

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

3
4 ANNUNZIATA GOULD,
5 *Petitioner,*

6
7 and

8
9 PAUL J. LIPSCOMB,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 DESCHUTES COUNTY,
15 *Respondent,*

16
17 and

18
19 CENTRAL LAND AND CATTLE COMPANY, LLC,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2022-013

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from Deschutes County.

28
29 Jeffrey L. Kleinman filed the petition for review and a reply brief and
30 argued on behalf of petitioner.

31
32 Paul J. Lipscomb filed the intervenor-petitioner's brief and a reply brief
33 and argued on behalf of themselves.

34
35 No appearance by Deschutes County.

36
37 J. Kenneth Kataroff filed the intervenor-respondent's brief and argued on
38 behalf of intervenor-respondent.

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

3
4 AFFIRMED

06/01/2022

5
6 You are entitled to judicial review of this Order. Judicial review is
7 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer approval of a site plan for 80 Overnight Lodging Units (OLUs) as part of Phase A-1 of the Thornburgh Destination Resort.

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.¹ The first step is Conceptual Master Plan

¹ DCC 18.113.040 provides:

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

“A. Conceptual Master Plan and Conditional Use Permit for Destination Resort. A conceptual master plan (CMP) shall be submitted which addresses all requirements established in DCC 18.113.040. The CMP application shall be processed as if it were a conditional use permit under DCC Title 22, shall be subject to DCC 18.128.010, 18.128.020 and 18.128.030 and shall be reviewed for compliance with the standards and criteria set forth in DCC 18.113.

1 (CMP) review, which is processed as though it were a conditional use permit.
2 DCC 18.113.040(A). The second step is Final Master Plan (FMP) review. DCC
3 18.113.040(B). The final step in the county’s three-step approval process is land
4 division or site plan review (third-stage review). DCC 18.113.040(C). In addition
5 to finding that it satisfies the site plan review criteria in DCC 18.124 or the
6 subdivision criteria in DCC Title 17, the county must find at the third-stage
7 review that the specific development proposal complies with the standards and
8 criteria of DCC 18.113 and the FMP.² DCC 18.113.040(C).

“B. Final Master Plan. The applicant shall prepare a final master plan (FMP) which incorporates all requirements of the County approval for the CMP. The Planning Director shall review the FMP to determine if it complies with the approved CMP and all conditions of approval of the conditional use permit. The Planning Director shall have the authority to approve, deny or return the FMP to the applicant for additional information. When interpretations of the Planning Director involve issues which are discretionary, the FMP approval shall be treated as a land use permit in accordance with DCC Title 22.

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

² DCC 18.124.020 provides:

1 The land use dispute around the proposed Thornburgh Destination Resort
2 has been before LUBA many times. We discuss that history only to the extent
3 that it is relevant to this appeal.

4 The subject property consists of approximately 1,970 acres of land zoned
5 for exclusive farm use and mapped within the destination resort overlay zone.
6 The property was formerly used as a large ranch and is surrounded by public land.
7 In 2006, the county approved the Thornburgh Destination Resort CMP and, in
8 2008, it approved the FMP. Those approvals were ultimately upheld after
9 multiple rounds of appeals.

10 DCC 18.113.070(D) requires that, for the development of a destination
11 resort, “[a]ny negative impact on fish and wildlife resources will be completely
12 mitigated so that there is no net loss or net degradation of the resource.” We have
13 referred to that standard as the “no net loss” standard. The FMP provides for

“The elements of a site plan are: The layout and design of all existing and proposed improvements, including, but not limited to, buildings, structures, parking, circulation areas, outdoor storage areas, bicycle parking, landscape areas, service and delivery areas, outdoor recreation areas, retaining walls, signs and graphics, cut and fill actions, accessways, pedestrian walkways, buffering and screening measures and street furniture.”

DCC 17.16.030 sets out the informational requirements for tentative subdivision plans including existing conditions, the proposed physical layout, and the “[s]ource, method and preliminary plans for domestic and other water supplies, sewage disposal, solid waste disposal and all utilities.” DCC 17.16.030(C)(8).

1 phased development and includes approval of a fish and wildlife habitat
2 mitigation plan (FWMP) to satisfy the no net loss standard and offset
3 development impacts through mitigation. The FWMP contains two components.
4 The first component addresses terrestrial wildlife. The second component
5 addresses off-site fish habitat and requires Thornburgh to secure water rights for
6 fish and wildlife habitat mitigation from Big Falls Ranch and Central Oregon
7 Irrigation District (COID). FMP Condition 38 requires Thornburgh to “abide by”
8 the FWMP and to provide annual reporting.³ *See Gould v. Deschutes County*, 59
9 Or LUBA 435 (2009), *aff’d*, 233 Or App 623, 227 P3d 758 (2010) (affirming the
10 FMP, including and FMP Condition 38).

11 The FMP divides the development into seven phases. The first phase,
12 Phase A, includes development of transportation infrastructure, a golf course, a
13 restaurant, meeting facilities, open space, 300 residential units, and 150 OLUs,
14 and implementation of the FWMP. In May 2018, Thornburgh sought approval of
15 a tentative plan for a portion of the approved Phase A, calling the partial subphase

³ FMP Condition 38 provides:

“[Thornburgh] shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of offsite mitigation efforts. Consistent with the plan, [Thornburgh] 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.” Record 990.

