BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

and

STEVE MUNSON,
Intervenor-Petitioner,

vs.

DESCHUTES COUNTY,
Respondent.

LUBA No. 2008-068

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

Jannett Wilson, Eugene, filed a petition for review and represented intervenor-petitioner. With her on the brief was the Goal One Coalition.

Laurie E. Craghead, Assistant Legal Counsel, Bend, and Peter Livingston, Portland, filed the response brief and Peter Livingston argued on behalf of respondent. With them on the brief was Schwabe, Williamson & Wyatt PC.

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

AFFIRMED 09/11/2008

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

Petitioner appeals a county decision that grants conceptual master plan (CMP) approval for a destination resort.[1]

FACTS

The county's initial approval of the disputed CMP was remanded by LUBA. *Gould v. Deschutes County*, 54 Or LUBA 205, *rev'd and remanded* 216 Or App 150, 171 P3d 1017 (2007). In this opinion, we will refer to our initial decision in this matter as *Gould I* and we will refer to the Court of Appeals' decision as *Gould II*. The decision that is before us in the present appeal is the county's decision following that remand, in which the county responded to the errors identified by LUBA and the Court of Appeals.

FIRST ASSIGNMENT OF ERROR

A. Introduction

The public's right to notice and a meaningful right to participate in local government land use permit proceedings is set out at ORS 215.416 (counties) and 227.175 (cities). Two-stage land use permit approval processes are common. Frequently, the first stage approval requires public hearings at which the public has a right to participate, in accordance with ORS 215.416 and 227.175. Almost as frequently, the public has no participatory rights or limited participatory rights in the second stage approval. In this case, under the Deschutes County Code (DCC), the public has a right to participate in the public hearings that must precede county approval of a CMP. But under the DCC, public hearings are not required by the DCC for final master plan (FMP) approval. The leading case that addresses the aspects of permit decision making that must be completed in the first stage (where the public has a right to participate) and the aspects of permit decision making that may be completed in the

[1] Intervenor-petitioner's petition for review simply incorporates petitioner Gould's petition for review. In this opinion we refer to petitioner in the singular.

final stages (where the public has no participatory rights) is *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den* 297 Or 82 (1984). We discuss the key principles articulated in *Meyer* before turning to the Court of Appeals' decision in *Gould II*.

Meyer concerned a planned unit development (PUD). The decision on appeal granted approval for a preliminary plan for the PUD. The city process for final plan approval for the PUD did not include any public right to participate in the final plan approval. One of the approval standards for the preliminary PUD approval decision required that the city find the proposed PUD "is not detrimental or injurious to the public health, peace or safety, or to the character and value of the surrounding properties." 67 Or App at 278. In *Meyer*, the city approved the PUD preliminary plan with conditions. Those conditions of approval were set out in detail in the Court of Appeals' decision in *Meyer*. Those conditions required that the applicant prepare detailed final geotechnical reports as a condition of securing final plan approval. Under the city's conditions of approval, those final geotechnical reports were to, among other things, "verify that all proposed roadways, drainageways and building sites can be safely developed." 67 Or App at 279 n 4. As described by the Court of Appeals in *Meyer*, there were two issues on review: "(1) Did the city address the issues on which petitioners had a right to be heard during the first stage of the approval process; and (2) are the city's findings on those issues supported by substantial evidence?" 67 Or App at 280.

The development issues that were raised under the city's general "public health, peace or safety" standard in *Meyer* were whether roads, drainageways and building sites could be safely developed and whether there were suitable methods of storm water and groundwater disposal. The city found that public agencies, including the city Bureau of Building's geotechnical engineer, testified that the area was subject to landslides, but that the proposed PUD was responsive to that limitation and that construction was "feasible" in the areas of the site that were proposed for development, which included "ridge tops and areas with slopes less than 30%." 67 Or App at 281. With regard to drainage, the city found that

the proposed use of existing drainage ways and an enlarged pond would be sufficient to ensure adequate drainage. As noted above, the city's geotechnical engineer recommended more detailed geotechnical studies to ensure that building sites were buildable and that post development peak storm water flows would not exceed peak storm water flows before development.

The petitioners in *Meyer* argued that the city preliminary plan approval decision failed to address the building safety and ground and storm water drainage issues they raised under the city's "public health, peace or safety" standard. Petitioners argued those issues "were deferred under the guise of conditions" to the final approval stage where the public would have no right of participation. 67 Or App at 280-81.

