BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

ANNUNZIATA GOULD,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

CENTRAL LAND & CATTLE CO., LLC,
Intervenor-Respondent.

LUBA No. 2018-140

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Jeffrey L. Kleinman, Portland, filed a petition for review and argued on behalf of petitioner.

No appearance by Deschutes County.

Liz Fancher, Bend, filed a reply brief and argued on behalf of intervenor-respondent.

ZAMUDIO, Board Member; RUDD, Board Member, participated in the decision.

RYAN, Board Chair, did not participate in the decision.

REMANDED 06/21/2019

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner challenges a decision by a county hearings officer approving a tentative plan, site plan review, and site plan review application modification for phased development of a destination resort.

REPLY BRIEF

Petitioner moves to file a reply brief to respond to new matters raised in the response brief filed by intervenor-respondent Central Land & Cattle Company, LLC (intervenor). Intervenor does not oppose the reply brief and it is allowed.

FACTS

A destination resort is a "self-contained development providing visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities." Oregon Statewide Planning Goal 8 (Recreation); *see also* ORS 197.445 (providing similar destination resort definition). Local governments may plan for the siting of destination resorts on rural lands, subject to the provisions of state law. *Id.*; ORS 197.435 – 197.467. A destination resort may include residential dwellings, but the number of residential units is limited by the number of visitor-oriented overnight lodging units (OLUs), as explained further below.

In 2006, the county approved the Thornburgh Resort conceptual master plan (CMP) and, in 2008, approved a final master plan (FMP). Those approvals

were ultimately upheld after multiple rounds of appeals. This case is the eighth time that this land use dispute around the proposed Thornburgh Resort has been before this Board. We last summarized our prior cases in *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2018-008, Aug 21, 2018) (slip op at 3). A general summary of those prior appeals is not necessary or useful for this case. We discuss specific prior appellate decisions in our analysis of the assignments of error below.

The subject property consists of approximately 1,970 acres of land zoned for exclusive farm use and mapped within the destination resort overlay zone. The property was formerly used as a large ranch and is surrounded by public land managed by the US Bureau of Land Management (BLM) and Oregon Department of State Lands. The FMP provides for phased development and fish and wildlife habitat mitigation (the mitigation plan) to offset the impacts of the resort development.

The resort will include residential dwellings and OLUs. Recreational amenities will include two golf clubhouses, a recreation center, a spa and fitness center, and swimming pools and associated structures. Planned visitor-oriented facilities will include restaurants, convention facilities, business center, art gallery, and cultural center. The resort will include approximately 1,293 acres of open space, (approximately 66% of the entire acreage of the resort) planned as a golf course, common areas, and buffer areas. Record 196–97.

The FMP divides the development into seven phases. The first phase, Phase A, includes development of transportation infrastructure, golf course, restaurant, meeting facilities, open space, 300 residential units, and 150 OLUs, with the first 50 OLUs to be constructed before any sale of residential lots, and financial assurance (bonding) for another 100 OLUs, and implementation of the mitigation plan. Record 4.

As noted, the county's decision approving the FMP was ultimately affirmed after multiple rounds of appeals. In May 2018, intervenor sought approval for the first phase of development. Intervenor requested approval of a tentative plan for a portion of the approved Phase A, calling the partial sub-phase "Phase A-1," which includes a tentative subdivision plat for 192 single-family residential dwelling lots, 24 single-family deed restricted OLU lots, and 13 OLU lots, together with roads, utility facilities, lots, and tracts for future resort facilities and open space. Intervenor also applied for site plan review for a well, well house, pump house, reservoir, and sewage disposal. In this decision we refer to the approvals, collectively, as the tentative plan or TP. Record 1551. The county hearings officer approved with conditions the tentative plan for Phase A-1. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner challenges the hearings officer's decision that the tentative plan meets the requirements in the FMP and destination

resort regulations for phased development of OLUs and visitor-oriented recreational facilities.

A. Overnight Lodging Units

A destination resort may include residential units, limited by the number of OLUs.[1] A destination resort CMP must include a mechanism to ensure a minimum of 150 OLUs, and a maximum ratio of 2.5 residential units for each OLU (OLU Ratio). DCC 18.113.050(B)(21).[2] The first 50 OLUs must be constructed prior to the closure of sales, rental, or lease of any residential

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[1] DCC 18.04.030 defines overnight lodgings:

> "'Overnight lodgings' with respect to destination resorts, means permanent, separately rentable accommodations that are not available for residential use. Overnight lodgings include hotel or motel rooms, cabins and time-share units. 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 and check-in service operated by the destination resort or through a real estate property manager, as defined in ORS 696.010. Tent sites, recreational vehicle parks, mobile homes, dormitory rooms and similar accommodations do not qualify as overnight lodging for purposes of this definition."

See also ORS 197.435(5)(b) (providing similar OLU definition).

[2] DCC 18.113.050(B)(21) provides that the CMP shall include:

> "A description of the mechanism to be used to ensure that the destination resort provides an adequate supply of overnight lodging units to maintain compliance with the 150-unit minimum and 2 and one-half to 1 ratio set forth in DCC 18.113.060(D)(2). The mechanism shall meet the requirements of DCC 18.113.060(L)."

dwelling or lot. DCC 18.113.060(A)(1)(a). At least 50 of the remaining 100 required OLUs must be constructed or guaranteed through surety bonding or equivalent financial assurance within five years of the close of the sale of individual lots or units, and the remaining 50 required OLUs must be constructed or guaranteed through surety bonding or equivalent financial assurance within 10 years of the close of the sale of individual lots or units. DCC 18.113.060(A)(1)(b). The maximum 2.5:1 OLU Ratio may not be exceeded at any phase of the development. DCC 18.113.060(A)(1)(b)(iv). If the resort does not phase development of the OLUs, then the required 150 OLUs must be constructed prior to the closure of sales, rental, or lease of any residential dwelling or lot. DCC 18.113.060(A)(1)(c).