1 “Phase A-1,” which includes a tentative subdivision plat for single-family
2 residential dwelling lots and OLU lots, together with roads, utility facilities, lots,
3 and tracts for future resort facilities and open space.⁴ Thornburgh also applied for
4 site plan review for a well, well house, pump house, reservoir, and sewage
5 disposal. We refer to the proposals, collectively, as the Phase A-1 TP. The county
6 hearings officer approved with conditions the Phase A-1 TP.

7 Petitioner appealed. On June 21, 2019, we remanded the Phase A-1 TP
8 because we concluded that Condition 17 thereof (TP Condition 17) violated the
9 right to a public hearing on whether the no net loss standard would be satisfied
10 for Phase A-1 by mitigation from water sources not specified in the FWMP.⁵

⁴ The Thornburgh Resort Company, which was dissolved, sold its rights in and to the development of the Thornburgh Resort to Kameron K. DeLashmutt, who sold those rights to Central Land and Cattle Company, LLC. DeLashmutt also acquired water rights for the Thornburgh Resort and sold those water rights to Pinnacle Utilities, LLC. *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) (citing *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326, 349 n 13, *aff’d*, 283 Or App 286, 388 P3d 739 (2016)). In this decision, we refer to the applicant as Thornburgh for ease of reference.

⁵ TP Condition 17 provided:

“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 [FWMP] and FMP decision have been secured, [or] demonstrate that the proposed alternate source is acceptable to ODFW and

1 *Gould v. Deschutes County*, 79 Or LUBA 561 (2019) (*Gould VIII*), *aff'd*, 310 Or
2 App 868, 484 P3d 1073 (2021). On remand, the hearings officer again approved
3 the Phase A-1 TP, this time without TP Condition 17. Petitioner appealed. That
4 appeal is currently pending in *Gould v. Deschutes County*, LUBA No. 2021-112.

5 Meanwhile, on May 21, 2021, Thornburgh applied for site plan review for
6 80 OLUs to be developed on 8.43 acres as part of Phase A (the OLU site plan).⁶
7 Record 74-75, 1837. The hearings officer approved the OLU site plan with
8 conditions. Petitioner appealed to the board of county commissioners, which
9 decided not to hear the appeal, making the hearings officer's decision the
10 county's final decision. DCC 22.32.035. This appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 Petitioner argues that the hearings officer misconstrued the applicable law
13 and failed to make adequate findings supported by substantial evidence in
14 approving the OLU site plan. Petitioner argues that the approval violates FMP
15 Conditions 10 and 38 and TP Condition 17.

provides the same quantity and quality mitigation so as not to constitute a substantial modification or justify a modification to the FMP.” Record 973 (underscoring and boldface omitted).

⁶ DCC 18.113.060(A)(1)(a) and FMP Condition 21 require that 50 OLUs be provided prior to the sale, rental, or lease of any residential dwelling or lot. While the Phase A-1 TP includes a subdivision of lots planned to be developed with OLUs, it does not include an OLU site plan.

1 **A. TP Condition 17**

2 In *Gould VIII*, we remanded the county’s approval of the Phase A-1 TP,
3 concluding that “TP Condition 17 violates the right to a public hearing on
4 whether the no net loss/degradation standard will be satisfied by mitigation from
5 water sources not specified in the mitigation plan.” 79 Or LUBA at 580. On
6 remand, on October 4, 2021, the county hearings officer again approved the
7 Phase A-1 TP, this time without TP Condition 17. Petitioner appealed the
8 hearings officer’s decision and the board of county commissioners denied review
9 in an order dated October 27, 2021. Accordingly, the hearings officer’s Phase A-
10 1 TP approval decision is the county’s final decision. DCC 22.32.035.

11 In this proceeding, the hearings officer concluded that TP Condition 17 is
12 not a relevant approval criterion because it was “deleted/removed” from the
13 Phase A-1 TP approval. Record 86. The hearings officer issued the OLU site plan
14 approval on December 21, 2021. Petitioner appealed the hearings officer’s
15 decision and the board of county commissioners denied review in an order dated
16 January 12, 2022 and mailed January 24, 2022. Record 12-13. Thus, at the time
17 that the county made the OLU site plan decision, the county’s Phase A-1 TP
18 approval did not impose *former* TP Condition 17.

19 Petitioner appealed the county’s Phase A-1 TP approval, arguing that the
20 hearings officer erred in removing TP Condition 17. That appeal is currently
21 pending in *Gould v. Deschutes County*, LUBA No. 2021-112. However, the
22 county’s Phase A-1 TP approval without TP Condition 17 is a final county

1 decision. The hearings officer correctly concluded that TP Condition 17 does not
2 apply to the OLU site plan. Petitioner’s argument that the OLU site plan violates
3 TP Condition 17 provides no basis for reversal or remand.

4 **B. FMP Condition 10**

5 FMP Condition 10 provides:

6 “[Thornburgh] shall provide, at the time of tentative plat/site plan
7 review for each individual phase of the resort development, updated
8 documentation for the state water right permit and an accounting of
9 the full amount of mitigation, as required under the water right, for
10 that individual phase.” Record 986.