The Court of Appeals rejected petitioners' argument that the city improperly deferred discretionary decision making to the final (non-public) approval stage. The court held that the city's findings regarding the "public health, peace or safety" standard were supported by substantial evidence, which the court described as a detailed 1973 geotechnical study of the area and "extensive testimony by the city's experts." 67 Or App at 282. The Court of Appeals also found that the opponents' participatory rights were preserved because they were allowed to appear and "present evidence at the public hearings upon which the city's [PUD preliminary plan approval] findings in this matter were based." *Id*.

In *Meyer*, the Court of Appeals made two important additional points in footnotes. First, the court noted that in LUBA's decision, where LUBA explained why it believed that the city made the decisions it needed to make in the public stage of the process, "[f]or some reason LUBA couched its discussion of this question in terms of whether or not the city found the preliminary plan posed a 'feasible' development project." 67 Or App at 280 n 5. The Court of appeals explained in footnote five that it understood LUBA to use the term "feasibility" to mean more than "technical engineering" feasibility, "[i]t means that substantial evidence supports findings that solutions to certain problems (for example

landslide potential) posed by a project are possible, likely and reasonably certain to succeed." *Id*.

The Court of Appeals made a second important point in footnote six. The court noted that the city obviously did not have the additional detailed geotechnical reports that were required by the city's conditions of approval:

> "It is true that the city council has not identified a precise solution for each and every potential problem posed by the PUD. Although the council must find that solutions are available, detailed technical matters involved in selecting a particular solution to each problem are left to be worked out between the applicant and city's experts during the second stage approval process for the final plan. *Fasano* does not require that technical discussion and review to proceed by way of public hearings." 67 Or App at 282 n 6.

The key principles that we derive from *Meyer* regarding two-stage land use permit approval processes, where the public has no participatory rights in the second stage, are set out below:

1. In such two-stage approval processes, public participatory rights may be limited to the first stage, so long as findings demonstrating compliance with all mandatory, discretionary approval criteria are adopted as part of the first stage approval, and those findings are adequate and supported by substantial evidence.

2. The second *Meyer* principle is a subset or refinement of the first principle. Where a land use permit application and the evidentiary record supporting that land use permit application demonstrate at the first stage that the development complies with all mandatory approval criteria, and in its decision the local government finds that solutions to any identified problems regarding the proposal's compliance with the approval criteria are "feasible," that is, those solutions are shown to be "possible, likely and reasonable certain to succeed," first stage approval may be granted, even if it is not yet known precisely which feasible solutions will be adopted.

3. Where a local government has properly granted first stage land use permit approval under 1 or 2 above, the local government may require any additional technical studies that it believes are necessary, and the public need not be given a right to participate in the review and approval of those technical studies.

B. The Court of Appeals' Decision in *Gould II*

DCC 18.113.070(D) requires that all negative impacts on fish and wildlife resources from a destination resort must be "completely mitigated." As the Court of Appeals explained:

> "The development code requires the CMP application to include a description of the wildlife resources of the site and the effect of the destination resort on those resources, the 'methods employed to mitigate adverse impacts on the resources,' and a 'proposed resource protection plan to ensure that important natural features will be protected and maintained.' DCC 18.113.050(B)(1). The approval criteria include a requirement that the decision maker 'find from substantial evidence in the record' that '[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource.' DCC 18.113.070(D)." *Gould II*, 216 Or App at 154.

The destination resort applicant submitted studies and entered into discussions with the Oregon Department of Fish and Wildlife (ODFW) and the federal Bureau of Land Management (BLM) to develop a program to comply with the DCC 18.113.070(D) "complete mitigation" standard. The record includes a letter from an ODFW biologist that expresses the opinion that all habitat impacts can be mitigated. Record 5512.[2] The county ultimately found that "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." Record 62. [3] Based on that finding and a condition of approval that a mitigation plan be completed, approved by BLM and ODFW and implemented, the county found that the CMP complied with DCC 18.113.070(D). In our initial decision we rejected petitioners' challenge

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[2] The parties agreed that the county would not be required to resubmit the large record that was compiled in *Gould I* and that "each party will attach to their respective briefs any pages from the original record that party believes is relevant to the party's argument." *Gould v. Deschutes County*, (LUBA No. 2008-068, Order, June 9, 2008), slip op 1. In this opinion we cite to the record in *Gould I* as "Record," and we cite the record that the county compiled following remand as "Remand Record."

