Community Development Department
Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
(541)388-6575 FAX (541)385-1764
http://www.co.deschutes.or.us/cdd/

MEMORANDUM

DATE: April 24, 2015

TO: Board of County Commissioners

FROM: Will Groves, Senior Planner

RE: Whether to hear the Kine & Kine Properties appeal of a Hearings Officer's decision. File Nos. 247-14-000391-TP, 247-14000392-SP, and 247-14-000393-LM (247-15-000207-A)

Before the Board of County Commissioners (BOCC) is an appeal filed by Kine & Kine Properties. The appeal is submitted in response to a Deschutes County Hearings Officer's decision that a proposed subdivision does not comply with all applicable regulations. The appellant requests the BOCC formally consider the decision.

BACKGROUND

The applicant, Kine & Kine Properties, requested approval of an eight-lot, zero-lot-line subdivision consisting of a partial replat of Elkai Woods Townhomes Phase III, as well as site plan and non-visible Landscape Management (LM) review for dwellings on the proposed subdivision lots. The proposal is on property in Widgi Creek zoned Resort Community (RC) and LM and located on land developed with a swimming pool, community building, and parking area.

The Hearings Officer issued a decision on April 6, 2015 finding that the proposal does not comply with all applicable regulations. On April 17, 2015, Kine & Kine Properties appealed the decision to the BOCC.

The 150-day period for issuance of a final local decision under ORS 215 expires on June 15, 2015.

APPEAL

The notice of appeal describes several assignments of error. These are summarized below, with references to those pages within the decision where the Hearings Officer addressed the issue.

(a) The Hearings Officer erred when she concluded Comprehensive Plan Policy 4.8.2 applies to the subject property and requires it to remain undeveloped except for community amenities. H.O. Decision, p. 7, 26.1

(b) The Hearings Officer erred when she used the "physically developed" exception process as a basis to conclude the BOCC intended to limit future development at Widgi Creek to all but 14 acres. H.O. Decision, p. 12, 25-26.

(c) The Hearings Officer erred when she concluded Comprehensive Plan Policy 4.8.2. was intended to maintain the status quo at Widgi Creek as of 2001. H.O. Decision, p. 23.

(d) The Hearings Officer erred when she failed to apply the definition of "Common Area" in the County Comprehensive Plan to the subject property. H.O. Decision, p. 25.

(e) The Hearings Officer erred when she concluded there was nothing in Ordinance 2001-046 and -048, the RC Zone or the RC plan policies that "otherwise zoned" the subject property for development. H.O. Decision, p. 26.

(f) The Hearings Officer erred when she concluded the proposal to create a subdivision of 8 zero lot line lots and remove the common area notation did not constitute a replat and was not authorized under ORS Chapter 92. H.O. Decision, p. 27, 30.

(g) The Hearings Officer erred when she concluded the Conditions of Approval Agreement requires the applicant to permanently maintain the community amenities on the subject property, including the pool, community building, parking areas and landscaping. H.O. Decision, p. 28-30.

(h) The Hearings Officer erred when she concluded the configuration of the private road and Lots 6, 7 and 8 would not relate harmoniously with the existing development. H.O. Decision, p. 39.

(i) The Hearings Officer erred when she concluded the removal of the pool, building, parking area and landscaping on the subject property and the development of dwellings would not be harmonious with the existing development. H.O. Decision, p. 40.

(j) The Hearings Officer erred when she concluded the proposed subdivision and residential development do not contribute to the land use patterns of the area. H.O. Decision, p. 50.

(k) The Hearings Officer erred when she concluded the orientation of Lots 6, 7 and 8 is not appropriate for the type of development and use contemplated. H.O. Decision, p. 61.

(l) The Hearings Officer erred when she applied the double frontage standards to the zero lot line subdivision and when she concluded the double frontage on Lots 1, 2 and 3 was not essential or appropriate. H.O. Decision, p. 62.

(m) The Hearings Officer's decision violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment of the U.S. Constitution by interpreting the County Conditions of Approval agreement in a way that results in a taking of private property for public use by requiring the private property owner to dedicate his property to community use and permanently maintain improvements thereon for the benefit of the community.

(n) The Hearings Officer's decision violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment of the U.S. Constitution by interpreting the County Code and Comprehensive Plan to require the subject property to be devoted to community uses.

The appellant requests de novo review. In deciding whether to hear an appeal, the BOCC may consider only the notice of appeal, the record of the proceedings below and discussions with staff regarding the record and any staff recommendations. DCC 22.32.030(D). No additional comments from the parties is allowed.

The appellant requests de novo review. In deciding whether to hear an appeal, the BOCC may consider only the notice of appeal, the record of the proceedings below and discussions with staff regarding the record and any staff recommendations. DCC 22.32.030(D). No additional comments from the parties is allowed.

If the BOCC decides to hear the appeal, the review shall be on the record unless the BOCC decides to hear the appeal de novo. The BOCC may hear this matter de novo if it finds the substantial rights of the parties would be significantly prejudiced without de novo review and it does not appear that the request is necessitated by failure of the appellant to present evidence that was available at the time of the previous review. The BOCC may also choose as de novo review when, in its sole judgment, a de novo hearing is necessary to fully and properly evaluate a significant policy issue relevant to the proposed land use action (DCC 22.32.027(B)(2)(c) and (d)).

The BOCC may, at its discretion, determine that it will limit the issues on appeal to those listed in the notice of appeal or to one or more specific issues from among those listed on the notice of appeal (DCC 22.32.027(B)(4)).

DECLINING REVIEW

If the BOCC decides that the Hearings Officer's decision shall be the final decision of the county, then the BOCC shall not hear the appeal and the party appealing may continue the appeal as provided by law. The decision on the land use application becomes final upon the mailing of the BOCC's decision to decline review.

STAFF RECOMMENDATION

Reasons to hear:

1) There are a number of significant code interpretation issues for which LUBA will be obligated to defer to the BOCC if the interpretation is at least plausible. The BOCC may want to reinforce or refute some or all of the Hearing Officer's findings/interpretations prior to LUBA.

Reasons not to hear:

1) CDD Staff and Legal believes the hearings officer decision is well reasoned and well written and could be supported as is on appeal.
2) The policy and interpretative questions are limited to the Widgi Creek development and would not impact land use outside of that resort community.

3) The "Mile Post One" case (TP-14-1024, SP-14-8, LM-14-17) that was not heard by the BOCC is presently on appeal at LUBA. The outcome of that appeal may impact the criteria that apply to the current appeal. The uncertain timing of the "Mile Post One" LUBA decision adds complexity to the current decision.

4) The applicant may challenge the denial at LUBA as a remedy to the Hearing Officer's denial.

Attachments

1. Hearing Officer's decision
2. Notice of Intent to Appeal
3. Draft Order to not hear this matter

REVIEWED

_____
LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Declining Review of Hearings Officer's Decision in File Nos. 247-14-000391-TP, 247-14000392-SP, and 247-14-000393-LM (247-15-000207-A).	* * * *	ORDER NO. 2015-030

WHEREAS, Appellant, Kine & Kine Properties, appealed the Hearings Officer's decision in application number 247-14-000391-TP, 247-14000392-SP, and 247-14-000393-LM; and

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners (Board) discretion on whether to hear appeals of Hearings Officer's decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. That the Board will not hear on appeal application number 247-14-000391-TP, 247-14000392-SP, and 247-14-000393-LM (247-15-000207-A) pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. The appellants shall be granted a refund of some of the appeal fees, according to County procedures.

Dated this _____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

_____
ANTHONY DEBONE, Chair

_____
ALAN UNGER , Vice Chair

ATTEST:

_____
Recording Secretary

_____
TAMMY BANEY, Commissioner

IN A MATTER BEFORE
THE DESCHUTES COUNTY BOARD OF COMMISSIONERS

KINE AND KINE PROPERTIES,	)	**NOTICE OF APPEAL -**
	)	File Numbers 247-14-000391-TP,
Applicant/Appellant.	)	247-14-000392-SP, 247-14-000393-LM –
	)	Decision of Deschutes County
	)	Hearings Officer
	)	

1. **DCC 22.32.010 Who May Appeal.**

Appellant Kine and Kine Properties was the applicant below, a party to the proceedings and is entitled to appeal under DCC 22.32.010(A)(1).

2. **DCC 22.32.015 Filing Appeals.**

Appellant Kine and Kine Properties submits the attached Notice of Appeal form, the appeal fee and the following statement of issues on appeal.

3. **DCC 22.32.020 Notice of Appeal.**

The present Notice of Appeal includes the following statement of issues relied upon for appeal, a request for de novo review and the reasons why the Board should review the Hearings Officer's decision and why it should do so de novo for the issues on appeal.

4. **Issues on Appeal.**

The Hearings Officer's decision is in error in the following ways:

(a) The Hearings Officer erred when she concluded Comprehensive Plan Policy 4.8.2 applies to the subject property and requires it to remain undeveloped except for community amenities. H.O. Decision, p. 7, 26.[1]

(b) The Hearings Officer erred when she used the "physically developed" exception process as a basis to conclude the Board intended to limit future development at Widgi Creek to all but 14 acres. H.O. Decision, p. 12, 25-26.

(c) The Hearings Officer erred when she concluded Comprehensive Plan Policy 4.8.2. was intended to maintain the status quo at Widgi Creek as of 2001. H.O. Decision, p. 23.

(d) The Hearings Officer erred when she failed to apply the definition of "Common Area" in the County Comprehensive Plan to the subject property. H.O. Decision, p. 25.

[1] The version of the H.O. Decision received by Appellant did not contain page numbers. Therefore, for purposes of specificity, the Appellant numbered the pages, attached the Decision hereto and refers to those page numbers to identify the issues on appeal in the assignments of error.

(e) The Hearings Officer erred when she concluded there was nothing in Ordinance 2001-046 and -048, the RC Zone or the RC plan policies that "otherwise zoned" the subject property for development. H.O. Decision, p. 26.

(f) The Hearings Officer erred when she concluded the proposal to create a subdivision of 8 zero lot line lots and remove the common area notation did not constitute a replat and was not authorized under ORS Chapter 92. H.O. Decision, p. 27, 30.

(g) The Hearings Officer erred when she concluded the Conditions of Approval Agreement requires the applicant to permanently maintain the community amenities on the subject property, including the pool, community building, parking areas and landscaping. H.O. Decision, p. 28-30.

(h) The Hearings Officer erred when she concluded the configuration of the private road and Lots 6, 7 and 8 would not relate harmoniously with the existing development. H.O. Decision, p. 39.

(i) The Hearings Officer erred when she concluded the removal of the pool, building, parking area and landscaping on the subject property and the development of dwellings would not be harmonious with the existing development. H.O. Decision, p. 40.

(j) The Hearings Officer erred when she concluded the proposed subdivision and residential development do not contribute to the land use patterns of the area. H.O. Decision, p. 50.

(k) The Hearings Officer erred when she concluded the orientation of Lots 6, 7 and 8 is not appropriate for the type of development and use contemplated. H.O. Decision, p. 61.

(l) The Hearings Officer erred when she applied the double frontage standards to the zero lot line subdivision and when she concluded the double frontage on Lots 1, 2 and 3 was not essential or appropriate. H.O. Decision, p. 62.

(m) The Hearings Officer's decision violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment of the U.S. Constitution by interpreting the County Conditions of Approval agreement in a way that results in a taking of private property for public use by requiring the private property owner to dedicate his property to community use and permanently maintain improvements thereon for the benefit of the community.

(n) The Hearings Officer's decision violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment of the U.S. Constitution by interpreting the County Code and Comprehensive Plan to require the subject property to be devoted to community uses.

5. <u>Request for De Novo Review</u>.

Appellant requests review by the Board because the Hearings Officer interprets the Resort Community Ordinance and the findings for that Ordinance, as adopted by the Board, for the first time. She interprets it incorrectly in many instances and, in fact, refuses to apply one of the

definitions in the Comprehensive Plan provisions adopted as a part of the Resort Community Zone. She incorrectly interprets the Ordinance to preclude future development of private property. She also incorrectly interprets a County development agreement to require a property owner to permanently maintain significant improvements on private property at significant expense to this property owner for the benefit of residents who have specifically excluded the improvements from their covenants, assessments or responsibility.

De novo review is required because it is necessary to fully and properly evaluate several significant policy issues relevant to the proposed land use action. Specifically, de novo review is necessary to fully evaluate and correct the Hearings Officer's conclusions regarding the scope, intent and meaning of the Resort Community zone, the supporting plan policies and definitions and to correct her unfounded conclusions that a County development agreement could somehow bind a property owner to maintain significant community improvements in perpetuity despite complete abandonment of those improvements by the community they are supposed to benefit.

DATED this 17th day of April, 2015.

Schwabe, Williamson & Wyatt, P.C.

Tia M. Lewis, OSB # 933437
Of Attorneys for Appellant

DECISION OF DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS:	247-14-000391-TP, 247-14-000392-SP, 247-14-000393-LM
APPLICANT:	Kine and Kine Properties 1133 N.W. Wall Street, Suite 1 Bend, Oregon 97701
PROPERTY OWNER:	Bhelm, LLC 18707 S.W. Century Drive Bend, Oregon 97701
APPLICANT'S ATTORNEY:	Tia M. Lewis Schwabe, Williamson & Wyatt 549 S.W. Mill View Way, Suite 100 Bend, Oregon 97702
APPLICANT'S ENGINEER:	HWA, Hickman, Williams & Associates, Inc. 62930 O.B. Riley Road, Suite 100 Bend, Oregon 97701
OPPONENTS' ATTORNEY:	Michael H. McGean Francis Hansen & Martin LLP 1148 N.W. Hill Street Bend, Oregon 97701 Attorney for Elkai Woods HOA, Elkai Woods Fractional HOA, and Widgi Creek HOA
REQUEST:	The applicant requests approval of an eight-lot, zero-lot-line subdivision consisting of a partial replat of Elkai Woods Townhomes Phase III, as well as site plan and non-visible LM review for dwellings on the proposed subdivision lots, on property in Widgi Creek zoned RC and LM and located on land developed with a swimming pool, community building, and parking area. (**Pool** application).[1]
HEARING DATE:	January 6, 2015
RECORD CLOSED:	February 3, 2015

I. <u>APPLICABLE STANDARDS AND CRITERIA:</u>

A. Title 17 of the Deschutes County Code, the Subdivision/Partition Ordinance

[1] The applicant also submitted applications for tentative plan, site plan and LM approval for a 9-lot, zero-lot-line subdivision in Widgi Creek on land between Seventh Mountain Drive and the first fairway of the Widgi Creek Golf Course (File Nos. 247-14-000391-TP, 247-14-000393-SP, 247-14-000493-LM) (**Fairway** application).

1. Chapter 17.16, Approval of Subdivision Tentative Plans and Master Development Plans

*** Section 17.16.100, Required Findings for Approval**
*** Section 17.16.105, Access to Subdivisions**

2. Chapter 17.20, Zero Lot Subdivision

*** Section 17.20.010, Requirements**
*** Section 17.20.100, Required Findings for Approval**

3. Chapter 17.36, Design Standards

*** Section 17.36.020, Streets**
*** Section 17.36.040, Existing Streets**
*** Section 17.36.050, Continuation of Streets**
*** Section 17.36.060, Minimum Right of Way and Roadway Width**
*** Section 17.36.080, Future Extension of Streets**
*** Section 17.36.120, Street Names**
*** Section 17.36.130, Sidewalks**
*** Section 17.36.140, Bicycle, Pedestrian and Transit Requirements**
*** Section 17.36.150, Blocks**
*** Section 17.36.160, Easements**
*** Section 17.36.170, Lots – Size and Shape**
*** Section 17.36.180, Frontage**
*** Section 17.36.190, Through Lots**
*** Section 17.36.200, Corner Lots**
*** Section 17.36.210, Solar Access Performance**
*** Section 17.36.220, Underground Facilities**
*** Section 17.36.230, Grading of Building Sites**
*** Section 17.36.250, Lighting**
*** Section 17.36.260, Fire Hazards**
*** Section 17.36.270, Street Tree Planting**
*** Section 17.36.280, Water and Sewer Lines**
*** Section 17.36.300, Public Water System**

4. Chapter 17.44, Park Development

*** Section 17.44.010, Dedication of Land**
*** Section 17.44.020, Fee in Lieu of Dedication**

5. Chapter 17.48, Design and Construction Specifications

*** Section 17.48.160, Road Development Requirements -- Standards**
*** Section 17.48.180, Private Roads**

B. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance

1. Chapter 18.04, Title, Purpose and Definitions
*** Section 18.04.030, Definitions**

2. Chapter 18.08, Basic Provisions

*** Section 18.08.020, Existing Agreements and Zoning Permits**

3. Chapter 18.84, Landscape Management Combining Zone

*** Section 18.84.020, Application of Provisions**
*** Section 18.84.030, Uses Permitted Outright**
*** Section 18.84.050, Use Limitations**
*** Section 18.84.080, Design Review Standards**
*** Section 18.84.090, Setbacks**
*** Section 18.84.095, Scenic Waterways**

4. Chapter 18.110, Resort Community Zone

*** Section 18.110.010, Purpose**
*** Section 18.110.020, Seventh Mountain/Widgi Creek and Black Butte Ranch Resort Districts**
*** Section 18.110.060, Development Standards**

5. Chapter 18.116, Supplementary Provisions

*** Section 18.116.030, Off-Street Parking and Loading**
*** Section 18.116.031, Bicycle Parking**
*** Section 18.116.180, Building Setbacks for the Protection of Solar Access**

6. Chapter 18.124, Site Plan Review.

*** Section 18.124.030, Approval Required**
*** Section 18.124.060, Approval Criteria**
*** Section 18.124.070, Required Minimum Standards**

C. Title 22 of the Deschutes County Code, the Development Procedures Ordinance

1. Chapter 22.04, Introduction and Definitions

* **Section 22.04.020, Definitions**

2. Chapter 22.20, Review of Land Use Action Applications

*** Section 22.20.055, Modification of Application**

3. Chapter 22.24, Land Use Action Hearings

*** Section 22.24.140, Continuances and Record Extensions**

D. Deschutes County Comprehensive Plan

1. Chapter 4, Urban Growth
*** Section 4.3, Unincorporated Communities**
*** Section 4.8. Resort Communities**

*** Section 4.8, Resort Community Policies**

E. Oregon Revised Statutes (OAR) Chapter 92, Subdivisions and Partitions

1. Replatting

*** ORS 92.180, Authority to Review Replats**
*** ORS 92.185, Reconfiguration of Lots or Parcels and Public Easements; Vacation; Notice Utility Easements**
*** Section 92.190, Effect of Replat; Operation of Other Statutes; Use of Alternate Procedures**

I. FINDINGS OF FACT:

A. Location. The subject property does not have an assigned address. It is identified as Tax Lot 1600 on Deschutes County Assessor's Map 18-11-22DA, and is located at the intersection of Seventh Mountain Drive and Elkai Woods Drive.

B. Zoning and Plan Designation. The subject property is zoned Resort Community (RC) and Seventh Mountain Widgi Creek Resort (SMWCR) District, and is within the Landscape Management (LM) Zone associated with Century Drive and the Deschutes River. The property is designated Resort Community on the Deschutes County comprehensive plan map.

C. Site Description. The subject site is 1.59 acres is size and roughly triangular in shape. It is developed with a swimming pool, community building, parking area and landscaping. The property has access from a driveway off Seventh Mountain Drive. Most of the property is level. However, the property has a moderate slope down to Seventh Mountain Drive on the north and to Elkai Woods Drive on the east.

D. Surrounding Zoning and Land Uses. The subject site is located within the Widgi Creek development which consists of a mixture of residential and recreational facilities, including single-family detached and attached dwellings, a golf course, club house, tennis courts, pool, and private roads, bicycle paths and golf cart paths. To the west of the subject site are an existing common area and townhomes in Elkai Woods Townhomes (Elkai Woods). Farther to the west are The Inn of the Seventh Mountain (Seventh Mountain) resort and the Points West Phase I Subdivision (Points West). The Seventh Mountain development consists of approximately 240 condominium units as well as resort facilities including conference facilities, two pools, a restaurant, and an ice skating rink. To the north and west of the subject site are existing townhomes in Elkai Woods. Farther to the north and west are the Widgi Creek Golf Course, clubhouse, tennis courts, and residential development. All of the surrounding developments are zoned RC designated Resort Community. Widgi Creek abuts Cascade Lakes Highway on the north and the Deschutes River canyon on the south. The Deschutes National Forest (DNF) surrounds Widgi Creek and Seventh Mountain.

