BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

THORNBURGH RESORT COMPANY, LLC and
CENTRAL OREGON IRRIGATION DISTRICT,
Intervenor-Respondents.

LUBA No. 2006-100

STEVE MUNSON,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

THORNBURGH RESORT COMPANY, LLC and
CENTRAL OREGON IRRIGATION DISTRICT,
Intervenor-Respondents.

LUBA No. 2006-101

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Paul D. Dewey, Bend, filed a petition for review and argued on behalf of petitioner Gould.

Jannett Wilson, Eugene, filed a petition for review and argued on behalf of petitioner Munson. With her on the brief was the Goal One Coalition.

Laurie E. Craghead, Assistant County Legal Counsel, Bend, filed a response brief and argued on behalf of respondent.

Peter Livingston, Portland, filed a response brief and argued on behalf of intervenor-respondent Thornburgh Resort Company, LLC. With him on the brief was Schwabe, Williamson & Wyatt, PC.

Elizabeth A. Dickson and Jennifer L. Coughlin, Bend, filed a response brief and argued on behalf of intervenor-respondent Central Oregon Irrigation District. With them on the brief was Hurley Re & Gruetter, PC.

Renee Moulun, Assistant Attorney General, Salem, filed a State Agency Brief on behalf of the Oregon Water Resources Department. With her on the brief was Steven E. Shipsey.

HOLSTUN, Board Member: BASSHAM, Board Chair; RYAN, Board Member, participated in the decision.

REMANDED 05/14/2007

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners Gould and Munson appeal a decision by the board of county commissioners that grants conditional use and conceptual master plan approval for a destination resort.

REPLY BRIEF

Petitioner Gould moves for permission to file a reply brief to respond to new matters that are raised in intervenor-respondent Thornburgh's Response Brief (Thornburgh's Response Brief). The motion is granted.

THE PROPOSAL

A map from the record showing the proposed destination resort is attached as Appendix A. Petitioner Gould's Petition for Review (Gould's PFR) includes the following description of the proposed destination resort:

> "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 land is zoned Exclusive Farm Use and is also mapped as part of the Destination Resort Overlay Zone. The property is on the west and south flanks of Cline Buttes, a prominent geologic feature of the area.
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> "There are two separate areas of the subject property, one to the north and one to the south, bisected by a steep ridge and U.S. Bureau of Land Management ('BLM') lands. BLM lands adjoin the property on all sides except on the very north where there is private property. There is also a parcel of Oregon Division of State Lands ('DSL') property on the east.
>
> "* * * * *
>
> "The proposed development consists of two 'villages,' one in the south part called the 'Tribute' and one in the north part called the 'Pinnacle.' The Tribute would include approximately 1,240 acres of land and the Pinnacle would include approximately 730 acres. The development would be constructed in seven phases (Phases A through G), with an ultimate build-out date around 2018.
>
> "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.
>
> "The Tribute area is planned to include two golf courses, a golf practice area, golf clubhouse, community center and eating and meeting facilities. The Pinnacle area is planned to have one golf course, a resort hotel, a resort retail area, a recreational lake and a lake/boating clubhouse." Gould's PFR 6-7 (record citations and footnote omitted).

OVERVIEW OF THE COUNTY'S DESTINATION RESORT APPROVAL PROCESS

The legal standards that directly govern approval of destination resorts appear in state statutes, a statewide planning goal and local law. ORS 197.435 to 197.467; Goal 8 (Recreational Needs); Deschutes County Code (DCC) Chapter 18.113. Under DCC Chapter 18.113, there are three steps to secure approval for a destination resort. The first step is approval of a conceptual master plan (CMP). DCC 18.113.040(A). Pursuant to DCC 18.113.040(A), a CMP application is "processed as if it were a conditional use permit * * *." The decision that is before us in this appeal is the county's approval of intervenor-respondent's (Thornburgh's) CMP. The second step is approval of a final master plan (FMP). DCC 18.113.040(B). The third step is approval of individual components or phases of the destination resort, through site plan or subdivision approval. DCC 18.113.040(C).

The CMP is the "framework" for ensuring that the destination resort complies with the relevant standards and approval criteria.[1] DCC 18.113.050 sets out a long list of items of information that must be included in an application for CMP approval. DCC 18.113.060 sets out "[s]tandards for destination resorts." DCC 18.113.070 sets out "[a]pproval criteria" for destination resorts. One of the DCC 18.113.050 information requirements, DCC 18.113.050(B)(3), is a requirement that an application for CMP approval describe "how the

[1] Under DCC 18.113.050, "[t]he 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." (Emphasis added.)

proposed destination resort will satisfy the standards and criteria of DCC 18.113.060 and 18.113.070."[2]

Under DCC 18.113.075, the standards that apply under DCC 18.113 "may be met by the imposition of conditions calculated to insure that the standard will be met."[3] Once a CMP has been approved, the planning director may later approve "insubstantial change[s]" in the CMP administratively, without notice or any hearings; but "substantial change[s]" must be reviewed and approved in the same way the original CMP was approved. DCC 18.113.080.[4] Under DCC 18.113.100(A), the final master plan may be approved administratively, without notice to the parties to the CMP approval or any additional hearings, unless approval of the FMP "involves the exercise of discretion." If the exercise of discretion is required to approve a FMP, the approval is "treated as a land use action," which requires notice and a public hearing or notice of a decision on the land use action with a right of appeal and a hearing on appeal.[5] *Id.*

THE LEVEL OF DETAIL AND SPECIFICITY REQUIRED IN THE CMP

Whether Thornburgh (1) supplied the required level of detail and specificity in the CMP to demonstrate how the proposed destination resort will comply with the many

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[2] Petitioners rely on DCC 18.113.050(B)(3) in several of their assignments of error to argue that the CMP insufficiently explains "*how* the proposed destination resort will satisfy the standards and criteria of DCC 18.113.060 and 18.113.070." (Emphasis added.)

[3] In response to a number of assignments of error, intervenor contends the county properly relied on conditions of approval to ensure that the destination resort will comply with the destination resort standards and approval criteria at DCC 18.113.060 and 18.113.070.

[4] A substantial change to a CMP "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 [CMP] approval was based would be materially affected."

[5] DCC 18.113.040(B) provides:

> "[Thornburgh] shall prepare a [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 [Thornburgh] for additional information. * * *"

standards in DCC 18.113.060 and approval criteria in DCC 18.113.070, or (2) failed to do so and therefore may have improperly deferred decisions regarding those criteria to the FMP approval stage is an issue that permeates this appeal. As previously noted, DCC 18.113.050(B)(3) expressly requires that the CMP include "[a] description of how the proposed destination resort will satisfy the standards and criteria of DCC 18.113.060 and 18.113.070." Once the CMP is approved, unless subsequent amendments to the CMP are approved, the FMP must comply with the CMP and any conditions the county attaches to the CMP approval decision. DCC 18.113.040(B). *See* n 5. Given this relationship between the two documents, petitioners 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. This position is driven in part by petitioners' concerns over the lack of certainty about the opportunity for a public role in review and approval of the FMP. As noted earlier, the county can approve a FMP without additional public hearings if its approval does not require "the exercise of discretion." DCC 18.113.100(A). If significant decisions about the nature, design and characteristics of the destination resort are deferred to the FMP stage, petitioners might not have an opportunity to comment on those decisions.[6]

Thornburgh, on the other hand, emphasizes DCC 18.113.050, which describes the CMP as a "framework." *See* n 1. Thornburgh also relies on the structure of DCC 18.113, which clearly envisions that the CMP will be refined by the FMP which in turn will be further refined by site design and subdivision review decisions. Finally, Thornburgh relies

[6] Petitioners and Thornburgh dispute whether the FMP could be approved without additional public hearings at which petitioners would have an opportunity to comment on and challenge the FMP. Petitioners are correct that the DCC, as written, only requires such a public approval process if, in the words of DCC 18.113.100(A), approval of the FMP "involves the exercise of discretion." It seems likely to us, as Thornburgh argues, that approval of a FMP for a proposal that is controversial and complicated as this one is will almost certainly require decisions that call for the exercise of discretion and trigger a requirement for public review process where petitioners can participate. But at this point, we cannot know for sure. Of course the county could have eliminated any need to argue the point by imposing a condition of approval that requires a public review process for approval of the FMP. The county did not do so. Thornburgh invites LUBA to require that the county provide a public approval process for the FMP decision in this matter. We are not aware of any authority that would allow us to require that the county do so.

on DCC 18.113.075, which expressly provides that conditions may be imposed on CMPs to assure the destination resort will comply with relevant standards and criteria. *See* n 3 and associated text. The authority to impose conditions means that in some circumstances identified defects in the proposed CMP may be corrected by imposing conditions of approval. 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.

As is frequently the case with local land use regulatory schemes that provide for multi-step approval processes, there is language in DCC 18.113 that lends some support to both positions. However, in our view, the sometimes extreme positions that are taken by petitioners on the one hand and Thornburgh on the other rely too heavily on the particular wording in the sections of DCC 18.113 that lend some support to their particular view of the level of detail that is required in the CMP and largely ignore other sections of DCC 18.113 that contradict or undercut that view. When DCC 18.113 is viewed as a whole, the county has a fair amount of discretion in the level of detail it can or must require in a CMP. However, the amount of discretion the county has in this regard is directly affected by the nature and wording of particular approval standards and criteria that the CMP is required to address. 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. Based on the nature and wording of the standard or criterion, the CMP must be sufficiently detailed to provide (1) adequate assurances that each standard and criterion will be met, and (2) an adequate understanding of *how* those standards and criteria will be met. DCC 18.113.050(B)(3). *See* n 2. If the CMP is lacking in making either of those showings, it may be possible for the county to impose conditions of approval under DCC 18.113.075 that are adequate to ensure that the relevant standards and criteria will be

met. *See* n 3.[7] However, if conditions are not sufficient to correct any deficiencies in the CMP, so that the CMP as conditioned demonstrates how all standards and criteria will be satisfied, the county must require that the CMP be amended to do so.

Finally, the parties disagree over the bearing, if any, our decision in *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), has on the above issue. *Rhyne* did not directly address the central dispute between the parties in this appeal (the level of specificity that is required of a CMP to comply with DCC 18.113.050(B)(3)). But *Rhyne* does address a closely related question (the options a land use decision maker has to ensure that discretionary decision making occurs in the public phase of a multi-phase land use approval process where the final phase does not guarantee a right of public participation). In *Rhyne* we offered the following description of those options:

> "Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such

[7] The authority to impose conditions of approval is a potentially powerful decision making tool for the county. It essentially allows the county to modify or supplement the CMP to respond to defects in the CMP that the county or parties identify. While it may be that identified defects cannot be corrected by imposing conditions of approval, in many cases conditions of approval may allow the county to respond to and correct identified defects and thereby permit the county to find that the CMP, as conditioned, shows that relevant approval standards and criteria will be met.

> notice and hearing for second stage decisions in other circumstances." 23 Or LUBA at 447-48 (citation and footnotes omitted).

We understand petitioners to argue that because DCC 18.113.050(B)(3) expressly requires that the CMP include "[a] description of *how* the proposed destination resort will satisfy the standards and criteria of DCC 18.113.060 and 18.113.070," one aspect of the first *Rhyne* option is either unavailable to the county in approving the CMP or is significantly circumscribed. Specifically, we understand petitioners to contend that in view of DCC 18.113.050(B)(3), the county does not have the option of simply finding that "feasible solutions to identified problems exist." Rather, we understand petitioners to contend that DCC 18.113.050(B)(3) requires that the CMP itself must provide a detailed explanation for "how the proposed destination resort will satisfy the standards and criteria of DCC 18.113.060 and 18.113.070."

We do not see that the general rule we described in *Rhyne* is significantly affected by DCC 18.113.050(B)(3). Turning first to *Rhyne*, that decision is not correctly read to say that a local government adequately addresses mandatory approval criteria at the conclusion of the public phase of a multi-stage process by adopting vague, unexplained references to "feasible solutions to identified problems," which will be refined and selected in a later, non-public stage. Even without a provision like DCC 18.113.050(B)(3), demonstrating that a land use proposal satisfies relevant approval criteria, because there are "feasible solutions to identified problems" regarding those approval criteria, requires *some* explanation of what those feasible solutions are—in the evidentiary record, in the decision maker's findings or in both. If that explanation is provided, that explanation of feasible solutions is an adequate substitute for a more direct or precise finding that the approval criterion is satisfied, and the choice among those feasible solutions can occur in a technical or administrative review process, without additional public hearings. *Rhyne*, 23 Or LUBA at 447 (citing *Meyer v. City of Portland*, 67 Or App 274, 280 n 3, 678 P2d 741 , *rev den* 297 Or 82 (1984)).