[3] The meaning and appropriate role of the concept of "feasibility" in reviewing multi-stage development review where the public has participatory rights in some but not all stages of approval is at the core of petitioner's first assignment of error. We turn to that question below after discussing the Court of Appeals' decision in *Gould II*.

to those findings and concluded that they were adequate and supported by substantial evidence:

> "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. ODFW 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 18.13.070(D)." 54 Or LUBA at 260-61 (emphases added; footnote omitted).

The Court of Appeals explained that the issue on review was "whether LUBA erred in affirming the county's findings that the conceptual master plan application complied with DCC 18.113.070(D) because an acceptable mitigation plan was *feasible* and likely to be adopted by BLM, ODFW, and Thornburgh." 216 Or App at 159 (emphasis added). The Court of Appeals concluded that LUBA erred:

> "LUBA's opinion and order was unlawful in substance for the reasons that follow. First, the county's findings were inadequate to establish the necessary and likely content of any wildlife impact mitigation plan. Without knowing

> the specifics of any required mitigation measures, there can be no effective evaluation of whether the project's effects on fish and wildlife resources will be 'completely mitigated' as required by DCC 18.113.070(D). ORS 215.416(9) requires that the county's decision approving the CMP explain 'the justification for the decision based on the criteria, standards and facts set forth' in the decision. The county's decision is inconsistent with ORS 215.416(9) because the decision lacks a sufficient description of the wildlife impact mitigation plan, and justification of that plan based on the standards in DCC 18.113.070(D). Second, that code provision requires that the content of the mitigation plan be based on 'substantial evidence in the record,' not evidence outside the CMP record. In this case, the particulars of the mitigation plan were to be based on a future negotiation, and not a county hearing process. Because LUBA's opinion and order concluded that the county's justification was adequate despite those deficiencies, [LUBA's] decision was 'unlawful in substance.'" 216 Or App at 159-60 (footnote omitted).

As explained in *Gould II*, LUBA's error was twofold. First, the specifics of the mitigation measures must be known at the time the county finds the proposal complies with DCC 18.113.070(D), and those specifics are lacking here. Second, because the needed mitigation plan would be completed after the county found the CMP complied with DCC 18.113.070(D), its decision was based on evidence outside the CMP record. In reversing LUBA's decision, we understand the Court of Appeals to have concluded that the standard set forth in DCC 18.113.070(D) requires that the specifics of any mitigation plan or plans that are proposed to comply with DCC 18.113.070(D) must be known to the county so that it may make a finding that the mitigation plan or plans completely mitigate any impacts, and that finding must be supported by substantial evidence in the CMP record.

In reversing LUBA's decision in *Gould I,* the Court of Appeals also noted an alternative the city might have selected, but did not select. The Court of Appeals explained that rather than make a current decision regarding whether the CMP complies with DCC 18.113.070(D), the county could postpone its findings concerning DCC 18.113.070(D) until the mitigation plan had been completed and reviewed and approved by BLM and ODFW so that the specifics that are necessary to make the finding required by DCC 18.113.070(D) are available. The Court of Appeals explained:

> "In this case, the county's decision did not postpone a determination that the project complies with DCC 18.113.070(D). The county might have, but did not, postpone determination of compliance with that standard until the final master plan approval step *and infuse that process with the same participatory rights as those allowed in the CMP approval hearing*. Instead, the county implicitly concluded (but did not directly find) that the nature of the wildlife impact mitigation plan was sufficiently certain and probable to allow a present determination of consistency with the approval criterion. LUBA found that the findings were 'adequate' to explain compliance with DCC 18.113.070(D).
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> "But the governing ordinance requires a *Meyer* determination of whether 'solutions to certain problems * * * are * * * likely and reasonably certain to succeed'--whether the findings and conditions of the conceptual master plan approval adequately support the conclusion that 'any negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource' as required by DCC 18.113.070(D). The adopted findings fail to make that case." 216 Or App at 162 (emphasis added; footnote omitted).