E. Land Use History. The Seventh Mountain resort was established prior to the county's adoption of land use regulations. The Seventh Mountain/Widgi Creek/Elkai Woods developments have a long land use history dating back to at least 1983 when Widgi Creek

received its original land use approval (Z-83-7, MP-83-1, CU-83-107). The staff report lists the following land use permits and approvals as applicable to Tax Lot 1600:

MC8922	Modification Of Conditions For The Golf Course At The Inn Of The Seventh Mountain
MC9021	Modification Of Conditions For The Expansion To The Inn
MC9014	Modification Of Conditions For The Inn Of The Seventh Mountain's Subdivision Plat
PA908	Extension Of City Sewer Line To Inn
TP90735	Tentative Plat For 107 Lots At The Inn Of The Seventh Mountain
MC9018	Modification Of Conditions To Allow A Sales Office For New Lots At The Inn of The Seventh Mountain
MC9024	Modification Of Conditional Use Permit
V9112	Variance To Sign Code Permit
S9137	Sign For Seventh Mt. Golf Village
SP9121	Clubhouse Site Plan
S9136	Sign For Seventh Mountain Golf Village
AD9428	Ad For Widgi Creek
SP9445	Minor Alteration For Sales Office At Restaurant
AD9516	Declaratory Ruling For Status Of Widgi Creek/Seventh Mountain Golf Village, And Condo Site
FP951	Financial Segregation
MP9519	Partition To Divide Remainder Lot At Widgi Creek/Seventh Mountain Golf Village
SP9672	Site Plan Review For Golf Course Clubhouse
SP9674	Site Plan Review For Amenities Complex For The Elkai Woods Townhome Development Within In Widgi Creek PUD
TP96857	Tentative Plat/Master Plan For 86 Townhouse Lots--Elkai Woods
SP9610	Site Plan For 8 Townhouse Units--Phase I Elkai Woods
SP965	Site Plan Approval For Improvements To Maintenance Facility.
FPA9714	Final Plat Approval For Elkai Woods Townhomes At Widgi Creek
FPA9749	Final Plat Review For Phase Ii Elkai Woods
SP9731	Site Plan Review For Elkai Woods Phase Ii
SP9752	Site Plan For Permanent Restrooms To Replace Temporary Restrooms For Golf Course
SP9857	Site Plan For Phase III Of Elkai Woods At Widgi Creek
SP9842	Site Plan For Elkai Amenities Buildings
FPA997	Final Plat Review For Elkai Woods Phase III
FPA0011	Final Plat Review Of TP-96-857
LM05110	Landscape Management Site Plan For Sign.
SP0534	Site Plan For New Storage Building For Widgi Creek Golf Course
LL0842	Lot Line Adjustment
SP0915	Site Plan Review For Addition To Storage Building

F. **Procedural History:** These applications were submitted on November 17, 2014, and were accepted by the county as complete on December 17, 2014. Therefore, the 150-day period for issuance of a final local land use decision under ORS 215.427 would have expired on May 18, 2015.[2] The Hearings Officer conducted a site visit to the subject property and vicinity on January 6, 2015, accompanied by Senior Planner Will Groves. A combined public hearing on the applicant's Pool and Fairway proposals was held on January 6, 2015. At the hearing, the Hearings Officer disclosed my observations and impressions from my site visit, received testimony and evidence, left the written evidentiary record open through January 27, 2015, and allowed the applicant through February 3, 2015 to submit final argument pursuant to ORS 197.763. The applicant submitted final argument on February 3, 2015 and the record closed on that date. Because the applicant agreed to extend the written record from January 6 through February 3, 2015, under Section 22.24.140 of the procedures ordinance, the 150-day period was tolled for 28 days and now expires on June 15, 2015. As of the date of this decision, there remain 70 days in the extended 150-day period.

G. **Proposal.** The applicant proposes to create an eight-lot, zero-lot-line subdivision through a partial replat of "Common 18" in the Elkai Woods Townhomes Phase III Subdivision located at the intersection of Seventh Mountain Drive and Elkai Woods Drive. The applicant requests approval to remove the common area designation from the subject site. The applicant also requests site plan approval and non-visible LM review for the proposed townhome dwellings on the subdivision lots. The applicant would remove the existing development. Proposed Lots 1, 3, 4 and 5 would have access from Seventh Mountain Drive. Proposed Lots 2, 6, 7, and 8 would have access from a new private road off Seventh Mountain Drive.

H. **Public/Private Agency Comments.** The Planning Division sent notice of the applicant's proposal to a number of public and private agencies and received responses from: the Deschutes County Senior Transportation Planner and Road Department (road department); the City of Bend Fire Department (fire department); and the Oregon Department Water Resources (OWRD), Watermaster-District 11. These comments are set forth verbatim at pages 4 and 5 of the staff report and are included in the record. The following agencies did not respond to the request for comments or submitted a "no comment" response: the Deschutes County Assessor and Building Division (building division); the City of Bend Planning Department and Public Works Department; the Oregon Department of Transportation (ODOT); Pacific Power; and CenturyLink.

I. **Public Notice and Comments.** The Planning Division mailed individual written notice of the applicant's proposal and the public hearing to the owners of record of all property located within 250 feet of the boundaries of Tax Lot 1600. The record indicates this notice was mailed to the owners of 25 tax lots. In addition, notice of the public hearing was published in the Bend "Bulletin" newspaper, and the subject property was posted with a notice of proposed land use action sign. As of the date the record in this matter closed, the county had received 52 letters from the public and two petitions signed by a total of 159 persons. In addition, 12 members of the public testified at the public hearing. Public comments were addressed to both the Pool and Fairway applications and are discussed in the findings below.

J. **Lot of Record.** The proposed subdivision site is a legal lot of record having been platted as "Common 18" on the 1999 plat for Elkai Woods Townhomes Subdivision Phase III.

---

[2] As the 150th day falls on a Saturday, under Section 22.08.070 the 150th day is Monday, May 18, 2015.

III. CONCLUSIONS OF LAW:

A. Summary:

The Hearings Officer has found that because the proposed subdivision site was designated "common area" within the Elkai Woods Townhomes Phases III Subdivision in 1999, it is subject to Comprehensive Plan Policy 4.8.2 adopted in 2001 which requires that the site remain undeveloped except for community amenities. I also have found the applicant's proposed replat to remove the "common area" designation is not authorized by the statutes governing replatting. Consequently I have found I cannot approve the proposed replat and residential subdivision. However, because I anticipate this decision will be appealed to the Board of County Commissioners (board), in the event the board elects to hear the appeal, and to assist the board and county staff in that appeal, I have included in this decision findings concerning the proposal's compliance with applicable provisions of the comprehensive plan, Titles 17 and 18, and ORS Chapter 92, as well as recommended conditions of approval.

B. Preliminary Issues:

1. Effect of Pending LUBA Appeal.

FINDINGS: On September 29, 2014, the Hearings Officer issued a decision granting tentative plan, site plan, and LM approval for a 24-lot, zero-lot line subdivision called "Mile Post One" in Widgi Creek. (*Arrowood*, TP-14-1024, SP-14-8, LM-14-17). In that decision, I held the RC Zone governs development in Widgi Creek and superseded the Widgi Creek master plan. Opponents in *Arrowood*, who also are opponents of the subject application, appealed my decision to LUBA. As of the date of this decision, LUBA had not issued its decision on the *Arrowood* appeal. I understand opponents in the subject application have presented the same arguments concerning application of the master plan in their appeal to LUBA as they have here. Therefore, LUBA's decision in the *Arrowood* appeal likely will be relevant to the subject applications. Nevertheless, in the absence of a stay of the Fairway and Pool applications from LUBA, and/or the applicant's agreement to toll the 150-day period while the LUBA appeal is pending, I find I cannot delay issuing the subject Pool and Fairway decisions.

2. Incomplete Application.

FINDINGS: In his January 6, 2015 memorandum, Michael McGean, attorney for opponents Elkai Woods Homeowners Association, Elkai Woods Fractional Homeowners Association, and Widgi Creek Homeowners Association (hereafter "HOAs"), stated:

> *"As the staff report notes, the County Transportation Planner finds that the application is lacking a Site Traffic Report under DCC 18.16.310(F). The application in its current form must therefore be denied. If applicant applies to modify its application under DCC 22.20.055, the application should be re-noticed and re-set for a new hearing."*

There is no section 18.16.310(F) in Title 18. The Hearings Officer assumes Mr. McGean meant to cite Section 17.16.115(F) of the subdivision ordinance which establishes minimum requirements for a site traffic report. In response to the aforementioned comments from the county's Senior Transportation Planner Peter Russell, the applicant submitted a site traffic report on January 20, 2015. I find submission of this report following the county's acceptance of

the applicant as complete did not constitute a modification under Section 22.20.055. "Modification of application" is defined in Section 22.04.020 as:

> *** * * the applicant's submittal of new information after an application has been deemed complete and prior to the close of the record on a pending application that would modify a development proposal by changing one or more of the following previously described components: proposed uses, operating characteristics, intensity, scale, site layout (including but not limited to changes in setbacks, access points, building design, size or orientation, parking, traffic, or pedestrian circulation plans), or landscaping in a manner that requires the application of new criteria to the proposal or that would require the findings of fact to be changed. It does not mean an applicant's submission of new evidence that merely clarifies or supports the pending application.**

The Hearings Officer finds the applicant's site traffic report did not constitute a modification because it did not change the development proposal. Rather, it constituted new evidence that clarifies and supports the applicant's proposal. Therefore, I find the applicant was not required to submit a modification application, and the county was not required to re-notice the application or set it for a new hearing.

In her December 12, 2014 letter, opponent Barbara Munster, President of the Widgi Creek HOA, argued the subject application was incomplete and should not have been accepted by the county because "there are several blanks in" the application. However, Ms. Munster does not identify what information she considers missing from the application. She does state her belief that the applicant incorrectly identified the applicable zoning of the subject property as SMWCR when "it has always been Resort Community." The Hearings Officer finds the SMWCR designation is correct and reflects the area within the Widgi Creek RC Zone in which the subject property is located.

3. Resort Community Zoning and Designation.

FINDINGS: Several opponents argue Widgi Creek is not a "resort community" and therefore should not be subject to the RC Zone. As discussed in the findings below, the county's decision to designate and zone Widgi Creek a "resort community" was made by the board in 2001. That decision is final and is not before me in this matter.

4. Need. Opponents argue there is no need for the proposed new dwellings. The Hearings Officer finds need for housing is not an approval criterion for the applicant's proposal under Titles 17 and 18.

5. Savings Clause. Opponents argue the Widgi Creek master plan remained in effect after the board's adoption of the RC Zone based on the following language in Section 18.08.020:

> **DCC Title 18 does not repeal, abrogate or impair any existing easements, covenants, deed, restrictions or zoning permits such as preliminary plat and partition approvals, conditional use permits, nonconforming use permits, temporary use permits, special exceptions or building permits.**

This "savings clause" was included in Title 18 when it was adopted in 1979. The Hearings Officer finds this language signifies that any land use approvals and permits in effect *on the date Title 18 took effect* would continue to be valid. In other words, the effect of the "savings clause"

was to apply Title 18 *prospectively*. In my decision in *Arrowood*, I held that if the board had intended to preserve Widgi Creek's master plan as the controlling regulation for Widgi Creek development it would have included a "savings clause" in Ordinance Nos. 2001-047 and 2001-048. The board did not do so. I found the lack of a "savings clause" in those ordinances indicates the board intended *the RC Zone* to apply to future development in Widgi Creek. I adhere to that holding here.

C. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance

RESORT COMMUNITY ZONE STANDARDS

1. Chapter 18.110, Resort Community Zone

a. Section 18.110.010, Purpose

The purpose of the Resort Community Zone is to provide standards and review procedures for development in the communities of Black Butte Ranch and the Inn of the Seventh Mountain/Widgi Creek. The provisions of this chapter shall apply to any Resort Community that is planned pursuant to OAR 660 Division 22.

FINDINGS: As was the case in the aforementioned *Arrowood* application, the threshold issue in the Pool and Fairway applications is the relationship between the RC Zone and the Widgi Creek master plan approved in 1983. In *Arrowood*, the Hearings Officer found the master plan was superseded by the RC Zone when it was adopted and applied to Widgi Creek in 2001. I also found the property for which Arrowood sought approval to develop the Mile Post One subdivision was specifically identified by the board in 2001 as available for development, and the board stated it intended future residential development of any remaining undeveloped land within Widgi Creek "would be subject to" the RC Zone provisions. In my decision, I also noted that when former Hearings Officer Anne Briggs approved Arrowood's development plan for the Points West Subdivision (TP-06-968, SP-06-13, LM-06-34), she rejected the HOAs' argument that the Widgi Creek master plan forbade further development within Widgi Creek. Her decision was not appealed.

Opponents of the applicant's Pool and Fairway applications argue this Hearings Officer's decision in *Arrowood* was wrong, and that the Widgi Creek master plan prohibits further residential development in Widgi Creek in general, and on the proposed pool and fairway sites in particular. They submitted extensive evidence and argument in support of their position. For the reasons set forth in my *Arrowood* decision, I adhere to my holding that the RC Zone superseded the master plan and now governs development within Widgi Creek. However, because I find it is likely my Pool and Fairway decisions will be appealed to the board, I include the following detailed findings concerning the relationship between the Widgi Creek master plan and the RC Zone.

In the Hearings Officer's *Arrowood* decision I included the following brief history of the RC Zone:

> *"In 1997 the Land Conservation and Development Commission (LCDC) adopted Division 22 of its administrative rules (OAR Chapter 660) to establish statewide policies and procedures for planning and zoning of 'unincorporated communities.' OAR 660-22-0010 included within 'unincorporated communities' the category of 'resort community,' defined as 'an unincorporated community that was*

established primarily for and continues to be used primarily for recreation and resort purposes.'

In 1998, as part of its required 'periodic review,' the county began the 'unincorporated community planning project' for the Seventh Mountain and Widgi Creek resorts in order to conform them with LCDC's 'unincorporated community' administrative rules. In December of 2001 the county adopted Ordinance No. 2001-48, effective March 13, 2002, amending Title 18 to adopt new definitions, to take exceptions to the applicable statewide land use planning goals for both the Black Butte Ranch and Seventh Mountain/Widgi Creek resorts, to adopt the Resort Community Zone through Chapter 18.110, and to adopt new zoning and comprehensive plan maps for the Seventh Mountain/Widgi Creek resorts to include them within the Resort Community Zone and plan designation in general, and the SMWCR Zone in particular. The record indicates these amendments subsequently were acknowledged by LCDC." [3]

Prior to adoption of the 2001 ordinances, Widgi Creek was zoned Forest Use (F-3) which did not allow a resort. Widgi Creek had not been approved as a destination resort under Goal 8 (Recreational Needs) and its implementing administrative rules. Therefore, to comply with the "unincorporated community" administrative rules, the county had to take three steps for Widgi Creek: (1) adopt an exception to Goal 4 (Forest Lands); (2) adopt comprehensive plan and zoning ordinance provisions implementing the "unincorporated community" administrative rules; and (3) adopt a plan amendment, map amendment, and zone change to designate and zone Widgi Creek "resort community." These steps were accomplished through the adoption of Ordinance Nos. 2001-047 and 2001-048, which also implemented the "unincorporated community" administrative rules for Black Butte Ranch.

The board adopted extensive findings in support of Ordinances 2001-047 and 2001-048. These findings are somewhat contradictory, and as a result both the applicant and opponents point to these findings as support for their respective positions. For the reasons set forth below, the Hearings Officer finds that when the board adopted the RC Zone and applied it to Widgi Creek, it intended the RC Zone, not the Widgi Creek master plan, to govern development in Widgi Creek.

1. Goal Exception. The board adopted a "physically developed" exception to Goal 4 for Widgi Creek under Oregon Administrative Rules (OAR) 660-004-0025 which states:

> **(1) A local government may adopt an exception to a goal when the land subject to the exception <u>is physically developed to the extent that it is no longer available for uses allowed by the applicable goal.</u> Other rules may also apply, as described in OAR 660-004-0000(1).**
>
> **(2) Whether the land has been physically developed with uses not allowed by an applicable goal will depend on the situation at the site of the exception. The exact nature and extent of the area found to be physically developed shall be clearly set forth in the justification for the exception. The specific area(s) must be shown on a map or otherwise described and keyed to the**

[3] The board also adopted Ordinance 2001-047, effective March 13, 2002, amending the comprehensive plan and Title 18 to take an exception to Goal 4, and to adopt the RC Zone and designation, for Widgi Creek.

> **appropriate findings of fact. The findings of fact shall identify the extent and location of the existing physical development on the land and can include information on structures, roads, sewer and water facilities, and utility facilities. Uses allowed by the applicable goal(s) to which an exception is being taken shall not be used to justify a physically developed exception.** (Emphasis added.)

Ordinance No. 2001-047 includes the following findings in support of the "physically developed" exception for Widgi Creek:

> *"The Inn/Widgi site is already developed to an extent which, for all practical purposes, limits its use to the type of resort uses that already exist. Resort Community zoning is being adopted concurrent with this exception.* ***The resort community zoning uses permitted in the County zoning ordinance, Title 18 of the County Code, will further limit any future development to resort related uses only****.*
>
> * * *
>
> *The County is proposing a goal exception based on the existing physical developments on the property, which are not allowed under Goal 4. These physical developments include the existing Inn of the Seventh Mountain resort and condominium facility and the existing Widgi Creek residential and golf course facility. The site is also developed with expanses of paved roads, parking areas and vehicle storage and maneuvering areas. The physical improvements at the Inn of the Seventh Mountain are illustrated and described in detail on Figure 3, a site plan drawing covering this 80-acre site. Figure 4, an aerial photograph of the site and surrounding lands, also illustrates development of the site. As indicated on these exhibits, the property is physically developed with resort facilities and accessory uses including condominiums, convention facilities, restaurants, and numerous recreational facilities (pool complex, spa, ice/roller rink, volleyball pit, tennis courts, equestrian center, etc.)*
>
> *A small 1.2-acre area formerly used for on-site sewage treatment, located near the boundary with Widgi Creek to the east,* ***might be redeveloped some day for resort uses****, but no plans exist as of now for this to occur. This area is surrounded by resort development and could only be redeveloped in the future for resort purposes. A second area on the property, approximately 13 acres in size, of which only about 8-9 acres is usable due to steep slopes down to the Deschutes River,* ***could possibly be developed in the future for resort facilities such as a lodge, single-family or multi-family dwellings, or conference center.***
>
> * * *
>
> *<u>Widgi Creek was approved in 1983 as a resort including 107 single-family homes, 103 townhouses, a regulation golf course and appurtenant golf facilities, including clubhouse, driving range and maintenance facilities. The physical developments at Widgi Creek encompass 237 acres</u> and are shown on Figures 5 and 6 (an aerial photograph). The layout for town homes, known as Elkai Woods, is depicted on Figure 6. When Widgi Creek was approved it was zoned F3. In*

> *1992, when the County amended its Forest zone and discontinued the F3 zone to comply with legislative changes, the resort became zoned F2 and became a nonconforming use.*
>
> *As of November 2001, 70 single-family homes have been constructed and all single-family lots have been sold. The majority of townhomes have been constructed. The remaining town homes are expected to be completed in 2002.*
>
> *Similar to the Inn of the Seventh Mountain, Widgi Creek has never been approved as a Goal 8 destination resort, however the development of the site justifies a 'physically developed; exception to Goal 4. As illustrated in the Figures, Widgi Creek is for all practical purposes built-out."* (Bold and underscored emphasis added.)

Opponent HOAs argue the above-underscored language signifies the board found no further development could occur in Widgi Creek *beyond the uses and densities approved in 1983*. The Hearings Officer disagrees. The board expressly identified two undeveloped areas within Widgi Creek totaling approximately 14 acres that could be developed in the future "for resort facilities" including single-family dwellings. One of those areas was approved for development of the Mile Post One subdivision. In addition, the board's "built-out" language must be read in its context of supporting a "physically developed" exception to Goal 4. That exception required the county to find Widgi Creek was physically developed to the extent it is no longer available for uses permitted on forest lands. In that context, I find the above-underscored language means that as of the date of the board adopted the exception to Goal 4, it found all but approximately 14 acres of 237-acre Widgi Creek had been physically developed, that any future development within Widgi Creek would be as a resort and not for forest uses, and therefore Widgi Creek qualified for a "physically developed" exception because it was no longer available for forest uses.

Finally, the Hearings Officer finds the above-quoted language in bold type indicates the board understood and intended that there could be future development within Widgi Creek, but that any such development would be governed *by the provisions of Title 18*. As discussed in detail in the findings below, the board adopted comprehensive plan policies that both contemplate potential redevelopment of developed land within Widgi Creek, and strictly limit that redevelopment in terms of the type and density of uses. However, there is no reference to the Widgi Creek master plan in either the plan policies or the RC Zone.