11 The parties agree that Thornburgh must establish compliance with FMP
12 Condition 10 at each site plan review phase. In *Gould v. Deschutes County*, ___
13 Or LUBA ___ (LUBA No 2020-095, June 11, 2021) (*Gould Golf*), *aff’d*, 314 Or
14 App 636, 494 P3d 357 (2021), *rev den*, 369 Or 211 (2022), we explained that
15 FMP Condition 10 is imposed to ensure compliance with DCC 18.113.070(K),
16 which is concerned with the availability of water for resort use and mitigation for
17 the resort’s consumptive use of water. We explained:

18 “There are no existing natural streams, ponds, wetlands, or riparian
19 areas on the site. The resort water supply will be groundwater
20 obtained from wells on the property. On April 3, 2013, [the Oregon
21 Water Resources Department (OWRD)] issued [Thornburgh] a state
22 water right permit, Permit G-17036, for a quasi-municipal use of
23 groundwater, which authorized [Thornburgh] to drill six wells and
24 pump groundwater for resort use, including the golf course and
25 irrigation lakes. OWRD granted 2,129 acre-feet of water rights to
26 support the resort development year-round. Under that water right,
27 [Thornburgh] is responsible for providing 1,356 total acre-feet of
28 mitigation water. Permit G-17036 specified that completion of

1 construction of the resort water system and application of the water
2 must be accomplished within five years, by April 3, 2018. On April
3 2, 2018, [Thornburgh] requested an extension of Permit G-17036
4 from OWRD. On June 5, 2018, ORWD issued a proposed final order
5 approving the extension. On July 20, 2018, petitioner filed a protest
6 of the proposed final order and requested a contested case hearing.
7 On October 26, 2018, OWRD issued a final order allowing the
8 permit extension without holding a contested case hearing. On
9 January 31, 2019, OWRD withdrew the October 26, 2018 final order
10 and referred petitioner's protest to the Office of Administrative
11 Hearings for a contested case hearing. That contested case hearing
12 was pending at the time of the county's decision on the golf course
13 site review." *Gould Golf*, ___ Or LUBA at ___ (slip op at 13-14)
14 (citations omitted).

15 In *Gould VIII*, we agreed with Thornburgh that, because water mitigation
16 is based on consumptive use, FMP Condition 10 "requires proof of adequate
17 water rights and mitigation commensurate with the estimated consumptive use of
18 water for the development approved at each phase of development, and in
19 advance of actual water consumption." 79 Or LUBA at 574. Thornburgh argued
20 that petitioner's protest of the Permit G-17036 extension before OWRD did not
21 render Permit G-17036 void. We concluded that the hearings officer did not err
22 in construing FMP Condition 10 to require documentation of the water right and
23 that Thornburgh had sufficiently documented its water right, notwithstanding
24 petitioner's protest. Our decision was upheld by the Court of Appeals. 310 Or
25 App 868.

26 Petitioner again disputed the status of Thornburgh's water rights in *Gould*
27 *Golf*. Petitioner again argued that Thornburgh could not satisfy FMP Condition
28 10 because Permit G-17036 had expired and because the permit extension was

1 contested before OWRD and not final. The board of county commissioners
2 interpreted FMP Condition 10 as “primarily * * * an informational requirement,”
3 adopting the hearings officer’s interpretation of FMP Condition 10 as applied to
4 the Phase A-1 TP in *Gould VIII. Gould Golf*, ____ Or LUBA at ____ (slip op at 15).
5 The board concluded that FMP Condition 10 was satisfied for the golf course site
6 plan, notwithstanding the ongoing dispute over Permit G-17036 in the OWRD
7 contested case proceeding. The county found that Thornburgh had documented
8 the full amount of mitigation water needed for the golf course site plan and had
9 provided documentation for the state water right permit. The county concluded
10 that Permit G-17036 remains an effective and valid water right “unless and until
11 cancelled by OWRD” and observed that OWRD’s water rights information query
12 showed the status of the permit as “non-cancelled.” *Id.* We affirmed, reasoning:

13 “While the legal effect of the OWRD contested case hearing on
14 [Thornburgh’s] requested extension of Permit G-17036 is disputed,
15 petitioner has not established that, as a matter of law, Permit G-
16 17036 is not a valid water right. In that context, we cannot say that
17 the county erred in finding that intervenor provided the required
18 documentation for the state water right permit required by Condition
19 10. We conclude that the county did not err in finding that Condition
20 10 is satisfied by documentation that Permit G-17036 is not
21 cancelled and an accounting of the amount of mitigation water
22 needed for the golf course site plan.” *Id.* at ____ (slip op at 17-18).

23 Petitioner again disputed the status of Thornburgh’s water rights during
24 the county’s review of the OLU site plan, making the same arguments that the
25 county and LUBA rejected in *Gould VIII* and *Gould Golf*. The hearings officer

1 found that the facts related to Permit G-17036 had not changed and found that
2 FMP Condition 10 is satisfied:

3 “The Hearings Officer finds that there is no credible evidence in the
4 record of this case that the OWRD water permit at issue has been
5 *cancelled*; it has been challenged by [petitioner] but OWRD has not,
6 based on the evidence in the record *cancelled* the water permit. The
7 Hearings Officer finds that informational evidence is in the record
8 that the water permit has *not been cancelled* and that [Thornburgh]
9 has provided the Condition 10 necessary accounting.” Record 86.