The kind of explanation regarding feasible solutions to identified problems that would likely suffice under the first *Rhyne* option would likely also suffice to provide the description of "how the proposed destination resort will satisfy the standards and criteria of DCC 18.113.060 and 18.113.070," which is required by DCC 18.113.050(B)(3). As is the case under *Meyer* and *Rhyne*, we do not read DCC 18.113.050(B)(3) to dictate that the county provide a detailed explanation for precisely what the ultimate solution will look like. The county's explanation in approving the CMP must be sufficient to provide a general understanding of how the criteria will be met, but it need not include a resolution of all the technical details that may need to be resolved prior to FMP or subdivision or site plan approval. *Meyer*, 67 Or App at 280-82. We are acutely aware that the principle the Court of Appeals described in *Meyer*, our elaboration on that principle in *Rhyne* and our further elaboration on that principle here is fuzzy at the edges and that the principle may not be easy to apply in all circumstances. The principle is an attempt to recognize and give effect to the public's right to participate in a meaningful way when key decisions are made in a multi-stage quasi-judicial land use proceeding, without running the risk of rendering the entire process unworkable by requiring that every minor technical detail in a complex land development proposal be finally resolved via public hearings at the initial approval stage.

With the above description of the proposal, the county destination resort review process and the parties' general disagreement regarding the role that the CMP plays in that process, we turn to the petitioners' assignments of error.

GOULD'S FIRST ASSIGNMENT OF ERROR

A. The Ratio of Unrestricted Residential Units to Overnight Lodging Units May not Exceed 2:1

Destination resorts must provide at least 150 units of "overnight lodging."[8] The approved CMP proposes more than 150 units of overnight lodging. However, in addition to providing at least 150 overnight lodging units, a maximum 2:1 (residential units to overnight lodging units) ratio is imposed on destination resorts. DCC 18.113.060(D)(2).[9] That means that if 950 units of unrestricted residential housing units are proposed, which is the case here, there must be at least 475 units of overnight lodging in the proposed destination resort. Moreover, pursuant to DCC 18.113.060(E)(2), if the destination resort is to be developed in phases, the "first phase and each subsequent phase of the destination resort shall cumulatively meet the minimum requirements of DCC 18.113.060." This means the 2:1 ratio must be preserved as each phase is constructed. In her first assignment of error, petitioner alleges the county erred in finding that Thornburgh adequately demonstrated how the proposal will comply with the 2:1 ratio limitation that is imposed by DCC 18.113.060(2).

It does not seem that demonstrating how each phase of a destination resort will comply with the 2:1 ratio limit should present much of a problem. But there was a fair amount of confusion regarding this issue below. That confusion had not been cleared up at the time Thornburgh presented its final legal argument, after the evidentiary record had

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[8] Under Goal 8, "hotel or motel rooms, cabins and time-share units" all qualify as overnight lodging. In some circumstances, individually owned residences can also qualify as overnight lodging. Under DCC 18.113.060(D)(2), "[i]ndividually-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 service(s)." In eastern Oregon, Goal 8 only requires that individual units be available for overnight use by the public for 38 weeks per calendar year to qualify as overnight lodging. The subject property is in eastern Oregon. The 45-week per calendar year standard in DCC 18.113.060(D)(2) is therefore slightly more rigorous than the corresponding Goal 8 standard.

[9] DCC 18.113.060(D)(2) provides, in part:

> "Individually-owned residential units shall not exceed two such units for each unit of visitor-oriented overnight lodging."

closed. At that point Thornburgh was relying primarily on a phasing plan (Record 4230) and an Overnight and Density Calculations chart (Record 1940) to demonstrate that the proposal will comply with the 2:1 ratio limit.

The phasing plan shows a total of seven phases (Phase A through Phase G) and indicates where on the destination resort property each phase of construction would occur.[10] Each phase is made up of a number of pods.[11] The pods that make up each phase are displayed on the phasing plan and the type of development (*e.g.*, residential housing, hotel, overnight lodging) proposed for each pod is shown on the phasing plan.

To demonstrate that development of each phase will maintain the 2:1 ratio requirement, Thornburgh also prepared an Overnight Density Calculations chart, which appears at Record 1940. The relevant information from that chart is reproduced as Appendix B to this opinion.

The ratio of residential units to overnight units is computed and displayed on the Overnight Density Calculations chart by dividing the total residential units for each phase by the total number of overnight units (hotel units plus residential overnight units). If the destination resort is developed with the mix of hotel, residential overnight and residential units shown on the Overnight and Density Calculations chart, the 2:1 ratio is maintained for each of the seven phases.

B. Petitioner's Arguments and Thornburgh's Responses

There are a total of three inconsistencies in the phasing plan and the Overnight and Density Calculations chart. The first inconsistency has to do with overnight units in Phases B and C. The Overnight and Density Calculations chart shows 75 units of overnight dwelling

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[10] The time anticipated to construct each phase ranges from three years to four years and those phases overlap somewhat: Phase A (2006-2009); Phase B (2008-2011), Phase C (2009-2012); Phase D (2008-2011); Phase E (2010-2013); Phase F (2014-2018); and Phase G (2014-2018).

[11] A pod is a sub-area of the destination resort site that is designated for commercial, residential, hotel or overnight unit development. There is a total of 41 pods.

units in Phase B and 75 units of overnight dwelling units in Phase C. The phasing plan shows these overnight dwelling units in pod 27, which will be developed in Phase B. Thornburgh took the position below in its final legal arguments that the phasing plan is correct and the Overnight and Density Calculations chart should be corrected to be consistent with the phasing plan.[12]

The second inconsistency has to do with the 50 hotel units. The Overnight and Density Calculations chart shows 25 hotel units will be developed in Phase F and 25 hotel units will be developed in Phase G. The phasing plan shows these 50 hotel units will all be developed in phase D. Thornburgh takes the position that the phasing plan is correct and the Overnight and Density Calculations chart should be corrected to be consistent with the phasing plan.[13]

The final inconsistency has to do with the proposed 62.5 overnight dwelling units shown on the Overnight and Density Calculations chart for Phase D. The legend on the phasing plan does not show these overnight dwelling units being developed in Phase D. Thornburgh takes the position that the phasing plan needs to be corrected to show that the overnight dwellings will be developed with the hotel units that the phasing plan already shows are to be developed in pod 30 during Phase D.

In addition to the three inconsistencies noted above, petitioner pointed out below that the notation in the Overnight and Density Calculations Chart regarding the residential overnight units proposed for Phase A has implications for the 2:1 ratio limit. *See* Appendix B. If the 50 cottages are designed with lockoff units so that the 50 cottages function as 150 of the needed 475 overnight units, but those cottages are later modified to eliminate the

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[12] If this correction were made, the 2:1 ratio limit would not be violated (exceeded); the ratio would drop below 2:1 in Phase B, when the 150 units of overnight units are constructed, and the ratio would return to 2:1 in Phase C.

[13] If this correction were made, the 2:1 ratio limit would not be violated; but the ratio would drop below 2:1 in Phase D, when the 50 hotel units were constructed, and return to a 2:1 ratio in Phase G.

lockoff capability, the destination resort would violate (exceed) the 2:1 ratio limit, unless some additional measures were taken to add more overnight units or the number of unrestricted residential units were reduced to maintain the 2:1 ratio.

C. The County's Findings

The board of county commissioners adopted the following findings to address the above inconsistencies and the notation in the Overnight and Density Calculations chart:

> "Opponents correctly observe that the Overnight and Density Calculations page contains a note stating, 'It is likely that the Phase A buildings will be modified so that the lockoffs will not be used on a long term basis.' This note is speculative. In view of the protections given overnight lodging by DCC 18.113.070(U) * * *, [Thornburgh] could not modify the use of the Phase A buildings without returning to the County for a modification of this conceptual master plan. If that were to occur, the overnight lodging calculations would be reviewed anew before approval. Since the note is inconsistent with the calculations in the table, the Board disregards it.
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> "Opponents also point out three inconsistencies between the types of development shown on the Overnight and Density Calculations page and the Phasing Plan * * *."
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> "These inconsistencies are insignificant. Even without correction the Overnight and Density Calculations table and the Phasing Plan make clear that the overnight lodging units and the individually owned residential units will be distributed throughout the resort. More importantly, the mistakes in the table and the plan, which can easily be corrected, do not raise a genuine issue concerning whether the distribution of units will meet DCC 18.113 standards since, during the preparation of the final master plan, as required by DCC 18.113.090(I). and (J), the number and location of residential lots and overnight lodging units will be reviewed to assure consistency with code requirements. * * *
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> "DCC 18.113 itself does not require the level of specificity that [Thornburth] tried to provide. DCC 18.113.050(A)(4) requires only 'Types and *general location* of proposed development uses, including residential and commercial uses.' * * * Because [Thornburgh] furnished information that exceeds what is required at this stage and a condition of approval is included to assure compliance with the criterion, the County views the errors as harmless and subject to correction later in the development process. In [Thornburgh's] Final Argument to [the] Board of Commissioners * * * [Thornburgh] demonstrated one way such errors could be corrected; however, it is not necessary to adopt [Thornburgh's] demonstration exactly for this criterion to be met." Record 47-48 (emphasis in original).

D. Discussion

The 2:1 ratio limit is a pretty straightforward standard. *See* n 9. But just because the 2:1 ratio is straightforward does not mean the CMP need not show how each phase of the destination resort will stay at or below the 2:1 ratio. One way a CMP can demonstrate how that limit will be met would be to identify the number of unrestricted residential units in each phase and the number of overnight units proposed for each phase, and divide the first number by the second number to demonstrate that the 2:1 ratio will be achieved in each phase. That is the approach Thornburgh took in this case. The third paragraph of the county's findings quoted above erroneously suggests that the county is generally free to ignore inconsistencies or errors in the CMP simply because the FMP will have to comply with the 2:1 ratio limit. The FMP certainly could not deviate from an approved CMP that proposed phases that met the 2:1 ratio and thereby violate the 2:1 ratio requirement. But it is the CMP that must demonstrate how the 2:1 ratio will be achieved throughout each phase.

Equally erroneous is the county's suggestion in fourth paragraph quoted above that the county is generally free to ignore errors or inconsistencies in the CMP regarding the required 2:1 ratio limitation, simply because "DCC 18.113.050(A)(4) requires only 'Types and *general location* of proposed development uses, including residential and commercial uses." Record 48. The DCC 18.113.060(D)(2) ratio must be maintained in each phase of the destination resort's development. Under DCC 18.113.050(B)(3), the CMP must demonstrate "how the proposed destination resort will satisfy" that 2:1 ratio during each phase. Notwithstanding DCC 18.113.050(A)(4), if a more detailed CMP is needed to establish that the 2:1 ratio will be maintained in each phase of the destination resort that is being proposed, that additional detail must be supplied.

Turning to the first two inconsistencies, the Overnight and Density Calculations chart was Thornburgh's more focused and specific attempt to demonstrate that the 2:1 ratio would be satisfied during each phase. That Overnight and Density Calculations chart shows the 2:1

ratio limit is met, in part, by constructing (1) 75 units of overnight lodging in Phase B, (2) 75 units of overnight lodging in Phase C, (3) 25 hotel units in Phase F and (4) 25 hotel units in Phase G. As explained, the phasing plan shows those overnight and hotel units will be completed in earlier phases. Therefore, whether the phasing proposed in the Overnight and Density Calculations chart or the slightly inconsistent phasing shown on the phasing plan is ultimately reflected in the FMP, the 2:1 ratio would be maintained. We agree with the county and Thornburgh that in this case these minor inconsistencies between the Overnight and Density Calculations chart and the phasing plan, inconsistencies which do not affect compliance with the 2:1 ratio no matter which way the inconsistencies are resolved, can properly be ignored as harmless error and corrected at the time the FMP is approved.[14]

The third inconsistency, which if corrected in accordance with Thornburgh's suggestion, would require that the phasing plan be modified to show that 62.5 overnight dwelling units will be developed in Phase D with the hotel, presents a different question. Until the phasing plan is corrected, it proposes phased development that does not comply with the 2:1 ratio.[15] That problem could have been eliminated if the county had imposed a condition of approval that specifically required that correction.[16] Had the county done so, it would be clear "how" the CMP phasing plan proposes to maintain the 2:1 ratio. Until that

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[14] Admittedly, until these corrections are made, one way or the other, there is some uncertainty about which option might ultimately be selected to comply with the 2:1 ratio. However, we agree with the county and Thornburgh, that DCC 18.113.050(B)(3) need not be interpreted to command that degree of certainty at the CMP approval stage. Petitioner does not argue that resolving these inconsistencies one way as opposed to the other has any particular legal significance.

[15] Although no party cites DCC 18.113.080, *see* n 4, it could be that correcting the phasing plan after it is approved would qualify as a "substantial" change that would require a public approval process.

[16] The county was likely concerned that Thornburgh's suggested correction as part of its final legal argument might be viewed as post-hearing evidence that might give petitioners a right to demand an opportunity to rebut such evidence. In fact, petitioner Gould alleges that Thornburgh's final legal argument did include evidence. We do not believe the Thornburgh's suggested correction is properly viewed as evidence. The only conceivable evidentiary component of that suggestion is whether the proposed correction, if adopted, would in fact preserve the 2:1 ratio. We do not understand petitioners to dispute that, as a factual matter, the suggested correction will preserve the 2:1 ratio.

error is eliminated, the CMP phasing plan does not demonstrate how the 2:1 ratio will be maintained in Phase D. Thornburgh has explained that it intends to correct that inconsistency by modifying the phasing plan to conform to the Overnight and Density Calculations chart. It appears that that correction would be sufficient to make the CMP show how the 2:1 ratio will be preserved in Phase D. The county needs to either require that Thornburgh make that correction, or impose a condition of approval that the correction be made, before it grants approval of the CMP.

