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

ANNUNZIATA GOULD,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

CENTRAL LAND AND CATTLE COMPANY, LLC,
Intervenor-Respondent.

LUBA No. 2022-011

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Jeffrey L. Kleinman filed a petition for review and reply brief and argued on behalf of petitioner.

No appearance by Deschutes County.

J. Kenneth Katzaroff filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 06/16/2022

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 appeals a county hearings officer approval of amendments to the Conceptual Master Plan (CMP) and Final Master Plan (FMP) of the Thornburgh Destination Resort.

MOTION TO TAKE OFFICIAL NOTICE

Petitioner moves the Board to take official notice of Deschutes County Ordinance No. 2015-016. Central Land and Cattle Co., LLC (intervenor) moves the Board to take official notice of Deschutes County Ordinance No. 2013-008. Both documents are subject to official notice under ORS 40.090(2) and are relevant to matters in this appeal. The motions are unopposed and are 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." Statewide Planning Goal 8 (Recreational Needs); ORS 197.445. Local governments may plan for the siting of destination resorts on rural lands, subject to the provisions of state law. Goal 8; ORS 197.435 - 197.467.

Under Deschutes County Code (DCC) 18.113.040, destination resorts are subject to a three-step approval process. The first step is Conceptual Master Plan (CMP) review, which is processed as though it were a conditional use permit. DCC 18.113.040(A). The second step is Final Master Plan (FMP) review. DCC

18.113.040(B). The final step in the county's three-step approval process is land division or site plan review. DCC 18.113.040(C).

In 2006, the county approved the Thornburgh Destination Resort CMP and, in 2008, it approved the FMP. Those approvals were ultimately upheld after multiple rounds of appeals.

A destination resort must provide visitor-oriented accommodations, including overnight lodging units (OLUs), which include hotel or motel rooms, cabins, and time-share units. ORS 197.435; ORS 197.445. Individually owned units may count as an OLU if they are available for overnight rental use by the general public for a certain number of weeks per calendar year through a central reservation system. *Id.* A destination resort may include residential dwellings. However, the number of residential dwelling units is limited by the number of OLUs. ORS 197.445.

DCC 18.04.030 sets out county zoning code definitions. In 2005, when Thornburg applied for CMP approval, DCC 18.04.030 defined "destination resort" and provided, in part, "Accommodations available for residential use will not exceed two such units for each unit of overnight lodging." That is a 2:1 OLU ratio. Similarly, various destination resort standards in DCC 18.113 required a 2:1 OLU ratio. DCC 18.04 and DCC 18.113 also required individually owned OLUs be available for overnight rental use by the general public for at least 45 weeks per calendar year. The CMP and FMP reflect these requirements by

imposing a 2:1 OLU ratio and 45 weeks of rental availability for individually owned OLUs.

In 2003, Senate Bill (SB) 911 amended state law governing destination resorts and created a 2.5:1 OLU ratio for eastern Oregon, while retaining a 2:1 OLU ratio for western Oregon. Or Laws 2003, ch 812, § 2 (amending ORS 197.445). SB 911 changed the weekly rental requirement from 45 weeks to 38 weeks for eastern Oregon, while retaining the 45-week requirement for western Oregon. Or Laws 2003, ch 812, § 1 (amending ORS 197.435(5)(b)).

In 2007, after the Thornburgh Destination Resort CMP was approved, the county amended DCC 18.04 and 18.113 to change to the weekly rental requirement from 45 weeks to 38 weeks for eastern Oregon. Ordinance No. 2007-05. In 2013, the county amended DCC 18.04 and 18.113 to change the OLU ratio from 2:1 to 2.5:1. Ordinance No. 2013-008. The amendment provides that the 2.5:1 OLU ratio "applies to destination resorts which were previously approved under a different standard." DCC 18.113.060(D)(2)(a). In 2015, the county amended DCC 18.113.060(A)(1)(b)(iv) to change the OLU ratio from 2:1 to 2.5:1 to conform to the prior amendments to DCC 18.113. Ordinance No. 2015-016. Those DCC amendments align with state law. ORS 197.435; ORS 197.445.