2. Resort Community Designation and Zoning. As part of its adoption of the "resort community" designation and zoning for Widgi Creek, OAR 660-022-0060 required the county to demonstrate its process afforded adequate opportunities for Widgi Creek owners and residents to participate. The board's findings in support of the RC designation and zoning state adopted in Ordinance No. 2001-47 state in relevant part:

> *"The meetings were well attended by resort staff and representatives, particularly at the* [Black Butte] *Ranch where the Board of Directors for the owner's association and resort staff took a very active role in reviewing policies and draft ordinance language. Attendance by and contact from individual landowners at both resort areas, and by agency staff, was generally sparse. This may have been due to a perception that significant changes would not occur at either resort as a result of this project work because both resorts are substantially built out and have their own internal controls for future development in accordance with approved master plans.*

> *<u>This is a correct perception for the most part</u>. However, the 82-acre exception area that would be included in the Ranch boundary and an internal piece of land encompassing approximately 8-9 buildable acres at Inn/Widgi both offer significant potential for some additional development. This potential could not be realized at either resort unless and until rezoning to a Resort Community designation occurs, concurrent with the exceptions to Goal 4 previously described.* ***However, development in each of these exception areas will be limited by the zoning ordinance restrictions in Chapter 18.110 of the County zoning ordinance.****"* (Underscored and bold emphasis added.)

Opponents argue the above-underscored reference to master plans signifies the board intended future development in the resorts would be governed by those plans. Again, the Hearings Officer disagrees. I find this language also must be read in context as part of the board's explanation for the lack of significant resort landowner participation in the public meetings concerning adoption of the RC Zone -- presumed to be due to their "perception" that no significant changes would occur following that rezoning. However, I find the above-quoted language in bold type makes clear the board understood and intended that future development in Widgi Creek following the RC designation and zoning would be governed by Title 18 and the provisions of the RC Zone – not by the master plans.

Through Ordinances 2001-047 and 2001-048 the board also adopted comprehensive plan policies and zoning regulations implementing the "unincorporated communities" administrative rules, the purpose of which, set forth in OAR 660-022-0000, is to establish statewide policy for planning and zoning unincorporated communities in rural Oregon. They are defined in OAR 660-022-010(9) primarily as lands: (a) subject to an exception to Goal 3 or 4; (b) located outside a city and urban growth boundary (UGB); and (c) falling within the definition of one of the four types of unincorporated communities – e.g., "resort community." OAR 660-022-0030(2), governing planning and zoning for unincorporated communities, states the county "may authorize <u>any residential use and density</u> * * * subject to the requirements of" OAR 660-022 (emphasis added). OAR 660-022-030(6), (7), and (8) establish the parameters for county zoning ordinance provisions governing uses allowed in unincorporated communities as follows:

> **(6) County plans and land use regulations shall ensure that new or expanded uses authorized within unincorporated communities do not adversely affect agricultural or forestry uses.**
>
> **(7) County plans and land use regulations shall allow only those uses which are consistent with the identified function, capacity and level of service of transportation facilities serving the community, pursuant to OAR 660-012-0060(1)(a) through (c)** [Transportation Planning Rule]**.**
>
> **(8) Zoning applied to lands within unincorporated communities shall ensure the cumulative development:**
>
> > **(A) Will not result in public health hazards or adverse environmental impacts that violate state or federal water quality regulations; and**
> >
> > **(B) Will not exceed the carrying capacity of the soil or of existing water supply resources and sewer services.**

Under the administrative rules, the county's comprehensive plan and zoning ordinance provisions for unincorporated communities must assure new and expanded development does not exceed the capacity of available infrastructure. OAR 660-022-0040(7) requires counties to include findings demonstrating compliance with the unincorporated communities rule.

The board's findings in support of Ordinances 2001-047 and 2001-048 include the following pertinent findings under Paragraphs (7) and (8) of OAR 660-022-0030 and OAR 660-022-050 dealing with community public facilities plans:

> *"The Resort Community designation will not allow any new types of uses to be developed other than resort-related facilities as both communities are substantially developed as resorts. * * **
>
> * * *
> *Inn/Widgi: Inn/Widgi has its own wells and uses city sewer services. Existing services meet current needs and are not in danger of becoming insufficient. Weekly water testing is done in conformance with all prescribed standards. The state may also conduct well testing, at their discretion.* * **
>
> *** * ***
>
> *Both the Ranch and Inn/Widgi have existing water and sewer facilities that are adequate. Neither community is in a groundwater limited area nor is there a history of failing wells."*

None of these findings states or implies that new or expanded development of Widgi Creek as a "resort community" is limited by its master plan. To the contrary, these findings make clear future development will be constrained by the RC designation and zoning and by the availability and adequacy of infrastructure. The Hearings Officer finds the lack of reference to the master plan in these findings is not inadvertent given the purpose of the unincorporated community rules to establish standards for development of what are essentially urban uses in rural areas. A resort community master plan could be inconsistent with those rules by, for example, permitting development of a type or density exceeding the capacity of available infrastructure, or falling outside the uses permitted in a "resort community."

Finally, neither the RC Zone nor the resort community policies in Chapter 4.8 of the comprehensive plan, discussed in detail in the findings below, makes reference to the Widgi Creek master plan. Rather, they identify permitted uses and limitations thereon solely by reference to the RC Zone and OAR Chapter 660-022. For example, Plan Policy 4.8.27 for Resort Communities states new uses and expansion of existing uses in Widgi Creek that require land use approval "shall be approved only upon confirmation from the City of Bend that sewer service can be provided."

For the foregoing reasons, the Hearings Officer finds there is nothing in the county's 2001 adoption of a Goal 4 exception or RC designation and zoning for Widgi Creek that identifies the Widgi Creek master plan as applicable to Widgi Creek development. To the contrary, the board's findings in support of the exception and rezoning overwhelmingly support the conclusion that the board intended *the RC Zone* to govern such development.

b. Section 18.110.020. Seventh Mountain/Widgi Creek and Black Butte Ranch Resort Districts.

A. Uses permitted outright. The following uses and their accessory uses are permitted subject to the applicable provisions of DCC 18.110.050:

1. Single-family dwelling.

FINDINGS: The applicant proposes to develop an eight-lot zero-lot-line subdivision with single-family dwellings which are permitted outright in the RC Zone. As discussed below, zero-lot-line subdivisions for single-family dwellings are permitted outright under Section 18.110.060(J).

c. Section 18.110.060, Development Standards

A. Setbacks.

1. Single-Family Dwelling. The following setbacks shall be maintained for single-family dwellings and accessory uses on residential parcels:

*** * ***

B. Other Setbacks. The following setbacks shall be maintained for buildings and structures, based on the applicable provision(s) of DCC Title 18:

1. Solar Setback. The setback from the north lot line shall meet the solar access setback requirements in DCC 18.116.180 for south roof protection.

FINDINGS: As discussed in the findings below, under Section 18.110.060(J)(2) the proposed dwellings on zero-lot-line subdivision lots are not subject to the front, side and rear year setbacks, or the solar setback, and therefore the standards in these paragraphs do not apply.

2. Waterway Setback. All structures, buildings or similar permanent fixtures shall be set back from the ordinary high water mark along all streams and lakes a minimum of 100 feet measured at right angles to the ordinary high water mark.

FINDINGS: The record indicates the proposed homesites would be at least 1,000 feet from ordinary high water mark of the Deschutes River, therefore satisfying this criterion.

3. Building Code Setbacks. In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or Deschutes County under DCC 15.04 shall be met.

FINDINGS: The building division did not identify additional setbacks in the building code.

4. Rimrock Setbacks. Setbacks from rimrocks shall be maintained as provided in DCC 18.84 or DCC 18.116.160, whichever is applicable.

FINDINGS: The Hearings Officer finds this criterion is not applicable because there is no rimrock as defined in Section 18.04.030 on or adjacent to the subject property.

5. Scenic Waterway. The applicable provisions in DCC 18.84 shall be met.

FINDINGS: The record indicates the proposed homesites are located within the scenic waterway corridor associated with the Deschutes River because they are within one-quarter mile of the river. Therefore, the Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to obtain approval of its proposal from the Oregon Parks and Recreation Department.

6. Floodplain. The applicable provisions in DCC 18.96 shall be met.

FINDINGS: The record indicates the proposed subdivision is not located within any designated floodplain.

C. Building Height.

1. Resort Facility and Resort Utility Building. No resort facility or resort utility building or structure shall be erected or enlarged to exceed 40 feet, or 30 feet when the provisions in DCC 18.84.080 are applicable, unless a variance for a greater height is approved. For the purposes of DCC 18.110.060(C)(1) an application for a height variance may be granted provided the Planning Director or Hearings Body makes only the following findings:

*** * ***

FINDINGS: The subject property and the proposed subdivision are located within the LM Zone associated with the Cascade Lakes Highway and the Deschutes River, and therefore the design review standards in Section 18.84.080 governing building height are applicable. The applicant submitted an application for non-visible LM site plan review. The applicant's burden of proof states the proposed dwellings will not exceed 30 feet in height from natural grade. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring compliance with the 30-foot height limit.

2. All Other Buildings. No building or structure used for purposes other than a resort facility or resort utility, including a single-family dwelling, shall be erected or enlarged to exceed 30 feet in height, except as provided by DCC 18.120.040.

FINDINGS: The applicant does not propose any buildings or structures other than the dwellings, and therefore this criterion is not applicable.

3. Scenic Waterway. The applicable provisions in DCC 18.84 shall be met.

FINDINGS: As discussed above, the proposed homesites are located within the scenic waterway corridor associated with the Deschutes River. Compliance with the applicable criteria in Chapter 18.84 is discussed in the findings below.

D. Lot Coverage.

1. Single-family dwelling. The maximum lot coverage by a single-family dwelling and accessory structures shall be 40 percent of the total lot.

FINDINGS: As discussed below, under Section 18.110.060(J)(2) zero-lot-line lots are not subject to these lot coverage standards.

2. All Other Buildings. The maximum lot coverage by buildings and structures used for purposes other than a single-family dwelling shall be determined by the spatial requirements for yard setbacks, landscaping, parking and utilities.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose any buildings other than single-family dwellings.

E. Off-Street Parking and Loading.

1. Single-Family Dwelling. Off-street parking shall be provided for a minimum of two motor vehicles per dwelling.

2. All Other Uses. Off-street parking and loading shall be provided subject to the requirements of DCC 18.116.

FINDINGS: The applicant's submitted site plan shows each of the eight proposed dwellings would have a two-car garage as well as a driveway providing sufficient space for two more parking spaces, for a total of four off-street parking spaces for each dwelling. Therefore, the Hearings Officer finds the applicant's proposal satisfies this criterion. No other uses are proposed for the lots.

F. Outdoor Lighting. All outdoor lighting shall be installed in conformance with DCC 15.10.

FINDINGS: The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to install any outdoor lighting in conformance with the county's outdoor lighting standards in Chapter 15.10 of the Deschutes County Code.

G. Excavation, Grading and Fill and Removal. Excavation, grading and fill and removal within the bed and banks of a stream or lake, or in a wetland shall be subject to DCC 18.128.040(W), unless the activity meets the exception provisions in DCC 18.120.050.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose excavation, grading or fill and removal within the bed and banks of a stream or lake or in a wetland.

H. Signs. All signs shall be constructed in accordance with the provisions of DCC 15.08.

FINDINGS: The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring installation of any signs in conformance with the sign regulations in Chapter 15.08 of the Deschutes County Code.

I. Lot Requirements.

1. Single-Family Dwelling. A new lot for a single-family dwelling served by a community or public sewerage system shall have a minimum area of 6,000 square feet and a minimum average width of 60 feet, except that a corner lot shall have a minimum average width of 70 feet. A new lot for a single-family dwelling served by an on-site septic system shall have a minimum area of 22,000 square feet and a minimum average width of 100 feet. Any new residential lot shall have a minimum width at the street of 50 feet, except for a lot on a cul-de-sac, in which case the minimum width shall be 30 feet.

FINDINGS: As discussed below, under Section 18.110.060(J)(2) the proposed zero-lot-line subdivision is not subject to the lot requirements in this subsection.

2. All Other Uses. Every lot created for purposes other than residential use shall have dimensions for lot area, width and depth necessary for yard setbacks, landscaping, parking and utilities for the proposed use.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the proposed subdivision does not include anything other than residential uses.

J. Land Divisions

1. General. Notwithstanding any provision to the contrary contained herein or in other parts of the County Code, roads within the Resort Community Zone may be private roads and new lots or parcels may be created that have access from, and frontage on, private roads

only. These roads must meet the private road standards of DCC Title 17, and are not subject to public road standards of DCC Title 17. An agreement acceptable to the County Road Department and County Legal Counsel shall be required for the maintenance of new private roads.

FINDINGS: The proposed subdivision lots would have access from Seventh Mountain Drive and Elkai Woods Drive, both private roads within the Widgi Creek development. The applicant also proposes a new private to serve four of the proposed lots. Compliance with the private road standards in Title 17 is discussed in the findings below.

2. Zero Lot Line Subdivision. Notwithstanding any provision to the contrary contained herein, zero lot line subdivisions for single-family residences shall be allowed in the Resort Community Zone in accordance with the provisions of DCC Chapter 17.20. Zero lot line subdivisions are not subject to the setback provisions of 18.110.060(A), solar setback standards of 18.110.060(B)(1), lot coverage provisions of 18.110.060(D) or lot requirements of 18.110.060(I)(1).

FINDINGS: The Hearings Officer finds that under this subsection, the proposed zero-lot-line subdivision is not subject to the building setback, solar setback, or lot coverage requirements applicable to other subdivisions in the RC Zone.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal satisfies, or with imposition of the above-described recommended conditions of approval, will satisfy all applicable provisions of the RC Zone.

COMPREHENSIVE PLAN

C. Deschutes County Comprehensive Plan

1. Section 4.8, Resort Communities

Background

A Resort Community is characterized as an unincorporated community that was established primarily for, and continues to be used primarily for, recreation and resort purposes (OAR 660-022-0010(6). It includes residential and commercial uses and provides for both temporary and permanent residential occupancy, including overnight lodging and accommodations.

*** * ***

Inn of the Seventh Mountain/Widgi Creek

*** * ***

Land Use

The Inn of the Seventh Mountain/Widgi Creek community boundary includes 260 acres (23 for the Inn and 237 for Widgi Creek). The property is used for recreational amenities, rental and residential units. The western boundary is Century Drive. The southern boundary is generally the Deschutes River Canyon. The entire resort community is bordered by the Deschutes National Forest.

The predominant land use at the Inn is resort use with overnight lodging and recreation facilities for tourists, in addition to a restaurant, meeting rooms and a retail/rental sport shop. The predominant land use for Widgi Creek is residential, with single-family residential development and condominium units, in addition to a golf course. Fire and sewer services are currently provided by the City of Bend, with water service provided by on-site well. Utility services will continue to be provided in the current manner.

*** * ***

2. Section 4.8, Resort Community Policies

General Resort Community Policies

Policy 4.8.1 Land use regulations shall conform to the requirements of OAR 660 Division 22 or any successor.

Policy 4.8.2 <u>Designated open space and common area, unless otherwise zoned for development, shall remain undeveloped except for community amenities such as bike and pedestrian paths, park and picnic areas.</u> Areas developed as golf courses shall remain available for that purpose or for open space/recreation uses.

*** * ***

Policy 4.8.4 Residential minimum lot sizes and densities shall be determined by the capacity of the water and sewer facilities to accommodate existing and future development and growth.

*** * ***

Inn of the Seventh Mountain/Widgi Creek Public Facility Policies

*** * ***

Policy 4.8.27 New uses or expansion of existing uses that require land use approval shall be approved only upon confirmation from the City of Bend that sewer service can be provided. (Emphasis added.)

FINDINGS: Opponents argue the above-underscored language in Policy 4.8.2 prohibits the applicant's proposed 8-lot, zero-lot-line subdivision because it would be located on "Common 18," a "designated common area," and therefore unless it is "otherwise zoned for development" it must "remain undeveloped except for community amenities. The applicant counters that the proposed subdivision site is not "designated common area" and therefor is not subject to Policy 4.8.2. The Hearings Officer finds that in order to resolve this dispute I must determine: (1) whether this plan policy constitutes an approval criterion for development in Widgi Creek; (2) whether "Common 18" is "designated common area;" and (3) whether "Common 18" was "otherwise zoned for development." Each of these issues is addressed in the findings below.

1. Policies as Approval Criteria. In *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004), LUBA held a comprehensive plan is a "potential" source of approval standards for quasi-judicial land use permit applications. LUBA described the proper analysis of the effect of plan provisions as follows:

> *"Local governments and this Board have frequently considered the text and context of cited parts of comprehensive plans and concluded that the alleged comprehensive plan standard was not an applicable approval standard. Stewart v. City of Brookings, 31 Or LUBA 325, 328 (1996); Friends of Indian Ford v. Deschutes County, 31 Or LUBA 248 258 (1996); Wissusik v. Yamhill County, 20 Or LUBA 246, 254-55 (1990). Even if the comprehensive plan includes provisions that can operate as approval standards, those standards are not necessarily relevant to all quasi-judicial land use permit applications. Bennett v. City of Dallas, 17 Or LUBA at 456. Moreover, even if a plan provision is a relevant standard that must be considered, the plan provision might not constitute a separate mandatory approval criterion, in the sense that it must be separately satisfied, along with any other mandatory approval criteria, before the application can be approved. Instead, that plan provision, even if it constitutes a relevant standard, may represent a required consideration that must be balanced with other relevant considerations. See Waker Associates, Inc. v. Clackamas County, 111 Or App 189, 194, 826 P2d 20 (1992) ('a balancing process that takes account of relative impacts of particular uses on particular [comprehensive plan] goals and of the logical relevancy of particular goals to particular uses is a decisional necessity').*
>
> *Before considering whether particular plan provisions must be applied as approval standards when considering individual land use permit applications, it is appropriate, as the hearings officer did in this case, to consider first whether the comprehensive plan itself expressly assigns a particular role to some or all of the plan's goals and policies. Downtown Comm. Assoc. v. City of Portland, 80 Or App 336, 339, 722 P2d 1258 (1986); Eskadarian v. City of Portland, 26 Or LUBA 98, 103 (1993); Schellenberg v. Polk County, 21 Or LUBA 425, 429 (1991); Miller v. City of Ashland, 17 Or LUBA 147, 167-69 (1988). We review the hearings officer interpretation of the BAGP* [Bend Area General Plan] *to determine if her interpretation is correct. McCoy v. Linn County, 90 Or App 271, 275-76, 752 P2d 323 (1988)."*

The Hearings Officer most recently addressed the issue of application of plan policies to a quasi-judicial land use application in my decision in *Leading Edge Aviation* (A-13-4, SP-13-7), on remand from LUBA. In that case, I found nothing in the county's comprehensive plan, plan policies, Transportation System Plan (TSP), Bend Airport Master Plan (AMP), or Bend Airport

Layout Plan (ALP) constituted an applicable approval standard for the applicant's proposed site plan for development at the Bend Airport. I made the following relevant findings:

> *"In Bothman v. City of Eugene, 51 Or LUBA 426 (2006), LUBA was asked to consider the effect on a zone change application of a geographically-specific 'area plan' adopted as part of the city's comprehensive plan. The area plan language stated its policies were 'guides' for land use actions within the area subject to the plan, required the city to 'recognize' existing uses in the area, and 'discouraged' the city from rezoning the subject property. LUBA held that although this area plan did not expressly prohibit rezoning the subject property and was not couched in absolute terms, it nevertheless expressed a strong policy preference that the subject property retain its existing zoning. LUBA held that 'read in context the policy clearly mandates that the city be guided by -- at a minimum, consider -- that preference in the context of an application to rezone the subject property.' LUBA remanded for the city to reconsider its rezoning decision in light of this policy.*
>
> *Based on LUBA's direction on remand, as well as the analysis in Save Our Skyline, the Hearings Officer finds I must examine the text and context of the comprehensive plan, TSP, AMP and ALP to determine if any provisions therein prohibit the siting of the applicant's fueling station on the subject property. And because the Bend Airport AMP and ALP are, like the area plan in Bothman, geographic- and site-specific plans adopted as part of the comprehensive plan, I must also determine whether and to what extent these plans are to be considered and balanced with other policy considerations in evaluating the applicant's site plan application."*

In *Leading Edge*, the Hearings Officer reviewed the comprehensive plan and found numerous statements therein indicating the plan was not intended to establish approval criteria for the applicant's quasi-judicial land use application.