Finally, the county's finding that it is free to ignore as "speculative" the notation that the Phase A overnight units might at some point in the future eliminate the lockoff feature that allows them to function as 150 overnight units probably should have been stated differently. The county could have more directly rejected that notation and could have eliminated any possibility of confusion by imposing a condition that the FMP omit any suggestion that the lockoff feature might later be eliminated from those 50 residential units, unless the lockoff units were no longer needed to preserve the 2:1 ratio. However, the county's decision effectively requires that the lockoff feature of those 50 units be reflected in the FMP. The fact that the decision also can be read to suggest that some other approach might be taken at the FMP stage that also preserves the 2:1 ratio limit is not inconsistent with the structure of DCC 18.113. Any such different approach might require approval of a substantial change to the CMP under DCC 18.113.080. *See* n 4. But the fact of the matter is that changes in the approved CMP before FMP approval are possible under DCC 18.113.080, regardless of the challenged finding.

The first assignment of error is sustained, in part.

GOULD'S SECOND ASSIGNMENT OF ERROR

Under her second assignment of error, petitioner alleges that Thornburgh inadequately demonstrated how the proposed 475 units of overnight lodging will be set up to assure that they actually function as overnight lodging, rather than normal residential housing

that does not qualify as overnight lodging. In making this argument, petitioner relies significantly on our decision in *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

We agree with Thornburgh, that our decision in *Wetherell* turned in part on a Douglas County Code requirement for a "business plan," a requirement that is not replicated in the DCC. 44 Or LUBA at 749-50. In addition, as we explain in more detail below, the proposal in this case turns largely on DCC provisions that did not play a role in *Wetherell*. In addition, the overnight units in *Wetherell* were timeshare units with lockouts, which created some confusion regarding how those timeshare units could operate as timeshares (which qualify automatically as overnight lodging without being available for overnight rental to the public) at the same time the lockout units could be available for overnight rental to the public for at least 45 weeks each year (which they must be to qualify as overnight lodging). Thornburgh does not propose to meet its overnight lodging requirements with timeshares.

Thornburgh proposes that 50 of the required 475 overnight units will be provided by the hotel that the phasing plan shows will be constructed in Phase D. The remaining 425 overnight units will be residential overnight units, including the 50 cottages that will include two lockout units each, so that each of the 50 units can function as three overnight units. Under Goal 8 and DCC 18.113.060(D)(2), these remaining 425 units must be available for rent for at least 45 weeks per year to qualify as overnight lodging. *See* n 8.

As we indicated earlier, DCC 18.113.050 requires that a great deal of information accompany an application for CMP approval. DCC 18.113.050(B)(21) requires:

> "A description of the system to be used for the management of any individually owned units that will be used for overnight lodging and how it will be implemented, including proposed rental contract provisions to assure that any individually-owned lodging facilities will be available for overnight rental use by the general public for at least 45 weeks per calendar year through a central reservation and check-in service[.]"

One of the approval criteria in DCC 18.113.070 sets out, in significant detail, what the system to manage individually owned units must look like. DCC 18.113.070(U) requires that the county find that the resort includes:

> "A mechanism to ensure that individually-owned units counting toward the overnight lodging total remain available for rent for at least 45 weeks per calendar year through a central reservation and check-in service. Such a mechanism shall include all of the following:
>
> "1. Designation on the plat of which individually-owned units are to be considered to be overnight lodging as used in DCC 18.113;
>
> "2. Deed restrictions limiting use of such identified premises to overnight lodging purposes under DCC 18.113 for at least 45 weeks each year;
>
> "3. Inclusion in the CC&R's of an irrevocable provision enforceable by the County limiting use of such identified units to overnight lodging purposes under DCC 18.113 for at least 45 weeks each year;
>
> "4. Inclusion of language in any rental contract between the owner of the unit and any central reservation and check-in service requiring that such units be made available as overnight lodging facilities under DCC 18.113 for at least 45 weeks each year; and
>
> "5. A requirement that each such unit be registered and a report be filed on each such unit yearly by the owner or central booking agent on January 1 with the Planning Division as to the following information:
>
> "a. Who the owner or owners have been over the last year;
>
> "b. How many nights out of the year the unit was available for rent through the central reservation and check-in service; and
>
> "c. How many nights out of the year the unit was rented out as an overnight lodging facility under DCC 18.113."

The rental contract language required by DCC 18.113.050(B)(21) and DCC 18.113.070(U)(4) apparently was not provided by Thornburgh. But the county imposed a condition of approval to correct this shortcoming.[17] The remaining subsections of DCC

[17] In addressing DCC 18.113.050(B)(21), the county explained:

18.113.070(U) do not leave a great deal to the imagination with regard to the steps that must be taken to ensure that individually owned overnight lodging in a destination resort is managed so that it in fact functions as overnight lodging. The county found that DCC 18.113.070(U) is so detailed that it effectively prescribes the mechanism that must be employed to ensure that individually owned units that are to be used to satisfy the overnight lodging requirement actually function as overnight lodging. Record 87. However, the county also acknowledged petitioner's argument that Thornburgh had not adequately described the mechanism that is required by DCC 18.113.070(U). In response to that argument, the county imposed condition of approval number 21. *Id*. That condition provides in part:

> "In addition to complying with the specific requirements of DCC 18.113.0[7]0(U), 1-5, [Thornburgh], its successors and assigns, shall at all times maintain (1) a registry of the individually owned units subject to deed restrictions under DCC 18.113.070(U)(2), requiring they be available for overnight lodging purposes; (2) an office in a location reasonably convenient to resort visitors as a reservation and check-in facility at the resort; and (3) a separate telephone reservation line and a 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), [Thornburgh] may enter into an agreement with a firm (booking agent) that specializes in the rental or time-sharing of resort property, providing that [Thornburgh] 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 [Thornburgh] contracts with a booking agent, [Thornburgh] 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." Record 97.

It is not readily apparent to us what more Thornburgh could do at the CMP stage to provide the description that is required by DCC 18.113.050(B)(21) or show how the

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> "the Board imposes as a condition that 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 [Resort Management] for overnight rental use by the general public at least 45 weeks per calendar year through a central reservation and check-in service.' This language satisfies [DCC 18.113.050(B)(21)]." Record 42.

destination resort will comply with DCC 18.113.070(U). As the CMP is conditioned, the steps that must be taken in the FMP to assure that overnight lodging units actually function as overnight lodging, as required by Goal 8 and DCC 18.113.070(U), is spelled out in sufficient detail. To the extent the CMP was inadequate as submitted, the condition imposed by the county directs additional steps that must be taken to secure FMP approval and comply with DCC 18.113.070(U). We believe the CMP, as conditioned, is adequate to explain "how" the destination resort will comply with DCC 18.113.070(U).

Finally, petitioner contends that ORS 197.435 only permits one central reservation system, and Thornburgh proposes more than one central reservation system.[18] Thornburgh argues that petitioner misreads ORS 197.435:

> "* * * Gould objects that ORS 197.435 allows just *one* central reservation system operated by the destination resort or by a real estate property manager, as defined in ORS 696.010. ORS 197.435(5)(b) actually calls for '*a* central reservation system,' not '*one* central reservation system.' It does not prohibit redundancy in reservation systems. Moreover, 'system' implies the organization of more than one part. A booking agent, if hired, will be part of Thornburgh's central reservation system." Thornburgh's Response Brief 18.

We agree with Thornburgh.

The second assignment of error is denied.

GOULD'S THIRD ASSIGNMENT OF ERROR

Under her third assignment of error, petitioner argues the county erroneously found that Thornburgh could provide financial assurances for the required 150 units of overnight lodging.[19] In addition, petitioner argues, the county's conditions of approval also

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[18] ORS 197.435(5)(b) provides in relevant part:

> "Individually owned units may be considered overnight lodgings if they are available for overnight rental use by the general public for at least 38 weeks per calendar year through a central reservation system operated by the destination resort or by a real estate property manager, as defined in ORS 696.010."

[19] The county adopted the following finding:

erroneously provide that all the required 150 units of overnight lodging that are scheduled for Phase A can be financially assured rather than actually constructed in Phase A. [20] According to petitioner, ORS 197.445(4)(b) requires that the first 50 units of the required 150 units of overnight lodging must actually be constructed before residential units may be sold, and that financial assurances for those units are not allowed by ORS 197.445(4)(b).[21]

"[Thornburgh] may provide financial assurances for these 150 units prior to recording the final plat for Phase A." Record 48.

[20] The county imposed the following condition of 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 units 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. *In lieu of construction, [Thornburgh] may provide financial assurances for construction of the required overnight lodging.*" Record 96 (emphasis added).

[21] ORS 197.445(4)(b) provides:

"On lands in eastern Oregon, as defined in ORS 321.805:

"(A) A total of 150 units of overnight lodging must be provided.

"(B) At least 50 units of overnight lodging must be constructed prior to the closure of sale of individual lots or units.

"(C) At least 50 of the remaining 100 required overnight lodging units must be constructed or guaranteed through surety bonding or equivalent financial assurance within five years of the initial lot sales.

"(D) The remaining required overnight lodging units must be constructed or guaranteed through surety bonding or equivalent financial assurances within 10 years of the initial lot sales.

"(E) The number of units approved for residential sale may not be more than 2-1/2 units for each unit of permanent overnight lodging provided under subparagraph (B) of this paragraph.

"(F) If the developer of a resort guarantees the overnight lodging units required under subparagraphs (C) and (D) of this paragraph through surety bonding or other equivalent financial assurance, the overnight lodging units must be constructed within four years of the date of execution of the surety bond or other equivalent financial assurance." (Emphasis added.)

DCC 18.113.060(A)(5), which allows all of the required 150 units of overnight lodging to be "physically provided or financially assured" is inconsistent with the requirement in ORS 197.445(4)(b)(B) that the first 50 of those 150 units "must be constructed prior to the closure of sale of individual lots or unit," *see* n 21. While the county's decision with regard to the option of financially assuring the first 50 units of overnight lodging is consistent with DCC 18.113.060(A)(5), it is inconsistent with ORS 197.445(4)(b)(B).

Thornburgh responds that it was never informed "that it must comply with a different statutory requirement." Thornburgh contends that because no issue was raised below with regard to the different statutory requirement, this issue is beyond LUBA's scope of review. ORS 197.835(3).[22] However, as petitioner correctly notes, she had no reason to expect that the county would ignore the more stringent ORS 197.445(4)(b)(B) requirement in its final decision and approve the CMP in a way that specifically allows Thornburgh to proceed under the less stringent DCC 18.113.060(A)(5) requirement. ORS 197.763(1) requires that parties raise issues locally, prior to the close of the final evidentiary hearing, but ORS 197.763(1) does not require that petitioner anticipate and object to a condition of approval that is imposed after the final evidentiary hearing has closed. *Beck v. City of Happy Valley*, 27 Or LUBA 631, 637 (1994).

If Thornburgh's application had specifically proposed to financially assure the first 50 units of overnight lodging rather than construct those units before residential units are sold, we might agree with Thornburgh that petitioner would be obligated in such a circumstance to object to that proposal below to preserve that issue on appeal. But

[22] ORS 197.835 sets out LUBA's scope of review and ORS 197.835(3) provides that "[i]ssues [before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

Thornburgh does not argue that it proposed to financially assure the first 50 units of overnight lodging.

The county must amend its finding and amend or eliminate the above-noted language in the conditions of approval so that they are consistent with ORS 197.445(4)(b)(B). The third assignment of error is sustained.

GOULD'S FOURTH ASSIGNMENT OF ERROR

Under DCC 18.113.060(E), Thornburgh was required to submit a phasing plan.[23] Under her fourth assignment of error, petitioner alleges the county failed to require that Thornburgh supply a phasing plan that describes phases that are consistent with the 2:1 ratio requirement.

In partially sustaining petitioner's first assignment of error, we agreed with petitioner that the phasing plan must be amended to demonstrate how the proposed destination resort will maintain the 2:1 ratio limitation in Phase D. Petitioner argues here it was error to approve the CMP without requiring that the phasing plan be amended to reflect the 62.5 units that Thornburgh plans to construct in Phase D. We agree and sustain the fourth assignment of error, in part.

But we rejected petitioner's other objections to inconsistencies between the Overnight and Density Calculations chart and the phasing plan. To the extent petitioner argues under this assignment of error that the county erred by failing to amend the phasing plan to resolve those inconsistencies we reject that argument here for the same reason we rejected that argument under the first assignment of error.

Petitioner also suggests that until all of the uncertainties she identified with regard to the 2:1 ratio requirement and the phasing plan are resolved it will not be possible to be

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[23] DCC 18.113.060(E) provides in part:

> "If a proposed resort is to be developed in phases, each phase shall be as described in the CMP."

confident that other criteria that depend on the proposed phasing are adequately resolved. However, petitioner does not sufficiently develop this argument to provide any additional basis for remand under this assignment of error.

The fourth assignment of error is sustained in part.

GOULD'S FIFTH ASSIGNMENT OF ERROR

Under her fifth assignment of error, petitioner alleges the CMP is insufficient to supply certain information required under DCC 18.113.050, certain standards under DCC 18.113.060 and certain approval criteria under DCC 18.113.070. We address petitioner's arguments separately below.