In 2021, intervenor applied for a modification to the CMP and FMP to reflect the 2.5:1 OLU ratio and 38-week OLU rental requirement in the amended DCC. Intervenor also asked the county to revise the FMP OLU bonding requirement to reflect the bonding requirement in ORS 197.445(4)(b)(F) and

DCC 18.113.060(A)(1)(b)(3), which provide, if the developer of a resort guarantees the required OLUs through surety bonding, then the OLUs must be constructed within four years of the date of execution of the surety bond. Intervenor explained this change would limit the amount of time that the OLUs may be bonded instead of built. Record 73. In this decision, we will refer to those requests collectively as "the Master Plan modifications."

County planning staff approved the Master Plan modifications with conditions. Petitioner appealed. After a *de novo* hearing, the county hearings officer approved the Master Plan modifications with conditions. Petitioner appealed. The board of county commissioners denied review, which made the hearings officer's decision the county's final decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The FMP, as approved in 2008, approves overall resort development of a maximum of 950 residential single family (RSF) units and requires a 2:1 OLU ratio so that, if 950 RSFs are built, then the resort must provide 475 OLUs. Record 550. 425 of the OLUs are planned to be provided as individually owned units and 50 of the OLUs are planned to be provided as hotel rooms. *Id.*

The FMP divides the development into seven phases. The first phase, Phase A, includes development of 300 RSFs 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. *See Gould v. Deschutes County*, 79 Or LUBA

561, 564 (2019) (*Gould VIII*), *aff'd*, 310 Or App 868, 484 P3d 1073 (2021) (describing phased development approved by the FMP).

The following Phasing Plan and Overnight and Density Calculations Chart is adopted as part of the FMP (the FMP phasing plan), to satisfy CMP Condition 37. Record 1360.

ITEM	Phase A	Phase B	Phase C	Phase D	Phase E	Phase F	Phase G	Totals
Residential Single Family (RSF)	300	150	150	125	125	50	50	950
Hotel Overnight	0	0	0	50	0	0	0	50
Residential Overnight	150	150	0	63	62	0	0	425
Net Overnight	150	150	0	113	62	0	0	475
Cumulative RSF	300	450	600	725	850	900	950	950
Cumulative Overnight	150	300	300	413	475	475	475	475
Ratio – RSF/Overnight	2.00	1.50	2.0	1.76	1.79	1.89	2.00	2.00

Record 550.

The hearings officer found that intervenor did not request to amend the FMP to increase the maximum number of RSFs. Instead, the total maximum units *allowed* would remain 950 RSFs and 450 OLUs, but that the total number of *required* OLUs would be decreased to 380, resulting in a 2.5:1 OLU ratio. Record 81-82.[1]

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[1] The decision does not explain how intervenor and the hearings officer calculated 450 OLUs as the maximum allowed under the FMP. 950:475 is a 2:1 ratio. The FMP phasing plan allows and requires 475 OLUs, with 425 units of residential overnight. Petitioner notes that the FMP "actually" provides for a minimum of 475 OLUs. Petition for Review 9. Petitioner does not assign error to

Intervenor requested approval to modify the FMP approved phasing to allow intervenor to build 375, instead of 300 RSFs, in Phase A. Record 108 (proposed revised phasing chart). Intervenor sought approval to move 75 RSFs from Phase B into Phase A so that, once intervenor builds 50 OLUs and bonds 100 OLUs, intervenor could build as many as 375 RSFs, which would result in 375 RSF to 150 OLUs for a 2.5:1 OLU ratio.

The hearings officer denied intervenor's request to modify the FMP phasing plan and explained that the "appropriate time" to request modifying the FMP phasing plan "would be in a subsequent land use application for the balance of Phase A or an application for a tentative plan or site plan review for a later Phase."[2] Record 83.

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the hearings officer's conclusion that the FMP required and permitted 450 OLUs. In any event, that error, if error, is harmless. The hearings officer concluded, and we agree below, that the challenged decision does not modify the FMP phasing plan. We affirm that conclusion in resolving petitioner's argument that the challenged decision permits intervenor to build additional RSFs.