10 With respect to FMP Condition 10, petitioner argues that at the OLU site
11 plan “is the last station on the plan review railroad for these highly water
12 consumptive elements.” Petition for Review 8. Thus, petitioner argues, the
13 county must apply a heightened evidentiary standard to proof of compliance with
14 FMP Condition 10. According to petitioner, “[a]t *this* stage, it is no longer
15 sufficient to hold that [petitioner] has not demonstrated that, as a matter of law,
16 [Thornburgh’s] OWRD Permit G-17036 * * * is not a valid water right.” *Id.*
17 (emphasis in original).

18 Thornburgh responds, and we agree, that petitioner’s argument that the
19 hearings officer misconstrued FMP Condition 10 is essentially the same
20 argument that the county and LUBA has twice rejected. *Gould Golf*, ___ Or
21 LUBA at ___ (slip op at 17-18); *Gould VIII*, 79 Or LUBA at 581. Petitioner has
22 not, in this appeal, established that our prior decisions were wrongly decided, and
23 we adhere to them.

1 As explained, the hearings officer found that the facts related to Permit G-
2 17036 had not changed and that FMP Condition 10 is satisfied. Petitioner argues
3 that the facts *have* changed because Thornburgh has filed several applications
4 with OWRD for approval to use water rights that are different from the rights
5 under Permit G-17036.⁷ While petitioner’s argument is somewhat difficult to
6 follow, we understand petitioner to contend that those applications demonstrate
7 that (1) water under Permit G-17036 is not actually available for resort use and
8 (2) Thornburgh intends to use sources of water that have different fish habitat
9 impacts from the source contemplated in the FWMP and approved in the FMP.

10 Thornburgh responds that it did not seek to change the source of
11 consumptive water for the OLU site plan.

12 Petitioner’s argument is a substantial evidence argument. Substantial
13 evidence is evidence that a reasonable person would rely on in making a decision.
14 *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing
15 the evidence, LUBA may not substitute its judgment for that of the local decision-
16 maker. Rather, LUBA must consider all the evidence to which it is directed and
17 determine whether, based on that evidence, a reasonable local decision-maker

⁷ We note that, at the time of this decision, five appeals are pending at LUBA in which petitioner challenges county decisions issuing land use compatibility statements for OWRD permits for resort use of water: LUBA Nos. 2021-060, 2021-062, 2021-066, 2021-109, and 2022-012.

1 could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-
2 60, 752 P2d 262 (1988).

3 The evidence that petitioner points to establishes that Thornburgh is
4 seeking OWRD approval to use water under water rights different from Permit
5 G-17036 for some resort purposes. However, those applications do not contradict
6 the evidence in the record that Thornburgh's water right under Permit G-17036
7 remains valid. Thornburgh does not rely on any alternative water right or any
8 pending OWRD application to satisfy FMP Condition 10 for the OLU site plan.
9 Accordingly, the evidence that Thornburgh is seeking OWRD approval to use
10 water rights other than those rights under Permit G-17036 does not undermine
11 the hearings officer's conclusion that Thornburgh's evidence satisfies FMP
12 Condition 10 for the OLU site plan. We conclude that the hearings officer's
13 finding that FMP Condition 10 is satisfied is supported by substantial evidence.

14 Petitioner argues that FMP Condition 10 requires a "fresh showing," at
15 each development phase, of "an accounting of the full amount of mitigation, as
16 required under the water right." Petition for Review 28-29. We agree, and the
17 hearings officer agreed. Contrary to petitioner's assertion, the hearings officer
18 did not rely on a prior accounting. Instead, Thornburg demonstrated in the OLU
19 site plan record that Permit G-17036 is not cancelled and provided an accounting
20 of the full amount of mitigation. The hearings officer found that that accounting
21 satisfies FMP Condition 10.

1 We conclude that the hearings officer's conclusion that FMP Condition 10
2 is satisfied does not misconstrue the applicable law and is supported by adequate
3 findings and substantial evidence.

4 **C. FMP Condition 38**

5 The FMP provides for phased development and includes the FWMP to
6 offset the impacts of the resort development and satisfy the no net loss standard.

7 FMP Condition 38 provides:

8 "[Thornburgh] shall abide by the April 2008 Wildlife Mitigation
9 Plan, the August 2008 Supplement, and agreements with the BLM
10 and ODFW for management of offsite mitigation efforts. Consistent
11 with the plan, [Thornburgh] shall submit an annual report to the
12 county detailing mitigation activities that have occurred over the
13 previous year. The mitigation measures include removal of existing
14 wells on the subject property, and coordination with ODFW to
15 model stream temperatures in Whychus Creek." Record 990.

