, as defined in DCC Title 18, in areas designated DR by the County zoning maps. The provisions of DCC 18.113 shall not apply to any development proposal in an area designated DR other than a destination resort.
- B. When these provisions are applicable, they shall supersede all other provisions of the underlying zone. Other provisions of the zoning ordinance, made applicable by specific map designations, such as the SMIA, AH, CH, FP or LM, or otherwise applicable under the terms of the zoning ordinance text shall remain in full force and effect, unless otherwise specified herein.

C. The provisions of DCC 18.113 apply to destination resorts sited through the Goal 2 exception process.
(Ord. 92-004 §13, 1992)

18.113.025. Application to Existing Resorts.

Expansion proposals of existing developments approved as destination resorts shall meet the following criteria:

- A. Meet all criteria of DCC 18.113 without consideration of any existing development; or
- B. Meet all criteria of DCC 18.113 for the entire development (including the existing approved destination resort development and the proposed expansion area), except that as to the area covered by the existing destination resort, compliance with setbacks and lot sizes shall not be required.

If the applicant chooses to support its proposal with any part of the existing development, applicant shall demonstrate that the proposed expansion will be situated and managed in a manner that it will be integral to the remainder of the resort.

(Ord. 92-004 §13, 1992)

18.113.030. Uses in Destination Resorts.

The following uses are allowed, provided they are part of, and are intended to serve persons at, the destination resort pursuant to DCC 18.113.030 and are approved in a final master plan:

- A. Visitor-oriented accommodations designed to provide for the needs of visitors to the resort:
 - 1. Overnight lodging, including lodges, hotels, motels, bed and breakfast facilities, time-share units and similar transient lodging facilities;
 - 2. Convention and conference facilities and meeting rooms;
 - 3. Retreat centers;
 - 4. Restaurants, lounges and similar eating and drinking establishments; and
 - 5. Other similar visitor-oriented accommodations consistent with the purposes of DCC 18.113 and Goal 8.
- B. Developed recreational facilities designed to provide for the needs of visitors and residents of the resort:
 - 1. Golf courses and clubhouses;
 - 2. Indoor and outdoor swimming pools;
 - 3. Indoor and outdoor tennis courts;
 - 4. Physical fitness facilities;
 - 5. Equestrian facilities;
 - 6. Wildlife observation shelters;
 - 7. Walkways, bike paths, jogging paths, equestrian trails;
 - 8. Other similar recreational facilities consistent with the purposes of DCC 18.113 and Goal 8.
- C. Residential accommodations:
 - 1. Single-family dwellings;
 - 2. Duplexes, triplexes, fourplexes and multi-family dwellings;
 - 3. Condominiums;
 - 4. Townhouses;
 - 5. Living quarters for employees;
 - 6. Time-share projects.
- D. Commercial services and specialty shops designed to provide for the visitors to the resort:
 - 1. Specialty shops, including but not limited to delis, clothing stores, bookstores, gift shops and specialty food shops;
 - 2. Barber shops/beauty salons;
 - 3. Automobile service stations limited to fuel sales, incidental parts sales and minor repairs;
 - 4. Craft and art studios and galleries;
 - 5. Real estate offices;
 - 6. Convenience stores;

7. Other similar commercial services which provide for the needs of resort visitors and are consistent with the purposes of DCC 18.113 and Goal 8.
- E. Uses permitted in open space areas generally include only those uses that, except as specified herein, do not alter the existing or natural landscape of the proposed open space areas. No improvements, development or other alteration of the natural or existing landscape shall be allowed in open space areas, except as necessary for development of golf course fairways and greens, hiking and bike trails, lakes and ponds and primitive picnic facilities including park benches and picnic tables. Where farming activities would be consistent with identified preexisting open space uses, irrigation equipment and associated pumping facilities shall be allowed.
- F. Facilities necessary for public safety and utility service within the destination resort.
- G. Other similar uses permitted in the underlying zone consistent with the purposes of DCC 18.113.030.
- H. Accessory Uses in Destination Resorts:
 1. The following accessory uses shall be permitted provided they are ancillary to the destination resort and consistent with the purposes of DCC 18.113 and Goal 8:
 - a. Transportation-related facilities excluding airports;
 - b. Emergency medical facilities;
 - c. Storage structures and areas;
 - d. Kennels as a service for resort visitors only;
 - e. Recycling and garbage collection facilities;
 - f. Other similar accessory uses consistent with the purposes of DCC 18.113 and Goal 8.

(Ord. 92-004 §13, 1992)

18.113.040. Application Submission.

The authorization of a permit for a destination resort shall consist of three steps.

- A. Conceptual Master Plan and Conditional Use Permit for Destination Resort. A conceptual master plan (CMP) shall be submitted which addresses all requirements established in DCC 18.113.040. The CMP application shall be processed as if it were a conditional use permit under DCC Title 22, shall be subject to DCC 18.128.010, 18.128.020 and 18.128.030 and shall be reviewed for compliance with the standards and criteria set forth in DCC 18.113.
- B. Final Master Plan. The applicant shall prepare a final master plan (FMP) which incorporates all requirements of the County approval for the CMP. The Planning Director shall review the FMP to determine if it complies with the approved CMP and all conditions of approval of the conditional use permit. The Planning Director shall have the authority to approve, deny or return the FMP to the applicant for additional information. When interpretations of the Planning Director involve issues which are discretionary, the FMP approval shall be treated as a land use permit in accordance with DCC Title 22.
- C. Site Plan Review. Each element or development phase of the destination resort must receive additional approval through the required site plan review (DCC 18.124) or subdivision process (DCC Title 17). In addition to findings satisfying the site plan or subdivision criteria, findings shall be made that the specific development proposal complies with the standards and criteria of DCC 18.113 and the FMP.