In footnote four, which is omitted from the foregoing text from *Gould II*, the Court of Appeals observed:

> "In the context of this case, a determination that a wildlife impact mitigation plan is *'feasible'* might be appropriate to justify postponement of any evaluation of the application of DCC 18.113.070(D) to the plan. The determination of *feasibility*, however, is not an adequate substitute for an assessment of whether a specific mitigation plan actually complies with the standard." *Id*.

As will hopefully become clearer later, the option the Court of Appeals suggests in the first of the above-quoted paragraphs is different from the approach that is required in the second *Meye*r principle. Under the second *Meyer* principle, a local government finds that all applicable approval standards are satisfied, and in doing so identifies solutions to identified problems that are "possible, likely and reasonably certain to succeed." In the option described by the Court of Appeals in the first of the above-quoted paragraphs, the local government would defer a finding regarding DCC 18.113.070(D) and defer to a future public proceeding the establishment of any solutions to identified problems. As the second of the above-quoted paragraphs makes clear, the Court of Appeals concluded in *Gould II* that the

county's first decision in this matter attempted, unsuccessfully, to take the approach authorized in the second *Meyer* principle.

Petitioner's first assignment of error rests largely on footnote four, which petitioner interprets to impose a requirement that the county must first find that a mitigation plan that complies with DCC 18.113.070(D) is "feasible," *i.e.*, "likely and reasonably certain to succeed" in completely mitigating any impacts on fish and wildlife resources, before the county can properly defer a decision concerning DCC 18.113.070(D) to a future public hearing and future county decision regarding that standard.

C. The County's Decision on Remand and Petitioner's Argument

On remand, the county deferred its finding regarding DCC 18.113.070(D). As noted above, although the county found in its first decision that a mitigation plan that complies with DCC 18.113.070(D) is feasible, the Court of Appeals determined that the county's feasibility finding in its initial decision was inadequate to demonstrate compliance with DCC 18.113.070(D). The county adopted no further "feasibility" finding on remand, and petitioner assigns error to that failure. Specifically, petitioner argues:

> "The Court of Appeals rejected the County's earlier findings of compliance with DCC 18.113.070(D), which 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.'
>
> "The County had determined compliance based on its finding of feasibility. The Court ruled that the County's findings of feasibility were inadequate, however, and that there was not sufficient evidence of feasibility. 216 Or App at 159-60. The Court also ruled that an opportunity for public comment is necessary. *Id*., at 163.
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> "On remand, the County this time did not make a finding based on substantial evidence that the approval criterion in DCC 18.113.070(D) is satisfied. Instead of making a finding of compliance, the County attempted to postpone a determination of compliance. The County said that it was adding a condition postponing determination of compliance until the [FMP] approval step and was infusing that process with the same participatory rights as allowed in the CMP approval hearing. The new condition states:

> "'37. Applicant shall demonstrate compliance with DCC 18.113.070(D) by submitting a wildlife mitigation plan to the County as part of its application for [FMP] approval. The County shall consider the wildlife mitigation plan at a public hearing with the same participating rights as those allowed in the CMP approval hearing.'
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> "However, merely providing for a hearing at the FMP stage does not substitute for the need of a finding of feasibility based on substantial evidence which is needed for a deferral of a decision to a later stage. * * *" Petition for Review 4.

D. Analysis and Conclusion

In its decision in *Gould II*, we understand the Court of Appeals to have articulated two options for the county on remand. Under the first option, the county could make another attempt to find that the proposed destination resort complies with DCC 18.113.070(D), and if it does, grant CMP approval. But the Court of Appeals made it clear that it likely would be impossible for the county to adopt and defend such a decision, based on the existing evidentiary record. That is because DCC 18.113.070(D) requires that an applicant demonstrate that the destination resort impacts on "fish and wildlife will be "completely mitigated." Without more specific information about destination resort impacts and how they can be mitigated, we understand the Court of Appeals to have concluded such a demonstration is problematic or impossible.

The second option in *Gould II* would be to postpone the county's DCC 18.113.070(D) findings to a later stage approval process after the needed information has been developed and made available and "infuse that process with the same participatory rights as those allowed in the CMP approval hearing." Petitioner believes a precondition of that second option is a county finding, supported by substantial evidence, that it is "feasible" that the proposed destination resort will comply with DCC 18.113.070(D). We understand petitioner to contend that such a "feasibility" demonstration and finding must be sufficient to satisfy the second of the *Meyer* principles discussed earlier in this opinion.