16 In the challenged decision, the hearings officer found that FMP Condition
17 38 does not require Thornburgh to demonstrate any specific mitigation measures
18 as a requirement for approval of the OLU site plan. The hearings officer adopted
19 and incorporated the following comments from Thornburgh into its decision:

20 "FMP Condition 38, unlike FMP Condition 10, does not apply
21 during the review of development applications unless the site plan
22 application changes the * * * FWMP. This site plan review
23 application for the resort's OLU's does not propose or require a
24 change to the * * * FWMP.^[8]

⁸ Petitioner argued that FMP Condition 38 should provide public review and a hearing on continued compliance with the FWMP. The hearings officer rejected

1 “[Petitioner] argues that Condition 38 requires a ‘continuous
2 showing of the developer’s [*sic*] abiding by the’ wildlife plans at the
3 time of development application review. This is not correct.

4 “Compliance with FMP [Condition] 38 and the [F]WMP is assured
5 by annual reporting and staff review of the reports—not by
6 concurrent review with development applications. If the County had
7 intended to allow a review for compliance with FMP Condition 38
8 during the review of development applications, it would have said
9 so—just as it did when it wrote FMP Condition 10.” Record 89.

10 Petitioner argues that the hearings officer misconstrued FMP Condition 38.

11 Petitioner argues that, when a party has “raised a valid dispute” as to compliance
12 with the FWMP during a third-stage review, FMP Condition 38 requires
13 Thornburgh to establish compliance with the FWMP by (1) proving up a water
14 right for the amount of mitigation water required for the development phase and
15 (2) proving that actual wet water exists to satisfy the instream water right. Petition
16 for Review 35. Based on their interpretation of FMP Condition 38, petitioner
17 argues that the hearings officer erred by not requiring Thornburgh to establish,
18 during the OLU site plan review, (1) a water right which will allow Thornburgh
19 to place the mitigation water permanently instream and (2) that actual water exists
20 instream in Deep Canyon Creek in a sufficient quantity to satisfy the required
21 mitigation. Petitioner further argues that the hearings officer failed to address

that argument, concluding that it should have been raised on review of the FMP,
when FMP Condition 38 was adopted, and that petitioner cannot now challenge
FMP Condition 38 during site plan review. Record 91.

1 petitioner’s water expert’s opinion that there is no actual water for resort
2 mitigation instream in Deep Canyon Creek.

3 Thornburgh responds that FMP Condition 38 requires only that
4 Thornburgh “abide by” the FWMP and submit an annual report to the county
5 detailing mitigation activities, and that reporting requirement does not apply at
6 the site plan review stage unless the site plan deviates from the FWMP.

7 The parties’ dispute calls us to interpret FMP Condition 38—particularly,
8 what it means to “abide by” the FWMP. We review the hearings officer’s
9 interpretation of FMP Condition 38 for legal correctness. *M & T Partners, Inc. v.*
10 *City of Salem*, ___ Or LUBA___, ___ (LUBA No 2018-143, Aug 14, 2019) (slip
11 op at 14-15); *Kuhn v. Deschutes County*, 74 Or LUBA 190, 194 (2016). In
12 interpreting a condition of approval, we use the same inquiry that we use in
13 interpreting statutes and rules. *Kuhn*, 74 Or LUBA at 193-94; *State v. Gaines*,
14 346 Or 160, 206 P3d 1042 (2009).

15 We start with the text. The phrase “abide by” is not defined in the FMP or
16 the DCC. The plain meaning of “abide by” is “to act or behave in accordance
17 with or obedience to (as a rule or promise) * * * : conform to.” *Webster’s Third*
18 *New Int’l Dictionary* 3 (unabridged ed 2002). The opposite of “conform to” is
19 “deviate from.”

20 We disagree with the hearings officer’s interpretation that FMP Condition
21 38 does not apply to third-step development applications *unless* the development
22 application deviates from the FWMP. The requirement that Thornburgh “abide

1 by” the FWMP is a continuous requirement for resort development, even without
2 FMP Condition 38. *See* DCC 18.113.040(C) (“Each element or development
3 phase of the destination resort must receive additional approval through the
4 required site plan review (DCC 18.124) or subdivision process (DCC Title 17).
5 In addition to findings satisfying the site plan or subdivision criteria, findings
6 shall be made that the specific development proposal complies with the standards
7 and criteria of DCC 18.113 *and the FMP.*” (Emphasis added.)).

8 However, that does not mean, as petitioner argues, that FMP Condition 38
9 requires specific proof of mitigation measures at the site plan review or
10 subdivision stage. The phrase “abide by” refers to specific documents that
11 comprise the FWMP—with respect to fish habitat, the April 21, 2008 Mitigation
12 Plan and an August 11, 2008 letter that provides for additional mitigation for
13 Whychus Creek. Petitioner quotes at length the April 2008 Mitigation Plan in the
14 petition for review and argues that the FWMP requires proof of fish habitat
15 mitigation actions at the site plan review or subdivision stage. Petition for Review
16 19-25 (quoting Record 1025-36). We see nothing in those quoted passages that
17 requires proof of fish habitat mitigation actions at the third-stage development
18 application.⁹

19 Petitioner argues that the OLU site plan does not abide by the FWMP
20 because Thornburgh has not demonstrated, at the site plan review stage, that the

⁹ Petitioner does not rely on the August 11, 2008 letter.