(Ord. 92-004 §13, 1992)

18.113.050. Requirements for Conditional Use Permit and Conceptual Master Plan Applications.

The CMP provides the framework for development of the destination resort and is intended to ensure that the destination resort meets the requirements of DCC 18.113. The CMP application shall include the following information:

- A. Illustrations and graphics to scale, identifying:
 1. The location and total number of acres to be developed as a planned destination resort;
 2. The subject area and all land uses adjacent to the subject area;

3. The topographic character of the site;
 4. Types and general location of proposed development uses, including residential and commercial uses;
 5. Major geographic features;
 6. Proposed methods of access to the development, identifying the main vehicular circulation system within the resort and an indication of whether streets will be public or private;
 7. Major pedestrian, equestrian and bicycle trail systems;
 8. Important natural features of the site, including habitat of threatened or endangered species, streams, rivers, wetlands and riparian vegetation within 200 feet of streams, rivers and wetlands.
 9. All uses proposed within landscape management corridors identified by the comprehensive plan or zoning ordinance.
 10. The location and number of acres reserved as open space, buffer area, or common area. Areas designated as "open space," "buffer area," or "common area" should be clearly illustrated and labeled as such;
 11. All proposed recreational amenities;
 12. Proposed overall density.
- B. Further information as follows:
1. A description of the natural characteristics of the site and surrounding areas, including a description of resources and the effect of the destination resort on the resources; methods employed to mitigate adverse impacts on resources; analysis of how the overall values of the natural features of the site will be preserved, enhanced or utilized in the design concept for the destination resort; and a proposed resource protection plan to ensure that important natural features will be protected and maintained. Factors to be addressed include:
 - a. Compatibility of soil composition for proposed development(s) and potential erosion hazard;
 - b. Geology, including areas of potential instability;
 - c. Slope and general topography;
 - d. Areas subject to flooding;
 - e. Other hazards or development constraints;
 - f. Vegetation;
 - g. Water areas, including streams, lakes, ponds and wetlands;
 - h. Important natural features;
 - i. Landscape management corridors;
 - j. Wildlife.
 2. A traffic study which addresses (1) impacts on affected County, city and state road systems and (2) transportation improvements necessary to mitigate any such impacts. The study shall be submitted to the affected road authority (either the County Department of Public Works or the Oregon Department of Transportation, or both) at the same time as the conceptual master plan and shall be prepared by a licensed traffic engineer to the minimum standards of the road authorities.
 3. A description of how the proposed destination resort will satisfy the standards and criteria of DCC 18.113.060 and 18.113.070;
 4. Design guidelines and development standards defining visual and aesthetic parameters for:
 - a. Building character;
 - b. Landscape character;
 - c. Preservation of existing topography and vegetation;
 - d. Siting of buildings; and
 - e. Proposed standards for minimum lot area, width, frontage, lot coverage, setbacks and building heights.
 5. An open space management plan which includes:
 - a. An explanation of how the open space management plan meets the minimum standards of DCC 18.113 for each phase of the development;

- b. An inventory of the important natural features identified in the open space areas and any other open space and natural values present in the open space;
 - c. A set of management prescriptions that will operate to maintain and conserve in perpetuity any identified important natural features and other natural or open space values present in the open space;
 - d. Deed restrictions that will assure that the open space areas are maintained as open space in perpetuity.
- 6. An explanation of public use of facilities and amenities on the site.
- 7. A description of the proposed method of providing all utility systems, including the location and sizing of the utility systems;
- 8. A description of the proposed order and schedule for phasing, if any, of all development including an explanation of when facilities will be provided and how they will be secured if not completed prior to closure of sale of individual lots or units;
- 9. An explanation of how the destination resort has been sited or designed to avoid or minimize adverse effects or conflicts on adjacent lands. The application shall identify the surrounding uses and potential conflicts between the destination resort and adjacent uses within 660 feet of the boundaries of the parcel or parcels upon which the resort is to be developed. The application shall explain how any proposed buffer area will avoid or minimize adverse effects or conflicts;
- 10. A description of the proposed method for providing emergency medical facilities and services and public safety facilities and services including fire and police protection;
- 11. A study prepared by a hydrologist, engineering geologist or similar professional certified in the State of Oregon describing:
 - a. An estimate of water demands for the destination resort at maximum buildout, including a breakdown of estimated demand by category of consumption, including but not limited to residential, commercial, golf courses and irrigated common areas;
 - b. Availability of water for estimated demands at the destination resort, including (1) identification of the proposed source; (2) identification of all available information on ground and surface waters relevant to the determination of adequacy of water supply for the destination resort; (3) identification of the area that may be measurably impacted by the water used by the destination resort (water impact area) and an analysis supporting the delineation of the impact area; and (4) a statistically valid sampling of domestic and other wells within the impact area;
 - c. A water conservation plan including an analysis of available measures which are commonly used to reduce water consumption. This shall include a justification of the chosen water conservation plan. The water conservation plan shall include a wastewater disposal plan utilizing beneficial use of reclaimed water to the maximum extent practicable.
For the purposes of DCC 18.113.050, beneficial uses shall include, but are not limited to:
 - i. Irrigation of golf courses and greenways;
 - ii. Establishment of artificial wetlands for wildlife habitation.
- 12. An erosion control plan for all disturbed land, as required by ORS 468. This plan shall include storm and melt water erosion control to be implemented during all phases of construction and permanent facilities or practices for the continuing treatment of these waters. This plan shall also explain how the water shall be used for beneficial use or why it cannot be used as such;
- 13. A description of proposed sewage disposal methods;
- 14. Wildfire prevention, control and evacuation plans;
- 15. A description of interim development including temporary structures related to sales and development;
- 16. Plans for owners' associations and related transition of responsibilities and transfer of property;
- 17. A description of the methods of ensuring that all facilities and common areas within each phase will be established and will be maintained in perpetuity;
- 18. A survey of housing availability for employees based upon income level and commuting distance;