Based on the Hearings Officer's *Leading Edge* decision and the cases cited therein, I find my analysis of the plan policies at issue here must begin with an examination of the plan text to determine whether the plan assigns a particular role to some or all of the plan's policies.

The preamble of the comprehensive plan includes the following language:

> **The Deschutes County Comprehensive Plan is a statement of issues, goals and policies <u>meant to guide the future of land use</u> in this County. This Comprehensive Plan is intended to recognize the expectations and rights of property owners and the community as a whole.**
>
> **Use of this Plan**
>
> **The Comprehensive Plan <u>is a tool for addressing changing conditions, markets and technologies.</u> It can be used in multiple ways, including:**
>
> > *** * ***
> >
> > **<u>To guide</u> public decisions on land use policy when developing land use codes, such as zoning or land divisions.**

* * *

> **This Plan does not prioritize one goal or policy over another. Implementation of this plan requires flexibility because the weight given to the goals and policies will vary based on the issue being addressed.**
>
> **The Plan is not intended to be used to evaluate specific development projects. Instead, the Plan is a 20-year blueprint to guide growth and development.** (Emphasis added.)

The preamble describes plan policies as follows:

> **Policies: Statements of principles and guidelines to aid decision making by clarifying and providing direction on meeting the Goals.** (Emphasis added.)

Thus, the comprehensive plan appears to contemplate that plan policies will serve only as *guidelines*. However, the plan policies themselves, and particularly Policy 4.8.2, are written in mandatory language that strongly suggests they were not intended to be mere "guidelines."

In *Bothman*, cited above, LUBA held the city erred in not "considering" a geographically-specific plan policy stating the city should "recognize" an area's existing zoning and "discourage" its rezoning. LUBA stated the policy was relevant to the proposed rezoning because it expressed a "strong preference" for the area's existing zoning. In contrast, Policy 4.8.2 states areas in Widgi Creek developed as golf courses "shall" remain available for that purpose or for open space/recreation uses. The Hearings Officer finds this language clearly expresses more than a "preference" for retaining designated common areas as undeveloped or developed with community amenities. Moreover, the context of this policy – i.e., the county's 2001 adoption of a "physically developed" Goal 4 exception and RC designation and zoning for Widgi Creek – explains this mandatory language. As discussed in the findings above, both the goal exception and the redesignation and rezoning of Widgi Creek were intended to authorize continuation of the existing resort which was a nonconforming use in the Forest Zone, while also limiting uses in accordance with the unincorporated communities administrative rules. In other words, the board did not want Widgi Creek to be redeveloped as a large urban-density residential subdivision located miles from the Bend urban growth boundary.

For the foregoing reasons, the Hearings Officer finds Policy 4.8.2 establishes a mandatory approval criterion for Widgi Creek development.

2. Areas "Designated Common Area." "Common 18" is located at the intersection of Seventh Mountain Drive and Elkai Woods Drive and currently is developed with community amenities consisting of a swimming pool, community building, parking areas and landscaping. Policy 4.8.2 states areas designated as common area shall "remain" undeveloped except for community amenities. The ordinary definition of "remain" is "to continue; to remain standing, endure, outlast." *Webster's New World Dictionary and Thesaurus, Second Edition.* Based on this definition, the Hearings Officer finds that by including the phrase "remain undeveloped except for community amenities," Policy 4.8.2 was intended to maintain the *status quo* in Widgi Creek as of *2001.* Therefore, I find the relevant question is whether the proposed subdivision site was "designated common area" in 2001 when Policy 4.8.2 was adopted.

The 1999 plat for the Elkai Woods Townhomes Phase III Subdivision shows the proposed site as "Common 18" surrounded by platted residential lots and another common area – "Common

21 in Elkai Woods Townhomes Phase V. In her final argument, the applicant's attorney Tia Lewis argued the designation of "Common 18" is not relevant for the following reasons:

> *"The subject property was improperly marked 'common area' on the plat but is privately owned, has never been part of the common area of any of the communities within Widgi Creek and is not supported or otherwise funded by any common assessments or owner fees. The subject property does not meet the definition of common area in the County Code or state statute and has specifically been excluded from all CC&Rs within the Widgi Community and the definitions of common areas therein. See Amended Declaration of Covenants, Conditions and Restrictions for Elkai Woods Homeowners Association, Inc., and Elkai Woods Fractional Homeowners Association, Inc., together with subsequent judicial decree and amendments, attached hereto as Exhibit D. It was not dedicated to the public or the homeowners on the plat or through any other declaration. In fact, it has always been privately owned and was conveyed to the current owner at the same time as the golf course by the Bankruptcy Trustee in 2004.*
>
> *Title 18 does not contain a definition of common area; however Section 5.2 of the County's Comprehensive Plan defines 'Common Area' as 'common property as defined in the Oregon Planned Communities Act at ORS 94.550(7).' The Oregon Planned Communities Act defines 'common property' as 'any real property or interest in real property within a planned community which is owned, held or leased by the homeowners association or owned as tenants in common by the lot owners, or designated in the declaration or the plat for transfer to the association.*
>
> *The subject property is not now and has never been owned by any HOA, has never been owned as tenants in common and was not designated for transfer to the HOA on the plat or in any declaration. In fact, all Elkai Woods declarations specifically exclude the area from the definitions of common area, and the HOAs have repeatedly disclaimed any responsibility or ownership of the property. The present partial replat application is to remove the common area notation from the plat."* (Underscored emphasis in original.)

The Hearings Officer understands Ms. Lewis to argue Common 18 is not designated common are for two reasons: (1) it is unique among common areas in Elkai Woods because it was not dedicated to the public or dedicated or conveyed to an HOA on the plat; and (2) the lack of such dedication or conveyance means Common 18 does not fall within the definition of "common area" in the comprehensive plan. With respect to the first argument, I find Common 18 is not unique in not having been dedicated to the public or transferred to an HOA on the subdivision plat. ORS 92.075 requires that any public dedications or restrictions applicable to subdivisions be stated in the declaration by which the subdivision is created – i.e., the first page of the recorded subdivision. I have not found, nor has Ms. Lewis identified, a dedication to the public or transfer to an HOA for *any* common areas on *any* of the Elkai Woods Townhomes plat declarations.[4]

[4] Copies of the Elkai Woods Townhomes plats are included in the record as attachments PH-3 through PH-8 to the applicant's January 20, 2015 submission.

The Hearings Officer finds the definition of "common area" in the comprehensive plan also does not support Ms. Lewis' argument that Common 18 was improperly designated. That definition refers to the "common property" definition in ORS Chapter 94 which governs "planned communities." Under ORS 94.580, such a community is created through a planned community declaration on or with the subdivision plat that includes a large number of specific components. However, there is nothing in this record that indicates the Elkai Woods Townhomes Subdivisions in general, or Elkai Woods Townhomes Phase III in particular, were developed as planned communities. Ms. Lewis did not identify, nor have I been able to locate, any such planned community declarations on the Elkai Woods Townhomes Subdivision plats.

Finally, in former Hearings Officer Briggs' 2006 decision approving Points West, she addressed the issue of determining which Widgi Creek property is subject to Policy 4.8.2. In that case, opponents argued that some of the proposed site for Points West was in the Widgi Creek Golf Course and therefore could not be developed with residences. Hearings Officer Briggs held the proposed site was not a part of the golf course and therefore could be developed. She went on to hold areas "specifically identified as open space or common area on the Widgi Creek plat" are subject to Policy 4.8.2, based on the following relevant findings:

> *"The findings adopted by the Board of County Commissioners in support of the amendments regarding the Inn/Widgi Creek resort community contemplate additional residential development within the area of the subject property, specifically 8-9 acres near the rim rock and the former Inn sewage treatment facilities. Those areas appear to be included within the subject property's* [Points West] *boundaries. Therefore, it is not inconceivable that areas the neighbors assumed would remain undeveloped would be built upon at some point. <u>Here, the evidence supports a finding that only those areas that were specifically identified as open space or common area on the Widgi Creek plat are subject to that portion of the policy.</u> The subject property does not include any areas subject to those designations. In addition, the language of the policy, which requires that 'developed golf courses' be retained, implies that undeveloped portions of golf courses may, in some circumstances, be developed. Here, the applicant presented evidence that the 'out of bounds' markers form the boundary between the 'developed golf course' and other areas. That evidence is substantial evidence to support a finding that the proposed development is consistent with this policy."* (Emphasis added.)

Hearings Officer Briggs' holding is consistent with the history of Policy 4.8.2 which was adopted in 2001 to implement a "physically developed" exception to Goal 4 and the "resort community" plan designation and zoning for Widgi Creek. As discussed above, the county made the following relevant findings concerning the status of Widgi Creek in 2001:

> *"A small 1.2-acre area formerly used for on-site sewage treatment, located near the boundary with Widgi Creek to the east, might be redeveloped some day for resort uses, but no plans exist as of now for this to occur. This area is surrounded by resort development and could only be redeveloped in the future for resort purposes. A second area on the property, approximately 13 acres in size, of which only about 8-9 acres is usable due to steep slopes down to the Deschutes River, could possibly be developed in the future for resort facilities such as a lodge, single-family or multi-family dwellings, or conference center.*
>
> * * *

> *Widgi Creek was approved in 1983 as a resort including 107 single-family homes, 103 townhouses, a regulation golf course and appurtenant golf facilities, including clubhouse, driving range and maintenance facilities. The physical developments at Widgi Creek encompass 237 acres and are shown on Figures 5 and 6 (an aerial photograph). The layout for town homes, known as Elkai Woods, is depicted on Figure 6."*

The board found that in 2001 the Widgi Creek development consisted of a residential component (approval for 107 single-family dwellings and 103 townhouses), a resort component (regulation golf course and appurtenant facilities, clubhouse, and tennis courts), common areas and open space, and infrastructure including roads, pathways, and sewer and water facilities. These approvals and facilities were the basis of the county's determination that Widgi Creek qualified for a "physically developed" exception and was "for all practical purposes built out." The board also found Widgi Creek included two specific areas that were available for future development. Finally, the board incorporated the aerial photos and diagrams attached as Figures 3, 5, 6 and 7 to Ordinance Nos. 2001-047 and 2001-048 which showed Widgi Creek and Elkai Woods as they existed and/or were approved in 2001. Figure 7 depicts the location and layout of the approved residential lots in Elkai Woods, along with the designated common areas including Common 18 and the "meeting facility and swimming pool" located thereon.

Based on the board's goal exception and RC Zone findings and supporting documents, the Hearings Officer finds that with the exception of the developable 8-9 acres identified in the board's findings, the board concluded the approvals and developed elements of Widgi Creek that existed in 2001 constituted the *status quo* that Policy 4.8.2 was intended to preserve. And I find the board intended residential development of the 8-9 acres would be governed by the RC Zone and by plan Policy 4.8.4 which states:

> **Residential minimum lot sizes and densities shall be determined by the capacity of the water and sewer facilities to accommodate existing and future development and growth.**

Based on the foregoing analysis, the Hearings Officer finds that when Policy 4.8.2 was adopted in 2001, the board intended it to assure all Widgi Creek areas that were "physically developed" – everything except the two identified undeveloped areas – would continue in their then-current uses or would be developed with "community amenities" or "open space/recreation uses." I find that because the proposed subdivision site was not identified as within the 8-9 developable acres in Widgi Creek, was clearly designated "common area" on the Elkai Woods Townhomes Phase III Subdivision plat, and was shown on Figure 7 as developed "meeting facility and swimming pool," the proposed subdivision site is subject to the prohibition in Policy 4.8.2 against development with anything other than community amenities.

3. Otherwise Zoned for Development. The Hearings Officer finds nothing in Ordinance Nos. 2001-047 and 200-048, the RC Zone, or the RC plan policies, that "otherwise zoned" Common 18 for residential development.

The Hearings Officer finds the proposed subdivision site is subject to Policy 4.8.2 because it was "designated common area" in 2001. Therefore, I cannot approve the proposed residential subdivision. However, because I anticipate this decision will be appealed to the board and the board may elect to hear the appeal, to assist the board and county staff I have included in this decision findings concerning the proposal's

compliance with applicable provisions of the comprehensive plan and Titles 17 and 18 and ORS Chapter 92, as well as recommended conditions of approval.

SUBDIVISION STATUTES

D. Oregon Revised Statutes (ORS) Chapter 92, Subdivisions and Partitions

Replatting

1. ORS 92.185, Reconfiguration of lots or parcels and public easements; vacation; notice; utility easements.

The act of replatting shall allow the reconfiguration of lots or parcels and public easements within a recorded plat. Except as provided in subsection (5) of this section, upon approval by the reviewing agency or body as defined in ORS 92.180, replats will act to vacate the platted lots or parcels and easements within the replat area with the following conditions:

(1) A replat, as defined in ORS 92.010 shall apply only to a recorded plat.

FINDINGS: The applicant requests approval to replat a portion of the recorded Elkai Woods Townhomes III Subdivision to remove the "common area" designation for the proposed subdivision site and to plat eight new lots. The term "reconfiguration" is not defined in ORS Chapter 92. The ordinary definition of the term "configuration" is "arrangement of parts; outline." *Webster's New World Dictionary and Thesaurus, Second Edition*. Based on this definition, the Hearings Officer finds the term "reconfiguration" means the alteration of an arrangement or outline. And in the context of this statute, I find it means altering the arrangement of lots, parcels or public easements. I find removal of a common area designation on a plat does not alter the configuration of lots, parcels or easements. Therefore, I find the applicant's proposal to remove that designation does not constitute a "replat" and is not authorized under ORS Chapter 92.

(2) Notice shall be provided as described in ORS 92.225 (4) when the replat is replatting all of an undeveloped subdivision as defined in ORS 92.225.

FINDINGS: The Hearings Officer finds this requirement does not apply because the subject property is not an undeveloped subdivision as defined in ORS 92.225.

(3) Notice, consistent with the governing body of a city or county approval of a tentative plan of a subdivision plat, shall be provided by the governing body to the owners of property adjacent to the exterior boundaries of the tentative subdivision replat.

FINDINGS: As discussed in the Findings of Fact above, the county provided written notice of the applicant's proposal and the public hearing to the owners of record of all property within 250 feet of the subject property's boundary, and notice also was provided to public and private agencies. These notices were provided pursuant to Title 22, the county's procedures ordinance.

(4) When a utility easement is proposed to be realigned, reduced in width or omitted by a replat, all affected utility companies or public

agencies shall be notified, consistent with a governing body's notice to owners of property contiguous to the proposed plat. Any utility company that desires to maintain an easement subject to vacation under this section must notify the governing body in writing within 14 days of the mailing or other service of the notice.

FINDINGS: The Hearings Officer finds this requirement is not applicable because the applicant does not propose any changes to a utility easement.

(5) A replat shall not serve to vacate any public street or road.

FINDINGS: The Hearings Officer finds this requirement is not applicable because the applicant does not propose to vacate any public street or road.

(6) A replat shall comply with all subdivision provisions of this chapter and all applicable ordinances and regulations adopted under this chapter.

FINDINGS: The Hearings Officer finds the provisions of ORS Chapter 92 are implemented through Title 17 of the Deschutes County Code. Compliance with those provisions is discussed in the findings below.

2. ORS 92.190, Effect of replat; operation of other statutes; use of alternate procedures.

(1) The replat of a portion of a recorded plat <u>shall not act to vacate any recorded covenants or restrictions</u>.

*** * *.** (Emphasis added.)

FINDINGS: The Hearings Officer finds it is unclear what the statutory terms "recorded covenants and restrictions" mean. They are not defined in ORS Chapter 92. However, I concur with opponent HOAs that the term "covenant" likely means CC&Rs. The parties disagree as to whether any existing CC&Rs apply to "Common 18." In any case, I find that any CC&Rs applicable to the proposed subdivision site are not enforceable by the county. The HOAs argue the term "restrictions" in the statute is broad enough to include the provisions of Policy 4.8.2 discussed above. I disagree. I find that in its context, the terms "recorded covenants and restrictions" mean recorded documents pertaining to and running with specific real property, including land use permits and approvals, but *not* including local government land use regulations.

Finally, the HOAs argue the terms "recorded covenants and restrictions" includes the October 14, 1998 "Conditions of Approval Agreement" (No. 98-457153) recorded at Volume 571 Page 1675 of the Deschutes County Clerk's Book of Deeds (hereafter "agreement"). A copy of the agreement is included in the record as an attachment to the January 5, 2015 letter from opponents Edward and M. Jeanne Coulson. The agreement is between the county and the property owner's predecessor Yamazoe International, Inc., and was executed to assure compliance with the conditions of approval in SP-98-42 which granted site plan approval for the community amenities on "Common 18." Opponent HOAs note in their January 20, 2015 submission that Yamozoe's burden of proof for the community amenities site plan stated in relevant part:

"With the filing of site plans for the clubhouse expansion and amenities complex, the resort will finally be completed with all of the facilities and recreational amenities originally contemplated in the 1983 master plan.

* * *

The amenities complex is designed to serve the residents and guests of Widgi Creek, primarily Elkai Woods Townhomes."

Condition 13 of SP-98-42 stated:

"The applicant shall sign and enter into a Conditions of Approval Agreement with Deschutes County to ensure that all elements of the site plan shall be installed and maintained as approved. This agreement shall be approved and recorded with the Deschutes County Clerk prior to issuance of the building permit for any new structure." (Emphasis added.)

The Conditions of Approval agreement states in relevant part:

"Construction and Permanent Maintenance. If Developer is required under the Permit to construct improvements of any kind or to install landscaping or plantings and Developer elects to proceed with development under the permit, Developer agrees: (1) to undertake the construction and landscaping required under the land use permit, as more specifically set forth in the conditions set out herein and in the land use permit; and (2) in the event that this Agreement and the Permit do not expire as set forth herein, to the permanent maintenance of required landscaping and improvements."

The agreement also includes the following provisions:

Expiration. This Agreement and the Permit shall expire on its expiration date or by the revocation of the Permit or by the explicit release by the County from this Agreement granted as part of an approval for a change of use of the Real Property. Additionally, this Agreement and the Permit shall automatically expire upon the foreclosure of any prior encumbrance upon the Real Property which results in the extinguishment of this Agreement.

* * *

Persons Bound by Agreement. The original of this Agreement shall be recorded with the Deschutes County Clerk and shall run with the land. It is the intent of the parties that the provisions of this Agreement shall be binding upon the parties, the parties' successors, heirs, executors, administrators, and assigns, or any other parties deriving any right, title or interest or use in the Real Property, including any person who holds such interests as security for payment on any obligation, including the Mortgagee or other secured party in actual possession of

the Real Property by foreclosure or otherwise or any person taking title from such security holder." (Emphasis added.)[5]

The agreement does not include an expiration date, nor is there any evidence in the record that the county has released the property owner from the agreement through a change of use approval or in any other manner. Therefore, even assuming the applicant's proposal to remove the "common area" designation from the proposed subdivision site is authorized as a replat under ORS Chapter 92, the Hearings Officer finds such a replat would not vacate the conditions of approval agreement requiring the applicant to permanently maintain the required improvements to the property – i.e., the community amenities including the pool, community building, parking areas and landscaping.

For the foregoing reasons, the Hearings Officer finds the applicant's proposed partial replat of the Elkai Woods Townhomes Phase III Subdivision is not authorized under ORS 92.185, and under ORS 92.190 does not relieve the property owner of the obligation under the Conditions of Approval agreement to permanently maintain the existing community amenities on the proposed subdivision site.

LANDSCAPE MANAGEMENT ZONE STANDARDS

2. Chapter 18.84, Landscape Management Combining Zone (LM)

a. Section 18.84.020, Application of Provisions

The provisions of DCC 18.84 shall apply to all areas within one-fourth mile of roads identified as landscape management corridors in the Comprehensive Plan and the County Zoning Map. The provisions of DCC 18.84 shall also apply to all areas within the boundaries of a State scenic waterway or Federal wild and scenic river corridor and all areas within 660 feet of rivers and streams otherwise identified as landscape management corridors in the Comprehensive Plan and the County Zoning Map. This distance specified above shall be measured horizontally from the centerline of designated landscape management roadways or from the nearest ordinary high water mark of a designated landscape management river or stream. The limitations in DCC 18.84.020 shall not unduly restrict accepted agricultural practices.

FINDINGS: The proposed subdivision lots would be located within the landscape management corridor for both Cascade Lakes Highway and the Deschutes River, and therefore the LM Zone applies to the applicant's proposal.

b. Section 18.84.030, Uses Permitted Outright

Uses permitted in the underlying zone with which the LM Zone is combined shall be permitted in the LM Zone, subject to the provisions in DCC 18.84.

[5] The record indicates the property owner obtained title to "Common 18" through a conveyance by a bankruptcy trustee.

