Community Development Department
Planning Division Building Safety Division Environmental Soils Division

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MEMORANDUM

To: Deschutes County Board of Commissioners

From: Paul Blikstad, Senior Planner

Date: May 26, 2015, for Commissioner's **June 3, 2015** Work Session

Re: DR-13-16 (247-14-000165-A), An appeal of the County Hearings Officer's decision on a Declaratory Ruling.

BACKGROUND:

The applicants, Jeff and Pat Dowell, applied for a Declaratory Ruling (DR) to interpret what requirements are necessary for a maintenance agreement to be approved by the County for the property identified on County Assessor's Map 16-11-19, tax lot 300. This interpretation is based on Condition of Approval no. 2 of CU-80-22, a conditional use permit application for a cluster development in the former F-3 zone in the County, approved back in 1980, with an associated partition (MP-79-232). See the history of the subject property, as well as the Kuhn's property, and the cluster development approval on pages 3-8 of the Hearings Officer's decision (attached). The application included a proposed agreement.

This Declaratory Ruling application went before the County Hearings Officer on December 3, 2013. The record on this matter closed on March 28, 2014. The Hearings Officer's determined that the proposed agreement did not meet the requirement for a maintenance agreement. The Hearings Officer's decision was mailed out on June 4, 2014. The applicants appealed the Hearings Officer's decision within the 12-day appeal period that followed. In June the applicants requested that the appeal be put on hold, pending discussions with the adjacent owners of tax lot 200 – William and Leigh Kuhn. By letter dated May 14, 2015, the applicant's attorney requested that the Planning Division reactivate the appeal.

The cluster development proposed and approved in 1980 included a 41.8-acre parent parcel, which was partitioned into three parcels – two parcels of approximately 4.3 acres each, and a 33.21-acre open space parcel. The open space parcel is the subject of the DR application, and is owned jointly between the Dowells and Kuhns, the respective owners of tax lots 100 and 200, the other two parcels in the cluster development. Condition of Approval no. 2 of CU-80-22 states:

2. *Prior to the sale of any lot a written agreement shall be recorded which establishes an acceptable homeowners association or agreement assuring the maintenance of common property in the partition.*

The only "common" property in the proposal was the 33.21-acre open space parcel. The Planning Division allowed both the Kuhn and Dowell properties to be developed based on the "Land Use Restrictions" document recorded in 1987 (Volume 148, Page 1792). The County Commissioners determined in the written decision for A-09-4, A-09-5, A-07-9 (a Land Use Compatibility Statement) that the "recorded deed restrictions, dated July 20, 1987, do not include provisions to assure the maintenance of common property in the partition nor do they create a homeowners association." Thus the Board determined that the condition no. 2 requirement has not been met.

The applicants submitted the DR application in an attempt to clarify what is required for the maintenance agreement that assures maintenance of the common property, meeting the condition no. 2 requirement.

ISSUES:

The applicants have stated four reasons for the appeal that they believe constitute errors in the Hearings Officer's decision as follows:

- The homeowner's association or maintenance agreements should only contain common property maintenance requirements, and not an open space vegetation maintenance requirement for wildlife habitat.
- The Hearings Officer erroneously concluded that the property must be maintained for wildlife habitat values. Requiring that the property be maintained for wildlife habitat values impermissibly elevates this use/value above other co-equal open space values and prohibits permitted open space uses.
- The Hearings Officer erroneously concluded that William and Martha Kuhn as well as the Dowells (the "parties") must execute the obligations of the original partner jointly, including jointly signing the homeowner's association or maintenance agreement.
- The Hearings Officer's decision erroneously implies that the interests in TL 300 cannot be severed from the residential parcels. The applicant believes that the maintenance agreement does not need to be jointly signed by the parties and the resulting document need only be recorded against TL 300, and not against tax lots 100 or 200.