A. Facility Phasing Schedule—DCC 18.113.050(B)(8)

A CMP must (1) describe the development phasing schedule, (2) explain when facilities will be provided, and (3) explain how facilities will be secured, if they will not be completed before sale of individual lots or units. DCC 18.113.050(B)(8).[24]

The county adopted four paragraphs of findings responding to DCC 18.113.050(B)(8). Petitioner sets out one sentence of those finding that concerns a "[a] list of possible amenities or commercial facilities" and states:

> "Those facilities will be constructed when they are warranted by the population base at the resort." Record 25.

Petitioner complains that the above-quoted finding is too "open-ended" to demonstrate the CMP complies with DCC 18.113.050(B)(8). Petitioner also complains that the county's decision "does not state 'how' facilities will be secured," as DCC 18.113.050(B)(8) requires. Gould's PFR 26.

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[24] DCC 18.113.050(B)(8) requires that a CMP include the following information:

> "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[.]"

It is not entirely clear to us what "facilities" DCC 18.113.050(B)(8) is concerned with and what "facilities" are the focus of petitioner's concern under this subassignment of error. Petitioner cites ORS 197.445(3) and (4) and DCC 18.113.060(A).[25] Absent a more developed argument from petitioner, we assume that the facilities that petitioner and DCC 18.113.050(B)(8) refer to are the required 150 units of overnight lodging and the required visitor-oriented accommodations for 100 persons.

Included in Thornburgh's response is a reference to the following findings:

> "[Thornburgh] will comply with [DCC 18.113.060(A)] for the first phase of development, including construction of 50 golf cottages with lockout facilities to ensure 150 separate rentable units are available within the first phase. [Thornburgh] also will develop (or bond) a restaurant with seating for at least 100 persons in the first phase. The Board finds that [Thornburgh] must provide the meeting and eating areas in the first phase. Although [Thornburgh] must show the location of the meeting and eating areas in Phase A, DCC 18.113.110(B) allows [Thornburgh] to provide financial assurances satisfactory to the County for those improvements rather than actually constructing them prior to recording the final plat. Condition of Approval #33 outlines this requirement." Record 44.

The above seems sufficient to comply with DCC 18.113.050(B)(8) with regard to the required 150 units of overnight lodging (they will be built in Phase A) and the restaurant with seating for at least 100 persons (it will be built or assured through a bond) in Phase A. With regard to recreational facilities, Thornburgh argues:

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[25] DCC 18.113.060(A) only requires three kinds of facilities: (1) 150 units of "visitor-oriented lodging," which is what we have generally been referring to as overnight units, and (2) visitor-oriented eating establishments for at least 100 people, and (3) at least $2,000,000 worth of recreational facilities (in 1984 dollars). ORS 197.445 imposes the following standards on destination resorts:

> "(3) At least $7 million 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.
>
> "(4) Visitor-oriented accommodations including meeting rooms, restaurants with seating for 100 persons and 150 separate rentable units for overnight lodging shall be provided. However, the rentable overnight lodging units may be phased in[.]"

> "[T]he challenged decision finds the criterion is met in part by the Phasing Plan, which shows seven phases, referred to as A to G, with the estimated time of development for each. The plan shows when and where the roads, the three golf courses, the community center, the golf clubhouse, the hotel and the power sub-station will be developed. The Open Space Plan shows what type of open space will be developed, while the Open Space Phasing Plan shows when the open space will be developed. The Recreation Amenities Plan shows where the hiking trails, hiking/biking trails, community amenities, golf courses, lake and vista points will be located. These are the 'facilities' subject to DCC 18.113.050(B)(8)." Thornburgh's Response Brief 22-23.

The cited phasing plans identify the phases in which the bulk, if not all of, the recreational facilities will be provided. Petitioner makes no attempt to explain why those phasing plans are inadequate to comply with DCC 18.113.050(B)(8).

Subassignment of error A is denied.

B. Site to Avoid or Minimize Impacts on Adjacent Land—DCC 18.113.050(B)(9)

DCC 18.113.050(B)(9) requires Thornburgh to explain how the proposal has been sited to avoid or minimize adverse impacts on adjacent lands.[26] According to petitioner, the challenged decision simply relies on a memorandum of understanding (MOU) with BLM, under which Thornburgh agrees to mitigate impacts on adjacent BLM lands. Petitioner complains that "[m]itigating impacts off-site is not the same as siting or designing a resort to avoid or minimize impacts." Gould's PFR 26.

As Thornburgh points out, the county adopted over two pages of findings addressing DCC 18.113.050(B)(9). Those findings cite the BLM MOU, but the county's findings regarding DCC 18.113.050(B)(9) do not rely entirely on the MOU. The findings note the

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[26] DCC 18.113.050(B)(9) requires that the CMP include the following information:

> "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[.]"

proposed 50-foot buffer around the perimeter of the proposed resort and the fact that the resort borders very little privately owned land. The findings also cite an agricultural assessment that includes recommendations for mitigating any impacts on nearby agriculture. Petitioner neither acknowledges nor challenges the adequacy of those findings.

Subassignment of error B is denied.

C. Erosion Control Plan—DCC 18.113.050(B)(12)

DCC 18.113.050(B)(12) requires an "erosion control plan for all disturbed land * * *." DCC 18.113.050(B)(12) specifically requires "[t]his plan shall also explain how the water shall be used for beneficial use or why it cannot be used as such." Petitioner argues the challenged decision "does not even mention the runoff [and] only calls for a detailed erosion control plan at the time of a site plan for each phase." Gould's PFR 26.

The findings observe that Thornburgh relied on a Natural Characteristics Report that describes soil conditions on the site. With regard to the specific issue that petitioner raises under this subassignment of error, the decision explains:

> "* * * The natural infiltration characteristics of the soil should prevent most runoff concerns. As necessary, specific erosion-control measures such as silt fence and mulching will be used to minimize erosion and dust when large areas of grading must occur. After construction, disturbed areas of the site will be restored with native landscaping or irrigated landscaping." Record 34.

After acknowledging petitioner's concern that Thornburgh failed to provide sufficient information under DCC 18.113.050(B)(12), the county found that the information submitted was sufficient to comply with DCC 18.113.050(B)(12) and conditioned approval on a more detailed erosion control plan at the time of tentative subdivision or site plan approval. Record 34. Thornburgh contends the county's findings are adequate to respond to petitioner's concern and the condition of approval requiring a more detailed erosion control plan at the tentative subdivision or site plan approval state is entirely appropriate under *Rhyne* and DCC 18.113.050(B)(3). We agree with Thornburgh.

Subassignment of error C is denied.

D. Dimensional Standards—DCC 18.113.060(G)

The dimensional standards that apply to lots and buildings under the applicable underlying zoning district do not apply to destination resorts. Instead, DCC 18.113.060(G)(1) requires that they be determined by the county at the time of CMP approval.[27]

Petitioner first argues that the county erred by approving Thornburgh's proposal for a range of lot standards.[28] However, we do not agree that DCC 18.113.060(G)(1) requires that a *single* set of dimensional requirements must apply to all lots in the destination resort. Petitioner does not argue that the county erred by failing to require that Thornburgh make some attempt to identify where in the proposed development the eight different lot types might be located. We therefore do not consider that question.

Petitioner also argues that the county erred by finding that "it was 'feasible' to meet setback standards." Gould's PFR 27. That argument is apparently directed at DCC 18.113.060(G)(2), which imposes specific setback requirements from the exterior property line for various types of development. Petitioner does not further develop her argument. The

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[27] DCC 18.113.060(G)(1) imposes the following destination resort standard:

> "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*." (Emphases added.)

[28] Thornburgh proposed eight lot "Types," Type A through Type H. Each type has its own area, width, frontage, coverage, setback and building height limit. Type A would provide the lowest density with a minimum lot area of 15,000 square feet, while Type H would be the highest density development with a minimum lot size of 3,200 square feet. Record 5642.

argument is insufficiently developed for review, and we reject the argument for that reason. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

Petitioner argues next that the county waived all solar setback standards, but failed to explain why doing so is "adequate to satisfy the intent of the comprehensive plan relating to solar access," as DCC 18.113.060(G)(1) requires. The county adopted three paragraphs of findings to explain why it did not impose a solar access setback. Record 52. While it is true that those findings do not mention the comprehensive plan specifically, they do offer a number of reasons why the county believes it is unnecessary to impose solar setbacks.[29] Petitioner neither acknowledges nor challenges those findings. For that reason, we reject petitioner's challenge to the county's decision not to impose a solar setback standard on the proposed development.

Finally, petitioner argues the county "violated the subsection (G) requirement that no lot shall exceed a project average of 22,000 square feet, where the County allowed lots over twice that size and even greater than one acre." Gould's PFR 27. Petitioner's challenge is presumably directed at the following findings in the county's decision:

> "* * * The Board finds that additional flexibility may be needed to accommodate the planned range of living units and services. For example, a lot size in excess of one acre may be necessary for a home site in some cases, particularly if it is desirable to preserve rocky or unique terrain. A 1,500-square-foot lot may be appropriate for condominiums or row houses surrounded by common area." Record 50-51.

Thornburgh argues, and we agree, that the final sentence of DCC 18.113.060(G)(1) is "inartfully worded." That sentence does not impose a maximum lot size of 22,000 square feet; it prohibits lot sizes that would result in the "overall project average" exceeding 22,000 square feet. However, to the extent the above quoted findings can be read to grant Thornburgh the "flexibility" to propose one acre or 1,500 square foot lots, even though the

[29] Among the reasons sited by the county are a desire to have the development fit more naturally into the terrain and a belief that solar orienting standards are less important for part-time residents.

approved lot dimensions at Record 5642 would not permit lots that large or small, we do not believe that grant of flexibility is within the county's discretion under DCC 18.113.060(G)(1). If Thornburgh can subdivide the property into whatever size lots it believes the terrain or high density housing type it desires might warrant, without first amending the CMP to allow such different lot sizes, the exercise required by DCC 18.113.060(G)(1) is a waste of time at best. Because the above-quoted findings need not be read to authorize lot sizes other than the ones set out at Record 5642, without first amending the CMP to allow such larger or smaller lots, we do not read the findings in that way. The dimensional standards approved by the county appear at Record 5642. If Thornburgh later discovers that the approved eight different lot types do not offer sufficient flexibility, it may request a change in the CMP to allow additional lot dimensions.[30]

Subassignment of error D is denied.

E. Time-Share Units

Petitioner's argument concerning time-share units is based largely on the erroneous assumption that Thornburgh proposes that some of the overnight units will be time-shares. Although there apparently was a suggestion at some point that some of the overnight units will be time-shares, the approved request does not propose any time-shares for overnight units. DCC 18.113.060(K) requires that "[t]ime-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." Thornburgh argues that it is simply not proposing any time-share units of any type at this time:

> "Thornburgh has not included any time-share units in the overnight lodging calculations. If they are developed for individually owned residential use * * *, they will be subject to a separate conditional use approval process.

[30] We need not and do not attempt to decide here whether approval of such additional lot dimensions would constitute a "substantial" or "insubstantial" change in the CMP. *See* n 4 and related text.

Nothing in DCC requires this occur during the CMP step of permit approval." Thornburgh's Response Brief 26.

Subassignment of error E is denied.

F. Remaining Arguments

In her remaining arguments under the fifth assignment of error, petitioner simply incorporates her arguments under her tenth and eleventh through thirteenth assignments of error. We address those arguments below.

The fifth assignment of error is denied.

GOULD'S SIXTH ASSIGNMENT OF ERROR

Under her sixth assignment of error, petitioner argues that the county erred in two ways. First, petitioner contends that the Pinnacle Village to the north and the Tribute Village to the south are in reality separate destination resorts and each should have been required to comply separately with the legal requirements for a destination resort. Second, petitioner argues that the DCC requires that destination resorts must have direct access onto a state or county arterial or collector roadway, and the Pinnacle Village lacks such direct access.

A. The Pinnacle and Tribute Villages are Separate Destination Resorts

A map from the record showing the proposal is attached as Appendix A.[31] Petitioner argues that although the northern and southern parts of the Thornburgh Resort touch corners in two places, the northern and southern parts are topographically separated by a ridge and will be connected by roadways on the east and in the southwest that travel outside the Thornburgh Resort onto lands owned by the Oregon Division of State Lands (DSL) (eastern connection) and BLM (southwestern connection).

Thornburgh answers that the identification of two villages within Thornburgh Resort

[31] The map appears at Record 1041. The two proposed roadways that will connect the Pinnacle and Tribute Villages are shown in dotted lines. Both the eastern and the southwestern connecting roads cross property that is located outside the destination resort property.

> "is, at its root, glossy real estate lingo, without much significance beyond marketing. Many other resorts have named areas, but that doesn't mean these areas are separate resorts." Thornburgh's Response Brief 27.

Thornburgh goes on to note that the Tribute and Pinnacle Villages are connected by roads and hiking and biking trails. The Tribute Village actually extends into the northern part and the Tribute and Pinnacle Villages will share rental and maintenance offices and visitors to either village will have full access to the facilities in the other village.

We reject petitioner's contention that the county erred by failing to require that the Pinnacle Village and Tribute Village each be separately approved as destination resorts.