1 mitigation water required by the FWMP is legally transferred to an instream
2 water right, as contemplated by the FWMP. However, as we have previously
3 explained, the FWMP “addresses potential impacts to fishery resources as a result
4 of ground water pumping” and requires Thornburgh to provide mitigation water
5 “in advance of water use.” Record 1034-35. Thus, the FWMP requires
6 Thornburgh to provide mitigation water—of both the quantity and quality
7 required by the FWMP—before pumping water for the uses allowed by the
8 approved phase of development. *Gould VIII*, 79 Or LUBA at 577. The FWMP
9 acknowledges that habitat impacts will not occur until development or
10 groundwater pumping begins. While Thornburgh must provide the full amount
11 of mitigation water for each phase “in advance of water use,” the FWMP does
12 not require *proof* of mitigation actions in advance of pumping. That is, the FWMP
13 does not require proof of mitigation actions at the third-stage development
14 application. Instead, FMP Condition 38 requires Thornburgh to act in accordance
15 with the FWMP and to submit an annual report of mitigation actions. Presumably,
16 the triggering event for that annual reporting requirement is actual resort
17 development activity or water pumping. However, the FWMP does not require
18 mitigation *actions* and reporting as a condition to site plan approval. *Id.* at 583
19 (“We agree with [Thornburgh] that the details of the mitigation plan are
20 established by the FMP, and compliance (or noncompliance) with the mitigation
21 measures will be established by annual reporting required by FMP Condition 38.

1 We reject petitioner's argument that the FMP required [Thornburgh] to 'fill in
2 the details' to obtain approval of a tentative plan during phased development.”).

3 We understand petitioner's concern that the FMP Condition 38 annual
4 reporting requirement does not provide public land use processes, such as notice
5 and hearing. That means a challenge to whether Thornburgh's actions abide by
6 or conform to the FWMP will be determined through enforcement proceedings.
7 Petitioner is concerned that resort development may harm fish habitat in violation
8 of the FWMP and the no net loss standard if interested parties are not able to
9 challenge the adequacy of mitigation until after Thornburgh begins pumping
10 water for resort use. However, the adequacy of FMP Condition 38 to meet the no
11 net loss standard was contested and resolved when the FMP was finally approved.
12 Petitioner's argument that FMP Condition 38 requires proof of mitigation actions
13 and reporting during site plan review because site plan review is the final stage
14 of review is essentially an argument that the county FMP approval *should have*
15 provided for public review and a hearing on mitigation actions associated with
16 each stage of development as required by the FWMP. We agree with Thornburgh
17 that interpretation of FMP Condition 38 is not supported by the text of FMP
18 Condition 38 or the requirements of the FWMP.

19 We proceed to context. FMP Condition 38 must be read in the context of
20 the FMP and the DCC resort development requirements. As explained,
21 destination resorts are subject to a three-step approval process under DCC
22 18.113.040. The first step is CMP review, which is processed as though it were a

1 conditional use permit. DCC 18.113.040(A). The second step is FMP review.
2 DCC 18.113.040(B). The final step is site plan or land division approval. DCC
3 18.113.040(C). “In addition to findings satisfying the site plan or subdivision
4 criteria, findings shall be made that the specific development proposal complies
5 with the standards and criteria of DCC 18.113 and the FMP.” *Id.*

6 Petitioner does not argue that DCC 18.113.040(C) requires each third-
7 stage development application be newly reviewed for compliance with all of the
8 standards and criteria of DCC 18.113, or the no net loss standard specifically.
9 The FMP, including FMP Condition 38, has been conclusively determined to
10 satisfy the no net loss standard. Any third-stage development proposal must
11 comply with the FMP, including the FWMP. For the reasons we explain above,
12 petitioner has not demonstrated that the OLU site plan does not abide by or
13 conform to the FWMP.

14 We take this opportunity to clarify our understanding of the continuing
15 applicability of the FWMP and FMP Condition 38 at third-stage resort
16 development review. As stated above, Thornburgh is required to abide by the
17 FWMP, even in the absence of FMP Condition 38. An example of Thornburgh
18 not abiding by the FWMP would be if a subdivision or site plan review
19 application proposes to provide a lesser quantity of mitigation water than the
20 amount required by the FWMP or identifies a different source of mitigation water
21 from those specified in the FWMP. A party could also raise noncompliance with
22 the FMP (and FWMP) during a third-stage proceeding by presenting evidence

1 that Thornburgh's development plan does not abide by the FWMP in some
2 particular.¹⁰

3 In this appeal, petitioner argues that the OLU site plan does not abide by
4 the FWMP because Thornburgh has not demonstrated, at the site plan review
5 stage, that the mitigation water required by the FWMP is legally transferred to an
6 instream water right, as contemplated by the FWMP. We conclude that the
7 FWMP does not require the mitigation water to be transferred to instream water
8 as a condition precedent to site plan approval. Thus, we reject petitioner's
9 argument that the OLU site plan approval violates FMP Condition 38.

10 Petitioner also argues that the hearings officer failed to make adequate
11 findings supported by substantial evidence that the OLU site plan satisfies FMP
12 Condition 38. Those arguments rely on petitioner's interpretation of FMP
13 Condition 38, which we reject above. Accordingly, we do not separately analyze
14 those arguments.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 In the second assignment of error, petitioner argues that the hearings
18 officer misconstrued the applicable law and failed to make adequate findings

¹⁰ In *Gould VIII*, petitioner presented evidence that the sources of mitigation water required by the FWMP were not available and, thus, Thornburgh could not comply with the FWMP for Phase A-1 development.