DEICSION:

The Board must decide whether it will hear this appeal. The applicant has requested an appeal on the record (i.e. no new hearing). If the Board decides to hear it, the Board will need to determine whether it will review the appeal on the record, or full *de novo*. And if *de novo*, whether it will limit the appeal to only specified issues.

Per DCC 22.32.035(D), the Board may consider only the following when determining whether to hear an appeal:

1. The record developed before the lower Hearings Body;
2. The notice of appeal; and
3. Recommendations of Staff.

The following are attached to this memorandum:

- The applicant's Notice of Appeal
- Hearings Officer's decision on DR-13-16
- CU-80-22 Findings and Decision
- Land Use Restrictions Document
- Current Assessor's Map showing tax lots 100, 200, 300

At the Board meeting on June 30, 2015, Staff will put before the Board the entire record below.

A165

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APPEAL APPLICATION

FEE: 2892.00

EVERY NOTICE OF APPEAL SHALL INCLUDE:

1. A statement describing the specific reasons for the appeal.
2. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons the Board should review the lower decision.
3. If the Board of County Commissioners is the Hearings Body and *de novo* review is desired, a request for *de novo* review by the Board, stating the reasons the Board should provide the *de novo* review as provided in Section 22.32.027 of Title 22.
4. If color exhibits are submitted, black and white copies with captions or shading delineating the color areas shall also be provided.

It is the responsibility of the appellant to complete a Notice of Appeal as set forth in Chapter 22.32 of the County Code. The Notice of Appeal on the reverse side of this form must include the items listed above. Failure to complete all of the above may render an appeal invalid. Any additional comments should be included on the Notice of Appeal.

Staff cannot advise a potential appellant as to whether the appellant is eligible to file an appeal (DCC Section 22.32.010) or whether an appeal is valid. Appellants should seek their own legal advice concerning those issues.

Appellant's Name (print): Jeff and Patti Dowell Phone: (541) 382-4331

Mailing Address: c/o Bryant Lovlien & Jarvis, PC-591 SW Mill View Way City/State/Zip: Bend, OR 97702

Land Use Application Being Appealed: Decision of the Deschutes County Hearings Officer, File Nos.: MA-14-4 / DR-13-16

Property Description: Township 16 Range 11 Section 19 Tax Lot 100 & 300

Appellant's Signature: Jeff Dowell Pat Dowell

EXCEPT AS PROVIDED IN SECTION 22.32.024, APPELLANT SHALL PROVIDE A COMPLETE TRANSCRIPT OF ANY HEARING APPEALED, FROM RECORDED MAGNETIC TAPES PROVIDED BY THE PLANNING DIVISION UPON REQUEST (THERE IS A $5.00 FEE FOR EACH MAGNETIC TAPE RECORD). APPELLANT SHALL SUBMIT THE TRANSCRIPT TO THE PLANNING DIVISION NO LATER THAN THE CLOSE OF THE DAY FIVE (5) DAYS PRIOR TO THE DATE SET FOR THE *DE NOVO* HEARING OR, FOR ON-THE-RECORD APPEALS, THE DATE SET FOR RECEIPT OF WRITTEN RECORDS.

(over)

247-14-000

BEFORE THE DESCHUTES COUNTY COMMUNITY DEVELOPMENT DEPARTMENT

DR-13-16 **As modified by** **MA-14-1**	)))))	**NOTICE OF APPEAL**

APPLICANT/OWNER: Jeff and Patti Dowell
c/o Bryant, Lovlien & Jarvis, P.C.
591 SW Mill View Way
Bend, Oregon 97702

ATTORNEY: Sharon R. Smith
Bryant, Lovlien & Jarvis, P.C.
591 SW Mill View Way
Bend, Oregon 97702

LOCATION: 65595 Sisemore Road, Bend, OR 97701
Tax Map: 16-11-19, Tax Lots 100, 300,
Deschutes County, Oregon.

REQUEST: Declaratory Ruling for an interpretation of the requirements (specific provisions, required signatures, and any other considerations) necessary to satisfy Condition of Approval #2 of CU-80-02, which mandates an 'acceptable written agreement' prior to the sale of any lot in the cluster development established by CU-80-02.