Subassignment of error A is denied.

B. Direct Access to a State or County Arterial or Collector

DCC 18.113.060(C) provides:

> "All destination resorts shall have direct access onto a state or county arterial or collector roadway, as designated by the Comprehensive Plan."

It is undisputed that Thornburgh Resort has direct access onto Cline Falls Highway at the southeast corner of the resort, in the Tribute Village. Thornburgh Resort will have access to Highway 126 to the north, but it does not and will not have "direct" access "onto" Highway 126. Because the Pinnacle Village lacks direct access onto Highway 126 and traffic from the Pinnacle Village must travel over roadways located outside the Thornburgh Resort to access Cline Falls Highway in the southeast corner of the Tribute Village, petitioner contends the Pinnacle Village lacks the direct arterial/collector access that DCC 18.113.060(C) requires.

DCC 18.113.060(C) requires that destination resorts must have "direct access onto" an arterial/collector. DCC 18.113.060(C) does not prohibit additional access onto roads that are not arterials or collectors. As we have already concluded, there is but one destination resort—Thornburgh Resort. Although it is divided into two villages, divided somewhat topographically and the northern and southern parts are connected by roadways that travel

outside Thornburgh Resort, that does not change the fact that Thornburgh Resort has "direct access onto a state or county arterial * * * roadway." Thornburgh Resort therefore complies with DCC 18.113.060(C).

Subassignment of error B is denied.

The sixth assignment of error is denied.

GOULD'S SEVENTH ASSIGNMENT OF ERROR

Petitioner alleges that the county erred by failing to require that Thornburgh justify a statewide planning goal exception for the northern access to an existing roadway that will provide access to Highway 126 and the two roadways that will cross BLM and DSL lands to connect the northern part of Thornburgh Resort with the southern part. *See* Appendix B.

ORS 215.283(2)(t) authorizes counties to approve the following use in an EFU zone: "[a] destination resort that is approved consistent with the requirements of any statewide planning goal relating to the siting of a destination resort." Therefore, under ORS 215.283(2)(t), Thornburgh Resort and all the roadways proposed within Thornburgh Resort may be approved subject to state and local laws governing destination resorts. Petitioner's focus here is on the roadways that will be needed to provide a connection between the northern and southern parts of Thornburgh Resort and the roadway that will be required to connect Thornburgh Resort to the existing roadway that serves a portion of Eagle Crest Resort to the north. That roadway will provide access to Highway 126 to the north. These roadways cross BLM and DSL lands that are zoned EFU, and we will refer to them as the connector roadways.

No party argues the northern, eastern and southwestern connector roads are allowed in EFU zones under ORS 215.283(1) or (2). ORS 215.283(3) provides:

> "Roads, highways and other transportation facilities and improvements not allowed under subsections (1) and (2) of this section may be established, subject to the approval of the governing body or its designee, in areas zoned for exclusive farm use subject to:

> "(a) Adoption of an exception to the goal related to agricultural lands and to any other applicable goal with which the facility or improvement does not comply; or
>
> "(b) ORS 215.296 for those uses identified by rule of the Land Conservation and Development Commission as provided in section 3, chapter 529, Oregon Laws 1993."

In response to Oregon Laws 1993, chapter 529, section 3, LCDC adopted OAR 660-012-0065. OAR 660-012-0065(1) explains that "[t]his rule identifies transportation facilities, services and improvements which may be permitted on rural lands consistent with Goals 3, 4, 11, and 14 without a goal exception." OAR 660-012-0065(3) sets out a list of 15 transportation improvements that may be allowed without an exception to Goal 3. That list includes a variety of transportation facilities and improvements. As relevant here, the list includes accessory transportation improvements for uses that are allowed by ORS 215.283 and new access roads.[32]

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[32] ORS 660-012-0065(3) provides:

> "The following transportation improvements are consistent with Goals 3, 4, 11, and 14 subject to the requirements of this rule:
>
> "(a) Accessory transportation improvements for a use that is allowed or conditionally allowed by ORS 215.213, 215.283 or OAR chapter 660, division 6 (Forest Lands);
>
> "(b) Transportation improvements that are allowed or conditionally allowed by ORS 215.213, 215.283 or OAR chapter 660, division 6 (Forest Lands);
>
> "* * * * *
>
> "(g) New access roads and collectors within a built or committed exception area, or in other areas where the function of the road is to reduce local access to or local traffic on a state highway. These roads shall be limited to two travel lanes. Private access and intersections shall be limited to rural needs or to provide adequate emergency access.
>
> "* * * * *
>
> "(o) Transportation facilities, services and improvements other than those listed in this rule that serve local travel needs. The travel capacity and performance standards of facilities and improvements serving local travel needs shall be limited to that necessary to support rural land uses identified in the acknowledged comprehensive plan or to provide adequate emergency access."

No party argues that the disputed connector roads qualify under OAR 660-012-0065(3)(o), presumably because the connector roads will have a capacity that exceeds the capacity needed to serve rural uses. In addition, no party argues that the disputed connectors qualify under OAR 660-012-0065(3)(b), which authorizes the roadways within the destination resort, since the connector roadways are located on publicly owned property that lies outside the destination resort property. The county found that the connector roadways qualify under OAR 660-012-0065(3)(a), as "[a]ccessory transportation improvements for a use that is allowed" under ORS 215.283(2). Petitioner contends that the connector roads are properly viewed as "new access roads," within the meaning of OAR 660-012-0065(3)(g), which must be located "within a built or committed exception area, or in other areas where the function of the road is to reduce local access to or local traffic on a state highway." Petitioner argues that because the function of the connector roadways will not be to "reduce local assess to or local traffic on a state highway," the connector roads may only be allowed in an EFU zone if they are located in an exception area.

Whether the connector roads are properly viewed as new access roads, as petitioner argues, or as accessory transportation improvements to the disputed destination resort, as the county found, turns on the scope of OAR 660-012-0065(3)(a). As an initial point, we reject petitioner's contention that the "transportation improvements" that are authorized under OAR 660-012-0065(3)(a) could not include new roads. OAR 660-012-0065(3) clearly does not use the term "transportation improvements" in a limited sense that would exclude new roads, since OAR 660-012-0065(3)(g) expressly authorizes "[n]ew access roads." *See* n 32.

We turn to the OAR 660-012-0065 definitions of the key terms. OAR 660-012-0065(2) provides the following definitions:

> "(a) 'Access Roads' means low volume public roads that principally provide access to property or as specified in an acknowledged comprehensive plan;
>
> "* * * * *

> "(d) 'Accessory Transportation Improvements' means transportation improvements that are incidental to a land use to provide safe and efficient access to the use;
>
> "* * * * *
>
> "(g) 'New Road' means a public road or road segment that is not a realignment of an existing road or road segment."

Under the above definitions, the question becomes whether the connector roads are accurately described as "incidental to [Thornburgh Resort] to provide safe and efficient access to the [resort]." There does not appear to be much question that the connector roads are proposed "to provide safe and efficient access" to Thornburgh Resort. The only real question appears to be whether they are properly viewed as "incidental" to Thornburgh Resort. OAR 660-012-0065(2) does not provide a definition of "incidental." Its dictionary definition is "subordinate, nonessential, or attendant in position or significance." Webster's Third New Intern'l Dictionary, 1142 (unabridged ed 1981).

We believe the eastern and southwestern connector roads can be accurately characterized as "incidental" to the Thornburgh Resort. Certainly in one sense they are not "nonessential," since they are needed to connect the northern part with the southern part. But when the resort is viewed as a whole, we believe those connector roads are accurately described as "subordinate * * * or attendant in position or significance." The northern connector presents a much closer question, since it will provide the connection to one of the two main access routes for the resort. However, once again, if that connecting road is viewed in context with the resort as a whole, we conclude that it may be accurately characterized as "subordinate * * * or attendant in position or significance."

Petitioner argues that even if the connector roads can be viewed as transportation improvements that are accessory to Thornburgh Resort, ORS 215.283(3) provides that they

are "subject to * * * ORS 215.296."[33] In addition, petitioner argues that OAR 660-012-0065(4) provides that such accessory transportation improvements are subject to the underlying destination resort criteria.[34] Petitioner contends the county's findings do not address these criteria.

Thornburgh argues first that petitioner waived these arguments by not presenting these precise arguments to the county. We agree with petitioner that the *issue* regarding whether the connector roads qualify as accessory transportation improvements under ORS 215.283(3) and OAR 660-012-0065 was clearly raised below. That is the *issue* that petitioner is presenting in this appeal. The particular *arguments* that petitioner now makes under that issue need not have been raised before the county in exactly the way the arguments are now presented at LUBA. *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001).

Thornburgh next argues that because the disputed connector roads are not a "use allowed under ORS 215.213 (2) or 215.283 (2)," ORS 215.296 does not apply. *See* n 33. We reject the argument. ORS 215.296 does not apply to the connector roads because ORS

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[33] ORS 215.296(1) provides:

> "A use allowed under ORS 215.213 (2) or 215.283 (2) may be approved only where the local governing body or its designee finds that the use will not:
>
> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

[34] OAR 660-012-0065(4) provides:

> "Accessory transportation improvements required as a condition of development listed in subsection (3)(a) of this rule shall be subject to the same procedures, standards and requirements applicable to the use to which they are accessory."

215.283(2) and 215.296 make it apply, ORS 215.296 applies to the connector roads because ORS 215.283(3) makes it apply.[35]

On the merits, Thornburgh argues the disputed connector roads are part of the Thornburgh Resort and the county adopted extensive findings regarding DCC 18.113.070(F), which duplicates the ORS 215.296(1) standards.[36] With regard to OAR 660-012-0065(4), Thornburgh argues:

> "The decision does not make findings in response to OAR 660-012-0065(4), but the rule does not require findings. It states how the County must review an application for the accessory transportation improvements. The County complied with the rule by considering the proposed roads using the 'same procedures, standards and requirements applicable to the use [i.e., the destination resort] to which they are accessory.'" Thornburgh's Response Brief 31 (bracketed language in original).

We agree with Thornburgh. The roadways were treated as the part of the resort they are and petitioner offers no reason why separate findings specifically addressing the roadways in isolation are required under ORS 215.283(3) or OAR 660-012-0065(4).

The seventh assignment of error is denied.

GOULD'S EIGHTH ASSIGNMENT OF ERROR

Citing DCC 18.113.060(D)(2), 18.113.070(G) and 18.128.015, petitioner argues the county's findings are inadequate to demonstrate that Thornburgh Resort will have "adequate access to and within the destination resort." Gould's PFR 33.[37] Petitioner contends that the

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[35] The text of ORS 215.283(3) was set out earlier in the text at the beginning of our discussion of the seventh assignment of error.

[36] DCC 18.113.070(F) requires that the county find:

> "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."

[37] The reference to DCC 18.113.060(D)(2) apparently was in error. Petitioner probably meant to cite DCC 18.113.060(C), which requires that the resort have direct access onto an arterial/collector. *See* discussion under subassignment of error B under Gould's Sixth assignment of error. DCC 18.113.070(G)(3)(b) requires that "[a]ccess within the project shall be adequate to serve the project in a safe and efficient manner for each phase

county failed to demonstrate that a number of roads will be available to provide the needed access to and within Thornburgh Resort.

A. The Northern Connector Road

In response to petitioner's objections below, the county found that it would be feasible to construct the northern connector roadway based on a memorandum of understanding between Thornburgh and the BLM. Record 91-92. The memorandum of understanding appears at Record 4232-36. BLM advised the county that it appeared the proposed northern connector road "is a reasonable and feasible alternative." Record 3961. Petitioner contends the county's finding of "feasibility" is not adequate or supported by substantial evidence, because BLM does not identify the legal standards that will govern BLM's decision to grant Thornburgh the right of way necessary to construct the northern connector road. Those legal standards apparently include the Federal Land Policy and Management Act, the Upper Deschutes Resource Management Plan and the National Environmental Policy Act.

We do not understand petitioner to contend that if the BLM right of way is granted, the northern connector road cannot be constructed across that right of way to provide a connection with an existing roadway that leads to Highway 126. The only issue is whether Thornburgh can secure the required right of way from BLM. In that circumstance, we have held, it is not necessary for the county to engage in a process of determining whether Thornburgh will be successful or that it is feasible that Thornburgh will be successful in demonstrating that all of the regulatory standards that BLM must address to grant the right of way are met. Instead, where the only question is whether a state or federal agency permit or other approval will be granted, the county need only ensure that the required permit or approval is not precluded "as a matter of law." *Wetherell v. Douglas County*, 44 Or LUBA

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of the project." DCC 18.128.015 is a conditional use access criterion. But as Thornburgh points out, DCC 18.113.040(A) makes CMPs subject to DCC 18.128.010, .020 and .030; it does not list DCC 18.128.015.

745, 764 (2003); *Bouman v. Jackson County*, 23 Or LUBA 628, 646-47 (1992). Thornburgh argues, and we agree, the MOU and letter from BLM are substantial evidence that approval of the right of way needed for the northern connection is not precluded as a matter of law.

Subassignment of error A is denied.