In the FMP phasing, Phase A involved the development of 300 residential units and 150 OLUs for a 2.0 OLU Ratio. Record 4, 61, 63. FMP Conditions of approval 21 and 33 required 50 OLUs be constructed in the first phase of development and an additional 100 OLUs be constructed or bonded.[3]

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[3] FMP Condition 21 provides, in part:

> "Each phase of the development shall be constructed such that the number of overnight lodging units meets the 150 overnight lodging unit and 2:1 ratio of individually owned units to overnight lodging unit standards set out in DCC 18.113.060 (A) (1) and 18.113.060 (D) (2). Individually owned units shall be considered visitor oriented lodging if they are available for overnight rental use by the general public for at least 45 weeks per calendar year through one or more

The FMP provides that the approval was "based upon the submitted plan," and that "[a]ny substantial change to the approved plan will require a new application." Record 217. DCC 18.113.080 provides that any substantial change proposed to an approved CMP must be reviewed in the same manner as the

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central reservation and check-in services. As required by ORS 197.445(4)(b)(B), at least 50 units of overnight lodging must be constructed in the first phase of development, prior to the closure of sale of individual lots or units." Record 219.

FMP Condition 33 provides:

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

"A. At least 150 separate rentable units for visitor-oriented lodging.

"B. Visitor-oriented eating establishments for at least 100 persons and meeting rooms which provide eating for at least 100 persons.

"C. The aggregate cost of developing the overnight lodging facilities and the eating establishments and meeting rooms required in DCC 10.113.060 (A) (1) and (2) shall be at least $2,000,000 (in 1984 dollars).

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

"E. The facilities and accommodations required by DCC 18.113.060 must be physically provided or financially assured pursuant to DCC 18.113.110 prior to closure of sales, rental or lease of any residential dwellings or lots." Record 220.

original CMP.[4] "Substantial change to an approved CMP, as used in DCC18.113.080, means an alteration in the type, scale, location, phasing or other characteristic of the proposed development *such that findings of fact on which the original approval was based would be materially affected.*" DCC 18.113.080 (emphasis added). The hearings officer reasoned that DCC 18.113.080, which applies to changes between the CMP and FMP, provides guidance for evaluating whether the tentative plan conforms to the FMP. The hearings officer concluded that the subphasing proposed in the tentative plan did not constitute a substantial change to the FMP. Petitioner argues that Phase A-1 is not approved by the CMP and FMP, and that subphasing is a substantial change to the approved plan.

Phase A-1 provides for division and development of 192 residential lots, division of 37 lots for approximately 110 OLUs, and bonding for approximately 40 OLUs, for a 1.28 OLU Ratio (192 RUs to 150 OLUs). Record 63. The hearings officer found that the different pace of development (subphasing) in Phase A-1

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[4] DCC 18.113.080 provides:

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

did not modify the FMP, because the FMP and applicable resort regulations do not require all development authorized in Phase A occur at the same time and that the different pace of development does not affect the material facts or compliance with relevant approval criteria. Record 63. The hearings officer observed that 50 OLUs must be constructed, and 150 total OLUs must be constructed or bonded prior to the sale of a residential lot.[5]

Petitioner has not established that the different pace of development in Phase A-1 alters the phasing or other characteristic of the proposed development such that findings of fact on which the original approval was based would be materially affected. Under Phase A-1, no residential lot can be sold or rented until the OLU requirements are satisfied. This is consistent with the FMP and

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[5] TP Condition 18 provides:

> "18. Construction. Prior to closing on the sale, lease or rental of any residential lots or dwellings:
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> "a. Obtain land use approvals for development of the remaining elements of Phase 'A,' including the remaining OLUs, restaurant, meeting rooms and recreational facilities.
>
> "b. Construct at least 50 OLUs
>
> "c. Construct or provide financial assurance for construction of the remaining 100 OLUs
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> "d. Construct or provide financial assurance for construction of the restaurant, meeting rooms and recreational facilities for Phase 'A' and as noted in FMP Condition 33." Record 117 (boldface omitted).

applicable regulations. The hearings officer did not misconstrue applicable law in concluding that Phase A-1 did not materially affect the FMP approval for phased development of OLUs.

Petitioner argues that the decision is based on inadequate findings because no part of the plan for Phase A-1 shows how the first 50 OLUs will be constructed. Intervenor responds, and we agree, that it may obtain approval of a tentative plan without providing details about the OLU construction. The residential units may not be sold, leased, or rented until the OLUs are built and assured through financing. Intervenor states that after the tentative site plan is approved, intervenor will subsequently submit site plans that show how the lots will be developed to provide the OLUs and recreational amenities. Record 1562.

Petitioner argues that the hearings officer erred in approving the tentative plan because the plan does not describe the OLU structures in sufficient detail to establish whether they qualify as OLUs as defined in DCC 18.04.030. See n 1. Petitioner argues that the proposed ownership, location, and design of the OLUs factor into whether a structure qualifies as an OLU.

