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

ANNUNZIATA GOULD,
Petitioner,

and

PAUL J. LIPSCOMB,
Intervenor-Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

KAMERON K. DELASHMUTT,
Intervenor-Respondent.

LUBA No. 2020-095

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.

Paul J. Lipscomb filed a petition for review.

No appearance by Deschutes County.

J. Kenneth Katzaroff filed the response brief and argued on behalf of intervenor-respondent. Also on the brief was Schwabe, Williamson & Wyatt, P.C.

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

AFFIRMED 06/11/2021

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 and intervenor-petitioner challenge a board of county commissioners decision approving with conditions a site plan for a golf course, irrigation lakes, and a road system (collectively, golf course site plan) as part of a 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.

The land use dispute around the proposed Thornburgh Resort has been before LUBA many times. We discuss that history only to the extent that it is relevant to this appeal. In 2006, the county approved the Thornburgh Resort conceptual master plan (CMP) and, in 2008, it approved a final master plan (FMP). The FMP provides for phased development and includes a fish and wildlife habitat mitigation plan (FWMP) to offset the impacts of the resort development. The FMP divides the development into seven phases. The first phase, Phase A, includes development of transportation infrastructure, a golf course, a restaurant, meeting facilities, open space, 300 residential units, and 150 overnight lodging units (OLUs), and implementation of the FWMP.

In May 2018, intervenor sought approval for the first phase of development.[1] 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. We refer to the approvals, collectively, as the Phase A-1 TP. A county hearings officer approved the Phase A-1 TP with conditions.

On June 21, 2019, we remanded the Phase A-1 TP. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019) (*Gould VIII*), *aff'd*, 310 Or App 868, 484 P3d 1073 (2021). Our remand was narrow. Deschutes County Code (DCC) 18.113.070(D) requires 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." We have referred to that standard as the "no net loss" standard. The resort's impact on fish and wildlife, and the efficacy of the FWMP to satisfy the

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[1] The Thornburgh Resort Company, which was dissolved, sold its rights in and to the development of the Thornburgh Resort to intervenor-respondent 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. *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 all of those parties as "intervenor" for ease of reference because the distinction among the parties makes no difference to our analysis.

no net loss standard, has been the subject of multiple prior appeals. In *Gould VIII*, we concluded that a condition of approval that the hearings officer imposed in approving the Phase A-1 TP violated the right to public participation on whether the no net loss standard will be satisfied by mitigation water from sources not specified in the FWMP. Petitioner appealed our decision to the Court of Appeals. That appeal ultimately went up to the Supreme Court and returned to the Court of Appeals, which affirmed our decision. 310 Or App 868, 484 P3d 1073.

While the Phase A-1 TP decision was climbing the appellate ladder, intervenor applied for the golf course site plan review. The county planning division administratively approved the application. Petitioner appealed that approval to the board of county commissioners, which approved the golf course site plan review with conditions. This appeal followed.

INTERVENOR-PETITIONER'S ASSIGNMENT OF ERROR

ORS 197.455 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."

The county found that the subject property was determined eligible for resort siting as part of the CMP approval and that ORS 197.455 is not a relevant site plan review criterion. Record 45.

Intervenor-petitioner (Lipscomb) argues 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 Lipscomb argues currently has a population of more than 100,000. Lipscomb acknowledges that, when the county's destination resort map was adopted, and when the CMP and FMP were approved, the population of Bend was less than 100,000. However, Lipscomb argues that relevant populations for purposes of ORS 197.455 must be measured and determined at the time of site plan review.

Lipscomb argues that interpretation is supported by the use of the terms "sited" in ORS 197.455(1) and "existing population" in ORS 197.455(1)(a). Lipscomb argues that, while the CMP and FMP have been approved, the resort is not "sited" for purposes of ORS 197.455 until site plan review. Hence,

according to Lipscomb, ORS 197.455 is an applicable approval criterion for site plan review of any phase of a resort.

Intervenor responds, and we agree, that Lipscomb's argument misinterprets the plain language of ORS 197.455. 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.

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. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192, 201 (2012); *Eder v. Crook County*, 60 Or LUBA 204, 211 (2009).

Lipscomb also argues that the county failed to make adequate findings supported by substantial evidence that the challenged decision complies with ORS 197.455. Those arguments rely on Lipscomb's interpretation of ORS 197.455, which we reject above. Accordingly, we do not separately analyze those arguments.

Intervenor-petitioner's assignment of error is denied.

PETITIONER'S FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county misconstrued the applicable law in approving the golf course site plan while the county's Phase A-1 TP approval was pending review at LUBA and in the appellate courts. Petitioner argued to the county that the location and layout of the golf course, lakes, and related open space depend upon the configuration of the residential lots in the Phase A-1 TP, which was on appeal and, thus, not final at the time that the county reviewed the golf course site plan. Record 1253.