19. An economic impact and feasibility analysis of the proposed development prepared by a qualified professional economist(s) or financial analyst(s) shall be provided which includes:
 - a. An analysis which addresses the economic viability of the proposed development;
 - b. Fiscal impacts of the project including changes in employment, increased tax revenue, demands for new or increased levels of public services, housing for employees and the effects of loss of resource lands during the life of the project.
 20. A solid waste management plan;
 21. A description of the mechanism to be used to ensure that the destination resort provides an adequate supply of overnight lodging units to maintain compliance with the 150-unit minimum and 2 to 1 ratio set forth in DCC 18.113.060(D)(2). The mechanism shall meet the requirements of DCC 18.113.060(L);
 22. If the proposed destination resort is in a SMIA combining zone, DCC 18.56 shall be addressed;
 23. If the proposed destination resort is in an LM combining zone, DCC 18.84 shall be addressed;
 24. A survey of historic and cultural resources inventoried on an acknowledged Goal 5 inventory;
 25. Other information as may reasonably be required by the Planning Director to address the effect of the proposed development as related to the requirements of DCC Title 18.
- (Ord. 2007-005 §2, 2007; Ord. 92-004 §13, 1992)

18.113.060. Standards for Destination Resorts.

The following standards shall govern consideration of destination resorts:

- A. The destination resort shall, in the first phase, provide for and include as part of the CMP the following minimum requirements:
 1. At least 150 separate rentable units for visitor-oriented overnight lodging as follows:
 - a. The first 50 overnight lodging units must be constructed prior to the closure of sales, rental or lease of any residential dwellings or lots.
 - b. The resort may elect to phase in the remaining 100 overnight lodging units as follows:
 - i. At least 50 of the remaining 100 required overnight lodging units shall be constructed or guaranteed through surety bonding or equivalent financial assurance within 5 years of the closure of sale of individual lots or units, and;
 - ii. The remaining 50 required overnight lodging units shall be constructed or guaranteed through surety bonding or equivalent financial assurance within 10 years of the closure of sale of individual lots or units.
 - iii. If the developer of a resort guarantees a portion of the overnight lodging units required under subsection 18.113.060(A)(1)(b) through surety bonding or other equivalent financial assurance, the overnight lodging units must be constructed within 4 years of the date of execution of the surety bond or other equivalent financial assurance.
 - iv. The 2:1 accommodation ratio required by DCC 18.113.060(D)(2) must be maintained at all times.
 - c. If a resort does not chose to phase the overnight lodging units as described in 18.113.060(A)(1)(b), then the required 150 units of overnight lodging must be constructed prior to the closure of sales, rental or lease of any residential dwellings or lots.
 2. Visitor-oriented eating establishments for at least 100 persons and meeting rooms which provide seating for at least 100 persons.
 3. The aggregate cost of developing the overnight lodging facilities, developed recreational facilities, and the eating establishments and meeting rooms shall be at least \$ 7,000,000 (in 1993 dollars).
 4. At least \$ 2,333,333 of the \$7,000,000 (in 1993 dollars) total minimum investment required by DCC 18.113.060(A)(3) shall be spent on developed recreational facilities.
 5. The facilities and accommodations required by DCC 18.113.060(A)(2) through (4) must be constructed or financially assured pursuant to DCC 18.113.110 prior to closure of sales, rental or lease of any residential dwellings or lots or as allowed by DCC 18.113.060(A)(1).