FINDINGS: Single-family dwellings are permitted outright in the SMWCR Zone, and therefore also are permitted outright in the LM Zone.

c. Section 18.84.050, Use Limitations

A. Any new structure or substantial alteration of a structure requiring a building permit, or an agricultural structure, within an LM Zone shall obtain site plan approval in accordance with DCC 18.84 prior to construction. As used in DCC 18.84 substantial alteration consists of an alteration which exceeds 25 percent in the size or 25 percent of the assessed value of the structure.

B. <u>Structures which are not visible from the designated roadway, river or stream and which are assured of remaining not visible because of vegetation, topography or existing development are exempt from the provisions of DCC 18.84.080 (Design Review Standards) and DCC 18.84.090 (Setbacks).</u> An applicant for site plan review in the LM Zone shall conform with the provisions of DCC 18.84, or may submit evidence that the proposed structure will not be visible from the designated road, river or stream. Structures not visible from the designated road, river or stream must meet setback standards of the underlying zone. (Emphasis added.)

FINDINGS: The applicant's proposal includes eight new single-family dwellings. The staff report states, and the Hearings Officer's site visit observations confirmed, that none of the proposed dwellings would be visible from Cascade Lakes Highway or the river because of the distance and the existing development, vegetation and topography between "Common 18" and the highway and river. Therefore, I find the proposed dwellings will not be visible and will remain not visible from the river and highway and accordingly are exempt from the provisions of Section 18.84.080 (Design Review Standards) and Section 18.84.090 (Setback Standards).

f. 18.84.095, Scenic Waterways

Approval of all structures in a State Scenic Waterway shall be conditioned upon receipt of approval of the State Parks Department.

FINDINGS: As discussed above, the Hearings Officer has found the proposed dwellings would be located within one-quarter mile of the Deschutes River, and therefore would be located within State Scenic Waterway for the river. I have found that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to obtain approval from the Oregon State Parks Department prior to submitting the final subdivision plat for approval.

For the foregoing reasons, and with imposition of the recommended condition of approval, the Hearings Officer finds the applicant's proposal will satisfy all applicable LM Zone standards.

SUPPLEMENTARY PROVISIONS

3. Chapter 18.116, Supplementary Provisions

a. Section 18.116.030, Off-Street Parking and Loading

A. Compliance. No building or other permit shall be issued until plans and evidence are presented to show how the off-street parking and loading requirements are to be met and that property is and will be available for exclusive use as off-street parking and loading. The subsequent use of the property for which the permit is issued shall be conditional upon the unqualified continuance and availability of the amount of parking and loading space required by this title.

FINDINGS: The submitted site plan shows there is space on each proposed subdivision lot for at least four off-street parking spaces per dwelling, including two spaces within each garage and two spaces on the driveways. Therefore, the Hearings Officer finds the applicant's proposal satisfies the off-street parking requirements discussed below under Paragraph C of this section.

B. Off-Street Loading. Every use for which a building is erected or structurally altered to the extent of increasing the floor area to equal a minimum floor area required to provide loading space and which will require the receipt or distribution of materials or merchandise by truck or similar vehicle, shall provide off-street loading space on the basis of minimum requirements as follows:

FINDINGS: The Hearings Officer finds this criterion is not applicable because the proposed dwellings do not require a loading berth.

C. Off-street parking. Off street parking spaces shall be provided and maintained as set forth in DCC 18.16.030 for all uses in all zoning districts. Such off-street parking spaces shall be provided at the time a new building is hereafter erected or enlarged or the use of a building on the effective date of DCC Title 18 is changed.

D. Number of spaces required. Off-street parking shall be provided as follows:

*** * ***

1. Residential.

Use	Requirements
One, two and three family dwellings	2 spaces per dwelling unit

FINDINGS: The applicant proposes four off-street parking spaces for each dwelling, including two spaces in the garages and two spaces on the driveways, therefore satisfying this criterion.

E. General Provisions. Off-Street Parking

1. More Than One Use on One or More Parcels. In the event several uses occupy a single structure or parcel of land, the total requirement for off-street parking shall be the sum of requirements of the several uses computed separately.

FINDINGS: The applicant proposes only a single residential use on each new residential lot. Therefore, the Hearings Officer finds this criterion is not applicable.

2. Joint Use of Facilities. The off-street parking requirements of two or more uses, structures or parcels of land may be satisfied by the same parking or loading space used jointly to the extent that it can be shown by the owners or operators of the uses, structures or parcels that their operations and parking needs do not overlap at any point of time. If the uses, structures or parcels are under separate ownership, the right to joint use of the parking space must be evidence by a deed, lease, contract or other appropriate written document to establish the joint use.

FINDING: The Hearings Officer finds this criterion is not applicable because the applicant does not propose that the off-street parking for the dwellings would be available for additional uses.

3. Location of Parking Facilities. Off-street parking spaces for dwellings shall be located on the same lot with the dwelling. Other required parking spaces shall be located on the same parcel or another parcel not farther than 500 feet from the building or use they are intended to serve, measured in a straight line from the building in a commercial or industrial zone. Such parking shall be located in a safe and functional manner as determined during site plan approval. The burden of proving the existence of such off-premise parking arrangements rests upon the applicant.

FINDINGS: The applicant's submitted site plan shows all required off-street parking spaces would be located on each proposed residential lot, therefore satisfying this criterion.

4. Use of Parking Facilities. Required parking space shall be available for the parking of operable passenger automobiles of residents, customers, patrons and employees only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.

FINDINGS: The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring that parking spaces for the dwellings be available for the parking of operable passenger automobiles of residents only and shall not be used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.

5. Parking, Front Yard. Required parking and loading spaces for multi-family dwellings or commercial and industrial uses shall not be located in a required front yard, except in the Sunriver UUC Business Park (BP) District and the La Pine UUC Business Park (LPBP) District and the LaPine UUC Industrial District (LPI), but such space may be located within a required side or rear yard.

FINDINGS: The Hearings Officer finds this criterion is not applicable because no multi-family dwellings or commercial or industrial uses are proposed.

F. Development and Maintenance Standards for Off-Street Parking Areas. Every parcel of land hereafter used as a public or private parking area, including commercial parking lots, shall be developed as follows:

1. Except for parking to serve residential uses, an off-street parking area for more than five vehicles shall be effectively screened by a sight obscuring fence when adjacent to residential uses, unless effectively screened or buffered by landscaping or structures.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the proposed parking will serve residential uses.

2. Any lighting used to illuminate off-street parking areas shall be so arranged that it will not project light rays directly upon any adjoining property in a residential zone.

FINDINGS: The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring that any lighting used to illuminate off-street parking areas be installed so that it will not project light directly upon any adjoining property.

3. Groups of more than two parking spaces shall be located and designed to prevent the need to back vehicles into a street or right of way other than an alley.

FINDINGS: At the outset, staff questions whether this criterion is applicable where, as here, the applicant is only required to provide two parking spaces per dwelling, and the parking spaces are not truly in "groups" but rather are located on adjacent residential lots. The Hearings Officer finds this subsection applies to parking lots or areas for uses that *require* more than two spaces,

and not to optional parking spaces provided on residential driveways. Read otherwise, this paragraph could prohibit the typical residential driveway design that requires vehicles to back onto a street. Therefore, I find this criterion does not apply to the applicant's proposal.

4. Areas used for standing and maneuvering of vehicles shall be paved surfaces adequately maintained for all weather use and so drained as to contain any flow of water on the site. An exception may be made to the paving requirements by the Planning Director or Hearings Body upon finding that:

a. A high water table in the area necessitates a permeable surface to reduce surface water runoff problems; or

b. The subject use is located outside of an unincorporated community and the proposed surfacing will be maintained in a manner which will not create dust problems for neighboring properties; or

c. The subject use will be in a Rural Industrial Zone or an Industrial District in an unincorporated community and dust control measures will occur on a continuous basis which will mitigate any adverse impacts on surrounding properties.

FINDINGS: The Hearings Officer finds none of the exceptions in this subsection applies to the applicant's proposal. The submitted tentative plan shows that all driveways will be paved and will connect to Seventh Mountain Drive or to the proposed private road, both of which would be paved. Opponents raised concerns about existing stormwater drainage problems in the vicinity of the subject property and potential contribution to those problems from the proposed dwellings. I find that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring that the applicant to design, construct and maintain the paved driveways so that any surface water drainage will be contained on each lot or diverted to existing storm drain facilities.

5. Access aisles shall be of sufficient width for all vehicular turning and maneuvering.

FINDINGS: The Hearings Officer finds this criterion is not applicable because no access aisles are proposed.

6. Service drives to off-street parking areas shall be designed and constructed to facilitate the flow of traffic, provide maximum safety of traffic access and egress and maximum safety of pedestrians and vehicular traffic on the site. The number of service drives shall be limited to the minimum that will accommodate and serve the traffic anticipated. Service

drives shall be clearly and permanently marked and defined through the use of rails, fences, walls or other barriers or markers. Service drives to drive in establishments shall be designed to avoid backing movements or other maneuvering within a street other than an alley.

7. Service drives shall have a minimum vision clearance area formed by the intersection of the driveway centerline, the street right of way line and a straight line joining said lines through points 30 feet from their intersection.

FINDINGS: The Hearings Officer finds these criteria are not applicable because no service drives are proposed.

8. Parking spaces along the outer boundaries of a parking area shall be contained by a curb or bumper rail placed to prevent a motor vehicle from extending over an adjacent property line or a street right of way.

FINDINGS: The Hearings Officer finds the proposed garage parking spaces will be sufficiently contained within the garage structure so that no curbs or bumpers are required.

G. Off-Street Parking Lot Design. All off-street parking lots shall be designed subject to County standards for stalls and aisles as set forth in the following drawings and table:

(SEE TABLE 1 AT END OF CHAPTER 18.116)

1. For one row of stalls use "C" + "D" as minimum bay width.

2. Public alley width may be included as part of dimension "D," but all parking stalls must be on private property, off the public right of way.

3. For estimating available parking area, use 300-325 square feet per vehicle for stall, aisle and access areas.

4. For large parking lots exceeding 20 stalls, alternate rows may be designed for compact cars provided that the compact stalls do not exceed 30 percent of the total required stalls. A compact stall shall be eight feet in width and 17 feet in length with appropriate aisle width.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose a “parking lot.”

c. Section 18.116.031, Bicycle Parking

New development and any construction, renovation or alteration of an existing use requiring a site plan review under this title for which planning approval is applied for after the effective date of Ordinance 93-005 shall comply with the provisions of this section.

A. Number and Type of Bicycle Parking Spaces Required.

1. General Minimum Standard. All uses that require off-street motor vehicle parking shall, except as specifically noted, provide one bicycle parking space for every five required motor vehicle parking spaces. Except as specifically set forth herein, all such parking facilities shall include at least two sheltered parking spaces or, where more than 10 bicycle spaces are required, at least 50 percent of the bicycle parking spaces shall be sheltered

FINDINGS: The Hearings Officer finds this criterion is not applicable because each proposed dwelling is required to have fewer than five off-street parking spaces.

d. Section 18.116.180, Building Setbacks for the Protection of Solar Access

FINDINGS: As discussed above, under Section 18.110.060(J)(2) dwellings in the proposed zero-lot-line subdivision are not subject to solar setbacks.

For the foregoing reasons, and with imposition of the recommended conditions of approval, the Hearings Officer finds the applicant's proposal will satisfy all applicable approval criteria in the supplementary provisions.

SITE PLAN REVIEW CRITERIA

4. Chapter 18.124, Site Plan Review

a. Section 18.124.030, Approval Required

A. No building, grading, parking, land use, sign or other required permit shall be issued for a use subject to DCC 18.124.030, nor shall such a use be commenced, enlarged, altered or changed until a final site plan is approved according to DCC Title 22, the Uniform Development Procedures Ordinance.

B. The provisions of DCC 18.124.030 shall apply to the following:

1. All conditional use permits where a site plan is a condition of approval;

2. Multiple-family dwellings with more than three units;

3. All commercial uses that require parking facilities;

4. All industrial uses;

5. All other uses that serve the general public or that otherwise require parking facilities, including, but not limited to, landfills, schools, utility facilities, churches, community buildings, cemeteries, mausoleums, crematories, airports, parks and recreation facilities and livestock sales yards; and

6. As specified for Flood Plain Zones (FP) and Surface Mining Impact Area Combining Zones (SMIA).

7. Non-commercial wind energy system generating greater than 15 to 100 kW of electricity.

C. The provisions of DCC 18.124.030 shall not apply to uses involving the stabling and training of equine in the EFU zone, noncommercial stables and horse events not requiring a conditional use permit.

D. Noncompliance with a final approved site plan shall be a zoning ordinance violation.

E. As a condition of approval of any action not included in DCC 18.124.030(B), the Planning Director or Hearings Body may require site plan approval prior to issuance of any permits.

FINDINGS: The applicant's proposal does not fall within any of the use categories listed in this section as requiring site plan approval. However, the Hearings Officer finds site plan approval is required for the applicant's proposal because zero-lot-line subdivisions require site plan approval under Chapter 17.20 of the subdivision ordinance. Compliance with the site plan approval criteria is addressed in the findings below.

b. Section 18.124.060, Approval Criteria

A. The proposed development shall relate harmoniously to the natural environment and existing development, minimizing visual impacts and preserving natural features including views and topographical features.

FINDINGS:

1. Natural Environment. The Hearings Officer finds the natural environment surrounding "Common 18" consists of native vegetation and topography within Widgi Creek and on surrounding public forest lands. However, I find "Common Area 18" does not include much "natural environment," having been fully developed with community amenities including a swimming pool, community building, parking areas and landscaping. However, the existing topography will be altered for the proposed eight-lot subdivision. I find the applicant's proposal

will preserve the natural topography to the extent possible considering development constraints. I also find that although the applicant's proposal will have no visual impacts on Cascade Lakes Highway or the Deschutes River. Finally, as discussed in the findings below, I have recommended that the applicant be required as a condition of approval to submit true color samples for the dwelling exterior finishes to assure they will blend with the natural environment. I find that with imposition of this condition of approval the applicant's proposal will relate harmoniously with the natural environment.

2. Existing Development. The Hearings Officer finds existing development surrounding "Common 18" consists of the rest of the Inn/Widgi Creek resort community, including residential uses, resort-related commercial uses (e.g., the clubhouse restaurant), the golf course and appurtenant facilities, tennis courts, pool, private roads and paths, and other infrastructure. Existing development close to "Common 18" consists of other Elkai Woods townhomes and the private roads serving them.

Opponents argue the applicant's proposal will not relate harmoniously with this nearby residential development for four reasons, each of which is discussed below.

a. Metal Roofs. Opponents believe the proposed metal roofs will be inconsistent with the existing non-metal townhome roofs. However, Section 18.84.080(A) of the LM Zone specifically allows metal roofing material if it is non-reflective and of a color that blends with the surrounding vegetation and landscape. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring that if the proposed dwellings have metal roofs, those roofs are non-reflective and of a color that blends with the surrounding vegetation and landscape.

b. Orientation and Style of Proposed Townhomes. Opponents argue the siting, orientation, and style of the proposed townhomes will not be harmonious with existing development surrounding "Common 18." Opponents note, and the Hearings Officer's site visit observations confirm, that "Common 18" is located at a higher elevation than land to the northeast across Elkai Woods Drive. They argue that placement of two-story townhomes on the subject site will make the new townhomes appear much larger as viewed from the homes across the road. Opponents also object to the proposed configuration of Lots 3, 4 and 5 because it would orient the townhomes on those lots so their long side elevations and decks would face the dwellings across the street – an anomalous orientation in the immediate neighborhood. The Hearings Officer understands opponents' concerns. However, I find the difference in elevation along Elkai Woods Drive is not unique in Widgi Creek. Similarly, I find there are other locations in Widgi Creek where due to road and lot layouts, dwellings are oriented so that their side elevations face onto the road.

Opponents also object to the proposed orientation of Lots 6, 7 and 8 which would have access from the proposed private road that would dead-end at the northern boundary of "Common 21" in Elkai Woods Townhomes Phase V, and as a result the garages and driveways for those three lots would be located close to the back yards of the existing townhomes in Elkai Woods Townhomes Phase V that back onto "Common 21." Based on the Hearings Officer's site visit observations and my review of the aerial photos and plats of the Widgi Creek development, it appears the proposed configuration of the private road and Lots 6, 7 and 8 is unique in that respect. I find placement of garages and driveways in such close proximity to both Common 21 and the back yards of existing townhomes will not relate harmoniously to this existing development.

c. Private Road. The applicant proposes to serve four of the subdivision lots – Lots 2, 6, 7 and 8 – with a private road. The submitted tentative plan shows this road would come off Seventh Mountain Drive at a point between proposed Lots 2 and 3, would run east for approximately 120 feet, would make a 90-degree turn to the right (south), and would dead-end adjacent to "Common 21" and the rear yards of some townhomes in Elkai Woods Townhomes Phase V. At the public hearing, the property owner testified he included this private road in the proposed subdivision because he could not obtain permission from the Elkai Woods HOAs to provide direct access to townhomes from Elkai Woods Drive. Subsequently, in response to concerns expressed by the Hearings Officer about the ability of fire trucks and other emergency vehicles to turn around at the end of the proposed private road, the applicant submitted a revised tentative plan drawing showing a "T"-shaped turnaround at the end of the private road. As discussed in the findings below under Title 17, in its comments on the applicant's proposal, the fire department stated the proposed private road configuration is acceptable to the fire department because fire trucks can reach the proposed dwellings on the private road from Elkai Woods Drive on which the fire department has permission to travel. While this configuration may be acceptable from a firefighting standpoint, the Hearings Officer finds it does not relate harmoniously to existing development by bringing a road, driveways and garages so close to "Common 21" and the back yards of nearby townhomes.

d. Removal of Amenities. Opponents argue the proposed subdivision would not be harmonious with existing residential development because it would remove the community amenities on "Common 18" that were designed and intended to serve Widgi Creek residents. Opponents submitted extensive evidence describing the history of these amenities and their use by Widgi Creek residents, as well as prior agreements between residents and the property own concerning operation and maintenance of these amenities, and ultimately unsuccessful negotiations to keep the pool facility operational. Opponents argue that for Widgi Creek truly to be considered a "resort community" it must have resort amenities in addition to the golf course. The Hearings Officer agrees with opponents that in light of Widgi Creek residents' historic and long-standing use of the "Common 18" community amenities, their removal and replacement with dwellings would not be harmonious with existing development.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal will relate harmoniously to the natural environment, preserving topographic features to the extent practicable considering development constraints. However, I find the applicant's proposal will not relate harmoniously to existing development, and therefore I find the proposal does not satisfy this criterion.

B. The landscape and existing topography shall be preserved to the greatest extent possible, considering development constraints and suitability of the landscape and topography. Preserved trees and shrubs shall be protected.

FINDINGS: As discussed above, the proposed subdivision site currently is developed with a swimming pool, community building, parking areas and landscaping. The applicant's burden of proof states relatively little grading will be required for construction of the proposed dwellings. Based on the Hearings Officer's site visit observations and review of the submitted elevation drawings, I agree with the applicant that minimal grading will be required on the proposed subdivision site. I find that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to preserve and protect all trees and shrubs not required to be removed for construction.

C. The site plan shall be designed to provide a safe environment, while offering appropriate opportunities for privacy and transition from public to private spaces.

FINDINGS: The applicant's burden of proof states with respect to this criterion:

> *"The site plan is designed to provide a safe environment for vehicular movement, pedestrians and bicycles. The roadways within the Widgi Creek development are sized and designed to accommodate shared vehicle, bicycle and pedestrian use. Given the low volume of traffic expected, Seventh Mountain Drive is fully adequate to accommodate the traffic and the ample off street parking ensures safe design and function of the subdivision with golfers and pedestrians."*

Opponents argue the applicant's proposal will not provide a safe environment because they believe Seventh Mountain Drive does not have sufficient width to handle the additional traffic that would be generated by the eight new dwellings in addition to existing vehicle, bicycle and pedestrian traffic. The Hearings Officer understands the golf cart paths generally are not available for bicycle or pedestrian traffic, particularly during the six- to seven-month golf season. As discussed in the findings below, the applicant's traffic analyses indicate traffic on Seventh Mountain Road southeast of Golf Village Loop is half the traffic northwest of Golf Village Loop (1,500 ADTs vs. 740 ADTs, respectively), with roughly half of the Seventh Mountain traffic turning at Golf Village Loop. Based on the applicant's traffic analyses, I have found Seventh Mountain Drive has the capacity to handle vehicular traffic generated by the proposed subdivision in combination with existing traffic. Because the two proposed subdivisions will add only 98 ADTs and only 9 p.m. peak hour trips to the Seventh Mountain Drive traffic, I find they will have minimal impact on the volume of traffic on the road and on shared use of the road. Therefore, I find the applicant's proposal satisfies this criterion.