Intervenor responds that the county's prior CMP/FMP decision, and related appeals, resolved the OLU issue. We agree. In *Gould v. Deschutes County*, 54 Or LUBA 205, 232 *rev'd and rem'd on other grounds*, 216 Or App 150, 171 P3d 1017 (2007) (*Gould CMP II*), we reasoned that the resort CMP proposed construction of 50 cottages with lockout facilities (to ensure 150 separate rentable units are available within the first phase) satisfied DCC

18.113.050(B)(8), which requires "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[.]" Petitioner does not contend that anything in the tentative plan changes the CMP/FMP provision for OLUs, and we do not understand that it does. The hearings officer did not err by failing to require intervenor to submit detailed plans for the cottages that will provide the required OLUs.

Petitioner argues that the challenged decision conflicts with the decisions in a line of destination resort cases that we have referred to as the *Caldera* cases. *See Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016) (*Caldera I*), *rev'd and remanded*, 285 Or App 267, 396 P3d 968 (2017) (*Caldera II*); *Central Oregon Landwatch v. Deschutes County*, 76 Or LUBA 6 (2017) (*Caldera III*). The *Caldera* cases concerned an expansion of an existing destination resort called Caldera Springs Resort. The existing resort included 38 single-family vacation homes with three to five bedrooms. Each bedroom has an en suite bathroom and outside entrance and could be locked off from the main cabin and the outside (lock-off rooms). The county approved the expansion, including 395 new single-family dwellings and an additional 95 OLUs. *Caldera I*, 74 Or LUBA at 544.

On appeal, the petitioner argued that the lock-off rooms in the existing resort could not be counted as separate OLUs. The intervenor responded that

argument was an impermissible collateral attack on the existing resort approval. We reasoned that the petitioner's argument that the existing lock-off rooms that were part of the prior-approved resort could not be counted to satisfy the overall OLU requirement for the expansion was not an impermissible collateral attack on a prior decision because the challenged expansion approval criteria, DCC 18.113.025(B), required the county to determine that the *entire resort facility*, including the existing facilities, satisfied all the requirements for a destination resort. *Caldera I*, 74 Or LUBA at 552.[6] The Court of Appeals affirmed that part of our decision. *Caldera II*, 285 Or App at 282.

On the merits, the intervenor in *Caldera* invoked *Gould CMP II*, 54 Or LUBA 205, arguing that we had approved inclusion of similar lock-off rooms in

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[6] DCC 18.113.025 provides:

> "Expansion proposals of existing developments approved as destination resorts shall meet the following criteria:
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> "A. Meet all criteria of DCC18.113 without consideration of any existing development; or
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> "B. Meet all criteria of DCC18.113 for the entire development (including the existing approved destination resort development and the proposed expansion area), except that as to the area covered by the existing destination resort, compliance with setbacks and lot sizes shall not be required.
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> "If the applicant chooses to support its proposal with any part of the existing development, applicant shall demonstrate that the proposed expansion will be situated and managed in a manner that will be integral to the remainder of the resort."

the calculation of OLUs in that case. We explained that the petitioner's challenge in *Gould CMP II* was narrow—the petitioner had argued to us that the fact that the OLUs could be converted to residential units in the future required denial of the CMP. In *Caldera I*, we explained that, in *Gould CMP II*, no party argued that the proposed lock-off units did not qualify as OLUs. *Caldera I*, 74 Or LUBA at 552–55.

In *Caldera I*, we determined that the individual lock-off rooms do not qualify as OLUs under the statutory definition in ORS 197.435(5)(b). See n 1; *Caldera I*, 74 Or LUBA at 552–55. The Court of Appeals reversed and remanded our decision on that statutory interpretation issue. *Caldera II*, 285 Or App 267. Ultimately, we remanded the decision to the county for further findings. *Caldera III*, 76 Or LUBA 6.

As an initial matter, the *Caldera* cases do not provide a definitive rule regarding what type of rentable accommodations satisfy the OLU definition. Instead, the *Caldera* cases concluded that whether an accommodation meets the OLU definition requires a fact-specific inquiry. Thus, the *Caldera* cases do not provide a general rule that lock-off accommodations cannot qualify as OLUs.

Second, and more importantly, this case is distinguishable from the *Caldera* cases on the issue of collateral attack. The *Caldera* cases involved the review of a CMP for a resort expansion, and specific resort expansion criteria reopened the issue of whether the lock-off rooms in the approved resort qualified as OLUs. Differently, the challenged decision in this appeal is a tentative plan

under an approved CMP/FMP. Even if the *Caldera* cases controlled the issue of what type of accommodations qualify as OLUs, the tentative plan approval could not violate the *Caldera* cases because the tentative plan approval does not decide whether the specific design of the OLUs meets the definition of OLU.

The character of the OLUs, and whether they met the definition of OLU, was decided in the CMP approval and not challenged on appeal from the CMP approval in *Gould CMP II*. That issue is settled, unless and until the resort seeks approval from the county to modify the design of the required OLUs. *See Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489, 500 (2004) ("As a general principle, issues that were conclusively resolved in a final discretionary land use decision, or that could have been but were not raised and resolved in that earlier proceeding, cannot be raised to challenge a subsequent application for permits necessary to carry out the earlier final decision."). Thus, even if we agreed with petitioner that the approved OLU design is inconsistent with the decisions in the *Caldera* cases, an issue on which we express no opinion, that conclusion would provide no basis for reversal or remand in this appeal because that issue is not subject to collateral attack in subsequent applications carrying out the FMP. The hearings officer did not err in approving a tentative plan that did not include detailed plans for the cottages that will provide the required OLUs.