- B. All destination resorts shall have a minimum of 160 contiguous acres of land. Acreage split by public roads or rivers or streams shall count toward the acreage limit, provided that the CMP demonstrates that the isolated acreage will be operated or managed in a manner that will be integral to the remainder of the resort.
- C. All destination resorts shall have direct access onto a state or County arterial or collector roadway, as designated by the Comprehensive Plan.
- D. A destination resort shall, cumulatively and for each phase, meet the following minimum requirements:
 - 1. The resort shall have a minimum of 50 percent of the total acreage of the development dedicated to permanent open space, excluding yards, streets and parking areas. Portions of individual residential lots and landscape area requirements for developed recreational facilities, visitor-oriented accommodations or multi-family or commercial uses established by DCC 18.124.070 shall not be considered open space;
 - 2. Individually-owned residential units that do not meet the definition of overnight lodging in DCC 18.04.030 shall not exceed two such units for each unit of visitor-oriented overnight lodging. Individually-owned units shall be considered visitor-oriented lodging if they are available for overnight rental use by the general public for at least 38 weeks per calendar year through one or more central reservation and check-in service(s) operated by the destination resort or by a real estate property manager, as defined in ORS 696.010.
- E. Phasing. A destination resort authorized pursuant to DCC 18.113.060 may be developed in phases. If a proposed resort is to be developed in phases, each phase shall be as described in the CMP. Each individual phase shall meet the following requirements:
 - 1. Each phase, together with previously completed phases, if any, shall be capable of operating in a manner consistent with the intent and purpose of DCC 18.113 and Goal 8.
 - 2. The first phase and each subsequent phase of the destination resort shall cumulatively meet the minimum requirements of DCC 18.113.060 and DCC 18.113.070.
 - 3. Each phase may include two or more distinct noncontiguous areas within the destination resort.
- F. Destination resorts shall not exceed a density of one and one-half dwelling units per acre including residential dwelling units and excluding visitor-oriented overnight lodging.
- G. Dimensional Standards:
 - 1. The minimum lot area, width, lot coverage, frontage and yard requirements and building heights otherwise applying to structures in underlying zones and the provisions of DCC 18.116 relating to solar access shall not apply within a destination resort. These standards shall be determined by the Planning Director or Hearings Body at the time of the CMP. In determining these standards, the Planning Director or Hearings Body shall find that the minimum specified in the CMP are adequate to satisfy the intent of the comprehensive plan relating to solar access, fire protection, vehicle access, visual management within landscape management corridors and to protect resources identified by LCDC Goal 5 which are identified in the Comprehensive Plan. At a minimum, a 100-foot setback shall be maintained from all streams and rivers. Rimrock setbacks shall be as provided in DCC Title 18. No lot for a single-family residence shall exceed an overall project average of 22,000 square feet in size.
 - 2. Exterior setbacks.
 - a. Except as otherwise specified herein, all development (including structures, site-obscuring fences of over three feet in height and changes to the natural topography of the land) shall be setback from exterior property lines as follows:
 - i. Three hundred fifty feet for commercial development including all associated parking areas;
 - ii. Two hundred fifty feet for multi-family development and visitor-oriented accommodations (except for single-family residences) including all associated parking areas;
 - iii. One hundred fifty feet for above-grade development other than that listed in DCC 18.113.060(G)(2)(a)(i) and (ii);
 - iv. One hundred feet for roads;
 - v. Fifty feet for golf courses; and

- vi. Fifty feet for jogging trails and bike paths where they abut private developed lots and no setback for where they abut public roads and public lands.
 - b. Notwithstanding DCC 18.113.060(G)(2)(a)(iii), above-grade development other than that listed in DCC 18.113.060(G)(2)(a)(i) and (ii) shall be set back 250 feet in circumstances where state highways coincide with exterior property lines.
 - c. The setbacks of DCC 18.113.060 shall not apply to entry roadways and signs.
- H. Floodplain requirements. The floodplain zone (FP) requirements of DCC 18.96 shall apply to all developed portions of a destination resort in an FP Zone in addition to any applicable criteria of DCC 18.113. Except for floodplain areas which have been granted an exception to LCDC goals 3 and 4, floodplain zones shall not be considered part of a destination resort when determining compliance with the following standards;
 - 1. One hundred sixty acre minimum site;
 - 2. Density of development;
 - 3. Open space requirements.

A conservation easement as described in DCC Title 18 shall be conveyed to the County for all areas within a floodplain which are part of a destination resort.
- I. The Landscape Management Combining Zone (LM) requirements of DCC 18.84 shall apply to destination resorts where applicable.
- J. Excavation, grading and fill and removal within the bed and banks of a stream or river or in a wetland shall be a separate conditional use subject to all pertinent requirements of DCC Title 18.
- K. Time-share units not included in the overnight lodging calculations shall be subject to approval under the conditional use criteria set forth in DCC 18.128. Time-share units identified as part of the destination resort's overnight lodging units shall not be subject to the time-share conditional use criteria of DCC 18.128.
- L. The overnight lodging criteria shall be met, including the 150-unit minimum and the 2 to 1 ratio set forth in DCC 18.113.060(D)(2).
 - 1. Failure of the approved destination resort to comply with the requirements in DCC 18.113.060(L)(2) through (6) will result in the County declining to accept or process any further land use actions associated with any part of the resort and the County shall not issue any permits associated with any lots or site plans on any part of the resort until proof is provided to the County of compliance with those conditions.
 - 2. Each resort shall compile, and maintain, in perpetuity, a registry of all overnight lodging units.
 - a. The list shall identify each individually-owned unit that is counted as overnight lodging.
 - b. At all times, at least one entity shall be responsible for maintaining the registry and fulfilling the reporting requirements of DCC 18.113.060(L)(2) through (6).
 - c. Initially, the resort management shall be responsible for compiling and maintaining the registry.
 - d. As a resort develops, the developer shall transfer responsibility for maintaining the registry to the homeowner association(s). The terms and timing of this transfer shall be specified in the Conditions, Covenants & Restrictions (CC&Rs).
 - e. Resort management shall notify the County prior to assigning the registry to a homeowner association.
 - f. Each resort shall maintain records documenting its rental program related to overnight lodging units at a convenient location in Deschutes County, with those records accessible to the County upon 72 hour notice from the County.
 - g. As used in this section, "resort management" includes, but is not limited to, the applicant and the applicant's heirs, successors in interest, assignees other than a home owners association.
 - 3. An annual report shall be submitted to the Planning Division by the resort management or home owners association(s) each February 1, documenting all of the following as of December 31 of the previous year:
 - a. The minimum of 150 permanent units of overnight lodging have been constructed or that the resort is not yet required to have constructed the 150 units;