D. When appropriate, the site plan shall provide for the special needs of disabled persons, such as ramps for wheelchairs and Braille signs.

FINDINGS: The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to comply with all requirements of the Americans with Disabilities Act (ADA) identified by the county during the building plan review and permitting process for the dwellings.

E. The location and number of points of access to the site, interior circulation patterns, separations between pedestrians and moving and parked vehicles, and the arrangement of parking areas in relation to buildings and structures shall be harmonious with proposed and neighboring buildings and structures.

FINDINGS: The Applicant proposes access to the dwellings from Cascade Lakes Highway via Seventh Mountain Drive, an existing private road, and a new private road off Seventh Mountain Drive. The applicant proposes off-street parking within the attached garages and on the driveways. As discussed in the findings above, opponents have raised concerns about the safety of pedestrians and bicyclists on Widgi Creek roads in general, and on Seventh Mountain Drive in particular, with the addition of traffic from the applicant's two proposed new subdivisions. The Hearings Officer has found the golf cart paths cannot provide a safe and reliable pathway for

pedestrians and bicyclists during the golf season. Nevertheless, I have found that because the proposed subdivisions will generate such minimal additional traffic, they will have minimal impact on traffic volumes on Widgi Creek roads. Therefore, I find the applicant's proposal satisfies this criterion.

F. Surface drainage systems shall be designed to prevent adverse impacts on neighboring properties, streets, or surface and subsurface water quality.

FINDINGS: The Applicant's burden of proof states all surface water drainage will be contained on site through a system of drainage swales, retention/infiltration basins, and/or culverts. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to install all surface drainage systems in conformance with the applicable Department of Environmental Quality (DEQ) design standards for such systems, and to provide to the Planning Division prior to final plat approval certification by a licensed professional engineer that drainage facilities have been designed and constructed in accordance with the current Central Oregon Stormwater Manual[6] to receive and/or transport stormwater from at least the design storm (as defined in the current Central Oregon Stormwater Manual) for all surface drainage water including stormwater coming to and/or passing through the development.

G. Areas, structures and facilities for storage, machinery and equipment, services (mail, refuse, utility wires, and the like), loading and parking and similar accessory areas and structures shall be designed, located and buffered or screened to minimize adverse impacts on the site and neighboring properties.

FINDINGS: The Hearings Officer finds all features described in this paragraph can be located within the garages and enclosed storage closets for each proposed dwelling, thereby satisfying this criterion.

H. All above-ground utility installations shall be located to minimize adverse visual impacts on the site and neighboring properties.

FINDINGS: The applicant's burden of proof states the applicant proposes to install all utilities underground with the exception of "standard above-ground power transformers and standard franchise utility pedestals and facilities." The submitted site plan does not identify the location of these proposed above-ground facilities or illustrate what they would look like or how they would be screened. Therefore, the Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to submit a revised site plan showing the location and design of any above-ground utility facilities and how they will be screened with vegetation or otherwise so that adverse visual impacts on the site and neighboring properties are minimized.

---

[6] The staff report states the manual can be found at the following website:

www.lcog.org/documents/sub_action/CentralOR_StormwaterManual_201008.pdf

I. Specific criteria are outlined for each zone and shall be a required part of the site plan (e.g. lot setbacks, etc.).

FINDINGS: Compliance with the standards in the RC and LM Zones is addressed in the findings above.

J. All exterior lighting shall be shielded so that direct light does not project off-site.

FINDINGS: The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to install all exterior lighting in compliance with the outdoor lighting ordinance in Chapter 15.10 of the Deschutes County Code, and to install all fixtures so that they are shielded and downcast to prevent direct light from projecting off-site.

K. Transportation access to the site shall be adequate for the use.

1. Where applicable, issues including, but not limited to, sight distance, turn and acceleration/deceleration lanes, right-of-way, roadway surfacing and widening, and bicycle and pedestrian connections, shall be identified.

2. Mitigation for transportation-related impacts shall be required.

3. Mitigation shall meet applicable County standards in DCC 17.16 and DCC 17.48, applicable Oregon Department of Transportation (ODOT) mobility and access standards, and applicable American Association of State Highway and Transportation Officials (AASHTO) standards.

FINDINGS: The applicant submitted as Exhibit "H" to its burden of proof a "Trip Generation Letter" dated October 15, 2014 and prepared by Ferguson & Associates and addressing both the Pool and Fairway applications. This letter concluded that since the predicted trip generation for the proposed subdivisions would be less than 20 p.m. peak hour trips (4:00 p.m. to 6:00 p.m. weekdays), no further traffic analysis is required by the county code. In his December 10, 2014 comments on the applicant's proposal, the county's Senior Transportation Planner Peter Russell stated the applicant's trip generation letter was not adequate for the following reasons:

> *"The most recent edition of the Institute of Traffic Engineers (ITE) Trip Generation Handbook indicates a Condo/Townhome (Land Use 230) generates 5.81 weekday trips per unit and 0.52 p.m. peak hour trips per unit. The proposed nine-lot subdivision would generate 52.29 daily trips (9 X 5.81). Deschutes County Code (DCC) at 18.16.310(C)(3)(a) states a site traffic report is required for a use that will generate more than 50 daily trip ends. The applicant's traffic engineer has misread the County's requirements for a Site Traffic Report. DCC 18.16.310(C)(3)(b) sets two thresholds for analysis. The first is the use will "...cause the site to generate 50-200 daily trip ends..." The 9-unit subdivision*

meets this test. The second portion of DCC 18.16.310(C)(3)(b) states "...and less than 20 peak hour trips..." The proposed use will generate 4.68 p.m. peak hour trips, which is less than 20. The applicant's traffic engineer has made the understandable mistake that 20 p.m. peak hour trips is the floor for a Site Traffic Report whereas it's actually the ceiling. This can be seen by comparing the language at DCC 18.16.310(C)(3)(c) which sets the thresholds for a Traffic Impact Study (TIA) at "more than 200 trip ends and 20 or more peak hour trips." The applicant's traffic analysis as submitted does not meet the requirements set by DCC 18.116.310(C)(3) nor contain the required elements for an STR set forth at DCC 18.116.310(D through F)."

In response to Mr. Russell's comments, the applicant submitted additional traffic analyses as attachments PH-9 and PH-10 to its January 20, 2015 submission. PH-10 is an e-mail message dated January 6, 2015 from Ferguson & Associates including a "preliminary analysis" of traffic on Seventh Mountain Drive generated by the 107 single-family dwellings and 86 townhome dwellings existing in Widgi Creek. This analysis concluded these dwellings generate 1,518 ADTs on Seventh Mountain Drive northwest of Golf Village Loop, of which 152 are p.m. peak hour trips, and 738 ADTs on Seventh Mountain Drive southeast of Golf Village Loop, of which 70 are p.m. peak hour trips. The analysis concluded this traffic "is within the range of what can be expected in a residential subdivision, which is typically up to 1,500 vehicles per day, but has been noted to exceed 3,000 vehicles per day in some circumstances."

PH-9 is a "site traffic report" dated January 12, 2015, and prepared by Ferguson & Associates. This report predicted the nine dwellings in the Fairway proposal would generate 52 average daily vehicle trips (ADTs) of which 5 would occur during the p.m. peak hour. The traffic report analyzed the impact of traffic from the Pool proposal as "in process development" and predicted it would generate 46 ADTs of which 4 would occur during the p.m. peak hour. Therefore, the total predicted traffic from the two subdivisions would be 98 ADTs of which 9 trips would be during the p.m. peak hour. The traffic analysis concluded the two Seventh Mountain Drive intersections that would be affected by this additional traffic – Cascade Lakes Highway and Golf Village Loop – would continue to function at acceptable levels of service. The analysis also concluded site and stopping distances at both intersections are adequate.

Based on the applicant's January 2015 traffic analyses, the Hearings Officer finds the addition of traffic predicted to be generated by the applicant's proposed eight-lot subdivision will not exceed the capacity of affected transportation facilities, and therefore no mitigation is required.

c. Section 18.124.070, Required Minimum Standards

A. Private or shared outdoor recreation areas in residential developments.

1. Private Areas. Each ground-level living unit in a residential development subject to site plan approval shall have an accessible outdoor private space of not less than 48 square feet in area. The area shall be enclosed, screened or otherwise designed to provide privacy for unit residents and their guests.

FINDINGS: The applicant's burden of proof states the proposed dwellings will have ground-level spaces with accessible private outdoor patios and yards in excess of 48 square feet in size. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval

should be subject to a condition of approval requiring the applicant to provide these private areas for each dwelling.

2. Shared Areas. Usable outdoor recreation space shall be provided for the shared use of residents and their guests in any apartment residential development, as follows:

a. Units with one or two bedrooms: 200 square feet per unit.
b. Units with three or more bedrooms: 300 square feet per unit.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant does not propose any apartment residential development.

3. Storage. In residential developments, convenient areas shall be provided for the storage of articles such as bicycles, barbecues, luggage, outdoor furniture, etc. These areas shall be entirely enclosed.

FINDINGS: The applicant's burden of proof states each dwelling (all over 3,000 square feet in size) will have adequate storage within the dwelling and two-car garage to accommodate the listed items. The Hearings Officer finds the applicant's proposal satisfies this criterion.

B. Required Landscaped Areas

1. The following landscape requirements are established for multi-family, commercial and industrial developments, subject to site plan approval:

a. A minimum of 15 percent of the lot area shall be landscaped.

b. All areas subject to the final site plan and not otherwise improved shall be landscaped.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the applicant's proposal is for single-family dwellings and not a multi-family, commercial or industrial development.

2. In addition to the requirement of DCC 18.124.070(B)(1)(a), the following landscape requirements shall apply to parking and loading areas:

a. A parking or loading area shall be required to be improved with defined landscaped areas totaling no less than 25 square feet per parking space.

b. In addition to the landscaping required by DCC 18.124.070(B)(2)(a), a parking or loading area shall be separated from any lot line adjacent to a roadway by a landscaped strip at least 10 feet in width, and from any other lot line by a landscaped strip at least five feet in width.

c. A landscaped strip separating a parking or loading area from a street shall contain:

1) Trees spaced as appropriate to the species, not to exceed 35 feet apart on the average.

2) Low shrubs not to reach a height greater than three feet zero inches, spaced no more than eight feet apart on the average.

3) Vegetative ground cover.

d. Landscaping in a parking or loading area shall be located in defined landscaped areas which are uniformly distributed throughout the parking or loading area.

e. The landscaping in a parking area shall have a width of not less than five feet.

f. Provision shall be made for watering planting areas where such care is required.

g. Required landscaping shall be continuously maintained and kept alive and attractive.

h. Maximum height of tree species shall be considered when planting under overhead utility lines.

FINDINGS: In previous decisions, the Hearings Officer has held that unlike the requirements of Paragraph (B)(1) of this section that apply only to multi-family and commercial uses, the requirements in Paragraph (B)(2) of this section apply to all uses. However, the staff report questions whether the standards in Paragraph (B)(2) should apply where, as here, the required "parking area" consists of two off-street parking spaces within an enclosed garage. I find that for this reason the standards in Paragraph (B)(2) do not apply to required off-street parking spaces for single-family dwellings.

C. Nonmotorized Access.

1. Bicycle Parking. The development shall provide the number and type of bicycle parking facilities as

required in DCC 18.116.031 and 18.116.035. The location and design of bicycle parking facilities shall be indicated on the site plan.

FINDINGS: Compliance with bicycle parking requirements is discussed in the findings above. The Hearings Officer has found that because only two off-street parking spaces are required for each proposed dwelling no bicycle parking is required.

2. Pedestrian Access and Circulation

a. Internal pedestrian circulation shall be provide in new commercial, office and multi-family residential developments through the clustering of buildings, construction of hard surface pedestrian walkways, and similar techniques.

b. Pedestrian walkways shall connect building entrances to one another and from building entrances to public streets and existing or planned transit facilities. On site walkways shall connect with walkways, sidewalks, bikeways, and other pedestrian or bicycle connections on adjacent properties planned or used for commercial, multi family, public or park use.

c. Walkways shall be at least five feet in paved unobstructed width. Walkways which border parking spaces shall be at least seven feet wide unless concrete bumpers or curbing and landscaping or other similar improvements are provided which prevent parked vehicles from obstructing the walkway. Walkways shall be as direct as possible.

d. Driveway crossings by walkways shall be minimized. Where the walkway system crosses driveways, parking areas and loading areas, the walkway must be clearly identifiable through the use of elevation changes, speed bumps, a different paving material or other similar method.

e. To comply with the Americans with Disabilities Act, the primary building entrance and any walkway that connects a transit stop to building entrances shall have a maximum slope of five percent. Walkways up to eight percent slope are permitted, but are treated as ramps with special standards for railings and landings.

FINDINGS: The applicant's burden of proof states these criteria do not apply because the applicant does not propose new office, commercial or multi-family residential developments. The

staff report states staff previously has interpreted this section to require compliance with Paragraph (a) only for multi-family residential developments, but to require compliance with Paragraphs (b) through (e) for all developments subject to site plan review. The Hearings Officer finds the wording of this subsection is somewhat ambiguous. Nevertheless, I find that reading the subsection as a whole strongly suggests that it was not intended to apply to individual dwellings requiring site plan approval. For example, Paragraph (b) addresses connections between multi-family dwelling buildings. Paragraphs (b) and (e) address multiple building entrances. And Paragraph (d) discusses speed bumps and other features typically found in commercial or multi-family parking and maneuvering areas. For these reasons, I find this subsection does not apply to the applicant's proposal.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal does not satisfy all applicable site plan approval criteria.

SUBDIVISION STANDARDS

C. Title 17 of the Deschutes County Code, the Subdivision/Partition Ordinance

1. Chapter 17.20, Zero Lot Line Subdivision

a. Section 17.20.010, Requirements

In addition to the general provisions for subdivision and partitioning set forth in DCC Title 17, any application for a zero lot line subdivision or partition shall meet the following requirements:

A. The tentative plan shall indicate all lot divisions, including those along the common wall of duplex units.

FINDINGS: The applicant proposes an eight-lot, zero-lot-line subdivision. The submitted tentative plan shows all lot divisions for the proposed development. The record indicates there are no duplexes with common walls.

B. Independent utility service shall be provided to each unit, including, but not limited to, water, electricity and natural gas, unless common utilities are approved by the affected utility agency and are adequately covered by easements.

FINDINGS: The applicant proposes to provide independent utility service including sewer, water, electricity, cable, and phone service to each lot. The Hearings Officer is aware electricity, cable, and telephone infrastructure already exists in Widgi Creek and in the Elkai Woods neighborhood in which the proposed dwellings would be sited. I find that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to install these utility service facilities for each dwelling.

C. Prior to the granting of final approval for creation of a zero lot line subdivision or partition, the Planning Director shall require the applicant(s) to enter into a written agreement in a form approved by the County Legal Counsel that establishes the rights, responsibilities and liabilities of the parties with respect to maintenance and use of any common areas of the unit, such as, but not limited to, common walls, roofing, water

pipes and electrical wiring. Such agreement shall be in a form suitable for recording, and shall be binding upon the heirs, executors, administrators and assigns of the parties.

FINDINGS: The applicant's burden of proof states the proposed Covenants, Conditions and Restrictions (CC&Rs) for the proposed eight-lot subdivision will be similar to the CC&Rs approved for the Elkai Woods Townhomes development and will be refined as necessary prior to final plat approval. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring that prior to final plat approval the applicant must submit draft CC&Rs for the proposed subdivision to the Deschutes County Legal Counsel for its review and approval, and record the CC&Rs with the Deschutes County Clerk following legal counsel's approval.

Opponents questioned whether and how any new HOA formed for the proposed new subdivision will coordinate with the three existing HOAs. The Hearings Officer finds that given the adverse positions of the applicant and the HOAs in this and the Fairway application, it is unlikely any of the HOAs would be interested in assuming responsibility for the proposed new subdivision. Nevertheless, I find that potential conflicts among the HOAs are not a reason to deny the applicant's proposal.

D. Each zero lot line subdivision or partition proposal shall receive site plan approval prior to submission of the final plat. Site plan approval shall be granted only upon a finding that the design, materials and colors proposed for each dwelling are harmonious and do not detract from the general appearance of the neighborhood.

FINDINGS: The applicant has applied for site plan approval. However, as discussed in the findings above, the Hearings Officer has found the applicant's proposal does not satisfy all applicable site plan approval criteria.

The submitted burden of proof does include elevation drawings for the proposed dwellings, showing the townhomes are designed to resemble single-family dwellings. The applicant has stated exterior building materials will include natural stone and wood timbers, and exterior colors will be muted earth tones to blend with the natural environment and the structures within the Widgi Creek resort. Opponents argue the proposed metal roofs are incompatible with nearby residential development. However, as discussed in the site plan findings above, the Hearings Officer has found Section 18.84.080(A) specifically allows metal roofing material if it is non-reflective and of a color that blends with the surrounding vegetation and landscape.

2. Chapter 17.16, Approval of Subdivision Tentative Plans and Master Development Plans

a. Section 17.16.100, Required Findings for Approval

A tentative plan for a proposed subdivision shall not be approved unless the Planning Director or Hearings Body finds that the subdivision as proposed or modified will meet the requirements of DCC Title 17 and DCC Title 18 through 21, and is in compliance with the comprehensive plan. Such findings shall include, but not be limited to, the following:

A. The subdivision contributes to orderly development and land use patterns in the area, and provides for the preservation of natural features and resources such as streams, lakes, natural vegetation, special terrain features, agricultural and forest lands and other natural resources.

FINDINGS:

1. Orderly Development. The Hearings Officer finds that for purposes of this approval criterion, "orderly development" is development that is served by adequate public facilities and services and utilities. The applicant proposes to develop an eight-lot, zero-lot-line subdivision that will have access from Cascade Lakes Highway via Seventh Mountain Drive, a private road improved to the county's private road standards, and a new private road off Seventh Mountain Drive. The proposed dwellings will receive water from the SMGV Water Co. water system, will be served by the City of Bend sewer system, and will have utility services through extension of existing utility facilities serving the adjacent developments. Therefore, I find the proposed subdivision will contribute to orderly development in the area.

2. Land Use Patterns. The existing land use pattern in the larger area surrounding the subject property consists of resort and residential development within the Inn/Widgi Creek. The staff report states, and the based on the Hearings Officer's site visit observations I agree, that existing residential development reflects a variety of dwelling styles and densities, and surrounding development includes private roads, resort amenities such as the clubhouse, tennis courts and pool, and the Widgi Creek Golf Course. I find the proposed townhomes will be of comparable size to many of the detached single-family dwellings in Widgi Creek and will be similar to the existing townhome developments in Elkai Woods.

Opponents argue the proposed subdivision will conflict with the existing land use pattern in the immediate vicinity by orienting some townhomes so that their long side elevations face other townhomes, by orienting the lots and townhomes on the proposed private road so that their garages and driveways are in close proximity to "Common 21" and the rear yards of adjacent townhomes, and by removing the existing community amenities from "Common 18." As discussed in the site plan findings above, the Hearings Officer has found the configuration of the proposed private road and the orientation of the lots thereon, as well as removal of the existing community amenities, render the proposed subdivision inharmonious with existing development. For those same reasons, I find the proposed subdivision also does not contribute to the existing land use pattern, but rather conflicts with it.

3. Preservation of Natural Features and Resources. The record indicates the proposed subdivision site does not have any streams or special terrain features. The Widgi Creek development has man-made lakes and other features, native vegetation including scattered pine trees and native brush and grasses, as well as introduced landscaping such as golf course tees, fairways and greens. The proposed subdivision site is located within the LM Zone associated with Cascade Lakes Highway and the Deschutes River. The Hearings Officer has found that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to preserve and protect existing vegetation not required to be removed for construction. I find that with imposition of this condition of approval the Applicant's proposal will preserve natural features and resources.

For the foregoing reasons, the Hearings Officer finds the applicant's proposal does not satisfy this criterion.

B. The subdivision will not create excessive demand on public facilities and services, and utilities required to serve the development.

FINDINGS: Public facilities and services affected by the proposed subdivision include domestic water, sewer, roads, storm drainage, police and fire protection, and schools. Each of these facilities and services is addressed in the findings below.

1. Domestic Water. The applicant's burden of proof states the proposed subdivision will be served by the existing Widgi Creek Water System which is a shared system owned by SMGV Water Company and Bhelm, LLC. The well permit for this water system is included as Exhibit G to the applicant's burden of proof. The burden of proof states the water system is supplied by ground wells permitted through the OWRD with water quality and distribution regulated under Oregon's Drinking Water Quality Act, administered by the Drinking Water Services (DWS) division of the Oregon Health Authority. The applicant states the well permit is for a total of 107 single family dwellings, 103 condominiums, and 130.9 acres of irrigation, commercial uses and ponds. The applicant states that because currently there are 107 single family residential lots and 86 townhomes platted at Widgi Creek, there remain 17 "condominium" units on the current well permit. The proposed subdivision would add nine residential units.