Although the precise meaning of footnote four in *Gould II* is not clear to us, we do not agree that in order to defer the question of compliance with DCC 18.113.070(D) to a later stage that provides public participatory rights, the county must first find that it is "feasible" to comply with DCC 18.113.070(D).

As noted, footnote four in *Gould II* states:

> "In the context of this case, a determination that a wildlife impact mitigation plan is '*feasible*' might be appropriate to justify postponement of any evaluation of the application of DCC 18.113.070(D) to the plan. The determination of *feasibility*, however, is not an adequate substitute for an assessment of whether a specific mitigation plan actually complies with the standard." 216 Or App at 162 (emphases in original).

We do not understand footnote four to *require* a finding that it is "feasible" for the proposed destination resort to comply with DCC 18.113.070(D), as a necessary precondition for the county's decision on remand to defer a finding on DCC 18.113.070(D) to the future and provide full rights of public participation at the time the destination resort's plan for complying with DCC 18.113.070(D) is considered in the future. Even if such a finding of feasibility could be made, we fail to see what function it would serve in that context.

Petitioner also cites *Paterson v. City of Bend*, 201 Or App 344, 118 P3d 842 (2005), which is cited in *Gould II*, for her position that a "feasibility" finding is required to defer a finding of compliance with DCC 18.113.070(D) to a future public hearing process. In *Paterson*, one of the approval standards for tentative subdivision plan approval required the applicant to show that there was street access to each phase of a subdivision that was to be developed in several phases. The hearings officer in *Paterson* found that it was "unclear from the information provided where street access during phase 1 is located." 201 Or App at 348. To respond to that lack of clarity in the application for tentative subdivision approval, the hearings officer imposed a condition of approval that the applicant "'demonstrate that there will be street access' before final plat approval." *Id*. On appeal, the petitioner argued the city erred by substituting a condition of approval for a finding of compliance with the

tentative subdivision approval standard. The applicant argued on appeal that the hearings officer's decision was proper, because there were "four 'feasible' means of access" to phase 1.

In sustaining petitioner's assignment of error, the Court of Appeals explained:

> "In principle, we agree that nothing in the development code precludes the city from, *in effect, postponing a showing of compliance with specific development criteria* until the final plat approval, provided there is a showing that compliance is feasible. *See Meyer v. City of Portland*, 67 Or App 274, 280 n 5, 280-82, 678 P2d 741, *rev den*, 297 Or 82, 679 P2d 1367 (1984) (citing, with approval, LUBA opinion addressing the need for land use decision-maker to find, at a minimum, that compliance with mandatory criteria is "feasible"). *In this case, however, the hearings officer did not expressly find that compliance with the relevant access provisions was feasible*. Nor, where the hearings officer stated that the location of street access was "unclear," are we able to conclude that the hearings officer implicitly made such a finding. We therefore reverse and remand with instructions to remand to the city for further consideration of that issue, including at a minimum, some identification by the city of the factual predicates for its finding. * * *" 201 Or App at 349-50 (emphases added).

The inadequate findings that the court identified in *Paterson* are similar to the inadequate findings that the court identified in *Gould II*. We do not think *Paterson* stands for the principle that a demonstration and finding of "feasibility," is required in order to defer a finding on a discretionary approval standard to a future stage that will be infused with full public participatory rights. As we have already explained, a feasibility finding within the meaning of the second principle from *Meyer* is a constituent part of a *current* finding of compliance with all discretionary approval standards. Such a finding of current compliance under the second principle in *Meyer* would make deferral to a future public process and additional findings unnecessary. In *Paterson*, the hearings officer did not defer a finding of compliance to a second stage with full public participatory rights. The court likely intended the above-quoted passage in *Paterson* as a response to the applicant's argument that there were four "feasible" ways to provide the required access to phase 1. As the Court of Appeals noted, the hearings officer did not find that there were four "feasible" ways to provide the

required access to phase 1. The above-quoted passage from *Paterson* seems to say that had the city adopted findings that established that there were four "feasible" ways to provide the needed access to phase 1, within the meaning of the second principle from *Meyer*, the city could have deferred a choice between those four "feasible" means of access to the final plat approval stage. If so, contrary to the suggestion in the above-quoted text from *Paterson*, such a deferral would not be "postponing a showing of compliance with specific development criteria until the final plat approval." We do not understand the above passage from *Paterson* to contemplate that a public process would be required for final plat approval. To the contrary, it seems clear that the above-quoted passage from *Paterson* anticipates that final plat approval will be a non-public process.