- b. The number of individually-owned residential platted lots and the number of overnight-lodging units;
- c. The ratio between the individually-owned residential platted lots and the overnight lodging units;
- d. The following information on each individually-owned residential unit counted as overnight lodging.
 - i. Who the owner or owners have been over the last year;
 - ii. How many nights out of the year the unit was available for rent;
 - iii. How many nights out of the year the unit was rented out as an overnight lodging facility under DCC 18.113;
 - iv. Documentation showing that these units were available for rental as required.
- e. This information shall be public record subject to ORS 192.502(17).
- 4. To facilitate rental to the general public of the overnight lodging units, each resort shall set up and maintain in perpetuity a telephone reservation system..
- 5. Any outside property managers renting required overnight lodging units shall be required to cooperate with the provisions of this code and to annually provide rental information on any required overnight lodging units they represent to the central office as described in DCC 18.113.060(L)(2) and (3).
- 6. Before approval of each final plat, all the following shall be provided:
 - a. Documentation demonstrating compliance with the 2 to 1 ratio as defined in DCC 18.113.060(D)(2);
 - b. Documentation on all individually-owned residential units counted as overnight lodging, including all of the following:
 - i. Designation on the plat of any individually-owned units that are going to be counted as overnight lodging;
 - ii. Deed restrictions requiring the individually-owned residential units designated as overnight lodging units to be available for rental at least 38 weeks each year through a central reservation and check-in service operated by the resort or by a real estate property manager, as defined in ORS 696.010;
 - iii. An irrevocable provision in the resort Conditions, Covenants and Restrictions ("CC&Rs") requiring the individually-owned residential units designated as overnight lodging units to be available for rental at least 38 weeks each year through a central reservation and check-in service operated by the resort or by a real estate property manager, as defined in ORS 696.010;
 - iv. A provision in the resort CC&R's that all property owners within the resort recognize that failure to meet the conditions in DCC 18.113.060(L)(6)(b)(iii) is a violation of Deschutes County Code and subject to code enforcement proceedings by the County;
 - v. Inclusion of language in any rental contract between the owner of an individually-owned residential unit designated as an overnight lodging unit and any central reservation and check-in service or real estate property manager requiring that such unit be available for rental at least 38 weeks each year through a central reservation and check-in service operated by the resort or by a real estate property manager, as defined in ORS 696.010, and that failure to meet the conditions in DCC 18.113.060(L)(6)(b)(v) is a violation of Deschutes County Code and subject to code enforcement proceedings by the County.

(Ord. 2007-05 §2, 2007; Ord. 92-004 §13, 1992)

18.113.070. Approval Criteria.

In order to approve a destination resort, the Planning Director or Hearings Body shall find from substantial evidence in the record that:

- A. The subject proposal is a destination resort as defined in DCC 18.040.030.
- B. All standards established by DCC 18.113.060 are or will be met.
- C. The economic analysis demonstrates that:
 1. The necessary financial resources are available for the applicant to undertake the development consistent with the minimum investment requirements established by DCC 18.113.
 2. Appropriate assurance has been submitted by lending institutions or other financial entities that the developer has or can reasonably obtain adequate financial support for the proposal once approved.
 3. The destination resort will provide a substantial financial contribution which positively benefits the local economy throughout the life of the entire project, considering changes in employment, demands for new or increased levels of public service, housing for employees and the effects of loss of resource land.
 4. The natural amenities of the site considered together with the identified developed recreation facilities to be provided with the resort, will constitute a primary attraction to visitors, based on the economic feasibility analysis.
- D. Any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.
- E. Important natural features, including but not limited to significant wetlands, riparian habitat, and landscape management corridors will be maintained. Riparian vegetation within 100 feet of streams, rivers and significant wetlands will be maintained. Alterations to important natural features, including placement of structures, is allowed so long as the overall values of the feature are maintained.
- F. The development will not force a significant change in accepted farm or forest practices or significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
- G. Destination resort developments that significantly affect a transportation facility shall assure that the development is consistent with the identified function, capacity and level of service of the facility. This shall be accomplished by either:
 1. Limiting the development to be consistent with the planned function, capacity and level of service of the transportation facility;
 2. Providing transportation facilities adequate to support the proposed development consistent with Oregon Administrative Rules chapter 660, Division 12; or
 3. Altering land use densities, design requirements or using other methods to reduce demand for automobile travel and to meet travel needs through other modes.A destination resort significantly affects a transportation facility if it would result in levels of travel or access that are inconsistent with the functional classification of a facility or would reduce the level of service of the facility below the minimum acceptable level identified in the relevant transportation system plan.
 - a. Where the option of providing transportation facilities is chosen, the applicant shall be required to improve impacted roads to the full standards of the affected authority as a condition of approval. Timing of such improvements shall be based upon the timing of the impacts created by the development as determined by the traffic study or the recommendations of the affected road authority.
 - b. Access within the project shall be adequate to serve the project in a safe and efficient manner for each phase of the project.
- H. The development will not create the potential for natural hazards identified in the County Comprehensive Plan. No structure will be located on slopes exceeding 25 percent. A wildfire management plan will be implemented to ensure that wildfire hazards are minimized to the greatest extent practical and allow for safe evacuation. With the exception of the slope restriction of DCC 18.113.070, which shall apply to destination resorts in forest zones, wildfire management of destination

resorts in forest zones shall be subject to the requirements of DCC 18.40.070, where applicable, as to each individual structure and dwelling.