B. Visitor-oriented Recreational Facilities

In addition to establishing compliance with the FMP, each development phase of a destination resort must receive additional approval through site plan

review or the subdivision process. DCC 18.113.040(C).[7] Petitioner argued to the hearings officer that the tentative plan failed to provide information required for a subdivision approval. Specifically, DCC 17.16.030(C) requires that the following information "be shown on the tentative plan or provided in accompanying materials":

> "5. Location, approximate area and dimensions of any lot or area proposed for public use, the use proposed, and plans for improvements or development thereof;
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> 6. Proposed use, location, approximate area and dimensions of any lot intended for nonresidential use."

DCC 17.16.030(C) provides that "[n]o tentative plan shall be considered complete unless all such information is provided."

Petitioner argues that the tentative plan fails to show the required information for the recreational amenities, restaurant, and meeting facilities. Intervenor responds that DCC 17.16.030(C) provides application submittal requirements but does not constitute approval criteria. Intervenor argues that petitioner has not established that the absence of specific information required by

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[7] DCC 18.113.040(C) provides:

> "Site Plan Review. Each element or development phase of the destination resort must receive additional approval through the required site plan review (DCC 18.124) or subdivision process (DCC Title 17). In addition to findings satisfying the site plan or subdivision criteria, findings shall be made that the specific development proposal complies with the standards of DCC 18.113 and the FMP."

DCC 17.16.030(C)(5) and (6) results in noncompliance with any approval criteria.

Intervenor relies on *Conte v. City of Eugene*, __ Or LUBA __ (LUBA No 2018-042, Oct 15, 2018), *aff'd*, 295 Or App 789, 434 P3d 984 (2019). Like this case, *Conte* involved multiple trips up and down the appeal ladder. The petitioner appealed a city hearings officer's decision approving an application for final planned unit development (PUD) approval. The tentative plan approval imposed a condition, Condition 20, to ensure that the PUD provide "safe and adequate" transportation systems to nearby areas as required by the city's code. *Id.* (slip op at 4). The petitioner argued that the intervenor was required to submit new or amended "final maps and supplemental materials" as supplements to its final PUD application. *Id.* (slip op at 9). Similar to petitioner in this case, the petitioner in *Conte* invoked an application requirements for a final PUD that requires applications contain, among other things, final maps and supplemental materials to demonstrate compliance with tentative plan conditions of approval, including evidence that all required public improvement have been completed or financially assured.

The city hearings officer observed that the application requirements are not approval criteria, "and that the failure to satisfy application requirements can only serve as a basis to deny an application if the required information is necessary to demonstrate compliance with an applicable approval criterion." *Id.* (slip op at 10). The hearings officer also concluded that maps and supplemental drawings

are not required to be submitted in order to demonstrate that the final PUD plan conforms with the tentative PUD plan and all conditions. The hearings officer observed that Condition 20 required the street improvement be completed "[p]rior to occupancy" rather than prior to final PUD approval. *Id.* We affirmed the hearings officer's interpretation of the city's final PUD submission requirements.

Our reasoning in *Conte* requires the same result in this appeal. DCC 17.16.030(C) requires that certain information be provided in an application for a tentative subdivision plan. 18.113.040(C) requires that "[e]ach * * * development phase of the destination resort must receive additional approval through the required site plan review (DCC 18.124) or subdivision process (DCC Title 17)." Petitioner has not explained how, absent the information required by DCC 17.16.030(C)(5) and (6), approval of a tentative plan would violate some portion of the destination resort approval criteria or the FMP. The FMP requires that the recreational amenities, restaurant, and meeting room facilities be provided or bonded before the sale of lots. *See also* ORS 197.465(3) (requiring that in phased developments recreational amenities intended to serve a phase must be constructed prior to sales of residential units in that phase).

Petitioner has not demonstrated that the violation of the submission requirements contained DCC 17.16.030(C) resulted in non-compliance with at least one mandatory approval criteria. We agree with inventor that petitioner's argument under DCC 17.16.030(C) provides no basis for reversal or remand. *See*

Le Roux v. Malheur County, 32 Or LUBA 124, 129 (1996) (the fact that application requirements may not have been satisfied provides no basis for remand unless the failure to satisfy the requirements resulted in non-compliance with at least one mandatory approval criteria). Like *Conte*, where the required street improvements were required to be completed "[p]rior to occupancy" rather than prior to final PUD approval, it appears to us that subsequent application and review for the resort development will ensure compliance with the subdivision and FMP requirements.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that the approved tentative plan violates mitigation requirements for impacts of the development on protected fish and wildlife resources. To satisfy destination resort approval criteria, intervenor is required to demonstrate 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). The resort's impact on fish and wildlife, and the efficacy of required mitigation, was litigated over the course of multiple prior appeals, as we explained in *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2018-008, Aug 21, 2018). We have referred to the DCC 18.113.070(D) standard as the "no net loss/degradation" standard. *Id.*

In *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007), the Court of Appeals held that the county's determinations on wildlife impacts and

mitigation were inadequate to satisfy the applicable criteria for the CMP. The FMP includes a revised fish and wildlife mitigation plan that the applicant prepared in coordination with Oregon Department of Fish and Wildlife (ODFW) and BLM (mitigation plan). The mitigation plan was challenged in multiple rounds of appeals, and ultimately upheld in *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2018-008, Aug 21, 2018). In this appeal, petitioner does not challenge the mitigation plan, but instead challenges the Phase 1-A approval as inconsistent with the mitigation plan, as explained further below.