The county rejected that argument, explaining that the golf course site plan and the Phase A-1 TP are separate applications for different development activities authorized to occur in Phase A. Moreover, the Phase A-1 TP and the golf course site plan are independent. The Phase A-1 TP authorizes the division of lots. The applicable approval criteria for the golf course and irrigation lakes do not require that the property be divided.[2] Each application was reviewed by

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[2] The county found:

> "The subject site plan and the Phase A-1 [TP] application are separate development applications for different development activities authorized to occur in Phase A of the Thornburgh Resort. Each application was reviewed, as described below, as the third step in a 3 step process, and neither is dependent on the other. Each application was independently reviewed for its compliance with the FMP and relevant provisions of the [DCC]. One application was reviewed under tentative plan criteria and the other application was reviewed under site plan criteria. The fact that each application was required to establish that it complied with the FMP did not cause the

the county for compliance with relevant approval criteria. *See* DCC 18.113.040(C) (providing that, 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).

On appeal, petitioner argues that, if the configuration of the residential lots, or other related development such as roadways, in the Phase A-1 TP is changed, then the location of the golf course and lakes will likely have to be reconfigured.

Intervenor responds that, while the road system in the golf course site plan is the same as the road system approved in the Phase A-1 TP, the golf course site plan does not depend on approval of the Phase A-1 TP. Intervenor observes that, even if the Phase A-1 TP approval is modified or denied on remand, the subdivision of residential lots contemplated in the Phase A-1 TP can be reconfigured around the approved golf course site plan, so long as both the golf course site plan and the Phase A-1 TP comply with the approved FMP.

Petitioner's first assignment of error outlines practical problems that could potentially arise from the timing and procedural posture of the Phase A-1 TP approval and appeal, and the golf course site plan review. However, petitioner does not assert, let alone demonstrate, that the county's approval of the golf course site plan misconstrues any applicable site plan review criteria or that the county's findings that the site plan review criteria are satisfied are inadequate or

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subject site plan to hinge upon the outcome of the Phase A-1 [TP] appeals as argued by [petitioner]." Record 11.

unsupported by substantial evidence. Accordingly, petitioner's first assignment of error provides no basis for reversal or remand.

Petitioner's first assignment of error is denied.

PETITIONER'S THIRD ASSIGNMENT OF ERROR

FMP Condition 10 provides:

> "Applicant shall provide, at the time of tentative plat/site plan approval 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 15.

The county imposed Condition 10 to ensure compliance with DCC 18.113.070(K), which requires intervenor to demonstrate that "[a]dequate water will be available for all proposed uses at the destination resort." The resort's use of water is governed by water rights and rules administered by the Oregon Water Resources Department (OWRD). The county explained the genesis of Condition 10 as follows:

> "What is now FMP Condition #10 was first included in, and carried over from the CMP approved in 2006. By including the condition as part of the CMP, the [board of county commissioners] at that time overturned a finding by a County Hearings Officer stating that 'until the applicant demonstrates that it has enough mitigation credits to mitigate for 942 acre-feet of water (the estimated amount of consumptive use per OWRD), it is unlikely that the application will be approved.'[3]

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[3] *See* OAR 690-505-0605(2) ("'Consumptive use' means [OWRD's] determination of the amount of a ground water appropriation that does not return

"[Intervenor] appealed that Hearing Officer's decision to the [board of county commissioners] arguing that mitigation water only needed to be provided when the water rights permit dictated, not prior to development of the entire resort. On appeal, [Central Oregon Irrigation District (COID)] manager Steve Johnson argued that:

> "'The decision rendered by Hearings Officer Anne Corcoran Briggs last month implies that the Resort must bring all of the water to the table with the application. This decision, if left unmodified, will set a precedent that will artificially escalate the competition for water rights in the basin, and consequently drive the price up, and drive some farmers out. Her analysis of Water Availability on page 25 expressly conditions approval of the application on having the credits in hand now. Some of this water will not be needed for many years, and this policy, if followed, will be a waste of water, against the beneficial use doctrine that is the pillar of Oregon's water law policy.'

"The previous [board of county commissioners] agreed with [intervenor] and COID, and required [intervenor] through Condition 10 to provide mitigation water when required by the OWRD water right permit.

"The previous [board of county commissioners] further found that prior to mitigation water being required by the OWRD water right permit, [intervenor] is only required to show it is not precluded from obtaining mitigation water as a matter of law. The previous [board of county commissioners] further found that [intervenor] had met that standard and had exceeded it by showing it was feasible at that time to obtain sufficient mitigation water when required by OWRD. The current [board of county commissioners] agrees with and considers those previous findings as binding on the subject application." Record 15-16 (internal citations omitted).