I. STANDING:

Appellants Jeff and Patti Dowell (the "Dowells") are the Applicants in the matter that is the subject of this appeal and appeared in proceedings below.

II. STATEMENT DESCRIBING SPECIFIC REASONS FOR APPEAL:

Appellants concur with a majority of the Hearings Officer's decision dated June 3, 2014. However, Appellants object to certain aspects of the Conditions of Approval and seek to clarify other facets of the decision. Accordingly, Appellants assert that the decision is in error for the following reasons:

1. The Hearings Officer erroneously concluded that the required homeowner's association or maintenance agreement is the vehicle for preservation of open space values and therefore must include a provision describing how vegetation is to be maintained for wildlife habitat values (Condition of Approval #4(b)). As part of an application for a

cluster development, Section 8.05(16)(C)(b) of PL-15 requires a submittal of "adequate deed restrictions to maintain the land in the open space provided" ("open space maintenance requirements"). Section 8.05(16)(C)(c) establishes a separate requirement for a homeowner's association for maintenance of common property ("common property maintenance requirements"). The recorded Land Use Restrictions satisfy 8.05(16)(C)(b) and thus prohibit the County from imposing additional open space maintenance requirements. By requiring that the homeowner's association or maintenance agreement include a provision regarding vegetation maintenance for wildlife habitat, the Hearings Officer erroneously added an open space maintenance requirements as an obligation in the homeowner's association or maintenance agreement. The homeowner's association or maintenance agreements should only contain common property maintenance requirements.

2. The Hearings Officer erroneously concluded that the property must be maintained for wildlife habitat values (Condition of Approval #4(b)). In arriving at this conclusion, the Hearings Officer relied upon an improperly selective excerpt from the definition of "open space." The definition of "open space" in PL-15 also indicates that agricultural uses, landscaping, golf courses, and recreational opportunities, among a menu of other activities, meet the definition of "open space." The Land Use Restrictions already establishes restrictions on uses of Tax Lot ("TL") 300 and requiring that the property be maintained for wildlife habitat values impermissibly elevates this use/value above other co-equal open space values and prohibits permitted open space uses.

   Furthermore, the reference to "wildlife preserves" in the definition of "open space" states open spaces "enhance the value of abutting or neighboring ...parks, forests, and wildlife preserves." There are no neighboring wildlife preserves, only federally owned range lands and some forest lands further to the west. The Wildlife Area Combing (WA) Zone and the Tumalo Deer Winter Range overlay zone do not render the subject property, or any neighboring properties, a "wildlife preserve." Thus, the County cannot obligate that TL 300 be maintained as a wildlife preserve and cannot impose additional open space maintenance requirements beyond those included in the Land Use Restrictions.

3. The Hearings Officer erroneously concluded that William and Martha Kuhns as well as the Dowells (the "parties") must execute the obligations of the original developer jointly, including jointly signing the homeowner's association or maintenance agreement (Conditions of Approval #1, 2, 3, 5, 6, 7). Nothing in the text of Condition #2 requires both parties be signatories to the Agreement, even if both parties "step into the shoes of the Developer," and nothing prevents the maintenance agreement to be between one of the parties and a third party such as the County, a property management company, or a conservation organization. There is also no reason that the parties could not independently fulfill the obligations of the original developer as the developer could have performed the tasks independently for the two residential parcels by signing separate agreements with third parties.

4. The Hearings Officer's decision erroneously implies that the interests in TL 300 cannot be severed from the residential parcels. Specifically, the Hearings Officers concludes

that the homeowner's association or maintenance agreement must be binding on all future owners of the cluster development parcels by being recorded against the residential parcels. As the Hearings Officer found, Section 1.030(21) of PL-15 does not require joint ownership of TL 300. Moreover, Condition #1 to CU-80-2 only requires that TL 300 be in joint ownership *prior to the sale of any lots*. That condition has been satisfied because TL 300 was placed in joint ownership prior to the sale of a lot and a lot has been sold. TL 300 no longer needs to be held in joint ownership and the owners of TL 300 can sell their interests to each other or to a third party. Accordingly, the required association or agreement need not be jointly signed by the parties and the resulting document need only be recorded against TL 300.