A. Water

There are no existing natural streams, ponds, wetlands, or riparian areas on the site. The resort water supply will be groundwater obtained from six wells on the property. The applicant obtained 2,129 acre-feet of water rights to support the resort development year-round.[8] The Oregon Water Resources Department (OWRD) granted the water right upon finding that intervenor is responsible for providing 1,356 total acre-feet of mitigation water: 836 acre-feet from Deep

[8] Ground water will be used for domestic and commercial uses, golf course and landscape irrigation, reservoir and pond maintenance, and fire protection. As we understand it, the current water right holder is an entity called Pinnacle, which we understand is a separate entity from intervenor, however for the sake of simplicity in this decision we refer to intervenor as the water right holder.

Canyon Creek irrigation rights that were granted to Big Falls Ranch, and the remaining mitigation water from the Central Oregon Irrigation District (COID).[9]

The resort's consumptive use of groundwater is anticipated to impact an offsite fish-bearing stream, Whychus Creek, by reducing instream water volumes and increasing water temperatures. The mitigation plan requires intervenor to replace the water consumed by the resort with volumes and quality of water that will maintain fish habitat, especially cold water thermal refugia. The county

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[9] The FMP included the following conditions of approval:

> "10. Applicant shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase." Record 217.
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> "38. The applicant shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of off-site mitigation efforts. Consistent with the plan, the applicant shall submit an annual report to the county detailing mitigation activities that have occurred over the previous year. The mitigation measures include removal of existing wells on the subject property, and coordination with ODFW to model stream temperatures in Whychus Creek.
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> "39. The applicant shall provide funding to complete a conservation project by the Three Sisters Irrigation District to restore 106 acre-feet of instream water to mitigate potential increase in stream temperatures in Whychus Creek. The applicant shall provide a copy of an agreement with the irrigation district detailing [the] funding agreement prior to the completion of Phase A." Record 221.

found that the mitigation plan will result in no net loss/degradation to fish and wildlife resources.

1. Sub-phasing

The mitigation plan requires intervenor to provide in-stream mitigation water "in advance for the full amount of water to be pumped under each phase of development," including an estimated 610 acre feet (AF) of water in Phase A and 1,201 AF in Phase B. Record 661–63. Big Falls Ranch and COID were identified as sources of the mitigation water. Record 661. The impact of the resort water use on thermal refugia for fish was central to disputes in prior appeals. *See Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2018-008, Aug 21, 2018).

Petitioner argues that sub-phasing Phase A impacts the mitigation plan so that it is unknown whether any negative impact on fish will be completely mitigated. Petition for Review 40. Petitioner contends that the changes required a new application for CMP and FMP review, or an application for a modification of the FMP. Petition for Review 42.

Intervenor responds, and we agree, that the mitigation plan was not specifically tied to or dependent upon the stages of phased development approved in the FMP. Instead, mitigation is planned to occur as development occurs. FMP Condition 10 requires intervenor to submit documentation that mitigation and a water rights permit has been issued for each development phase. See n 9. We do not read that condition to require the specific phasing stages approved in the FMP. Instead, we agree with intervenor that because water mitigation is based on

consumptive use, the condition requires proof of adequate water rights and mitigation commensurate with the estimated consumptive use of water for the development approved at each phase of development, and in advance of actual water consumption. While intervenor ultimately bears the burden to establish that the resort development will result in no net loss/degradation to fish and wildlife resources, petitioner has not argued or established that subphasing materially affects the findings underlying the mitigation plan for phased development. The hearings officer did not err in concluding that subphasing did not require a new application for CMP and FMP review, or an application for a modification of the FMP.

This subassignment of error is denied.

2. Incremental Development Plan

In July 2018, OWRD approved a change to an OWRD permit related to the incremental development plan (IDP).[10] Petitioner contends that the IDP includes changes to the amount of mitigation water and timing of providing mitigation water. Consumptive use for Phase A is estimated at 610 AF per year.[11] Record 659. Petitioner argues that the IDP reduces mitigation water in Phase A

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[10] The IDP approves the following in-stream mitigation water uses: 2013-2019 3.6 AF; 2020-2024 315.8 AF; 2025-2029 212 AF; 2030-2034 515.5 AF. Record 1154.

[11] "Consumptive use" means the amount of ground water appropriation that will not return to surface water flows. Record 67; *see also* OAR 690-505-0605(2) (OWRD definitions for Deschutes Basin Ground Water Mitigation Rules).

from 610 AF to 203 AF, with 50 AF to be provided as part of Phase A-1, and violates the FMP condition that all mitigation water be provided in Phases A and B.

The hearings officer found that the tentative plan did not propose to modify the overall amount of mitigation water required to be provided in the mitigation plan but, instead, modified the timing of when the mitigation water would be provided based on consumptive use. Record 67–68. The hearings officer reasoned that the mitigation plan and related IDP "provide a framework for estimating use, consumptive use and mitigation, but were not intended to lock in a certain development pattern or timing." Record 68. The hearings officer observed that the record contained "no evidence that modifying the IDP to reflect the current resort development schedule in any way impacts the efficacy of mitigation and [intervenor's] expert's testimony is that it will not. To the contrary, there is evidence that the longer timeframe for water consumption will result in more gradual, spread out impacts." Record 68. The hearings officer found that the tentative plan for Phase A-1 refinement to the mitigation plan regarding timing of mitigation is not substantial. *Id.*

Petitioner argues that the changes to the mitigation plan require intervenor to apply for a modification to the CMP/FMP to justify the changes. Petition for Review 50. However, petitioner has not established that any finding of fact on which the original approval was based would be materially affected by the alteration in mitigation water timing, which remains attached to consumptive use.

Accordingly, petitioner's argument regarding the timing of mitigation provides no basis for remand.