For the reasons explained above, we conclude that neither *Gould II* nor *Paterson* support petitioner's position that the county must first find that it is "feasible," within the meaning of the second principle in *Meyer*, for the destination resort to comply with DCC 18.113.070(D), before it can defer a decision concerning whether the proposed destination resort complies with DCC 18.113.070(D) to a future public process as part of FMP approval. It follows that petitioner's first assignment of error must be denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under state and local law, the ratio of residential units to overnight lodging units may not exceed 2:1, and that maximum ratio must be maintained in each phase of development of a destination resort. In our decision in *Gould I*, we identified some inconsistencies between the destination resort phasing plan and an Overnight Density Calculation chart that were prepared, in part, to demonstrate that the destination resort complies with this maximum 2:1 ratio requirement. We noted in our decision that the applicant proposed that one of those inconsistencies could be eliminated by modifying the phasing plan "to show that 62.5 overnight dwelling units will be developed in Phase D." 54 Or LUBA at 222. After noting

that correction, we stated that the inconsistency "could have been eliminated if the county had imposed a condition of approval that specifically required that correction." *Id*. (footnote omitted).

On remand the county imposed a condition that, among other things, requires that the legend of the phasing plan be amended to show 63 units of overnight dwelling units will be provided in Phase D. That condition concludes with the following text:

> "Applicant shall present the corrected Phasing Plan and Overnight and Density Calculations chart, consistent with this condition, during the Final Master Plan approval process." Remand Record 22.

If we understand petitioner correctly, she argues that the city committed error by allowing the applicant to submit the corrected CMP when the FMP is submitted and instead should have required that the corrected Phasing Plan be prepared and submitted to the county before it issued its decision on remand that approves the CMP with conditions.

The required correction is clear and objective, and is the kind of correction that can be made and confirmed at the time the FMP is submitted. The county committed no error in allowing the corrected Phasing Plan to be submitted at the time the applicant submits the FMP for review and approval.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In *Gould I*, we sustained one of petitioner Gould's subassignments of error under the eighth assignment of error. In that subassignment of error, petitioner argued that the county erred by failing to adopt findings that demonstrate that the CMP complies with DCC 18.113.070(G)(3)(b), which 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." On remand, the county adopted approximately a page and a half of single-spaced findings. In her third assignment of error, petitioner challenges the adequacy of those findings and argues they are not supported by substantial evidence.

A. Phasing of Internal Roads

The phasing plan shows Phase A will be developed between 2006-2009. Phases F and G are the last phases, and they will be developed between 2014 and 2018. The other phases will be developed in specified intervals between those intervals. To provide assurances that the internal road system will be developed as needed to provide safe and efficient access to each of the development phases, the applicant submitted two plans, one entitled "Phasing Plan – Exhibit # AA-11 (Phasing Plan) and one entitled "Vehicular Access and Circulation" Plan (VAC Plan).[4] The county adopted the following findings on remand:

> "Applicant has submitted a [VAC Plan] * * * which illustrates how roads will provide access throughout each phase of the project. This plan can viewed together with the revised Phasing Plan * * * to determine how the different phases of development will be served by roads. The revised Phasing Plan does not show the roads extending to the Phase G residential area, but Applicant has explained that this is a typographical error * * * and the Board relies upon the [VAC Plan] to determine where the roads will go. The revised Phasing Plan shows the internal roads will be constructed in Phase A or, at the latest, Phase B." Remand Record 17.

Petitioner challenges the county's finding that all roads will be constructed in Phase A or Phase B. Except for the road necessary to serve Phase G, the Phasing Plan shows that the internal roads will be constructed in Phases A, B, D and E. Therefore, petitioner is correct that the county's finding that all roads will be constructed in Phases A or B is erroneous. However, petitioner makes no attempt to explain why that erroneous finding warrants remand. Except for Phase G, the Phasing Plan shows the phases in which the internal roads will be provided to provide access to each phase. If that is not adequate to demonstrate compliance with DCC 18.113.070(G)(3)(b), petitioner does not explain why.