III. REQUEST FOR REVIEW:

For the foregoing reasons, the Dowells request the Board of County Commissioners review the subject decision on the record. The Board should hear the appeal because it will assist in resolving a long standing land use dispute and will resolve matters of interpretation of the County Code.

SUBMITTED this 16th day of June, 2014

BRYANT, LOVLIEN & JARVIS, P.C.

By: _____
SHARON R. SMITH, OSB#862920
GARRETT CHROSTEK, OSB#122965
Of Attorneys for Applicants

DECISION OF DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS: MA-14-1, DR-13-16

APPLICANTS: Jeff and Pat Dowell
c/o Bryant Lovlien & Jarvis, PC
591 S.W. Mill View Way
Bend, Oregon 97702

APPLICANTS' ATTORNEY: Sharon R. Smith
Bryant Lovlien & Jarvis, PC
591 S.W. Mill View Way
Bend, Oregon 97702

OPPONENTS: William and Leigh Kuhn
P.O. Box 5996
Bend, Oregon 97708-5996

OPPONENTS' ATTORNEY: Liz Fancher
644 N.W. Broadway Street
Bend, Oregon 97701

REQUEST: Applicants requested a declaratory ruling to determine whether a proposed agreement assures the maintenance of common property and can be approved by the county. The first modification revised the declaratory ruling to request an interpretation of what requirements are necessary for a maintenance agreement to be approved by the county. The second modification revised the description of the subject property.

STAFF REVIEWER: Paul Blikstad, Senior Planner

HEARING DATE: December 3, 2013

RECORD CLOSED: March 28, 2014

I. APPLICABLE STANDARDS AND CRITERIA:

A. 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**

B. 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 22.20.040, Final Action in Land Use Actions**
*** Section 22.20.055, Modification of Application**

3. Chapter 22.36, Limitations on Approvals

*** Section 22.36.040, Modification of Approval**
*** Section 22.36.050, Transfer of Permit**

4. Chapter 22.40, Declaratory Ruling

*** Section 22.40.010, Availability of Declaratory Ruling**
*** Section 22.40.020, Persons Who May Apply**
*** Section 22.40.030, Procedures**
*** Section 22.40.040, Effect of Declaratory Ruling**
*** Section 22.40.050, Interpretation**

C. PL-14, Deschutes County Subdivision/Partition Ordinance of 1979

D. PL-15, Deschutes County Zoning Ordinance (1980)

1. Article 1, Section 1.030, Definitions
2. Article 4, Section 4.085, Cluster Developments in F-3 Zone
3. Article 8, Section 8.050, Requirements for Cluster Development

II. FINDINGS OF FACT:

A. **Location:** The subject property is identified as Tax Lots 100 and 300 on Deschutes County Assessor's Map 16-11-19. Tax Lot 100 is owned by Jeff and Pat Dowell (hereafter "Dowells" or "applicants") and has an assigned address of 65595 Sisemore Road, Bend. Tax Lot 300 is an open space parcel jointly owned by the Dowells and William and Leigh Kuhn (hereafter "Kuhns" or "opponents").

B. **Zoning and Plan Designation:** The subject property is zoned Forest (F-2), Landscape Management (LM), and Wildlife Area (WA) to protect the Tumalo Deer Winter Range. The property is designated Forest on the Deschutes County Comprehensive Plan.

C. **Surrounding Zoning and Land Uses.** The subject property is surrounded by land zoned F-2 and WA, including the adjacent Tax Lot 200 owned by the Kuhns. To the west are large parcels of forest land in both private and public ownership.