The mitigation plan provides that "mitigation must be provided in advance for the full amount of water to be pumped under each phase of development." Record 65. "The mitigation obligation for Phase A is 610 AF, equal to consumptive use. Maximum water use for Phase B is 2,129 AF per year (full build-out, including Phase A use)." Record 661. FMP Condition 10 provides:

> "10. Applicant shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase." Record 217.

In an attempt to demonstrate compliance with FMP Condition 10, in material submitted in support of the application in this proceeding, intervenor stated, "the full amount of the mitigation that will be required by this TP is approximately 50 acres of water[,]" and "the amount of mitigation that will be required for the entirety of the Phase A development, including numerous elements to be applied for in subsequent site plans, is 203 acres of mitigation." Record 997. Before the hearings officer, petitioner argued that amount of mitigation was inadequate to satisfy the FMP mitigation requirement. Intervenor responded with expert opinion that the proposed subphasing would spread water impacts over a longer period, but that the overall amount of mitigation would not be changed and must provide mitigation water in advance of water use. Record

65–66. Petitioner objected to the submission of the expert evidence on procedural grounds but does not appear to have attempted to respond with contrary evidence. Record 66. The hearings officer accepted intervenor's expert evidence over petitioner's objection. *Id.* On appeal, petitioner does not assert any procedural error with respect to that evidence.

The hearings officer agreed with petitioner that the approximately 50 AF refers to the water use for the 192 residential units planned in Phase A-1, which does not include the OLUs or any other use required to be provided in Phase A. Record 65. The hearings officer also appears to have agreed with petitioner that the tentative plan reduced the mitigation from 610 to 203 AF for Phase A and changed the timing from in advance of each phase to after construction. *Id.* Nevertheless, the hearings officer found that the change or refinement in the mitigation plan is not a substantial change because the required mitigation plan requires mitigation for use of water and, "if there is no water use, there is no impact." Record 67–68. The hearings officer observed that the record contained no evidence that modifying the mitigation to reflect the current resort development schedule in any way impacts the efficacy of mitigation and the only evidence in the record is that "the longer timeframe for water consumption will result in more gradual spread out impacts." Record 68.

Petitioner argues that, even if intervenor could alter the mitigation plan without an application modification approval, as we have concluded, intervenor's proposed 50 AF of mitigation water for Phase A-1, will cover consumptive use

of water for 192 residential dwellings, but does not include consumptive use of water for the OLUs and other uses required to be provided in Phase A-1. Petition for Review 51.

Intervenor responds that that it has not requested, and the county has not approved, any reduction in required mitigation. Instead, intervenor contends that the 50 AF consumptive use for Phase A-1 was provided as an estimate to satisfy the information requirement of FMP Condition 10, quoted above. Intervenor concedes that the 50 AF estimate does not include the OLUs proposed to be developed in Phase A-1. Intervenor argues that omission does not violate the FMP mitigation plan because, under the current IDP, intervenor is required to provide 319.4 AF of mitigation water before pumping water for the uses allowed by the tentative approval for Phase A-1. Response Brief 40–41.

We agree with intervenor that the challenged decision does not approve a reduction in the mitigation water or modify the requirement that mitigation water be provided in advance of water consumption. Petitioner has not established that the changes in the amount and timing of mitigation water materially affect the findings underlying the mitigation plan.

Petitioner also argues that the IDP change in mitigation quantity was carried out without an opportunity for public comment. Petition for Review 51. That argument is not developed sufficiently for our review. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

This subassignment of error is denied.

3. Mitigation Water Sources

The hearings officer found that the mitigation plan relies on mitigation water acquired from the COID and Big Falls Ranch. Record 69–70. Petitioner submitted a statement from COID that there are no current or active agreements between COID and the resort and a document suggesting that Big Falls Ranch proposes to transfer surface water rights that the resort had intended to acquire for mitigation water. Record 69. Intervenor responded that the mitigation plan did not "mandate" COID and Big Falls Ranch water, but instead authorized mitigation water within a general zone. *Id.* The hearings officer rejected intervenor's argument and found that, in approving the mitigation plan as part of the FMP, "both ODFW and the Hearings Officer relied on those sources in reaching their respective conclusions that mitigation was adequate." *Id.* The hearings officer concluded that petitioner's evidence was "sufficient evidence to call into question whether obtaining water from those sources remains feasible," and found that a change in the source of mitigation water "may constitute a substantial modification to the FMP approval." Record 70. The hearings officer further found that the record does not support a conclusion that a change of source for the mitigation water would satisfy both quantity and quality of mitigation water. However, the hearings officer concluded that compliance with the mitigation plan and, implicitly, the no net loss/degradation standard that the mitigation plan was designed to satisfy, could be met by imposing the following condition of approval:

> "17. Site design approval. Prior to issuance of building permits for the single-family dwellings, obtain design approval for at least 50 OLUs, which approval shall demonstrate that: (a) the OLUs qualify as such and (b) the Big [Falls] Ranch and COID water referenced in the Mitigation Plan and FMP decision have been secured, [or] demonstrate that the proposed alternate source is acceptable to ODFW and provides the same quantity and quality mitigation so as not to constitute a substantial modification or justify a modification to the FMP." Record 117 (boldface omitted).

Petitioner argues that TP Condition 17 impermissibly allows a modification of the mitigation plan without providing an opportunity for further public input on the issue of whether any proposed alternate source of mitigation water provides "the same quantity and quality mitigation" to satisfy the no net loss/degradation standard. Petition for Review 54. We agree.