The road that will serve Phase G is shown on the VAC Plan, but that road is not shown on the Phasing Plan. In the above-quoted findings, the county notes the omission

[4] The Phasing Plan appears at Record 4230 and is attached as Appendix 11 to the Petition for Review. The VAC Plan appears at Record 1049 and is attached as Appendix 12 to the Petition for Review.

from the Phasing Plan. With that omission, it is unclear *when* that road will be constructed. We have no idea what the applicant meant by claiming the omission was "a typographical error," and no party has provided us with the pages from the *Gould I* record that might disclose what that statement means. We also have no idea why the challenged decision recognized the potential problem, but did not clarify when the access to Phase G would be provided or impose a condition of approval to require that the omission be corrected. However, the legal standard that is at issue under the third assignment of error is DCC 18.113.070(G)(3)(b), which imposes a requirement 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." It does not, as petitioner argues, require "a phase by phase analysis" of the proposed internal roads. We conclude the applicant's and the county's failure to specify precisely in which phase the access road that will be needed to develop Phase G will be developed does not warrant remand. Phase G is one of the last two phases. We think it is reasonable to infer that the roadway that is shown on the VAC Plan to serve Phase G will be constructed in Phase G or in one of the prior Phases. In either event, the required roadway will be available to serve Phase G.

B. Emergencies, Safety

Petitioner argues "[f]urthermore, there is no specific evidence on the adequacy of this internal road system to handle emergencies." Petition for Review 10. Three paragraphs later, petitioner argues "[t]he evidence cited by the County simply does not address the issue at hand." Petition for Review 11. Apparently the "issue at hand" includes the alleged inadequacy of the internal road system to "handle emergencies" in a manner that will be adequate for each phase of the proposal. Following that sentence, petitioner identifies a number of documents the county cited in its findings and relies on to find the internal road system complies with DCC 18.113.070(G)(3)(b). For each item, petitioner identifies an alleged shortcoming. Later in the petition for review, petitioner argues:

> "Furthermore, the findings do not address the issues specifically raised by the Applicant regarding concerns for when the roads funnel into each other and of the adequacy of the road system to handle fires moving uphill." Remand Record 59-60.

We are not sure what petitioner means by roads funneling into each other and fires moving uphill. Without further elaboration by petitioner, we agree with the county that simply making such assertions is not sufficient to obligate the county to adopt findings that specifically address road funneling and fires moving uphill as issues in applying DCC 18.113.070(G)(3)(b).

The county adopted findings that explain that the "roads have been located in response to concerns expressed by the Bureau of Land Management and others." Remand Record 17. Observing that the roads minimize fragmentation of public lands, the county found the road system would "be efficient, as that term is used in the DCC." Remand Record 17. Citing two letters from the City of Redmond Fire Department, a letter from the Deschutes County Sheriff and the applicants' Evacuation and Emergency Preparedness Planning for Thornburgh Resort, the county found that the proposal complies with the DCC 18.113.070(G)(3)(b) requirement for safe and efficient internal access. Given the general nature of the standard and the lack of a more developed argument from petitioner, we conclude that the county's findings concerning emergency and safety issues are adequate.

C. Barr Road

We noted in *Gould I*:

> "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. * * *" *Gould I*, 54 Or LUBA at 249.

The road that will be extended to serve Phase G of the proposal will have to cross Barr Road to provide access to the most westerly part of Phase G. The county adopted the

following findings to reject petitioner's argument that by allowing the applicant to construct a road that would *cross* Barr Road, the county was allowing the applicant to *use* Barr Road:

> "On remand, Gould repeats her earlier arguments on internal access and also complains that one proposed road would cross Barr Road, which would constitute an impermissible 'use' of Barr Road. The Board disagrees, finding that merely crossing Barr Road does not constitute 'using' Barr Road." Remand Record 18.

We understand petitioner to argue the county erred by finding that allowing the applicant to construct a road that will "cross" Barr Road does not mean the county is allowing the applicant to "use" Barr Road. Even if petitioner's view is possible, we believe the county's contrary view on that point is more reasonable. We see no error.

The third assignment of error is denied.

The county's decision is affirmed.