B. The Eastern Connector Road

Petitioner argues that the lease with DSL that Thornburgh is relying on for permission to construct the eastern connector across property owned by DSL requires that the road comply with zoning and land use requirements. Petitioner's argument here concerning the eastern connector road depends on her seventh assignment of error, where she contends that without an exception to Goal 3, the eastern connector road cannot be constructed on EFU-zoned property. Because we reject the seventh assignment of error above, we reject petitioner's argument concerning the eastern connector road.

Subassignment of error B is denied.

C. The Southwestern Connector Road

Petitioner's argument concerning the southwestern connector road is based on the same theory that she argues in support of subassignment of error A—that the county is required to demonstrate that it is feasible for Thornburgh to successfully obtain the required right of way from BLM. We rejected that theory. Petitioner neither alleges nor demonstrates that the needed right of way for the southwestern connector roadway is prohibited as a matter of law. There is evidence in the record that the right of way will be granted. Record 4232.

Subassignment of error C is denied.

D. Secondary Access from Tribute Village to Cline Falls Highway

Thornburgh proposed and the county approved a secondary access from Tribute Village to Clines Fall Highway. Petitioner contends that the county made no finding that this secondary connection is feasible.

Thornburgh responds that petitioner cites no legal requirement for the proposed secondary access. Thornburgh also points out that there is evidence in the record that Thornburgh has a right to use the existing BLM road in this area. We agree with Thornburgh that petitioner fails to demonstrate that the county erred with regard to its approval of the secondary access from Tribute Village to Cline Falls Highway.

Subassignment of error D is denied.

E. Access to the Part of Tribute Village West of Barr Road

Petitioner and Thornburgh agree that Barr Road is not a suitable road, either for access or emergency access. Petitioner points out that Thornburgh at one point intended to rely on Barr Road for emergency access. However, the decision specifically states that no permission is given to use or improve Barr Road. Record 97. Thornburgh cites evidence that emergency fire access will be provided by the two Cline Falls Road access roads.

Petitioner cites no legal requirement that Barr Road must be available for access or emergency access. Therefore, the apparent unavailability of Barr Road for either access or emergency access provides no basis for reversal or remand.

Subassignment of Error E is denied.

F. Adequacy of Roads Within the Resort

As noted earlier, DCC 18.113.070(G)(3)(b) requires that "[a]ccess within the project shall be adequate to serve the project in a safe and efficient manner for each phase of the project." Petitioner argues the county adopted no findings regarding this criterion.

Thornburgh responds:

> "Thornburgh submitted a circulation plan in response to DCC 18.113.050(A)(6), which shows access within the resort. The issue of adequate access within the project, as opposed to the legitimacy or availability of the roads over public lands, which was addressed elsewhere in the findings, was never controversial. No objections to the proposed circulation plan were raised during the proceedings.
>
> "The BOCC addressed the issue of internal access by imposing Conditions 5, 7, 27 and 30. Condition 30, in particular, makes it clear the final details of the

> circulation plan must be completed prior to FMP approval. Because the FMP process will also provide an opportunity for public participation, a more complete response to DCC 18.113.070(G)(3)(b) can be provided then." Thornburgh's Response Brief 36.

In her reply brief, Gould contends that this issue was raised below at Record 3777-78. We agree with Gould that the issue was raised. That the county may provide a public hearing and may again consider DCC 18.113.070(G)(3)(b) when the FMP is approved does not mean the county is not obligated to address and demonstrate that the CMP complies with DCC 18.113.070(G)(3)(b). The county failed to do so.

Subassignment of error F is sustained.

The eighth assignment of error is sustained, in part.

GOULD'S NINTH ASSIGNMENT OF ERROR

DCC 18.113.050(B)(2) requires that a CMP be accompanied by a traffic study.[38] DCC 18.113.070(G) is similar to the transportation planning rule standard that must be applied when comprehensive plans or land use regulations are amended. OAR 660-012-0060. If the destination resort "significantly affects a transportation facility," certain steps must be taken to improve transportation facilities or mitigate those significant affects.[39]

Over the course of the local proceedings, Thornburgh's traffic expert (Clemow) submitted a number of documents.[40] Petitioner contends that Clemow's transportation

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[38] DCC 18.113.050(B)(2) requires that the following be submitted with a CMP:

> "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 * * * 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."

[39] Under DCC 18.113.070(G)(3):

> "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."

[40] Thornburgh lists those documents in footnote 33 on page 37 of its response brief.

impact analyses were based on assumptions about certain aspects of Thornburgh Resort that were not included the resort as finally approved. We list those alleged erroneous assumptions below:

1. The Pinnacle Village occupies the entire northern part of the property, and the Tribute Village occupies the entire southern part of the property.

2. Traffic to and from the Pinnacle Village will use the Highway 126 entrance to the north; traffic to and from Tribute will use the Cline Falls entrance to the south. External traffic accessing and departing Thornburgh Resort will use the northern Highway 126 entrance rather than the southern Cline Falls entrance.

3. The two Tribute golf courses will be available to Thornburgh members and their guests and will not be available to persons using overnight lodging.

4. The total number of dwelling units is 1325.

Petitioner contends the first assumption is erroneous, because a portion of the Tribute Village, as approved, is located in the northern part of the property. Thornburgh responds that "[i]ndividually owned residential or overnight lodging development generates exactly the same amount of traffic regardless of whether it is in an area labeled 'the Pinnacle' or one labeled 'the Tribute.'" Thornburgh's Response Brief 38. Thornburgh contends, and we agree, that petitioner fails to explain how the final location of boundaries between each village has any effect on the traffic analysis.

Petitioner next contends that the assumption regarding outside traffic using the Highway 126 entrance cannot be reconciled with the county's finding that "the primary access for the resort will be from Cline Falls Highway." Record 46. Thornburgh points out that the cited comment is made in a portion of the decision that was addressing the DCC 18.113.060(C) requirement that destination resorts must "have direct access onto a state or County arterial or collector roadway, as designated by the Comprehensive Plan." Thornburgh argues, and we agree, that the cited statement does not establish that Clemow's

traffic analysis assumptions regarding the preference of outside traffic for the Highway 126 entrance were erroneous.

With regard to the change in the proposal to allow persons in overnight lodging to use the Tribute golf courses, Thornburgh argues again that petitioner makes no attempt to establish why this change in the proposal would have any impact on the traffic analysis.[41] Unless the change would affect the traffic analysis, Clemow's failure to consider the change is not error. We agree with Thornburgh.

Finally, petitioner's contention that the traffic study assumes 100 fewer units than were actually approved is based on a misreading of Table 9A, which appears at Record 3996. Petitioner fails to include the bottom two entries in its total for the Tribute Village. If those units are included, the traffic analysis assumes one more unit of housing than was ultimately approved.

Petitioner next faults the traffic analysis for failing to analyze: (1) the roads that connect the Tribute and Pinnacle Villages, (2) roads within the Pinnacle and Tribute Villages, (3) impacts on roads in the City of Redmond to the east, and (4) impacts on Fifth and Seventh Street intersections with Highway 20 in Tumalo.

With regard to the first and second criticisms, Thornburgh responds that petitioner does not connect either criticism to a DCC informational requirement, standard or criterion. Thornburgh points out that DCC 18.113.050(B)(2) only requires that the traffic study consider "impacts on affected County, city and state road systems." DCC 18.113.050(B)(2) does not require that the traffic study consider the destination resort's proposed internal road

[41] Thornburgh argues that whether overnight lodgers read a book or play golf has no impact on traffic generation at the resort's access point.

system. We agree with Thornburgh that those criticisms are not sufficiently developed to provide a basis for reversal or remand.[42]

Turning to petitioner's third and fourth criticisms, the county adopted findings that explained how Clemow modified his transportation impact analysis (TIA) in response to concerns about the initial TIA.[43] Record 17-18. Thornburgh argues:

> "[T]he [board of county commissioners] considered and expressly rejected the need for more traffic studies after the TIA was expanded to consider 12 intersections, six more than originally studied. Neither ODOT nor the County Road Department objected to the approach taken. That fact, together with their comments in the record, is substantial evidence to support the County's approval of Thornburgh's decision to call a halt to more traffic studies." Thornburgh's Response Brief 39.

Petitioner's third and fourth criticisms reduce to a disagreement with the county and Thornburgh over how large an area and how many intersections must be included in the traffic study required by DCC 18.113.050(B)(2). However, petitioner cites no legal standard that requires that the county expand the traffic study to respond to her third and fourth criticisms. Her disagreement with the county, without more, is not a sufficient basis for remand.

The ninth assignment of error is denied.

GOULD'S TENTH ASSIGNMENT OF ERROR

DCC 18.113.050(B)(5) requires that an application for CMP approval include an "Open Space Management Plan."[44] Petitioner argues that the proposal and the county's decision are inadequate to comply with DCC 18.113.050(B)(5)(a) through (d).

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[42] Petitioner does not cite DCC 18.113.070(G)(3)(b) in her arguments under the ninth assignment of error. See subassignment of error F under the eighth assignment of error.

[43] Thornburgh argues that the "the TIA did study impacts on Fifth and Seventh Street intersections with Highway 20 in Tumalo. [Record 4000]." Thornburgh's Response Brief 39. Record 4000 shows that the intersections of Fifth and Seventh Street with "Cook Avenue" (Cline Falls Highway) were considered, not the intersections of those streets with Highway 20.

[44] DCC 18.113.050(B)(5) requires that a CMP shall include:

A. How the Open Space Management Plan Meets Minimum Standards

Under DCC 18.113.050(B)(5), the Open Space Management Plan must explain how "the minimum standards of DCC 18.113 [are met] for each phase of the development." Petitioner advances two arguments under this subassignment of error. First, petitioner contends the county "merely refers to revised Ex. B-1.04 and revised Ex. B-1.09." Gould's PFR 41. Petitioner contends those exhibits merely show proposed open space locations and do not explain how minimum standards will be met. Second, petitioner argues that the decision "notes that [Thornburgh] intends to amend its designations of open space," which petitioner contends will make it impossible for the county to compare the FMP with the CMP to determine if it can be approved. *Id*.

In addition to referring to the two exhibits, the county found that Thornburgh "submitted an Open Space Master Plan * * * which discusses a strategy to protect and preserve open space and open space values." Record 20. That Open Space Master Plan appears at Record 5644-49. Petitioner neither acknowledges nor makes any attempt to explain why that plan is inadequate to comply with DCC 18.113.050(B)(5)(a). Contrary to petitioner's contention that the decision says that Thornburgh plans to "amend" the open space designations, the challenged decision actually says the areas designated on the open space management plan "will be further identified and defined during the final master plan

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"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."

and subsequent subdivision/site plan reviews." Record 21. That statement simply recognizes the relationship between the CMP, FMP and subsequent subdivision/site plan stages, which allow refinement from stage to stage.

Subassignment of error A is denied.

B. An Inventory

DCC 18.113.050(B)(5)(b) requires that an open space management plan include an inventory of two things: (1) important natural features, and (2) any other open space and natural values. *See* n 44. Petitioner does not dispute the county's finding that there are no "important natural features" on the property. However, petitioner contends Thornburgh simply failed to inventory "other open space and natural values." Thornburgh responds:

> "* * * The decision does state that the soils, natural features and geologic history are shared with the entire area, and comments that the few rock outcroppings on the site 'lend themselves to preservation.' The Natural Characteristics Report, cited in the decision, makes the same points. There is more discussion of open space values in the Open Space Management Plan [Record 5644-46] and in the Architectural Guidelines [Record 5623-30], which take a prescriptive approach to preserving trees, outcroppings and other natural features." Thornburgh's Response Brief 40.

We fail to see why the cited material is not sufficient to supply the inventory of "any other open space and natural features" that is required by DCC 18.113.050(B)(5)(b).

C. Management Prescriptions

DCC 18.113.050(B)(5)(c) requires a "set of management prescriptions" to maintain and conserve open space "in perpetuity." *See* n 44. Petitioner contends that the county's findings, which appear at Record 20, are inadequate to demonstrate that the required set of management prescriptions will be provided.

Thornburgh points out that the challenged findings refer to the Open Space Management Plan, which appears at Record 5644-49. The Open Space Management Plan includes a number of "open space management prescriptions." Record 5646. Petitioner

makes no attempt to show that the Open Space Management Plan is inadequate to comply with DCC 18.113.050(B)(5)(c).

D. Deed Restrictions

DCC 18.113.050(B)(5)(d) requires "[d]eed restrictions that will assure that the open space areas are maintained as open space in perpetuity." Petitioner contends the county failed to require a deed restriction that complies with DCC 18.113.050(B)(5)(d).

Much of the open space protection is set out in the CC&Rs. Pursuant to condition of approval 14(B), Section 3.4 of the CC&Rs must include the following language:

> "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, the Association, and the Golf Club. All of the foregoing entities shall have the right to enforce [the] covenant and equitable servitude. This Section 3.4 may not be amended except if approved by an affirmative vote of all Owners, the Declarant, the Golf Club and the Association." Record 95.