A local government may defer a decision on approval criteria to a later date, so long as the local government finds that it is feasible to satisfy the approval criteria and "so long as interested parties receive a full opportunity to be heard before the decision becomes final." *Meyer v. City of Portland*, 67 Or App 274, 280, 678 P2d 741, 744 (1984). As pertinent here, the court explained in *Gould v. Deschutes County*, 216 Or App 150, 163, 171 P3d 1017 (2007):

> "The code mandates that the approval standards be evaluated 'from substantial evidence in the record.' DCC 18.113.070(D). That provision requires that the justification be based on evidence submitted at public hearings on the application. The county's decision, however, allows the mitigation plan justification to be established by future discussions among Thornburgh, ODFW, and BLM, and not on evidence submitted during the public hearings. That robs interested persons of the participatory rights allowed by the county ordinance."

Intervenor responds that the FMP did not require mitigation water be sourced from water provided by the COID and Big Falls Ranch and that the issue of feasibility of obtaining water from COID was settled in prior appeals. Intervenor's response misses the mark. As the hearings officer found, the mitigation plan relies on both quantity and quality of mitigation water acquired from the COID and Big Falls Ranch and the record does not support a conclusion that a change of source for the mitigation water would satisfy both quantity and quality of mitigation water. The no net loss/degradation issue has been litigated at length and affirmed based on facts and expert evidence modeled on assumptions of water sourced from COID and Big Falls Ranch, which includes the quality of those sources, including water temperature, and impacts on downstream fish habitat.

As the court explained in *Gould*, the public is entitled to a hearing on whether the no net loss/degradation standard will be satisfied by mitigation. *See* DCC 18.113.070(D) (requiring 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"). The hearings officer's decision and TP Condition 17 allow a change in mitigation water source with the question of whether the new source satisfies the "no net loss/degradation standard" to be evaluated solely among intervenor, ODFW, and the county without review or input by interested persons. That process would deny interested persons their participatory rights allowed by DCC 18.113.070(D).

Intervenor argues in its response brief that "the hearings officer had no legal basis to reopen the issue," and "there is no legal basis for imposing Condition 17." Response Brief 43, 46. Intervenor argues that the issue of water availability was settled by the FMP and intervenor did not propose to change the source of mitigation water as part of the tentative plan for Phase A-1. Intervenor asks that we reverse TP Condition 17. Response Brief 46.

Intervenor did not file a cross-petition for review seeking remand or cross-assigning error to the imposition of TP Condition 17. We have authority to affirm, reverse, or remand a land use decision. ORS 197.835(1) ("The Land Use Board of Appeals shall review the land use decision or limited land use decision and prepare a final order affirming, reversing or remanding the land use decision or limited land use decision."). We do not have authority to reverse an individual condition of approval and affirm the remainder of the decision. We do not have authority to grant intervenor's request for relief. Further, even if we did have such authority, the request for relief is not appropriate in a response brief.

Intervenor argues in the response brief that the FMP approval did not rely on mitigation water from COID and Big Falls Ranch. Response Brief 46–50. However, intervenor did not challenge the hearings officer's finding that the FMP approval relied on those water sources by way of cross-petition. Accordingly, we accept the hearings officer's findings on that issue.

The hearings officer found that petitioner's evidence calls into question whether intervenor will be able to satisfy the requirements of procuring and

providing the quantity and quality of water required to execute the mitigation plan to satisfy the no net loss/degradation standard. The hearings officer concluded that the record does not support a conclusion that a change of source for the mitigation water would satisfy both quantity and quality of mitigation water. The hearings officer determined that a change in the source of mitigation water "may constitute a substantial modification to the FMP approval." Record 70.

We conclude that TP Condition 17 violates the right to a public hearing on whether the no net loss/degradation standard will be satisfied by mitigation from water sources not specified in the mitigation plan. Accordingly, the county may not rely on TP Condition 17 to conclude that, as conditioned, the tentative plan approval will comply with the mitigation plan and thus satisfy the no net loss/degradation standard. On remand, the county must consider whether, without TP Condition 17, the tentative plan for Phase A-1 satisfies the no net loss/degradation standard and whether a change in the source of mitigation water constitutes a substantial change to the FMP approval, requiring a new application, modification of the application, or other further review consistent with FMP and DCC destination resort regulations.

This subassignment of error is sustained.

4. Water Permit

FMP Condition 10, requires "at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for

the state water right permit." See n 9. The hearings officer concluded that FMP Condition 10 requires "documentation of the state water permit and an accounting of mitigation 'under the water right,'" and that the condition was satisfied by the "complete documentation of the status of the permit and IDP." Record 73. Prior to expiration of the deadline for using the water under its water rights permit, intervenor applied to extend the permit. OWRD denied the request for permit extension. OWRD later withdrew the denial and approved the extension. Petitioner filed a protest of the OWRD order. Subsequently, OWRD informed the county that the resort "has done everything needed to be in compliance and good standing with OWRD in regards to [the permit] as well as purchasing mitigation credits and providing instream flow benefits without even using any water yet." Record 1152. In September 2018, OWRD stated that the permit is in full force and effect, which the hearings officer concluded means that the extension approval remains valid pending resolution of the appeal. Record 501.

Petitioner argues that the challenged decision is invalid because the initial OWRD water permit expired and, thus, the tentative plan cannot be approved in the absence of a condition of approval requiring intervenor to demonstrate that it has obtained a valid water permit.

Intervenor first responds that petitioner waived the water permit expiration argument because petitioner argued before the hearings officer only that intervenor's water permit extension was subject to petitioner's protest. Petitioner

replies, and we agree, that petitioner raised the issue of the validity of the water right permit and that issue is not waived. *See DLCD v. Tillamook County*, 34 Or LUBA 586, *aff'd*, 157 Or App 11, 967 P2d 898 (1998) (ORS 197.835(3) and ORS 197.763 require that petitioners at LUBA have raised the issues they wish to raise at LUBA during the local proceeding; however, that restriction does not apply to individual arguments regarding those issues).