1 supported by substantial evidence in approving the proposed OLU site plan while
2 the appeal of the Phase A-1 TP approval was pending.

3 The Phase A-1 TP approval authorizes the subdivision of land to create the
4 lots on which the OLU subject to the OLU site plan will be sited. Thornburgh
5 submitted the OLU site plan review application while the Phase A-1 TP decision
6 was pending review at LUBA in *Gould v. Deschutes County*, LUBA No. 2021-
7 112. Record 1844. However, the OLU site plan decision does not rely on the
8 Phase A-1 TP subdivision approval. Instead, the OLU site plan decision relies on
9 the larger lot of record approved in the CMP decision. Record 1837.

10 Before the hearings officer, petitioner argued that the county could not
11 approve the OLU site plan unless and until “there is a finally approved phase or
12 subphase of the resort of which the OLUs are a part.” Record 73. The hearings
13 officer rejected that argument and concluded that the subject OLUs are approved
14 and required by the FMP. While the Phase A-1 TP decision authorizes the
15 subdivision, and while the OLU site plan contemplates that the final plat will
16 establish the lot boundaries shown on that site plan, nothing in the FMP or
17 destination resort regulations requires that the OLUs be located on separate lots
18 or that subdivision approval be obtained and finalized before an OLU site plan
19 can be approved. Record 74-75. Thus, the hearings officer concluded that the
20 OLU site plan “is an independent application that must be judged” by the site
21 plan approval criteria. Record 75.

1 Petitioner argues that they “can find no legal basis in the county’s code
2 provisions for destination resorts, subdivisions, or tentative plans which would
3 allow the proposed development to be approved in the absence of platted lots,
4 whether per the Phase A-1 TP or otherwise.” Petition for Review 42.

5 Thornburgh responds, initially, that petitioner’s second assignment of error
6 is waived because petitioner did not argue to the hearings officer that OLU site
7 plan approval requires platted lots. Instead, Thornburgh asserts that petitioner
8 argued only that the OLU site plan could not be approved in the absence of final
9 tentative plan approval.

10 To be preserved for LUBA review, an issue must “be raised and
11 accompanied by statements or evidence sufficient to afford the governing body,
12 planning commission, hearings body or hearings officer, and the parties an
13 adequate opportunity to respond to each issue.” ORS 197.797(1).¹¹ Specific
14 arguments need not have been raised below to preserve an issue for LUBA
15 review, so long as the issue was raised with sufficient specificity. *See Boldt v.*

¹¹ ORS 197.797(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 *Clackamas County*, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078
2 (1991) (the “raise it or waive it” principle does not limit the parties on appeal to
3 the exact same arguments made below, but it does require that the issue be raised
4 below with sufficient specificity so as to prevent “unfair surprise” on appeal).
5 Petitioner replies, and we agree, that petitioner raised the issue of whether the
6 county may approve the OLU site plan in the absence of an approved subdivision,
7 as evidenced by the hearings officer’s specific findings on that issue.

8 On the merits, Thornburgh responds, and we agree, that petitioner’s
9 argument is inadequately developed. Petitioner cites no applicable law that
10 requires that OLUs be sited on separate lots. Petitioner has not articulated how
11 the county misinterpreted and misconstrued the applicable law, and made
12 inadequate findings unsupported by substantial evidence. *Deschutes*
13 *Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). Without a more
14 developed argument, the second assignment of error provides no basis for
15 reversal or remand.

16 The second assignment of error is denied.

17 **PETITIONER’S THIRD ASSIGNMENT OF ERROR**

18 **INTERVENOR-PETITIONER’S ASSIGNMENT OF ERROR**

19 ORS 197.455 provides, in part:

20 “(1) A destination resort may be sited only on lands mapped as
21 eligible for destination resort siting by the affected county.
22 The county may not allow destination resorts approved
23 pursuant to ORS 197.435 to 197.467 to be sited in any of the
24 following areas:

1 “(a) Within 24 air miles of an urban growth boundary with
2 an existing population of 100,000 or more unless
3 residential uses are limited to those necessary for the
4 staff and management of the resort.

5 “* * * * *

6 “(2) In carrying out subsection (1) of this section, a county shall
7 adopt, as part of its comprehensive plan, a map consisting of
8 eligible lands within the county. The map must be based on
9 reasonably available information and may be amended
10 pursuant to ORS 197.610 to 197.625, but not more frequently
11 than once every 30 months. The county shall develop a
12 process for collecting and processing concurrently all map
13 amendments made within a 30-month planning period. A map
14 adopted pursuant to this section shall be the sole basis for
15 determining whether tracts of land are eligible for destination
16 resort siting pursuant to ORS 197.435 to 197.467.”

17 In *Gould Golf*, intervenor-petitioner argued that, while the subject property
18 is mapped as eligible for destination resort siting by the county, the property is
19 nonetheless ineligible for destination resort siting because it is within 24 air miles
20 of the urban growth boundary for the city of Bend, which, at the time of the golf
21 course site plan review, had a population of more than 100,000. Intervenor-
22 petitioner argued that relevant populations for purposes of ORS 197.455 must be
23 measured and determined at the time of site plan review.