[2] In May 2018, intervenor sought approval for a tentative plan for a portion of the approved Phase A, calling the partial subphase "Phase A-1," which includes a tentative subdivision plat for 192 RSF lots, 24 single-family deed-restricted OLU lots, and 13 OLU lots. The county hearings officer approved with conditions the Phase A-1 TP. Petitioner appealed. We upheld the county decision approving subphasing of Phase A, but remanded based on a faulty condition of approval regarding fish and wildlife habitat mitigation obligations. We recently affirmed the county's second approval of the Phase A-1 TP. *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2022-013, June 9, 2022).

The hearings officer found that, based on the limitations in intervenor's request, the total number of RSFs approved for the resort "does not increase and the number of OLUs remains the same or decreases." Record 83. The hearings officer therefore rejected petitioner's arguments that were premised on impacts created by increased RSFs. *Id.*

FMP Condition 1 provides: "Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application." Record 79.

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."

DCC chapter 22 sets out the county's procedures for land use applications. DCC 22.36.040 provides, in part:

> "B. Unless otherwise specified in a particular zoning ordinance provision, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties.

> "C. An application to modify an approval shall be directed to one or more discrete aspects of the approval, the modification of which would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties. Any proposed modification, as defined in DCC 22.36.040, shall be reviewed only under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal."

In the first assignment of error, petitioner argues that the hearings officer misconstrued the applicable law and failed to make adequate findings supported by substantial evidence in concluding that the Master Plan modifications are not "substantial changes" under FMP Condition 1, DCC 18.13.080, and DCC 22.36.040.

A. Alleged increase in maximum number of RSFs

Petitioner argues that the hearings officer erred in approving the Master Plan modifications without simultaneously imposing a condition of approval that the destination resort shall not include more than 950 RSFs. Petitioner contends that, without a condition of approval, the challenged decision could be construed to allow up to 1,187 RSFs based on the 475 OLUs allowed under the FMP. Petitioner argues that change is substantial and, thus, the hearings officer erred in approving the Master Plan modifications.

The hearings officer reasoned that the Master Plan modifications are defined and confined by the application. In the application burden of proof, intervenor described the requested modifications as follows:

> "1. Revise the requirement that individually owned OLUs be available for rent to the general public for 45 weeks per year to requirement that said units be available for rent for a period of 38 weeks per year.
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> "2. Amend the CMP/FMP to replace the 2:1 ratio of individually owned units to overnight lodging units with a ratio of 2.5:1. This is a housekeeping amendment because the 2.5:1 ratio applies to the Thornburg Destination Resort by virtue or DCC 18.118.060(D)(2)(a) which says: '[t]he ratio [2.5:1] applies to destination resorts which were previously approved under a different standard.'
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> "3. Impose OLU bonding rules set by ORS 197.445 and DCC 18.113.060(A)(1) into its CMP/FMP. This change will limit the amount of time that required improvements may be bonded and will address one of the many objections Annunziata Gould raised during the review of the Phase A-1 tentative plan." Record 2011-12.

Intervenor stated that "approval of this application will not impose any additional impacts on surrounding properties because no additional development will be authorized by the change and there will be no change other than a potential, but not certain, reduction in the number of OLUs that may be built on the property." Record 2015.

During the local proceeding, petitioner argued that the changes would allow an increase in the total number of RSFs for the resort. Intervenor responded in written testimony that "The OLU ratio change does not authorize any new development. Instead, the maximum units allowed by unit type will remain 950 single-family units and 450 OLUs. The only change will be that the minimum development requirements for OLUs will be lowered." Record 103 (footnote omitted); see n 1.

The hearings officer concluded that approving the Master Plan modification to reflect a 2.5:1 OLU ratio would not approve an increase in overall RSFs, relying on intervenor's limited request as described in the application and intervenor's later description of the effect of the OLU ratio modification.