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to surface water flows in the Deschutes Basin due to transpiration, evaporation or movement to another basin.").

We understand petitioner to argue that the Condition 10 requirement that intervenor provide "an accounting of the full amount of mitigation, as required under the water right," implicates mitigation water required to satisfy the no net loss standard. Petitioner asks, "[W]here is [intervenor's] *updated* accounting of the full amount of mitigation, relating to Whychus Creek as to fish and wildlife, for this phase of the resort?" Petition for Review 16 (emphasis in original). However, petitioner does not explain the premise that Condition 10 relates to satisfaction of the no net loss standard. Accordingly, that argument is insufficiently developed for our review. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

Moreover, to the extent that we understand the argument, we reject it. Condition 10 requires "an accounting of the full amount of mitigation, *as required under the water right*." (Emphasis added.) Condition 10 is imposed to ensure compliance with DCC 18.113.070(K), which is concerned with the availability of water for resort use and mitigation for the resort's consumptive use of water, which is related to but distinct from the fish and wildlife mitigation plan that is required in order to satisfy DCC 18.113.070(D).

As we explained in *Gould VIII*, 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 FWMP requires intervenor to replace the water consumed by the resort with water of sufficient quantity and quality to maintain fish habitat, especially cold

water thermal refugia. FMP Condition 38 requires intervenor to "abide by" the FWMP and "submit an annual report to the county detailing mitigation activities that have occurred over the previous year." Record 34. Satisfaction of the no net loss standard is ensured through compliance with Condition 38, not Condition 10.

The county found that the provision of water to satisfy the FWMP is not relevant to the review of the golf course site plan because intervenor did not propose and the county did not approve any change to the FWMP as part of the golf course site plan review. Record 13 (citing *Gould VIII*, 79 Or LUBA at 583-84). Petitioner does not challenge those findings. Accordingly, we agree with intervenor that Condition 10 is concerned only with satisfaction of DCC 18.113.070(K) regarding the availability of water for resort use and mitigation for the volume of consumptive use, as required by OWRD under the water right.

The golf course development will require water. There are no existing natural streams, ponds, wetlands, or riparian areas on the site. The resort water supply will be groundwater obtained from wells on the property. On April 3, 2013, OWRD issued intervenor a state water right permit, Permit G-17036, for a quasi-municipal use of groundwater, which authorized intervenor to drill six wells and pump groundwater for resort use, including the golf course and irrigation lakes. OWRD granted 2,129 acre-feet of water rights to support the resort development year-round. Under that water right, intervenor is responsible for providing 1,356 total acre-feet of mitigation water. Permit G-17036 specified

that completion of construction of the resort water system and application of the water must be accomplished within five years, by April 3, 2018. Record 1696. On April 2, 2018, intervenor requested an extension of Permit G-17036 from OWRD. On June 5, 2018, ORWD issued a proposed final order approving the extension. On July 20, 2018, petitioner filed a protest of the proposed final order and requested a contested case hearing. On October 26, 2018, OWRD issued a final order allowing the permit extension without holding a contested case hearing. Record 1697. On January 31, 2019, OWRD withdrew the October 26, 2018 final order and referred petitioner's protest to the Office of Administrative Hearings for a contested case hearing. That contested case hearing was pending at the time of the county's decision on the golf course site review. Record 16.

In *Gould VIII*, petitioner argued that the hearings officer erred in concluding that intervenor had satisfied Condition 10 for the Phase A-1 TP because the record in that proceeding established that the water right had not been extended past its expiration date. We agreed with intervenor that, because water mitigation is based on consumptive use, Condition 10 "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." *Gould VIII*, 79 Or LUBA at 574. Intervenor argued that petitioner's protest of the water right permit extension did not render the permit void. We concluded that the hearings officer did not err in construing Condition 10 to require documentation of the water right and that

intervenor had sufficiently documented its water right, notwithstanding petitioner's protest. Our decision was upheld by the Court of Appeals. 310 Or App 868, 484 P3d 1073.

Petitioner again disputed the status of intervenor's water rights during the county's review of the golf course site plan. Petitioner argued that intervenor could not satisfy Condition 10 because intervenor's water rights permit had expired and the extension was contested and not final.

The board of county commissioners interpreted Condition 10 as "primarily * * * an informational requirement," adopting the hearing officer's interpretation of Condition 10 as applied to the Phase A-1 TP in *Gould VIII*. Record 16. The board concluded that Condition 10 was satisfied for the golf course site plan, notwithstanding the ongoing dispute over Permit G-17036 in the OWRD contested case proceeding. The county found that intervenor had documented the full amount of mitigation water needed for the golf course site plan and had provided documentation for the state water right permit. The county concluded that Permit G-17036 remains an effective and valid water right "unless and until cancelled by OWRD" and observed that OWRD's water rights information query showed the status of the permit as "non-cancelled." Record 16-17.