The county also required, as a condition of approval, that the following restriction be included in deeds conveying property in the resort:

> "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 Restrictions 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." Record 96.[45]

Petitioner contends that the above are insufficient to comply with DCC 18.113.050(B)(5)(d), because "both the FMP and the CC&Rs may be amended." Gould's PFR 43. We agree with Thornburgh that "[t]he requirement of a unanimous affirmative vote

[45] Petitioner complains that this language was submitted as part of Thornburgh's final legal argument and that it is "evidence" that is not properly included in an applicant's final legal argument under ORS 197.763(6)(e). Gould's PFR 43 n 15. We do not believe the proposed CC&R language is evidence. Neither, as a general proposition, do we see any error in the county imposing a condition of approval that requires CC&Rs to be amended. We reject petitioner's argument to the contrary.

of all Owners, the Declarant, the Golf Club and the Association affords considerable protection to the open space." Thornburgh's Response Brief 41. The deed restriction that the county required to satisfy DCC 18.113.050(B)(5)(d) cites the CC&R protection and also points out that the FMP, which will be approved in compliance with DCC 18.113, also will require protection of that open space. Amendment of either the CC&Rs or the FMP to dispense with protection for designated open space would be extremely difficult or impossible. Given the backdrop of the CC&Rs and the FMP, we agree with Thornburgh that the deed restriction is adequate to comply with DCC 18.113.050(B)(5)(d).

Gould's tenth assignment of error is denied.

GOULD'S ELEVENTH ASSIGNMENT OF ERROR

MUNSON'S FOURTH ASSIGNMENT OF ERROR

Under these assignments of error, petitioner Gould and petitioner Munson argue that the county's findings concerning mitigation for Thornburgh's negative impacts on fish and wildlife resources are inadequate and are not supported by substantial evidence.

DCC 18.113.070(D) requires that any negative impacts from the proposed destination resort be completely mitigated so that there is no net loss and no net degradation of fish and wildlife resources.[46] Thornburgh responded to this requirement by submitting a Wildlife Report. Record 5480-5511. That Wildlife Report describes the characteristics of the site and surrounding area and the resources on the site. The report then estimates the mostly negative impacts of developing the site. The report then describes the measures that will be employed

[46] DCC 18.113.070(D) requires:

> "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."

to mitigate the negative impacts. A total of 29 project impacts are identified and mitigation measures are proposed for those impacts. Record 5496-5502.[47]

One of the more significant steps that will be taken to mitigate habitat impacts will be to enhance existing habitat on nearby BLM lands. Thornburgh has entered into a memorandum of understanding (MOU) with BLM. Record 4232-36. That MOU recites that the intent of the parties is

> "to ensure that the Thornburgh Resort is developed in a manner that: (1) will mitigate any demands on publicly-owned recreation facilities on public lands in the surrounding area, (2) development does not alter the character of the surrounding area in a manner that impacts the adjacent public properties, and (3) completely mitigates for any negative impacts on fish and wildlife resources so that there is no net loss or degradation of fish and wildlife resources." Record 4232-33.

According to the MOU, Thornburgh is to commit up to $350,000 to work on issues identified in the MOU. One of those issues is "Mitigating for Impacts to Wildlife." One of the proposals cited in the MOU is set out below:

> "* * * The parties plan a joint site visit to the Masten Allotment and will continue to work together to develop a plan for the implementation of agreed upon mitigation measures at this location. Wildlife mitigation measures at the Masten Allotment may include, but shall not be limited to: (1) the construction and maintenance of a designated, non-motorized trail system that maintains primary wildlife habitat emphasis objectives in the [Upper Deschutes Resource Management Plan], (2) the rehabilitation and removal of existing trails that adversely impact wildlife and habitat, (3) the construction of fencing or other access control measures designed to consolidate public access points, (4) thinning of juniper and other vegetation management to ensure long-term wildlife habitat conditions, and (5) noxious weed control in the Masten Allotment and on affected public lands adjacent to the resort." Record 4236.

[47] The record also includes a September 28, 2005 technical report prepared by Thornburgh's wildlife expert. Record 3972-79.

The record also includes a letter from the Oregon Department of Fish and Wildlife (ODFW), in which ODFW states that it has been working with Thornburgh and expresses the view that habitat impacts can be mitigated. Record 5512.

Based on the above, after describing the key findings in the Wildlife Report, the county found:

> "The [county] finds that, as stated by ODFW, it is feasible to mitigate completely any negative impact on identified fish and wildlife resources so that there is no net loss or net degradation of the resource. The MOU between the BLM and [Thornburgh] requires [Thornburgh] to complete a wildlife mitigation plan that will be reviewed and approved by both ODFW and BLM. The [county] imposes as a condition below that the mitigation plan adopted by [Thornburgh] in consultation with Tetra Tech, ODFW and the BLM be adopted and implemented throughout the life of the resort." Record 62.[48]

As we explained earlier in this opinion, immediately before addressing Gould's first assignment of error, decision makers at the conclusion of the public/evidentiary stage of multi-stage quasi-judicial land use proceedings that concern projects as complicated as this one may be faced with disputes and conflicting evidence regarding whether the proposal complies with one or more mandatory approval criterion. Under the Court of Appeals' decision in *Meyer* and our decision in *Rhyne*, decision makers in such circumstances have three options. The decision maker must (1) find that the proposal satisfies the criterion, or that it is feasible for the proposal to satisfy the criterion because feasible solutions to identified problems exist, and impose any needed conditions to ensure the criterion is satisfied, (2) find that the evidence is insufficient to demonstrate that the proposal satisfies the criterion, or (3) defer a determination regarding whether that criterion is satisfied to a

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[48] The referenced condition is set out below:

> "28. [Thornburgh] shall abide at all times with the MOU with BLM, dated September 28, 2005, regarding mitigation of impacts on surrounding federal lands, to include wildlife mitigation and long-range trail planning and construction of a public trail system. The mitigation plan adopted by [Thornburgh] in consultation with Tetra Tech, ODFW and the BLM shall be adopted and implemented throughout the life of the resort." Record 97.

later stage and apply conditions or take other appropriate steps to ensure that there will be a public right of participation at that later stage with regard to the deferred finding on that criterion. The decision maker's choice from those three options must be supported by substantial evidence. *Rhyne* 23 Or LUBA at 447 n 5.

Petitioners Gould and Munson argue that the county's finding that Thornburgh demonstrated that it is feasible to completely mitigate anticipated habitat damage (*Rhyne* option 1) is not supported by substantial evidence. Petitioners also argue the county effectively selected the third *Rhyne* option by deferring responsibility for ensuring the proposal complies with the DCC 18.113.070(D) fish and wildlife habitat mitigation requirement to BLM and ODFW. But having selected that option, petitioners argue the county erred by failing to assure that the public will have a right to participate in determining whether the final wildlife plan in fact completely mitigates the damage that the destination resort will cause to fish and wildlife habit. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419, 445, *aff'd* 196 Or App 787, 106 P3d 699 (2004); *Kaye/DLCD v. Marion County*, 23 Or LUBA 452, 474-75 (1992)

Where the county finds that it is feasible to satisfy a mandatory approval criterion, as the county did here with regard to DCC 18.113.070(D), the question is whether that finding is adequate and supported by substantial evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999). Here, Thornburgh supplied the Wildlife Report to identify the negative impacts on fish and wildlife that can be expected in developing Thornburgh Resort. The report also describes how Thornburgh proposes to go about mitigating that damage, both on-site and off-site. In response to comments directed at that report, Thornburgh has entered into discussions with ODFW and a MOU with the BLM to refine that proposal and come up with better solutions to ensure that expected damage is completely mitigated.[49] ODFW and

[49] Petitioners fault the ODFW letter for using the term mitigated rather than the term "completely mitigated," which is the term used in DCC 18.113.070(D). The MOU uses the DCC 18.113.070(D) term and

BLM have both indicated that they believe such solutions are possible and likely to succeed. We conclude that the county's finding regarding DCC 18.113.070(D) is supported by substantial evidence and is adequate to explain how Thornburgh Resort will comply with DCC 18.113.070(D).

Had Thornburgh not submitted the Wildlife Report, we likely would have agreed with petitioners that a county finding that it is feasible to comply with DCC 18.113.070(D) would likely not be supported by substantial evidence. Even though ODFW and BLM have considerable expertise on how to mitigate damage to fish and wildlife, bare assurances from ODFW and BLM that solutions are out there would likely not be the kind of evidence a reasonable person would rely on to find that the damage that Thornburgh Resort will do to fish and wildlife habitat can be completely mitigated. But with that report, the dialogue that has already occurred between Thornburgh, ODFW and BLM, the MOU that provides further direction regarding future refinements to ensure complete mitigation, and the optimism expressed by the agencies involved, we believe a reasonable person could find that it is feasible to comply with DCC 18.113.070(D). It does not matter that "precise solution[s] for each and every potential problem" has not yet been identified. *Meyer*, 67 Or App at 282 n 6.

Finally, petitioners expressed concern below regarding the adequacy of the Wildlife Study and expressed concern that because the groundwater that Thornburgh Resort will use is hydrologically connected to the Deschutes River the federally listed Bull Trout may be negatively impacted. The county points out that Thornburgh's expert submitted a technical report in which it took the position that Thornburgh Resort would not negatively affect fish population or habitat in the Deschutes River which lies two miles to the east of the proposed resort. With regard to the other criticisms of the Wildlife Report the county contends that where experts disagree on how to go about identifying and mitigating negative impacts the

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we do not think there is any confusion on the part of ODFW, BLM or Thornburgh that all anticipated fish and wildlife negative impacts must be completely mitigated.

county is entitled to deference when it must choose which expert to believe. We agree with the county. *Mollala River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251, 268 (2002) *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258, 890 P2d 455 (1995).

Gould's eleventh assignment of error and Munson's fourth assignment of error are denied.

MUNSON'S FIRST ASSIGNMENT OF ERROR

DCC 18.113.050(B)(11)(b)(3) requires a water study that identifies a water impact area.[50] Petitioner Munson argues the county "arbitrarily limited the groundwater 'impact area' to wells within a two-mile radius from the destination resort * * *." Munson's PFR 4.

The county responds that the Hydrology Study that was prepared for Thornburgh by Newton Consultants Inc. (NCI) is not arbitrarily limited to wells within a two-mile radius. The county found, based on the NCI study, that Thornburgh Resort's wells would only have a perceptible impact on wells that are within a few hundred feet of the proposed resort wells. The county contends that the fact that NCI examined well logs within a two-mile radius does not mean the study imposed an arbitrary two-mile impact area. The county contends that it recognized the potential for surface water impacts at two aquifer discharge sites many miles from Thornburgh Resort. Record 31. The decision explains that the potential for such remote impacts "will be addressed through state mitigation requirements in connection with [Thornburgh's] application for a ground water permit." *Id.* We agree with the county, that petitioner has not established that the water study was arbitrarily limited to a two-mile radius.

[50] DCC 18.113.050(B)(11) requires that a CMP be accompanied by a "study prepared by a hydrologist, engineering geologist or similar professional," that describes the water demand the destination resort will have at final buildout and the water that is available to meet that demand. DCC 18.113.050(B)(11)(b)(3) specifically requires that the study include an "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."

Petitioner Munson also argues under this assignment of error that while the county imposed a condition of approval to provide additional assurances to well users within two miles of the resort, that condition will offer no protection to water users who are located beyond that two-mile area and may be impacted by Thornburgh wells.[51]

The county contends that "Thornburgh voluntarily subjected itself to this condition as part of a good faith effort to address the concerns of neighboring well owners." Respondent's Brief 31. The county contends that condition 11 does not affect the county's finding that Thornburgh's wells will have no measurable effect on off-site wells and that the mitigation that will be required of Thornburgh will operate to protect those water users. We agree with the county.

Munson's first assignment of error is denied.

GOULD'S TWELFTH ASSIGNMENT OF ERROR

MUNSON'S SECOND ASSIGNMENT OF ERROR

DCC 18.113.070(K) requires that Thornburgh establish that adequate water will be available to serve the proposed destination resort.[52] Thornburgh proposes to drill wells into

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[51] Thornburgh imposed the following condition of approval:

> "11. At the time of submission for [FMP] approval, [Thornburgh] shall include a written plan for entering into cooperative agreements with owners of existing wells within a two-mile radius of [Thornburgh's] wells. The plan shall include a description of how [Thornburgh] 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 [Thornburgh] under which [Thornburgh] will provide indemnification to well owners in the event of actual well interference as a result of [Thornburgh's] water use. The plan shall remain in effect for a period of five years following full water development by [Thornburgh]. Specific terms and conditions of the plan shall be developed in cooperation with County staff and the Oregon Water Resources Department." Record 95.