Petitioner argues that the hearings officer erred by relying on intervenor's statements that the Master Plan modifications do not approve additional RSFs. Generally, an applicant's nonbinding statement regarding a proposed development is not an adequate substitute for a condition of approval that is necessary to ensure compliance with applicable approval criteria. *Kaplowitz v. Lane County*, 74 Or LUBA 386, 401 (2016), *aff'd* 285 Or App 764, 398 P3d 478 (2017) (finding that an applicant's testimony that they would limit the proposed use was insufficient and that the county was required to impose a condition of approval limiting the use); *Penland v. Josephine County*, 29 Or LUBA 213 (1995) (explaining that more than testimony by the applicant is needed for a local government to ensure compliance with approval standards); *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992) (holding that nonbinding promises by the applicant are not sufficient to ensure compliance with approval criteria).

All third-stage development applications must comply with the FMP. DCC 18.113.040(C). The application does not propose and the challenged decision does not approve an increase in the maximum number of RSFs allowed in the resort, nor does the challenged decision modify the FMP phasing plan. Thus, it was not necessary for the hearings officer to impose a condition of approval to

ensure compliance with the 950 RSF limit in the FMP. *See Culligan v. Washington County*, 57 Or LUBA 395, 401-02 (2008) ("[W]here the promise or statement is embodied or found on the face of the plan that the decision approves, and any subsequent approvals or permits must be consistent with that approved plan, we see no need for a specific condition of approval to that effect.").

Here, the FMP controls. Before and after the Master Plan modifications, the FMP maintains a 950 RSF maximum. Accordingly, the challenged decision does not increase the number of allowed RSFs and the hearings officer did not err by failing to impose a condition of approval limiting the resort to 950 RSFs. Accordingly, petitioner's argument that the challenged decision approves a substantial change to the FMP with respect to an increase in total RSFs is incorrect and provides no basis for remand.

B. Potential reduction in number and rental availability of OLUs

Petitioner argues that a potential reduction in the required minimum number of OLUs from 475 to 380—the loss of 95 units of overnight tourist lodging—is a substantial change. According to petitioner, a resort that contains fewer OLUs "would be less of a resort and more of a residential subdivision." Petition for Review 9. Petitioner further argues that the reduction in the number of weeks that individually owned OLUs must be available for overnight rental use by the general public—from 45 to 38—will substantially change the character of the development. Petitioner argues that whether a change is "substantial" under

FMP Condition 1 or DCC 18.113.080 does not turn on whether the change will result in increased impacts.

Intervenor responds, generally, that the challenged decision does not itself alter the approved FMP phasing plan. Intervenor accepts the hearings officer's conclusion that any change in phasing—including allowing fewer OLUs in any particular phase—will be addressed in subsequent development applications. Intervenor responds that, under petitioner's interpretation of "substantial change," any change, even a change resulting in lesser impacts, would require a new application. Intervenor argues that interpretation is inconsistent with DCC 22.36.40, which allows modifications to approvals, so long as the modification "would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties."

The hearings officer interpreted FMP Condition 1, DCC 18.113.080, and DCC 22.36.40 in a manner that harmonizes and gives effect to all those provisions. While FMP Condition 1 or DCC 18.113.080 do not expressly define "substantial change" as a change that will result in significant additional impacts on surrounding properties, the hearings officer did not err in interpreting those criteria as implying that analysis. *See* ORS 174.010 ("[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."). In that context, the hearings officer did not err in concluding that the potential loss of 95 units of overnight tourist lodging is not a substantial change that would require a new application. "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." DCC 18.113.080. Importantly, petitioner does not identify any "findings of fact on which the original approval was based" that would be materially affected by a decrease in the overall number of OLUs. DCC 18.113.080.

"A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties." DCC 22.36.040(B). The hearings officer concluded that the Master Plan modifications will not authorize additional development so will not impose significant additional impacts on surrounding properties. Record 85. We address that issue above and affirm the hearings officer's conclusion that the Master Plan modifications do not authorize additional development.