The staff report questions whether the proposed townhome units, at over 3,000 square feet in size, reasonably can be considered "condominium" units for purposes of the well permit. The Hearings Officer assumes staff's concern relates to the amount of water usage predicted for different types of dwellings. In addition, opponents testified about occasional drops in water pressure in Widgi Creek. I understand staff's and opponents' concerns about water capacity, particularly in light of the board's intent, discussed in the comprehensive plan findings above, that future residential development in Widgi Creek be limited by water and sewer capacity. For this reason, I find that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to provide to the Planning Division written documentation from the SMGV Water Company that there is sufficient capacity in the water system and well permit to serve the eight dwellings proposed in this application and the nine dwellings proposed in the applicant's Fairway application.

2. Sewer. The applicant's burden of proof states the proposed subdivision would be served by an extension of and connection to City of Bend sewer facilities pursuant to the existing sewer service agreements between the city and SMGA Partnership (1992) and Widgi Creek, included in Exhibit "C" to the applicant's burden of proof. The applicant proposes that sewer service lines be extended to each lot in accordance with the city's standards and specification. Included as Exhibit "F" to the applicant's burden of proof is a "Sewer Analysis Memo" dated July 14, 2014 and prepared by the city's Engineering Division. The memo states the following with respect to the applicant's Fairway application:

> *"Existing Pool Site – There is an existing 8-inch gravity main located on the western boundary of the proposed development site within Seventh Mountain Drive. There is a proposed sewer mainline within the development site. It is assumed for the sake of analysis that flows generated by this development shall be directed to said pipe. A peak summer day average flow rate of* ***1.53 GPM*** [gallons per minute] *was assumed for the sake of modeling the development of 8*

single family lots (8 EDUs [equivalent dwelling units] *@ 0.19 GMP/DU) as provide by the applicant."* (Bold and underlined emphasis in original.)

The memo stated the city did not identify any areas of concern in its analysis, but that the applicant would be required to upgrade the city's existing lift station on the Widgi Creek Golf Course prior to final plat approval. The memo also stated the applicant would be required to submit a new sewer analysis application when "the final locations of the 38 lots" for which the applicant requested sewer service in Widgi Creek are determined.[7] The Hearings Officer finds the city's sewer analysis memo indicates there is sufficient sewer system capacity to serve the nine proposed lots. I find that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring that before final plat approval the applicant submit a new sewer analysis memo from the city documenting that sewer capacity is still available, and written documentation from the city that all required upgrades to the aforementioned lift station have been completed.[8]

Opponent HOAs argue extension of city sewer service to the proposed subdivision requires an exception to Goal 11, Public Facilities and Services, because they claim the original extension of sewer to the Inn/Widgi was not under an approved Goal 11. They are mistaken. The record includes a copy of Ordinance No. 90-039 through which the county took a "reasons" exception to Goal 11 to allow the extension of city sewer facilities to Seventh Mountain Golf Village and the Inn of the Seventh Mountain. The ordinance also adopted an amendment to the comprehensive plan adding the following paragraph:

> **The County shall not allow <u>any further connection</u> to the sewer line extended to the Inn of the Seventh Mountain destination resort outside of the City of Bend's acknowledged urban growth boundary.** (Emphasis added.)

The HOAs apparently believe the above-underscored language precludes serving the applicant's proposed subdivision with city sewer. The Hearings Officer disagrees. The findings in support of the exception include the following:

> "***<u>BASIC FINDINGS:</u>***
>
> * * *
>
> *9. The interest in the sewer line extension arises from The Inn's plans for a 237-acre expansion, which was authorized pursuant to case files M-83-1 and CU-83-107, and which was last modified in file MC-88-1. The project is scheduled for completion by December 31, 1991.*
>
> * * *

---

[7] Opponents expressed concern about the applicant's reservation of sewer capacity for 38 additional dwellings in Widgi Creek and questioned where all of those dwellings would be located. The Hearings Officer finds I need not address that issue because the only applications before me are the Fairway and Pool applications that together propose 17 dwelling units.

[8] The July 2014 sewer memo states its analysis is valid for six months, and therefore it would have expired in January of 2015. The applicant submitted into the record as an attachment to its January 20, 2015 submission, an electronic mail message dated January 13, 2015 from the city's engineer stating the sewer capacity reserved for Widgi Creek continues to be reserved from the date of the applicant's land use application.

CONCLUSIONARY FINDINGS:

2. ** * * [T]he use of the sewer line will be limited to The Inn of the Seventh Mountain, an existing resort whose expansion has been reviewed and approved in conformance with all local land use regulations. Therefore, the expansion of this key facility to the resort is consistent with the capabilities of the land and planned growth of the community.*

3. *The purpose of the amendment is to allow a specific user, The Inn of the Seventh Mountain, to connect to the City of Bend's sewerage system. * * **

4. *The proposed amendment would allow The Inn to replace or substitute the current on-site sewage disposal system with the City's sewage system. * * * The amendment would not result in the establishment of any new use, it would only alter the method of sewage disposal and the provider of that service. For these reasons, the requirements of OAR 660-04-020(2)(c)["*reasons" exception] *are satisfied."* (Bold and underscored emphasis in original.)

The Hearings Officer finds it is clear from these findings that the county took an exception to Goal 11 to extend city sewer service to what is now Widgi Creek – i.e., the approved 237-acre expansion to the original Inn of the Seventh Mountain -- and therefore the plan language prohibiting "any further connection" to the sewer line extended to the Inn/Widgi applies to any uses other than the Inn/Widgi resort.

3. Storm Drainage. The applicant's burden of proof states all surface water drainage will be contained on site through a system of a system of drainage swales, retention/infiltration basins, and/or culverts. As discussed in the findings above, the Hearings Officer has found that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to install all surface drainage systems in conformance with the applicable DEQ design standards for such systems, and to provide to the Planning Division before final plat approval certification by a licensed professional engineer that drainage facilities have been designed and constructed in accordance with the current Central Oregon Stormwater Manual.

4. Roads. The applicant proposes access to the new subdivision dwellings from Cascade Lakes Highway via the existing Seventh Mountain Drive and a new private road off Seventh Mountain Drive. As discussed in the findings above, incorporated by reference herein, the Hearings Officer has found that based on the applicant's January, 2015 traffic analyses, traffic predicted to be generated by the proposed eight new dwellings will not exceed the capacity of Seventh Mountain Drive or its intersections with Golf Village Loop and Cascade Lakes Highway.

5. Police Protection. Widgi Creek is served by the Deschutes County Sheriff who did not comment on the applicant's proposal.

6. Fire Protection. In his December 26, 2014 comments on the applicant's proposal, Bend Fire Marshal Larry Medina identified a number of applicable standards in the Oregon Fire Code applicable to the proposed new subdivision, including requirements for fire apparatus access roads, fire protection water supplies, and visible address numbers. The Hearings Officer finds

that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to assure the subdivision complies with all requirements identified by the fire department, and to submit to the Planning Division prior to final plat approval written documentation from the fire department that all such requirements have been met.

7. Schools. The Hearings Officer finds Widgi Creek is located within the boundaries of the Bend-LaPine School District. The district did not submit comments on the applicant's proposal. However, I am aware the district responds in a variety of ways to accommodate additional students who may move into new developments. In particular, the school district typically requests that roads within the development have sidewalks to accommodate student pedestrians, and that the developer be required to provide the school district with a perpetual easement to allow school district vehicles to travel across private roads. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring that the applicant record a perpetual easement allowing Bend-LaPine School District vehicles to travel across Seventh Mountain Drive.

8. Utilities. The Hearings Officer finds utilities including electric, cable and telephone service are available to the proposed subdivision because they currently are provided to existing development within Widgi Creek.

For the foregoing reasons, and with imposition of the recommended conditions of approval, the Hearings Officer finds the applicant's proposal will not create excessive demand on public facilities and services and utilities.

C. The tentative plan for the proposed subdivision meets the requirements of ORS 92.090.

FINDINGS: ORS 92.090(1) states a new subdivision can only use the same name if it is a continuation of an existing subdivision, with a sequential numbering system, and must either be platted by the same party or have the consent of the previous party. The applicant is requesting approval of an eight-lot, zero-lot-line subdivision that would be a partial replat of Elkai Woods Townhomes Phase III.
Subsection (2) of this statute requires that roads be laid out to conform with existing plats on adjoining property, that streets and roads held for private use are clearly indicated on the tentative plan, and that all reservations or restrictions relating to such private roads and streets are set forth on the plat. There are adjoining platted residential lots surrounding the proposed subdivision site. However, the Hearings Officer finds the applicant need not conform the proposed subdivision to the adjacent platted lots because those lots have direct access from Seventh Mountain Drive or Elkai Woods Drive. As discussed above, the proposed subdivision lots would take access from Seventh Mountain Drive, an existing private road within Widgi Creek, and a new private road off Seventh Mountain Drive. I find that if this subdivision is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to show on the final plat the private road status of Seventh Mountain Drive and any public easements.

The Hearings Officer finds Subsections (3), (4) and (5) of the statute relate to final platting and therefore are not applicable to the applicant's proposal for tentative plan approval.

D. For subdivision or portions thereof proposed within a Surface Mining Impact Area (SMIA) zone under DCC Title 18, the

subdivision creates lots on which noise or dust sensitive uses can be sited consistent with the requirements of DCC 18.56, as amended, as demonstrated by the site plan and accompanying information required under DCC 17.16.030.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is not within a SMIA Zone.

E. The subdivision name has been approved by the County Surveyor.

FINDINGS: The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to obtain approval of the subdivision name from the Deschutes County Surveyor.

c. Section 17.16.105, Access to Subdivisions

No proposed subdivision shall be approved unless it would be accessed by roads constructed to County standards and by roads accepted for maintenance responsibility by a unit of local or state government. This standard is met if the subdivision would have direct access to an improved collector or arterial, or in cases where the subdivision has no direct access to such a collector or arterial, by demonstrating that the road accessing the subdivision from a collector or arterial meets relevant County standards and has been accepted for maintenance purposes.

FINDINGS: The proposed subdivision would have frontage on Seventh Mountain Drive, a private road platted as part of the Seventh Mountain Golf Village Subdivision, Tract A, which connects to Cascade Lakes Highway, an ODOT-maintained arterial road. In addition, four of the proposed eight subdivision lots would have access from a new private road connecting with Seventh Mountain Drive. In its comments on the applicant's proposal, the road department stated all private roads providing access to the proposed subdivision meet, or must meet, the county's private road standards. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to improve the new private road to the county's private road standards.

3. Chapter 17.36, Design Standards

a. Section 17.36.020, Streets

A. The location, width and grade of streets shall be considered in their relation to existing and planned streets, topographical conditions, public convenience and safety, and the proposed use of land to be served by the streets. The street system shall assure an adequate traffic circulation system for all modes of transportation, including pedestrians, bicycles, and automobiles with intersection angles, grades, tangents, and curves appropriate for traffic to be carried, considering the terrain. The subdivision or partition shall provide for the continuation of the principal streets existing in the adjoining

subdivision or partition or of their property projection when adjoining property which is not subdivided, and such streets shall be of a width not less than the minimum requirement for streets set forth in this chapter.

FINDINGS: The proposed subdivision would have frontage on and access from Cascade Lakes Highway, an ODOT-maintained arterial road, with residential lot access via the existing Seventh Mountain Drive, a private road platted as Tract A in the Seventh Mountain Golf Village Subdivision and improved in accordance with the county's standards for private roads. In addition, four of the proposed subdivision lots would have access from a new private road connecting with Seventh Mountain Drive. As discussed above, the Hearings Officer has found the location and configuration of the proposed new private road do not relate harmoniously to existing development and do not contribute to the land use pattern in the area, and therefore the proposed new road does not satisfy the relevant site plan or subdivision approval criteria. I find there are no principal streets in adjoining subdivisions that must be continued in the proposed new subdivision. I find that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to improve the new private road in accordance with the county's private road standards.

B. Streets in subdivisions shall be dedicated to the public, unless located in a destination resort, planned community or planned or cluster development, where roads can be privately owned. Planned developments shall include public streets where necessary to accommodate present and future through traffic.

FINDINGS: The subject property is located in a RC Zone where private roads are allowed under Section 18.110.060(J)(1). The applicant proposes a new private road to serve four of the proposed eight lots. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to improve the private road in accordance with the county's private road standards.

b. Section 17.36.040, Existing Streets

Whenever existing streets, adjacent to or within a tract, are of inadequate width to accommodate the increase in traffic expected from the subdivision or partition or by the County roadway network plan, additional rights of way shall be provided at the time of the land division by the applicant. During consideration of the tentative plan for the subdivision or partition, the Planning Director or Hearings Body, together with the Road Department Director, shall determine whether improvements to existing streets adjacent to or within the tract, are required. If so determined, such improvements shall be required as a condition of approval for the tentative plan. Improvements to adjacent streets shall be required where traffic on such streets will be directly affected by the proposed subdivision or partition.

FINDINGS: Neither the road department nor the county's Senior Transportation Planner identified any required right-of-way or improvements to Seventh Mountain Drive, Elkai Woods Drive, or Cascade Lakes Highway to accommodate traffic generated by the proposed

subdivision. Nevertheless, opponents expressed concern that Seventh Mountain Drive is not wide enough to accommodate additional traffic from the proposed subdivision along with existing traffic. As discussed in the findings above, based on the applicant's traffic analyses the Hearings Officer has found the proposed subdivision will add such a small amount of additional traffic to Seventh Mountain Drive that the road's capacity will not be exceeded, and the intersections of Seventh Mountain Drive with Cascade Lakes Highway and Golf Village Loop will continue to function at acceptable levels of service. Therefore, I find the applicant will not be required to construct any improvements to Seventh Mountain Drive, Elkai Woods Drive, or Cascade Lakes Highway. However, if the applicant's proposal is approved on appeal, I find such approval should be subject to a condition of approval requiring the applicant to improve the new private road in accordance with the county's private road standards.

c. Section 17.36.050, Continuation of Streets

Subdivision or partition streets which constitute the continuation of streets in contiguous territory shall be aligned so that their centerlines coincide.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the proposed new subdivision street is not a continuation of existing streets in contiguous territory.

d. Section 17.36.060, Minimum Right of Way and Roadway Width

The street right of way and roadway surfacing widths shall be in conformance with standards and specifications set forth in DCC 17.48. Where DCC 17.48 refers to street standards found in a zoning ordinance, the standards in the zoning ordinance shall prevail.

FINDINGS: The applicant's proposal includes a new private road to serve four of the eight proposed lots. The Hearings Officer has found that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to improve the new road in accordance with the county's private road standards, including a 20-foot wide paved surface. The other four proposed subdivision lots would have frontage on and access from Seventh Mountain Drive. The record indicates Seventh Mountain Drive is improved with 20 feet of paved surface as required for private roads in Table A of Title 17. The Hearings Officer finds neither the RC nor WA Zone establishes street standards. Compliance with the private road standards in Section 17.48.180 is discussed in the findings below.

e. Section 17.36.080, Future Extension of Streets

When necessary to give access to or permit a satisfactory future division of adjoining land, streets shall be extended to the boundary of the subdivision or partition.

FINDINGS: The Hearings Officer finds all land surrounding the proposed subdivision site is platted and developed with existing subdivision lots and dwellings. Therefore, I find it is unlikely there will be future division of adjoining land or development with other uses. I find adjoining land on each side of the proposed subdivision site has frontage on and access to either Seventh Mountain Drive or Elkai Woods Drive.

f. Section 17.36.120, Street Names

Except for extensions of existing streets, no street name shall be used which will duplicate or be confused with the name of an existing street in a nearby city or in the County. Street names and numbers shall conform to the established pattern in the County and shall require approval from the County Property Address Coordinator.

FINDINGS: The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to obtain county approval of the name for the new private road.

g. Section 17.36.130, Sidewalks

*** * ***

C. Sidewalk requirements for areas outside of urban areas are set forth in DCC 17.48.175. In the absence of a special requirement set forth by the Road Department Director under DCC 17.48.030, sidewalks and curbs are never required in rural areas outside unincorporated communities as that term is defined in DCC Title 18.

FINDINGS: The subject property is located in an unincorporated community and therefore this criterion is applicable. Compliance with the provisions of Chapter 17.48 is addressed in the findings below.

h. Section 17.36.140, Bicycle, Pedestrian and Transit Requirements

A. Pedestrian and Bicycle Circulation within Subdivision.

1. The tentative plan for a proposed subdivision shall provide for bicycle and pedestrian routes, facilities and improvements within the subdivision and to nearby existing or planned neighborhood activity centers, such as schools, shopping areas and parks in a manner that will:

a. Minimize such interference from automobile traffic that would discourage pedestrian or cycle travel for short trips;

b. Provide a direct route of travel between destinations within the subdivision and existing or planned neighborhood activity centers, and

c. Otherwise meet the needs of cyclists and pedestrians, considering the destination and length of trip.

FINDINGS: The staff report questions whether the provisions of this paragraph apply where, as here, Widgi Creek includes an existing shared-use road system connecting dwellings with resort amenities. Staff also questions whether residents of the proposed dwellings will have legal access to this resort-wide path system. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to submit to the Planning Division before final plat approval written documentation (such as recorded easements) showing residents of the proposed dwellings will have legal access to all paths leading to resort amenities.

2. Subdivision Layout.

a. Cul-de-sacs or dead-end streets shall be allowed only where, due to topographical or environmental constraints, the size and shape of the parcel, or a <u>lack of through-street connections in the area, a street connection is determined by the Planning Director or Hearings Body to be infeasible or inappropriate.</u> In such instances, <u>where applicable and feasible</u>, there shall be a bicycle and pedestrian connection connecting the ends of cul-de-sacs to streets or neighborhood activity centers on the opposite side of the block.

b. Bicycle and pedestrian connections between streets shall be provided at mid-block where the addition of a connection would reduce the walking or cycling distance to an existing or planned neighborhood activity center by 400 feet and by at least 50 percent over other available routes.

c. Local roads shall align and connect with themselves across collectors and arterials. Connections to existing or planned streets and undeveloped properties shall be provided at no greater than 400-foot intervals.

d. Connections shall not be more than 400 feet long and shall be as straight as possible.

FINDINGS: The Hearings Officer finds these criteria are applicable to the applicant's proposal because it includes a proposed new private road that would dead-end at the southern boundary of the proposed subdivision site. I find the proposed dead-end street is justified under Paragraph (2)(a) of this section because of the lack of through-street connections in the area. I also find no bicycle and pedestrian connection at the end of the new private road is feasible because the new road would dead end at the boundary of "Common 21" and near the rear yards of several existing townhomes.

3. Facilities and Improvements.

a. Bikeways may be provided by either a separate paved path or an on-street bike lane, consistent with the requirements of DCC Title 17.

b. Pedestrian access may be provided by sidewalks or a separate paved path, consistent with the requirements of DCC Title 17.

c. Connections shall have a 20-foot right of way, with at least a 10-foot usable surface.

FINDINGS: Again, the staff report questions whether the existing shared-use road system in Widgi Creek will satisfy this criterion by being available to residents of the proposed dwellings. As discussed in the findings above, the Hearings Officer has found that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to provide to the Planning Division prior to final plat approval written documentation (such as recorded easements) showing residents of the proposed dwellings will have legal access to all shared-use roads leading to resort amenities.

i. Section 17.36.150, Blocks

A. General. The length, width and shape of blocks shall accommodate the need for adequate building site size, street width and direct travel routes for pedestrians and cyclists through the subdivision and to nearby neighborhood activity centers, and shall be compatible with the limitations of the topography.

FINDINGS: The Hearings Officer finds this criterion is not applicable because there is no grid system with typical blocks in Widgi Creek.

B. Size. Within an urban growth boundary, no block shall be longer than 1,200 feet between street centerlines. In blocks over 800 feet in length, there shall be a cross connection consistent with the provisions of DCC 17.36.140.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is located outside of an urban growth boundary.

j. Section 17.36.160, Easements

A. Utility Easements. Easements shall be provided along property lines when necessary for the placement of overhead or underground utilities, and to provide the subdivision or partition with electric power, communication facilities, street lighting, sewer lines, water lines, gas lines or drainage. Such easements shall be labeled "Public Utility Easement" on the tentative and final plat; they shall be at least 12 feet in width and centered on lot lines where possible, except utility pole

guyline easements along the rear of lots or parcels adjacent to unsubdivided land may be reduced to 10 feet in width.