- I. Adequate public safety protection will be available through existing fire districts or will be provided onsite according to the specification of the state fire marshal. If the resort is located outside of an existing fire district the developer will provide for staffed structural fire protection services. Adequate public facilities to provide for necessary safety services such as police and fire will be provided on the site to serve the proposed development.
- J. Streams and drainage. Unless otherwise agreed to in writing by the adjoining property owner(s), existing natural drainages on the site will not be changed in any manner which interferes with drainage patterns on adjoining property. All surface water drainage changes created by the development will be contained on site in a manner which meets all standards of the Oregon State Department of Environmental Quality (DEQ). The erosion control plan for the subject development will meet all standards of ORS 468.
- K. Adequate water will be available for all proposed uses at the destination resort, based upon the water study and a proposed water conservation plan. Water use will not reduce the availability of water in the water impact areas identified in the water study considering existing uses and potential development previously approved in the affected area. Water sources shall not include any perched water table. Water shall only be taken from the regional aquifer. Where a perched water table is pierced to access the regional aquifer, the well must be sealed off from the perched water table.
- L. The wastewater disposal plan includes beneficial use to the maximum extent practicable. Approval of the CMP shall be conditioned on applicant's making application to DEQ for a Water Pollution Control Facility (WPCF) permit consistent with such an approved wastewater disposal plan. Approval shall also be conditioned upon applicant's compliance with applicable Oregon Administrative Rules regarding beneficial use of waste water, as determined by DEQ. Applicant shall receive approval of a WPCF permit consistent with this provision prior to applying for approval for its Final Master Plan under DCC 18.113.
- M. The resort will mitigate any demands it creates on publicly-owned recreational facilities on public lands in the surrounding area.
- N. Site improvements will be located and designed to avoid or minimize adverse effects of the resort on the surrounding land uses. Measures to accomplish this may include establishment and maintenance of buffers between the resort and adjacent land uses, including natural vegetation and appropriate fences, berms, landscaped areas and similar types of buffers; and setback of structures and other developments from adjacent land uses.
- O. The resort will be served by an on-site sewage system approved by DEQ and a water system approved by the Oregon State Health Division except where connection to an existing public sewer or water system is allowed by the County Comprehensive Plan, such service will be provided to the resort.
- P. The destination resort will not alter the character of the surrounding area in a manner that substantially limits, impairs or prevents permitted or conditional uses of surrounding properties.
- Q. Commercial, cultural, entertainment or accessory uses provided as part of the destination resort will be contained within the development and will not be oriented to public highways adjacent to the property. Commercial, cultural and entertainment uses allowed within the destination resort will be incidental to the resort itself. As such, these ancillary uses will be permitted only at a scale suited to serve visitors to the resort.
The commercial uses permitted in the destination resort will be limited in type, location, number, dimensions and scale (both individually and cumulatively) to that necessary to serve the needs of resort visitors. A commercial use is necessary to serve the needs of visitors if:
 - 1. Its primary purpose is to provide goods or services that are typically provided to overnight or other short-term visitors to the resort, or the use is necessary for operation, maintenance or promotion of the destination resort; and
 - 2. The use is oriented to the resort and is located away from or screened from highways or other major through roadways.

- R. A plan exists to ensure a transfer of common areas, facilities such as sewer, water, streets and responsibility for police and fire protection to owners' associations or similar groups if contemplated. If such transfer is not contemplated, the owner or responsible party shall be clearly designated. Adequate open space, facility maintenance and police and fire protection shall be ensured in perpetuity in a manner acceptable to the County.
- S. Temporary structures will not be allowed unless approved as part of the CMP. Temporary structures will not be allowed for more than 18 months and will be subject to all use and site plan standards of DCC Title 18.
- T. The open space management plan is sufficient to protect in perpetuity identified open space values. (Ord. 2007-5 §2, 2007; Ord. 92-032 §1, 1992; Ord. 92-004 §13, 1992)

18.113.075. Imposition of Conditions.

The standards made applicable by DCC 18.113 may be met by the imposition of conditions calculated to insure that the standard will be met.
(Ord. 92-004 §13, 1992)

18.113.080. Procedure for Modification of a Conceptual Master Plan.

Any substantial change, as determined by the Planning Director, proposed to an approved CMP shall be reviewed in the same manner as the original CMP. An insubstantial change may be approved by the Planning Director. Substantial change to an approved CMP, as used in DCC 18.113.080, means an alteration in the type, scale, location, phasing or other characteristic of the proposed development such that findings of fact on which the original approval was based would be materially affected.
(Ord. 92-004 §13, 1992)

18.113.090. Requirements for Final Master Plan.

It shall be the responsibility of the applicant to provide a Final Master Plan (FMP) which includes text and graphics explaining and illustrating:

- A. The use, location, size and design of all important natural features, open space, buffer areas and common areas;
- B. The use and general location of all buildings, other than residential dwellings and the proposed density of residential development by location;
- C. Preliminary location of all sewer, water, storm drainage and other utility facilities and materials, and specifications and installation methods for water and waste water systems;
- D. Location and widths of all roads, streets, parking, pedestrian ways, equestrian trails and bike paths;
- E. Methods to be employed to buffer and mitigate potential adverse impacts on adjacent resource uses and property;
- F. Building elevations of visitor-oriented accommodations, recreational facilities and commercial services sufficient to demonstrate the architectural character of the proposed development;
- G. A description of all commercial uses including approximate size and floor area;
- H. The location of or distance to any emergency medical facilities and public safety facilities;
- I. When a phase includes a residential subdivision, a general layout of the subdivision shall include the number of lots, minimum and maximum lot sizes, and approximate location of roadways shall be included;
- J. A description of measures taken, with copies of deed restrictions, CC&R's and rental contracts, to implement the requirements of DCC 18.113.060(L).
- K. A description of measures taken, with copies of deed restrictions and a final management plan, to implement the open space management plan required by DCC 18.113.
- L. The status of all required off-site roadway improvements.
- M. Methods to be employed for managing automobile traffic demand.