Petitioner also argues that allowing a reduction in the number of OLUs and required weekly rental availability constitutes a "substantially new proposal" because, according to petitioner, those changes will make the development less of a destination resort and more of a residential subdivision. DCC 22.36.040(B); Petition for Review 10-11. The hearings officer rejected that argument, finding that the Master Plan modifications allow the resort to develop with an OLU ratio and weekly rental requirements that are within the range allowed under state law and the current DCC for destination resorts. The hearings officer also found that

the Master Plan modifications do nothing to change other components required for a destination resort, which includes open space, recreational facilities, and other visitor-oriented accommodations. Record 85. We agree.

We conclude that the hearings officer did not err in concluding that the Master Plan modifications are not "substantial changes" under FMP Condition 1, DCC 18.13.080, and DCC 22.36.040.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that the hearings officer erred by failing to make any findings on issues raised under ORS 197.455, which provides, in part:

> "(1) A destination resort may be sited only on lands mapped as eligible for destination resort siting by the affected county. The county may not allow destination resorts approved pursuant to ORS 197.435 to 197.467 to be sited in any of the following areas:
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> > "(a) Within 24 air miles of an urban growth boundary with an existing population of 100,000 or more unless residential uses are limited to those necessary for the staff and management of the resort.
>
> "* * * * *
>
> "(2) In carrying out subsection (1) of this section, a county shall adopt, as part of its comprehensive plan, a map consisting of eligible lands within the county. The map must be based on reasonably available information and may be amended pursuant to ORS 197.610 to 197.625, but not more frequently than once every 30 months. The county shall develop a

> process for collecting and processing concurrently all map amendments made within a 30-month planning period. A map adopted pursuant to this section shall be the sole basis for determining whether tracts of land are eligible for destination resort siting pursuant to ORS 197.435 to 197.467."

In *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2020-095, June 11, 2021) (*Gould Golf*), *aff'd*, 314 Or App 636, 494 P3d 357 (2021), *rev den*, 369 Or 211 (2022), the intervenor-petitioner argued that, while the subject property is mapped as eligible for destination resort siting by the county, the property is nonetheless ineligible for destination resort siting because it is within 24 air miles of the urban growth boundary for the city of Bend, which, at the time of the golf course site plan review, had a population of more than 100,000. Intervenor-petitioner argued that relevant populations for purposes of ORS 197.455 must be measured and determined at the time of site plan review.

We rejected that argument and affirmed the county's conclusion that ORS 197.455 is not a relevant site plan review criterion. We explained:

> "ORS 197.455 requires counties to inventory and map lands eligible for destination resort siting. The county mapped and identified the subject property as eligible for destination resort siting. Pursuant to ORS 197.455(2), the county's map is the *sole basis* for determining whether the subject property is eligible for destination resort siting.
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> "The limitations on resort siting in ORS 197.455(1) apply at the time that a county adopts maps identifying lands eligible for siting destination resorts. After a county has adopted such maps, the limitations in ORS 197.455(1) do not apply to specific applications for destination resorts. Instead, the adopted maps control whether a specific property is eligible for destination resort siting." *Gould Golf*, ___ Or LUBA at ___ (slip op at 7) (citing *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192, 201 (2012);

Eder v. Crook County, 60 Or LUBA 204, 211 (2009)) (emphasis in original).

During the Master Plan modification proceeding, an individual who is not a party to this appeal argued that compliance with ORS 197.455 must be measured by population conditions at the time of modification review.

The hearings officer did not address that argument or adopt any findings with respect to ORS 197.455. Petitioner argues that the hearings officer erred by not adopting any findings with respect to ORS 197.455.

We adhere to and reiterate our conclusion in *Gould Golf* that the limitations on resort siting in ORS 197.455(1) apply at the time that a county adopts maps identifying lands eligible for siting destination resorts. After a county has adopted such maps, the limitations in ORS 197.455(1) do not apply to specific applications for destination resorts. We conclude that ORS 197.455(1)(a) does not apply to the challenged decision as a matter of law. Accordingly, the hearings officer did not err by not adopting any findings with respect to ORS 197.455(1). *See Gould v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA No 2022-013, June 1, 2022) (slip op at 30-31) (reaching same conclusion with respect to ORS 197.455).

The second assignment of error is denied.

The county's decision is affirmed.