B. Drainage. If a tract is traversed by a watercourse such as a drainageway, channel or stream, there shall be provided a stormwater easement or drainage right of way conforming substantially with the lines of the watercourse, or in such further width as will be adequate for the purpose. Streets or parkways parallel to major watercourses or drainageways may be required.

FINDINGS: The applicant has proposed to show all utility easements on the final subdivision plat, and the Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to do so. The applicant proposes that the dwellings be served by City of Bend sewer facilities pursuant to a sewer service license/agreement between the applicant and the city. The record indicates there are no water courses such as a drainage way, channel or stream on the proposed subdivision site.

k. Section 17.36.170, Lots-Size and Shape

The size, width and orientation of lots or parcels shall be appropriate for the location of the land division and for the type of development and use contemplated, and shall be consistent with the lot or parcel size provisions of DCC Title 18 through 21.

FINDINGS: The Hearings Officer finds the size, width and orientation of the proposed lots are appropriate for townhomes. However, as discussed in the findings above, I have found the proposed configuration of the new private road, and orientation of Lots 6, 7 and 8 so that their garages and driveways are in close proximity to "Common 21" and the rear yards of the adjacent townhomes, are not harmonious with existing development and do not contribute to the land use pattern in the area. For the same reasons, I find the orientation of Lots 6, 7 and 8 is not appropriate for the type of development and use contemplated.

l. Section 17.36.180, Frontage

A. Each lot or parcel shall abut upon a public road, or when located in a planned development or cluster development, a private road, for at least 50 feet, except for lots or parcels fronting on the bulb of a cul-de-sac, then the minimum frontage shall be 30 feet, and except for partitions off of U.S. Forest Service or Bureau of Land Management roads. In the La Pine Neighborhood Planning Area Residential Center District, lot widths may be less than 50 feet in width, as specified in DCC 18.61, Table 2: La Pine Neighborhood Planning Area Zoning Standards. Road frontage standards in destination resorts shall be subject to review in the conceptual master plan.

B. All side lot lines shall be at right angles to street lines or radial to curved streets wherever practical.

FINDINGS: The applicant's burden of proof states these criteria are not applicable because Section 18.110.060(J) exempts zero-lot-line subdivisions from the lot width and frontage requirements in this section. The staff report questions whether such exemptions are applicable to requirements in Title 17. In the Hearings Officer's decision in *Arrowood*, cited above, I held without analysis or discussion that the zero-lot-line lots proposed in that decision were exempt from compliance with this section. I find it would not be appropriate to require compliance with the frontage standards in Title 17 while exempting the subdivision from equivalent requirements in Title 18. Therefore, I adhere to my holding in *Arrowood.*[9]

m. 17.36.190, Through Lots

Lots or parcels with double frontage should be avoided except where they are essential to provide separation of residential development from major street or adjacent nonresidential activities to overcome specific disadvantages of topography and orientation. A planting screen easement of at least 10 feet in width and across which there shall be no right of access may be required along the lines of lots or parcels abutting such a traffic artery or other incompatible use.

FINDINGS: The Hearings Officer finds the applicant's proposal includes three lots with double frontage – Lots 1, 2 and 3 which front on both Seventh Mountain Drive and the new private road. I find this double frontage is not essential or appropriate for the reasons set forth in the findings above concerning the configuration of the private road. However, I find that if the applicant's proposal is approved on appeal, such approval need not include a condition of approval requiring a planting screen easement to prevent access across these lots.

n. 17.36.200, Corner Lots

Within an urban growth boundary, corner lots or parcels shall be a minimum of five feet more in width than other lots or parcels, and also shall have sufficient extra width to meet the additional side yard requirements of the zoning district in which they are located.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is not located in an urban growth boundary.

o. 17.36.210, Solar Access Performance

A. As much solar access as feasible shall be provided each lot or parcel in every new subdivision or partition, considering topography, development pattern and existing vegetation. The lot lines of lots or parcels, as far as feasible, shall be oriented to provide solar access at ground level at the southern building line two hours before and after the solar zenith from September 22nd to March 21st. If it is not feasible to provide solar access to the southern building line, then

[9] The Hearings Officer notes former Hearings Officer Briggs also found, without discussion, that the proposed Points West zero-lot-line subdivision she approved in 2006 was exempt from the Title 17 frontage requirements.

solar access, if feasible, shall be provided at 10 feet above ground level at the southern building line two hours before and after the solar zenith from September 22nd to March 21st, and three hours before and after the solar zenith from March 22nd to September 21st.

B. This solar access shall be protected by solar height restrictions on burdened properties for the benefit of lots or parcels receiving the solar access.

C. If the solar access for any lot or parcel, either at the southern building line or at 10 feet above the southern building line, required by this performance standard is not feasible, supporting information must be filed with the application.

FINDINGS: For the reasons set forth in the findings above concerning street frontage, incorporated by reference herein, the Hearings Officer finds Section 18.110.060(J)(2) exempts the applicant's proposal from the solar access standards in this section as well as those set forth in Title 18.

p. 17.36.220, Underground Facilities

Within an urban growth boundary, all permanent utility services to lots or parcels in a subdivision or partition shall be provided from underground facilities; provided, however, the Hearings Body may allow overhead utilities if the surrounding area is already served by overhead utilities and the proposed subdivision or partition would create less than 10 lots. The subdivision or partition shall be responsible for complying with requirements of DCC 17.36.220, and shall:

*** * ***

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is not located in an urban growth boundary.

q. 17.36.230, Grading of Building Sites

Grading of building sites shall conform to the following standards, unless physical conditions demonstrate the property of other standards:

A. Cut slope ratios shall not exceed one foot vertically to one and one half feet horizontally.

B. Fill slope ratios shall not exceed one foot vertically to two feet horizontally.

C. The composition of soil for fill and the characteristics of lots and parcels made usable by fill shall be suitable for the purpose intended.

D. When filling or grading is contemplated by the subdivider, he shall submit plans showing existing and finished grades for the approval of the Community Development Director. In reviewing these plans, the Community Development Director shall consider the need for drainage and effect of filling on adjacent property. Grading shall be finished in such a manner as not to create steep banks or unsightly areas to adjacent property.

FINDINGS: The proposed subdivision site currently is developed with a swimming pool, community building, parking areas and landscaping. The applicant's burden of proof states construction of the eight proposed townhomes will not require significant grading. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to comply with the grading standards in this section.

s. 17.36.250, Lighting

Within an urban growth boundary, the subdivider shall provide underground wiring to the County standards, and a base for any proposed ornamental street lights at locations approved by the affected utility company.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is not located in an urban growth boundary.

t. Section 17.36.260, Fire Hazards

Whenever possible, a minimum of two points of access to the subdivision or partition shall be provided to provide assured access for emergency vehicles and ease resident evacuation.

FINDINGS: Access to the subject property is from Cascade Lake Highway via Seventh Mountain Drive, an existing private road. In addition, the record indicates there is an emergency access/egress near the northeast corner of the adjacent Points West Subdivision that connects Seventh Mountain Drive to Elkai Woods Road in the Widgi Creek resort. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to provide to the Planning Division before final plat approval written documentation that the existing emergency ingress/egress for Widgi Creek will be available to the residents of the proposed new dwellings.

u. 17.36.270, Street Tree Planting

Street tree planting plans, if proposed, for a subdivision or partition, shall be submitted to the Planning Director and receive his approval before the planting is begun.

FINDINGS: The applicant did not address this criterion in its burden of proof. The Hearings Officer finds the applicant's proposed landscape plan does not appear to propose any street

trees. Rather, the landscape plan shows existing trees along Seventh Mountain Drive and Elkai Woods Drive would be retained. Therefore, I find this criterion is not applicable.

v. Section 17.36.280, Water and Sewer Lines

Where required by the applicable zoning ordinance, water and sewer lines shall be constructed to County and city standards and specifications. Required water mains and service lines shall be installed prior to the curbing and paving of new streets in all new subdivisions or partitions.

FINDINGS: The applicant proposes to serve the new dwellings with domestic water via the existing private community water system owned and operated by SMGV Water Company and Bhelm, LLC). Sewage treatment would be provided through connection to existing City of Bend sewer facilities. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to construct all water and sewer lines to the applicable county and city standards and specifications, to install all required sewer and water mains prior to any street paving, and to provide to the Planning Division before final plat approval written verification that water and sewer lines have been extended to each lot.

w. Section 17.36.300, Public Water System

In any subdivision or partition where a public water system is required or proposed, plans for the water system shall be submitted and approved by the appropriate state or federal agency. A community water system shall be required where lot or parcel sizes are less than one acre or where potable water sources are at depths greater than 500 feet, excepting land partitions. Except as provided for in DCC 17.24.120 and 17.24.130, a required water system shall be constructed and operational, with lines extended to the lot line of each and every lot depicted in the proposed subdivision or partition plat, prior to final approval.

FINDINGS: The proposed lots are less than one acre in size and therefore a community water system is required. The applicant proposes to provide domestic water through connection to the existing private community water system owned and operated by SMGV Water Company and Bhelm, LLC. The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring that prior to final plat approval: (1) the water system shall be operational with lines extended to each lot; (2) any and all required plan review and approval of the water system by the Oregon Health Division (OHD) shall be performed; and (3) the applicant shall provide to the Planning Division written verification from the OHD of that review and approval.

4. Chapter 17.44, Park Development

a. Section 17.44.010, Dedication of Land

A. For subdivisions or partitions inside an urban growth boundary, the developer shall set aside and dedicate to the public for park and recreation purposes not less than eight

percent of the gross area of such development, if the land is suitable and adaptable for such purposes and is generally located in an area planned for parks.

FINDINGS: The Hearings Officer finds this criterion is not applicable because the subject property is not located within an urban growth boundary.

B. For subdivisions or partitions outside of an urban growth boundary, the developer shall set aside a minimum area of the development equal to $350 per dwelling unit within the development, if the land is suitable and adaptable for such purposes and is generally located in an area planned for parks.

C. For either DCC 17.44.010 (A) or (B), the developer shall either dedicate the land set aside to the public or develop and provide maintenance for the land set aside as a private park open to the public.

D. The Planning Director or Hearings Body shall determine whether or not such land is suitable for park purposes.

E. If the developer dedicates the land set aside in accordance with DCC 17.44.010 (A) or (B), any approval by the Planning Director or Hearings Body shall be subject to the condition that the County or appropriate park district accept the deed dedicating such land.

F. DCC 17.44.010 shall not apply to the subdivision or partition of lands located within the boundaries of a parks district with a permanent tax rate.

FINDINGS: The subject property is located outside of an urban growth boundary and outside the boundaries of the Bend Metro Park and Recreation District. In the Hearings Officer's decision in *Arrowood,* I made the following findings under this section:

> *"The Hearings Officer finds that in light of the subject property's location more or less in the center of a resort area that provides numerous recreational amenities and opportunities, and the proposed configuration of the subdivision, the proposed subdivision does not have land that is suitable and adaptable for park purposes and the applicant need not set aside park land. Rather, the applicant must comply with Section 17.44.020 discussed below."*

The Hearings Officer finds the proposed subdivision site also is in the center of the Widgi Creek resort and in close proximity to the many recreational amenities and opportunities provided in the resort. Therefore, I find the applicant need not set aside or dedicate park land in the proposed subdivision, but will be required to comply with Section 17.44.020.[10]

---

[10] The Hearings Officer notes former Hearings Officer Briggs came to the same conclusion concerning the lack of necessity to set aside or dedicate park land in her 2006 decision approving the Points West Subdivision.

b. Section 17.44.020, Fee in Lieu of Dedication

A. In the event there is no suitable park or recreation area or site in the proposed subdivision or partition, or adjacent thereto, then the developer shall, in lieu of setting aside land, pay into a park acquisition and development fund a sum of money equal to the fair market value of the land that would have been donated under 17.44.010 above. For the purpose of determining the fair market value, the latest value of the land, unplatted and without improvements, as shown on the County Assessor's tax roll shall be used. The sum so contributed shall be deposited with the County Treasurer and be used for acquisition of suitable area for park and recreation purposes or for the development of recreation facilities. Such expenditures shall be made for neighborhood or community facilities at the discretion of the Board of County Commissioners and/or applicable park district.

B. DCC 17.44.020 shall not apply to subdivision or partition of lands located within the boundaries of a parks district with a permanent tax rate.

FINDINGS: The Hearings Officer finds that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to pay a fee in lieu of dedication of park land in the amount of $3,150 ($350 x 9 dwelling units).

5. Chapter 17.48, Design and Construction Specifications

a. Section 17.48.160, Road Development Requirements-Standards

A. Subdivision Standards. All roads in new subdivisions shall either be constructed to a standard acceptable for inclusion in the County maintained system or the subdivision shall be part of a special road district or a homeowners association in a planned unit development.

FINDINGS: The applicant proposes a new subdivision road to serve four of the proposed eight lots. The other four lots would have access from Seventh Mountain Drive, an existing private road in Widgi Creek. The record indicates Seventh Mountain Drive is maintained by one or more of the existing Widgi Creek and Elkai Woods HOAs. The applicant proposes that maintenance of the new private road would be the responsibility of the HOA for the proposed new subdivision, therefore satisfying this criterion.

b. Section 17.48.180, Private Roads

The following minimum road standards shall apply for private roads:

A. The minimum paved roadway width shall be 20 feet in planned unit developments and cluster developments with two foot wide gravel shoulders;

B. Minimum radius of curvature, 50 feet;

C. Maximum grade, 12 percent;

D. At least one road name sign will be provided at each intersection for each road;

E. A method for continuing road maintenance acceptable to the County;

F. Private road systems shall include provisions for bicycle and pedestrian traffic.

1. In cluster and planned developments limited to ten dwelling units, the bicycle and pedestrian traffic can be accommodated within the 20-foot wide road.

2. In other developments, shoulder bikeways shall be a minimum of four feet wide, paved and striped, with no on street parking allowed within the bikeway, and when private roads are developed to a width of less than 28 feet, bike paths constructed to County standards shall be required.

Table A Footnote (8) 20' allowed for cul-de-sac's and roads with low anticipated traffic volumes as long as separate multiple use paths are provided. 28' width required (including the required 4' striped shoulder bikeway in each direction) for circulator and primary subdivision access roads and other roads when separate multiple use paths are not provided.

FINDINGS: The Hearings Officer finds the portions of this section that are not expressly applicable to planned unit and cluster developments apply to the applicant's proposed zero-lot-line subdivision. I have found that if the applicant's proposal is approved on appeal, such approval should be subject to a condition of approval requiring the applicant to improve the new private road in conformance with the county's standards for private roads in Table "A" to Title 17, including 20 feet of pavement width. As noted in the findings above, neither the road department nor the county's senior transportation planner identified the need for additional right-of-way for or improvements to Seventh Mountain Drive or Elkai Woods Drive to accommodate traffic generated by the new subdivision.

IV. DECISION:

For the foregoing reasons, the Hearings Officer hereby **DENIES** the applicant's proposed tentative subdivision plan, site plan, and LM review.

In the event this decision is appealed to the Board of County Commissioners, and the Board elects to hear the appeal and approves the applicant's proposal on appeal, the Hearings Officer

RECOMMENDS such approval be **SUBJECT TO THE FOLLOWING CONDITIONS OF APPROVAL:**

1. This approval for an eight-lot, zero-lot-line subdivision is based on the applicant's submitted tentative plan, site plan, burden of proof, supplemental memoranda, exhibits, and written and oral testimony. Any substantial change to the approved tentative plan and/or site plan shall require new land use applications and approvals.

PRIOR TO SUBMITTING THE FINAL SUBDIVISION PLAT FOR APPROVAL:

2. The applicant/owner shall submit to the Planning Division a revised site plan showing:

    a. the location and design of any above-ground utility facilities and the manner of screening with vegetation or otherwise so that adverse visual impacts on the site and neighboring properties are minimized;

    b. true color samples of the finish and roofing materials, demonstrating exterior finishes are in muted earth tones (e.g., browns, greens, or grays) that blend and reduce contrast with the surrounding vegetation and landscape of the building site, and that large areas, including roofs, are not finished with white, bright or reflective materials;

3. The applicant/owner shall provide to the Planning Division written documentation from the SMGV Water Company that there is sufficient capacity in its water system and well permit to serve the nine dwellings approved in this decision and the nine dwellings approved in the Fairway decision (247-14-000395-TP, 247-14-000396-SP, 247-14-000397-LM).

4. The applicant/owner shall obtain approval of the subdivision name from the Deschutes County Surveyor.

5. The applicant/owner shall submit to the Planning Division written documentation from the City of Bend Fire Department that all requirements for fire apparatus access roads and fire protection water supplies have been met.

6. The applicant/owner shall submit to the Planning Division a new sewer analysis memo from the City of Bend documenting that sewer capacity is still available, and written documentation from the City of Bend that all required upgrades to the existing lift station on the Widgi Creek Golf Course have been completed.

WITH OR ON THE FINAL PLAT:

7. The applicant/owner shall prepare the final plat in accordance with Title 17 of the Deschutes County Code, including all the necessary information required by Section 17.24.060.

8. The applicant/owner shall show on the final plat:

    a. the exact lot size of each residential lot;

    b. the exact location of the new private road;

c. all easements of record and existing rights-of-way;

d. a statement of water rights as required by ORS 92.120;

e. all utility easements; and

f. all public access easements.

9. The final plat shall be signed by all persons with an ownership interest in the property, as well as the Deschutes County Assessor and Tax Collector.

10. The applicant/owner shall record with the Deschutes County Clerk a perpetual easement allowing Bend-LaPine School District vehicles to travel on Seventh Mountain Drive.

11. The applicant/owner shall provide to the Planning Division certification by a licensed professional engineer that drainage facilities have been designed and constructed in accordance with the current Central Oregon Stormwater Manual to receive and/or transport stormwater from at least the design storm (as defined in the current Central Oregon Stormwater Manual) for all surface drainage water including stormwater coming to and/or passing through the development.

WITH CONSTRUCTION:

12. The applicant/owner shall assure that no dwellings exceed thirty (30) feet in height.

13. The applicant/owner shall install any outdoor lighting in conformance with the county's outdoor lighting standards in Chapter 15.10 of the Deschutes County Code.

14. The applicant/owner shall install any signs in conformance with the sign regulations in Chapter 15.08 of the Deschutes County Code.

15. The applicant/owner shall install all surface drainage systems in conformance with the applicable Department of Environmental Quality (DEQ) design standards for such systems. to construct all water and sewer lines to the applicable county and city standards and specifications, to install all required sewer and water mains prior to any street paving, and to provide to the Planning Division before final plat approval written verification that water and sewer lines have been extended to each lot.

16. The applicant/owner shall assure compliance with all requirements of the Americans with Disabilities Act (ADA) identified by the county during the building plan review and permitting process for the dwellings.

17. The applicant/owner shall comply with the county's grading standards in Section 17.36.230.

18. The applicant/owner shall provide for each dwelling a ground-level space with an accessible private outdoor patio and yard in excess of 48 square feet in size.

19. If the approved dwellings are constructed with metal roofs, the applicant/owner shall assure those roofs are non-reflective and of a color that blends with the surrounding vegetation and landscape.

20. The applicant/owner shall install all utilities underground.

21. The applicant/owner shall provide domestic water service to each approved dwelling through extension of and connection to the SMGV water system.

22. The applicant/owner shall provide sewer service to each approved dwelling through extension of and connection to the City of Bend sewer system.

AT ALL TIMES:

23. The applicant/owner shall assure that parking spaces for the dwellings are available for the parking of operable passenger automobiles of residents only and are not used for the storage of vehicles or materials or for the parking of trucks used in conducting the business or used in conducting the business or use.
24. The applicant/owner shall install any lighting used to illuminate off-street parking areas so that it will not project light directly upon any adjoining property.

25. The applicant/owner shall retain and preserve all existing vegetation on the subject site that is not required to be removed for construction.

26. The applicant/owner shall assure that address numbers are provided for each dwelling in as required by the Oregon Fire Code.

27. The applicant/owner shall maintain the paved driveways for the approved dwellings so that any surface water drainage will be contained on each lot or diverted to existing storm drain facilities.

DURATION OF APPROVAL:

28. The applicant/owner shall complete all conditions of approval and apply for final plat approval from the Planning Division within two (2) years of the date this decision becomes final, or obtain an extension the approval in this decision in accordance with the provisions of Title 22 of the County Code, or the approval shall be void.

Dated this 6th day of April, 2015. Mailed this 6th day of April, 2015.

Karen H. Green, Hearings Officer

THIS DECISION BECOMES FINAL TWELVE DAYS AFTER THE DATE OF MAILING UNLESS TIMELY APPEALED.