N. A copy of a WPCF permit issued by DEQ consistent with the requirements of DCC 18.113.070(L).
(Ord. 2007-005 §2, 2007; Ord. 92-004 §13, 1992)

18.113.100. Procedure for Approval of Final Master Plan.

- A. The FMP shall be submitted in a form approved by the County Planning Director consistent with DCC Title 22 for a development permit. The Planning Director shall review the FMP and if the Planning Director finds that all standards of the CMP have been met, the FMP shall be approved in writing without notice. If approval the FMP involves the exercise of discretion, the FMP shall be treated as a land use action and notice shall be provided in accordance with DCC Title 22;
- B. If the Planning Director finds evidence in the FMP of a substantial change from the CMP, the Planning Director shall advise the applicant to submit an application for modification or amendment of the CMP.
(Ord. 92-004 §13, 1992)

18.113.110. Provision of Streets, Utilities, Developed Recreational Facilities and Visitor-Oriented Accommodations.

- A. The Planning Director or Hearings Body shall find that all streets, utilities, developed recreational facilities and visitor-oriented accommodations required by the FMP are physically provided or are guaranteed through surety bonding or substantial financial assurances approved by the County prior to closure of sale of individual lots or units.
- B. Financial assurance or bonding to assure completion of streets and utilities, developed recreational facilities and visitor-oriented accommodations in the FMP shall be required pursuant to the security requirements for site plan review and subdivision review established by the Deschutes County Code.
(Ord. 92-004 §13, 1992; Ord. 92-003 §1, 1992)

18.113.120. Conservation Easement to Protect Resource Site.

- A. If a tract to be used as a destination resort contains a resource site designated for protection in an acknowledged comprehensive plan pursuant to open spaces, scenic and historic areas and natural resource goals, that tract of land shall preserve the resource site by conservation easement sufficient to protect the resource values of the resource site in accordance with ORS 271.715 to 271.795.
- B. A conservation easement under DCC 18.113.120 shall be recorded with the property records of the tract on which the destination resort is sited.
(Ord. 2007-005 §2, 2007)
(Zoning maps adopted by Ord. 92-031 §1, 1992)



THORNBURGH RESORT

Exhibit A8d1: RECREATION, VISITOR, COMMERCIAL AMENITIES PLAN

The Thornburgh Recreation Amenities Plan proposes a comprehensive plan with amenities distributed across the entire property. It is anticipated the proposed amenities will include the following:

- Three (3) championship golf courses
- State of the art golf teaching/practice areas
- Two (2) Golf club houses that may contain some or all of the following:
 - Locker rooms for both men and women
 - Pro shop
 - Meeting rooms and facilities
 - Kitchen and a dining/eating area
 - Wine Cellar and banquet room
 - Library
- Community center(s) that may include:
 - Country style/convenience store
 - Restaurant and grill area
 - Fitness center
 - Rock climbing walls
 - Swim club with amenity lake and sun decks
 - Adventure club rental centers
- A resort hotel complex comprising of:
 - Spa, health and fitness center
 - Swim center
 - Restaurant(s)/bar
 - Conference room facilities
- Recreation lakes and streams for boating, swimming, kayaking, fishing, water skiing, wakeboarding, and a boat club house
- A core village area that could include resort retail and shops, art gallery, cultural center and amphitheater
- A interconnecting hiking/biking trail system with vista points and viewing areas
- Tennis courts, pro shop and teaching center
- A church

All recreation/amenity improvements will be complementary with their immediate natural environment.

The following list complies with the conceptual master plan land use approval request for a list of proposed or allowed commercial, visitor oriented and recreational uses within the resort. The following items are things that would be allowed at Thornburgh Resort. It does not require that all of the following will be built, or be built to any specific standards.

Commercial Facilities and Activities Types and Sizing:

1. Specialty Retail. 20,000 Square feet
 - a. Bank
 - b. Florist shop
 - c. Drugstore
 - d. Grocery and convenience store
 - e. Dry cleaner
 - f. Art gallery
2. Real Estate Sales & Related. 15,000 square feet
 - a. Sales offices
 - b. Leasing and property management

Commercial Facilities/Visitor Oriented Accommodations:

1. Hotel, Dining and Related. 75,000 Square feet
 - a. Hotel
 - b. Pub, lounge, bars
 - c. Restaurants & diners
 - d. Snack shop, deli, bakery

Commercial Facilities/Recreational Amenities:

1. Golf Clubhouse 20,000 Square Feet
 - a. Pro shop
 - b. Food and Beverage sales
2. Spa Facilities 25,000 Square Feet
 - a. Massage and Treatments
 - b. Sauna and steam rooms,
 - c. Wellness and fitness center
3. Recreation center. 15,000 Square Feet
 - a. Adventure services
 - b. Sports equipment sales and rentals.