Intervenor argues that the current record demonstrates that intervenor has a valid water right and petitioner's protest of the extension "does not render the permit void." Response Brief 54. We agree that the hearings officer did not err in construing FMP Condition 10 to require documentation of the water right and concluding that, based on the record before him, intervenor had established a valid water right.

The subassignment of error is denied.

B. Wildlife Mitigation

Petitioner next argues that the hearings officer erred in approving the tentative plan because intervenor has failed to provide details for wildlife mitigation. The wildlife mitigation plan requires intervenor to restore wildlife habitat on the property. Onsite mitigation is required for each phase of development. For example, wildlife road underpasses are required to be completed at each phase and intervenor must control noxious weeds and preserve native vegetation, logs, and snags. With respect to off-site mitigation, the FMP wildlife mitigation plan requires intervenor to provide 2.3 acres of mitigation for

every developed acre or pay a fee in lieu into escrow if mitigation land is not available. Specific mitigation actions must be determined through consultation with wildlife management agencies. Record 84.

FMP Condition 38 requires intervenor to "abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of off-site mitigation efforts[,] and "submit an annual report to the county detailing mitigation activities that have occurred over the previous year." See n 9; Record 221.

Before the hearings officer, petitioner argued that the intervenor was required to demonstrate in the tentative plan how intervenor would carry out the FMP wildlife mitigation plan. Intervenor argued that the wildlife mitigation and consultation would occur during a later subphase of Phase A.

The hearings officer observed that wildlife mitigation measures are required to be incrementally implemented at each phase of development and that specific on-site implementation measures are dependent on the manner in which construction activities occur on the subject property. With respect to on-site mitigation measures, the hearings officer found no basis to deny the tentative plat or site plan applications. Record 84. However, the hearings officer reasoned that the subphasing of Phase A could potentially lead to noncompliance with the wildlife mitigation plan. For example, if the dwellings that are subject to the Phase A-1 approval are constructed, but further development stops, then development could potentially occur without compliance with the wildlife

mitigation plan. To prevent that result, the hearings officer imposed two conditions requiring ongoing restoration of native vegetation where construction disturbs native vegetation in open space areas that are planned to be retained in a substantially natural condition and requiring intervenor to obtain BLM and ODFW concurrence that no mitigation is required, or provide required mitigation or deposit escrow funds in lieu of mitigation. Record 118.[12]

Petitioner does not challenge the adequacy of those conditions, but instead simply reiterates her argument before the hearings officer that intervenor was required to provide a detailed mitigation plan prior to tentative plan approval. Petition for Review 56. Intervenor responds that FMP Condition 38 assures compliance with the wildlife mitigation plan by requiring an annual report of mitigation activities.

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[12] The TP includes the following conditions of approval:

> "19. FMP Condition 34: As an ongoing condition of approval, where construction disturbs native vegetation in open space areas that are to be retained in substantially natural condition, the applicant shall restore the native vegetation. This requirement shall not apply to land that is improved for recreational uses, such as golf courses, hiking or nature trails or equestrian or bicycle paths.
>
> "20. FMP Condition 38. Prior to issuance of building permits for any Phase 'A' development: obtain BLM/ODFW concurrence that no mitigation is required; provide such mitigation or establish the escrow and deposit funds equal to the area of such mitigation." Record 118 (boldface omitted).

As established in prior appeals, the mitigation plan satisfies the substantive no net loss/degradation standard for destination resort development. We agree with intervenor that the details of the mitigation plan are established by the FMP, and compliance (or noncompliance) with the mitigation measures will be established by annual reporting required by FMP Condition 38. We reject petitioner's argument that the FMP required intervenor to "fill in the details" to obtain approval of a tentative plan during phased development. Petition for Review 56. Petitioner has not demonstrated that the approved subphasing, as conditioned, alters any mitigation requirement under the FMP mitigation plan. Petitioner's argument provides no basis for remand.

The subassignment of error is denied.

C. Related Conditions of Approval

The mitigation plan involves (1) the removal of two wells on the subject property, (2) the removal of two dams that impede the flow of spring water from Deep Canyon Creek to the Deschutes River, and (3) transfer of water from Deep Canyon Creek that Big Falls Ranch uses for irrigation for mitigation. Record 215. Petitioner argues that the hearings officer erred in failing to require as a condition of approval for the tentative plan that, prior to beginning construction, intervenor remove the dams and the wells. Petitioner argues that while the body of the hearings officer's decision states that the first dam will be removed prior to construction under the tentative plan, he failed to include dam removal as a condition of approval.

Intervenor responds, and we agree, that removal of the dams and provision of mitigation water is required by the FMP approval and the tentative plan does not alter the mitigation plan. Response Brief 55. The hearings officer was not required to impose additional conditions to the approval of the tentative plan.

Petitioner also argues that the hearings officer's discussion of compliance with FMP Condition 38 is inadequate and that the hearings officer inappropriately allowed deposit of funds in lieu of required mitigation. Petitioner's argument appears to be repetitive of other arguments in the petition for review, which are addressed earlier in this decision. If, instead, petitioner intended to present a different and distinct argument, then that argument is not sufficiently developed for our review and, thus, provides no basis for remand. *Deschutes Development Co.*, 5 Or LUBA at 220.

This subassignment of error is denied.

The second assignment of error is sustained, in part, and denied, in part.

The county's decision is remanded.