Petitioner argues that the county misinterpreted Condition 10 and failed to make adequate findings supported by substantial evidence because, according to petitioner, the record demonstrates that the water right is expired and intervenor therefore does not have a valid water right permit.

The parties dispute our standard of review for the county's interpretation of Condition 10. Petitioner argues that Condition 10 implements state law that requires a permit for the use of water and, thus, the county's interpretation of Condition 10 is not entitled to any deference. *See* ORS 537.130 (providing that, generally, the use of water requires a permit from OWRD); *see also* ORS 197.829(1)(d), n 4. Differently, intervenor argues that the county's interpretation of Condition 10 is entitled to deference under ORS 197.829 and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).[4]

ORS 197.829(1) requires LUBA to affirm a governing body's interpretation of its own comprehensive plan provision or land use regulation unless the interpretation is inconsistent with the provision or regulation's express

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[4] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

language, purpose, or underlying policy. ORS 197.829(1) generally does not require LUBA to affirm a local government's interpretation of a prior land use decision or conditions of approval attached to a prior land use decision. *M & T Partners, Inc. v. City of Salem*, ___ Or LUBA ___, ___ (LUBA No 2018-143, Aug 14, 2019) (slip op at 14), *aff'd sub nom M & T Partners, Inc. v. Miller*, 302 Or App 159, 170, 460 P3d 117 (2020). To a "limited extent," LUBA will defer to plausible interpretations of county land use regulations that the governing body made in the course of interpreting a condition of approval. *Kuhn v. Deschutes County*, 74 Or LUBA 190, 194 (2016). The deference question "reduces to whether the city was interpreting a land use regulation," and a condition of approval is not a land use regulation. *M & T Partners*, 302 Or App at 170. Intervenor emphasizes that the county adopted Condition 10 to ensure compliance with DCC 18.113.070(K). However, intervenor does not contend or explain how, in interpreting Condition 10, the county interpreted DCC 18.113.070(K). Thus, the county's interpretation of Condition 10 is not entitled to deference and, instead, we review it for legal error. ORS 197.835(9)(a)(D).

As explained above, the county imposed Condition 10 to ensure compliance with DCC 18.113.070(K), which requires intervenor to demonstrate that "[a]dequate water will be available for all proposed uses at the destination resort." Condition 10 requires intervenor to provide "updated documentation for the state water right permit." While the legal effect of the OWRD contested case hearing on intervenor's requested extension of Permit G-17036 is disputed,

petitioner has not established that, as a matter of law, Permit G-17036 is not a valid water right. In that context, we cannot say that the county erred in finding that intervenor provided the required documentation for the state water right permit required by Condition 10. We conclude that the county did not err in finding that Condition 10 is satisfied by documentation that Permit G-17036 is not cancelled and an accounting of the amount of mitigation water needed for the golf course site plan.

We further conclude that the county's interpretation of Condition 10 is not "contrary to" ORS 537.130, which requires an OWRD permit for the use of water. DCC 18.113.070(K) requires intervenor to demonstrate, and the county to find, that adequate water will be available for all proposed uses for each phase of development of the destination resort. Condition 10 requires intervenor to provide documentation of the existence of a water right. The county is not authorized to approve or regulate the actual use of water—that is OWRD's role. In other words, county land use approval of the golf course site plan does not and cannot approve the use of water and, thus, will not result in a violation of ORS 537.130.

Petitioner's third assignment of error is denied.

PETITIONER'S SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that the county erred in finding that petitioner's arguments regarding Condition 10 are improper collateral attacks on the FMP. Petitioner does not challenge any specific findings.

Instead, petitioner points to a range of pages in the challenged decision. It is not clear to us which findings petitioner challenges regarding collateral attack and to which applicable site review criteria those findings relate. Condition 10 is the only provision that petitioner specifically identifies. Petition for Review 12.

Intervenor responds that, to the extent that the county determined that some of petitioner's arguments regarding Condition 10 and DCC 18.113.070(K) are impermissible collateral attacks on the final CMP and FMP approval decisions, those findings are alternative findings, and the county also addressed those issues on the merits. We agree. We affirm the county's conclusion that Condition 10 is satisfied under the third assignment of error. Accordingly, even if the county erred in concluding that some of petitioner's arguments regarding Condition 10 are impermissible collateral attacks, those errors provide no basis for remand.

Petitioner's second assignment of error is denied.

The county's decision is affirmed.