Other Visitor Oriented Facilities:

1. Convention facilities and meeting rooms
2. Business center
3. Cultural center
4. Church

Recreational Amenities:

1. Game rooms
2. Learning center
 - a. Arts and craft, technology, cooking, etc...
3. Library and book bars
4. Amphitheater
5. Stables and Equestrian facilities
6. Golf Clubhouse
7. Golf Learning Center,
 - a. Training school and Pro Shop
 - b. Golf putting course, practice area.
8. Water sports activities
 - a. Rafting, paddle surfing, and kayaking
 - b. Boating, water skiing, and wakeboarding
 - i. Practice and instruction
 - c. Swimming pools, water slide, wave pool, lazy river, etc...
9. Fitness, Athletics and Spa
 - a. Massage and treatments
 - b. Sauna and steam rooms
 - c. Wellness and fitness center
 - i. Weight rooms and aerobic training
 - d. Athletics
 - i. Running track, basketball court
 - ii. Tennis, racquetball, squash courts
 - e. Sports fields: soccer, baseball and others

10. Sports equipment sales and rentals
11. Recreation center
12. Fishing, including fly-fishing instruction and practice areas
13. Trail Activities
 - a. Hiking, jogging
 - b. Biking, mountain biking
 - c. Vista view points and interactive rest points
14. Climbing walls, and related
15. Kid's camp and activity center
16. Cultural and interpretive center

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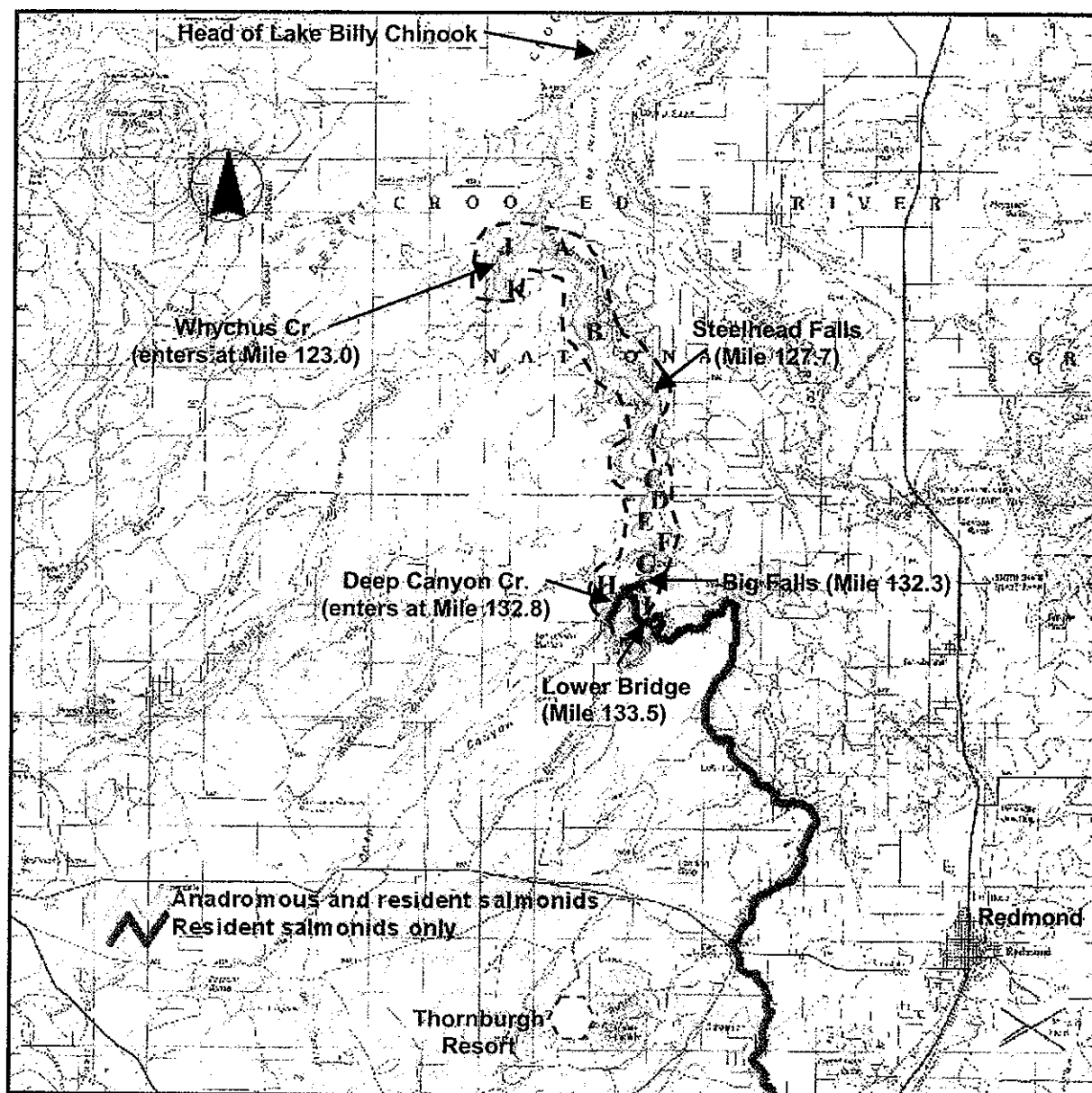


Figure 1. Segments of the Deschutes River and its tributaries that are a focus of effects analyses for groundwater pumping at Thornburgh Resort and mitigation measures described by NCI (2008) and TiEC (2008). Areas within these segments that provide habitat for resident and anadromous salmonids are as indicated. Locations of primary groundwater inputs to the Deschutes River and Whychus Creek within a project impact zone mapped by NCI (2008) are indicated by capital letters (A-K) shown in dark blue. Modeling by Yinger and Strauss (2008) has indicated a larger potential impact zone.