[52] DCC 18.113.070(K) provides, in part:

> "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. * * *"

the regional aquifer to supply the approximately 2355 acre-feet of water that will be needed by the resort annually at full buildout. Record 4261. The surface water in the Deschutes basin is fully allocated. Because the surface water is hydraulically connected to the regional aquifer that Thornburgh proposes to use for its source of water, the Oregon Water Resources Department will require that Thornburgh mitigate the impact that withdrawal would otherwise have on Deschutes Basin surface water. To mitigate for the 2355 acre feet of water, Thornburgh will need 942 mitigation credits. Record 4262. The 942 mitigation credits represent 942 acre-feet of water annually.[53] Thornburgh can secure the needed credits by purchasing and retiring individually owned water rights or by purchasing them from a mitigation credit bank or "other mitigation credit holder." *Id.*

In the proceedings below, the county adopted the following findings in response to petitioners' arguments that the county should require Thornburgh to produce the necessary mitigation credits before granting CMP approval:

> "The question before the [county] is whether, in order to demonstrate that water is 'available' under the county standard, an Applicant must provide evidence of actual mitigation credits at the time of county review, or whether it is sufficient to demonstrate that it is feasible for [Thornburgh] to obtain sufficient mitigation credits by the time the credits are ultimately required under the OWRD water right process. * * * In *Bouman v. Jackson County*, 23 Or LUBA 628, 647 [(1992)], LUBA stated, in the context of water availability, 'a decision approving the subject application simply requires that there be substantial evidence in the record that [Thornburgh] *is not precluded from obtaining such state agency permits as a matter of law*.' [County's emphasis.]
>
> "The [county] interprets the County standard to require no more than what LUBA required in *Bouman*. [Thornburgh] has easily satisfied that standard. Even if the standard were interpreted to require more, it certainly would require no more than a showing that the acquisition of the necessary mitigation credits is feasible. Such a showing can include evidence that

[53] OWRD considers Thornburgh's proposal to constitute a "quasi-municipal use." OWRD assumes that quasi-municipal uses use 40 percent of the water it withdraws from the aquifer and return 60 percent of the withdrawn water to the system. Forty percent of 2355 equals 942.

> mitigation water is generally available in the basin and that [Thornburgh] has a reasonable plan for acquiring mitigation from available sources.
>
> "The Source of water for the project is groundwater from the regional aquifer of the Deschutes Basin. As the Hearings Officer found, [Thornburgh] submitted the required water study and water conservation plan, which demonstrate that adequate water is available from this aquifer for the project. * * * In addition, [Thornburgh] submitted an application for a water right to OWRD, * * * and OWRD provided a letter indicating that the application is likely to be approved, subject to [Thornburgh's] providing sufficient mitigation, as required under rules of the OWRD. * * * The OWRD 'initial review * * * confirm[s] that groundwater is available for the project, and that the proposed use of ground water from new wells is not expected to interfere with other existing groundwater uses. These findings are also supported by conclusions reached in the Water Study submitted by [Thornburgh] * * * and in the report prepared by Eco:Logic, on behalf of the project opponents * * *. Based on this information, [Thornburgh] demonstrated that groundwater is available for the project and that a water right is likely to be approved, subject to the state mitigation requirement.
>
> "Based on this evidence, the Board finds that [Thornburgh has] shown it is not precluded from obtaining the state water right. Therefore, the Board finds that the standard is met." Record 72-73.

The county also imposed conditions of approval. Under those conditions, Thornburgh may not secure FMP approval until OWRD approves its application for a water right permit. In addition, at the time of tentative plat or site plan approval for individual phases, Thornburgh must demonstrate that the mitigation required for that phase under the approved water right is accounted for.[54]

The county's interpretation and application of DCC 18.113.070(K) is entirely consistent with our decision in *Bouman*. We do not understand petitioners to contend that

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[54] Condition 10 provides:

> "[Thornburgh] 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. [Thornburgh] shall provide at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation of the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase." Record 94-95.

Thornburgh faces any *legal* barrier in its application for a right to withdraw groundwater to serve Thornburgh Resort. Petitioners' argument that the county must interpret DCC 18.113.070(K) to require that Thornburgh secure all of the mitigation credits that the destination resort will ultimately need, before CMP approval can be granted, is inconsistent with our decision in *Bouman* and we reject the argument.

We also agree with the county that even if it is obligated under DCC 18.113.070(K) to require that Thornburgh demonstrate that it is feasible for Thornburgh to secure the mitigation credits as they are needed, there is substantial evidence in the record to establish such feasibility. The evidence in the record does not establish that Thornburgh currently has in hand all of the mitigation credits it will ultimately need. And there is evidence in the record that other entities are seeking mitigation credits to allow development to be served by groundwater. However, while Thornburgh may have to compete with these other entities at the time it seeks the mitigation credits that it will need to allow individual phases of Thornburgh Resort to go forward, there is no reason to believe that Thornburgh will not be able to purchase water rights directly from willing sellers or from banks that acquire such water rights and make the resulting mitigation credits available to willing purchasers.

Finally, petitioner Gould asserts three additional arguments under her twelfth assignment of error, beginning at page 45, line 14. The county responds to each of those arguments. Respondent's Brief 21-24. We agree with the county that none of the three arguments provides a basis for remand, and further discussion of those issues would only unnecessarily lengthen an already lengthy decision.

Gould's twelfth assignment of error and Munson's second assignment of error are denied.

MUNSON'S THIRD ASSIGNMENT OF ERROR

Under his third assignment of error, petitioner Munson contends that in seeking its water right permit from OWRD, Thornburgh should not be considered a "quasi-municipal"

use because much of the water Thornburgh will need will be used to irrigate golf courses and common areas and the 40 percent use assumption does not apply to irrigation uses.

The county responds, and we agree, that the assumptions that OWRD applies in reviewing Thornburgh's permit application are for OWRD to apply. OWRD apparently has initially determined that it is appropriate to treat Thornburgh Resort as a "quasi-municipal" use. Record 4262. Petitioner Munson's argument under this assignment of error is property directed at OWRD; it provides no basis for reversal or remand of the *county's* decision to grant CMP approval.

Munson's third assignment of error is denied.

GOULD'S THIRTEENTH ASSIGNMENT OF ERROR

Under her final assignment of error, petitioner contends the county's findings are inadequate to demonstrate Thornburgh Resort will be served with adequate fire and police services, as required by DCC 18.113.070(I).[55] Petitioner contends that while the area of the resort that will be occupied by the Tribute Village is within a fire district, the area that will be occupied by the Pinnacle Village is not. Petitioner contends the county erred by not finding that it is feasible to annex the Pinnacle Village area to the fire district. Petitioner also argues that the county erred by not requiring on-site police facilities.

With regard to fire service, the county found:

> "The [County] finds that the City of Redmond Fire Department, in conjunction with the Deschutes County Rural Fire Protection District No. 1, will provide fire protection services to the resort. The southern portion of the subject property, proposed development Phase A and most of Phase B, is currently within the boundaries of the Deschutes County Rural Fire Protection

[55] DCC 18.113.070(I) requires that the county find:

> "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."

> District No. 1. As stated by the City of Redmond Fire Department * * * [Thornburgh] initiated the process to annex the remainder of the resort property into the boundaries of the Rural Fire District."[56] Record 70.

We conclude that a reasonable decision maker could conclude that the initiated annexation request will be granted and that Thornburgh will therefore comply with the DCC 18.113.070(I) requirement that the resort must be located within a fire district. Petitioner cites no evidence that would suggest that the annexation petition will not be granted.

With regard to petitioner's argument concerning police facilities, Thornburgh argues that the DCC 18.113.070(I) requirement that "facilities to provide for necessary safety services such as police and fire will be provided on the site" does not impose a requirement for onsite police facilities. Police services can be "provided on the site" by the Deschutes County Sherriff from its facilities located elsewhere. We agree with Thornburgh on the interpretive issue. The county found:

> The [County] finds that the site falls within the jurisdictional boundaries of the Deschutes County Sheriff's Office, which will provide police protection for the resort. * * * The Sheriff's Department states that resort development will provide an additional tax base that will generate the funds needed to cover additional police services in the vicinity of the subject property. This additional revenue will be sufficient to provide the personnel and equipment needed to insure the resort can be provided with public safety protection." Record 70.

The above-quoted finding is sufficient to explain why the proposal complies with DCC 18.113.070(I), with regard to police protection.

Gould's thirteenth assignment of error is denied.

The county's decision is remanded.

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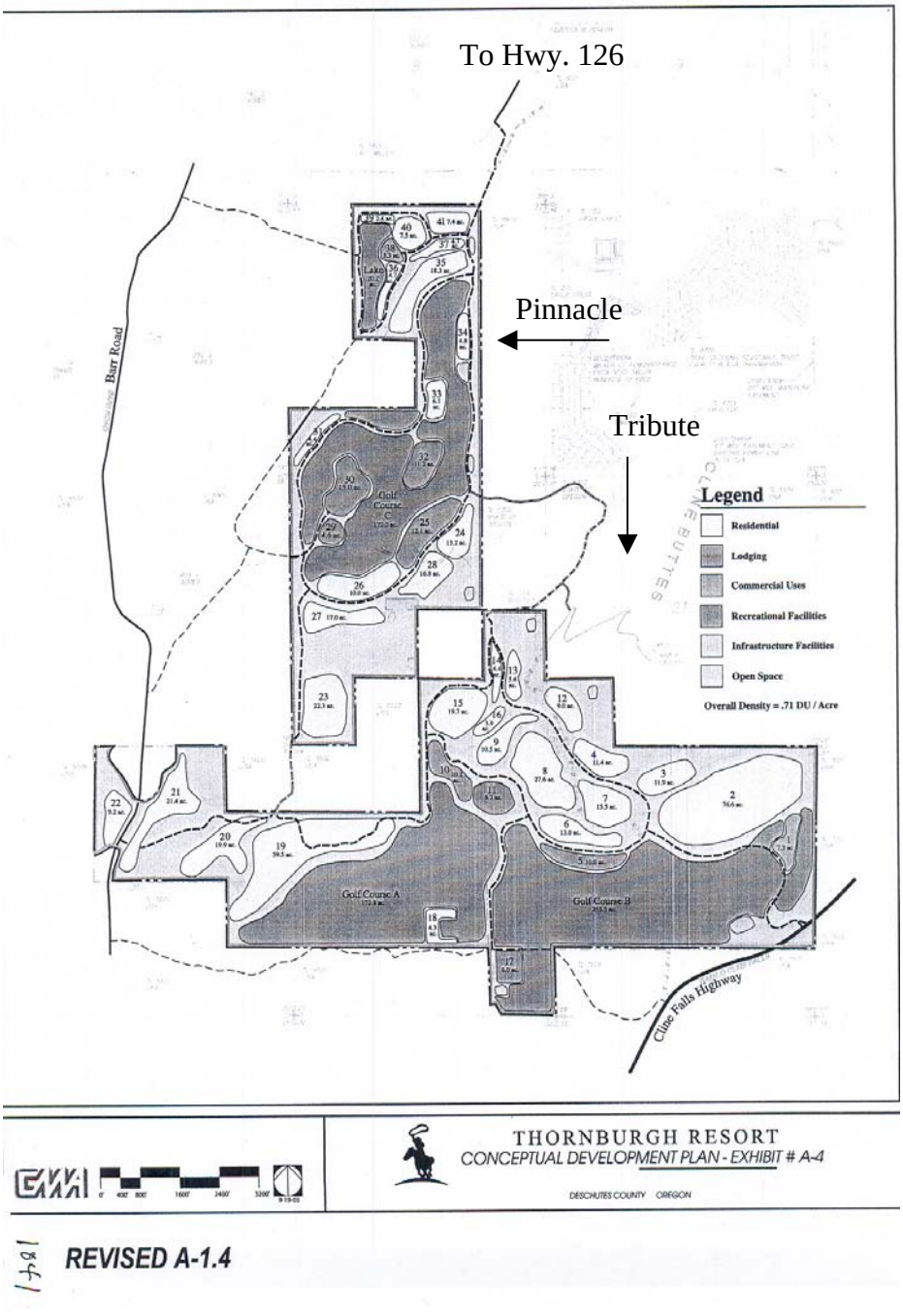
[56] In the referenced letter, the fire department explains:

> "[Thornburgh] has met with the [Fire District Board of Directors] and indicated that it intends to move forward with a petition to annex the remainder of the resort project into district boundaries. The Board has agreed to allow the developer to move forward with its annexation petition. Depending upon the timing of an annexation petition, the parties have agreed to explore the potential for serving this portion of the property on a contractual basis until annexation is final." Record 5761-62.

APPENDIX A


To Hwy. 126
Pinnacle
Tribute
Burr Road
Golf Course C
Golf Course A
Golf Course B
Cline Falls Highway
Legend
Residential
Lodging
Commercial Uses
Recreational Facilities
Infrastructure Facilities
Open Space
Overall Density = .71 DU / Acre
THORNBURGH RESORT
CONCEPTUAL DEVELOPMENT PLAN - EXHIBIT # A-4
DESCHUTES COUNTY OREGON
REVISED A-1.4

Appendix B

OVERNIGHT AND DENSITY CALCULATIONS								
PHASES	**A**	**B**	**C**	**D**	**E**	**F**	**G**	**TOTALS**
Residential Single Family	300	150	150	125	125	50	50	950
Hotel	0	0	0	0	0	25	25	50
Residential Overnight*	150	75	75	62.5	62.5	0	0	425
Net Overnight Units	150	75	75	62.5	62.5	25	25	475
Net Dwelling Units	450	225	225	187.5	187.5	75	75	1425
RATIO-Resid. Units/Overnight	2.00	2.00	2.00	2.00	2.00	2.00	2.00	
RATIO-Cumulative	2.00	2.00	2.00	2.00	2.00	2.00	2.00	

* In Phase A there will be 50 cottages that will be built in the Tribute that will be designated with/for lockoffs. These could accommodate 150 overnights. In later phases as buildings are constructed it is likely that these Phase A buildings will be modified so that the lockoffs will not be used on a long term basis. Thus these will only account for 50 overnights.

1