24 We rejected that argument and affirmed the county’s conclusion that ORS
25 197.455 is not a relevant site plan review criterion. We explained:

26 “ORS 197.455 requires counties to inventory and map lands eligible
27 for destination resort siting. The county mapped and identified the
28 subject property as eligible for destination resort siting. Pursuant to
29 ORS 197.455(2), the county’s map is the *sole basis* for determining

1 whether the subject property is eligible for destination resort siting.

2 “The limitations on resort siting in ORS 197.455(1) apply at the time
3 that a county adopts maps identifying lands eligible for siting
4 destination resorts. After a county has adopted such maps, the
5 limitations in ORS 197.455(1) do not apply to specific applications
6 for destination resorts. Instead, the adopted maps control whether a
7 specific property is eligible for destination resort siting.” *Gould*
8 *Golf*, ___ Or LUBA at ___ (slip op at 7) (citing *Central Oregon*
9 *Landwatch v. Deschutes County*, 66 Or LUBA 192, 201 (2012);
10 *Eder v. Crook County*, 60 Or LUBA 204, 211 (2009)).

11 During the OLU site plan review, intervenor-petitioner again argued that
12 compliance with ORS 197.455 must be measured by population conditions at the
13 time of site plan review. Intervenor-petitioner argued that, while the subject
14 property is eligible for destination resort siting, the county should apply ORS
15 197.455(1)(a) to restrict residential uses in the resort “to those necessary for the
16 staff and management of the resort” because the subject property is within 24 air
17 miles of the city of Bend urban grown boundary and, as of 2019, the population
18 of the city of Bend has exceeded 100,000. Record 779.

19 The hearings officer did not address that argument or adopt any findings
20 with respect to ORS 197.455. Petitioner argues that the hearings officer erred by
21 not adopting any findings with respect to ORS 197.455. Intervenor-petitioner
22 argues that the county misconstrued ORS 197.455. Intervenor-petitioner points
23 out that the population and proximity restriction in ORS 197.455(1)(a) derives
24 from Goal 8 itself and argues that it is directly applicable through Deschutes

1 County Comprehensive Plan (DCCP) Policies 3.9.1 and 3.9.3, and DCC
2 18.113.010.¹²

¹² DCCP Policy 3.9.1 provides, “Destination resorts shall only be allowed within areas shown on the ‘Deschutes County Destination Resort Map’ and when the resort complies with the requirements of Goal 8, ORS 197.435 to 197.467, and [DCC] 18.113.”

DCCP Policy 3.9.2 provides, “Applications to amend the map will be collected and will be processed concurrently no sooner than 30 months from the date the map was previously adopted or amended.”

DCCP Policy 3.9.3 provides:

“Mapping for destination resort siting.

“a. To assure that resort development does not conflict with the objectives of other Statewide Planning Goals, destination resorts shall pursuant to Goal 8 not be sited in Deschutes County in the following areas:

“1. 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[.]”

DCC 18.113.010(A) provides:

“The purpose of the [Destination Resorts] Zone is to establish a mechanism for siting destination resorts to ensure compliance with [Land Conservation and Development Commission] Goal 8 and the [DCCP]. The destination resort designation is intended to identify land areas which are available for the siting of destination resorts, but which will only be developed if consistent with the purpose and intent of DCC 18.113 and Goal 8.”

1 All intervenor-petitioner's arguments are based on the premise that the
2 population and proximity restriction in Goal 8 and ORS 197.455(1)(a) apply to
3 specific site plan review applications. That premise is incorrect. As a threshold
4 matter, Goal 8 is not directly applicable to the OLU site plan. Goal 8 is
5 implemented in DCC 18.113, which has been acknowledged by the Department
6 of Land Conservation and Development to be consistent with Goal 8. Under Goal
7 8, ORS 197.455, the DCCP, and DCC 18.113, the county-adopted maps control
8 whether a specific property is eligible for destination resort siting. The population
9 and proximity restriction applies when the county is determining whether
10 particular land is eligible for inclusion on the county map of lands where
11 destination resorts may be sited. Nothing in the language of Goal 8 or ORS
12 197.455(1) supports intervenor-petitioner's proffered interpretation that the
13 population and proximity restriction in ORS 197.455(1)(a) applies anew to
14 particular site plan review applications and requires or allows the county to
15 impose residential restrictions at the site plan review phase. Accordingly, we
16 adhere to and reiterate our conclusion in *Gould Golf* that the limitations on resort
17 siting in ORS 197.455(1) apply at the time that a county adopts maps identifying
18 lands eligible for siting destination resorts. After a county has adopted such maps,
19 the limitations in ORS 197.455(1) do not apply to specific applications for
20 destination resorts.

21 We conclude that ORS 197.455(1)(a) does not apply to the OLU site plan
22 as a matter of law. Accordingly, the hearings officer did not err by not adopting

1 any findings with respect to intervenor-petitioner's argument under ORS
2 197.455(1).

3 Petitioner's third assignment of error is denied.

4 Intervenor-petitioner's assignment of error is denied.

5 The county's decision is affirmed.