D. **Site Description.** The property described in the applicants' second modified declaratory ruling request consists of Tax Lots 100 and 300 on Assessor's Map 16-11-19, two parcels of a three-parcel cluster development that also includes Tax Lot 200. Tax Lots 100 and 200 are 4.3-acre residential parcels developed with the applicants' and opponents' residences. Tax Lot 300, the open space parcel, is approximately 34 acres in size and is undeveloped. Tax Lot 300 is located west and south of Tax Lots 100 and

200. Vegetation on all three parcels consists of juniper woodland and native brush and grasses. The subject property has varied topography.

E. **Land Use History.** This declaratory ruling is the latest chapter in a protracted dispute between the parties concerning use of the land in the cluster development. The following history is taken largely from this Hearings Officer's August 2009 decision in *Kuhn* (A-07-9) on remand from the Land Use Board of Appeals (LUBA).

1979: The subject property was the subject of a 1979 partition application (MP-79-69) submitted by the Dowells' and Kuhns' predecessor John Barton. At the time of this application the property was zoned F-3, a zone that no longer exists. The 1979 partition would have created two parcels, one 22 acres in size and one 20 acres in size. The county denied this partition by an administrative decision dated May 9, 1979 on the basis of what was referred to as an "interim agreement" between the county and the Oregon Department of Fish and Wildlife (ODFW) to maintain a 40-acre minimum lot size for parcels developed within the proposed -- but yet adopted -- Tumalo Deer Winter Range. The record indicates this partition denial was not appealed.

In November 1979 the county adopted its zoning ordinance PL-15 that included a new WA Zone that, among other things, established a 40-acre minimum lot size except for cluster developments that could be allowed as conditional uses with smaller residential parcels and large open space parcels. The new WA Zone did not establish any particular dwelling setbacks from roads. On December 11, 1979 Mr. Barton submitted another partition application that again proposed to create two parcels, one 20 acres in size and one 23.1 acres in size (MP-79-232). This application also was denied because of the newly adopted WA Zone 40-acre minimum lot size. The record indicates Mr. Barton then modified his proposed partition to create a cluster development with two 4.3-acre residential parcels and a 34.5-acre common area parcel. This proposed partition was put on hold pending Mr. Barton's submission of a conditional use application for a cluster development.

1980: On May 13, 1980 the county granted conditional use approval for Mr. Barton's proposed cluster development as well as tentative partition plat approval, subject to six conditions of approval (CU-80-22/MP-79-232). One of those conditions required Mr. Barton to obtain final partition approval and another condition required the recording of certain deed restrictions. Condition 2 of the decision stated:

> *"Prior to the sale of any lot a written agreement shall be recorded which establishes an acceptable homeowners association or agreement assuring the maintenance of common property in the partition."*

None of the conditions of approval referred to or established dwelling setbacks from Sisemore Road. The final partition plat was approved on November 12, 1980 and filed with the Planning Division. The plat included a building setback line on both residential parcels 400 feet west of Sisemore Road measured perpendicular to the road, as well as a notation stating "Max. Bldg. Setback 400' From Sisemore Rd." The record indicates the final partition plat was not recorded with Deschutes County Clerk until October 5, 2004, long after the Dowells acquired the subject property in 1989 and constructed the existing dwelling on their property between 1994 and 1997.

1987: The Kuhns acquired their property – Tax Lot 200 on Assessor's Map 16-11-19 – by a deed dated July 22, 1987. On June 19, 1987 the county approved a lot line adjustment requested by the Kuhns (LL-87-23) that reconfigured their lot relative to the open space parcel in order to provide the Kuhns with a buildable lot meeting all required setbacks. According to the Kuhns, this lot line adjustment reconfigured their parcel so it is located entirely within 400 feet of Sisemore Road. This lot line adjustment approval was subject to a condition requiring that prior to issuance of a building permit for a dwelling on the Kuhns' property the deed restrictions required by the 1980 cluster development conditional use approval be recorded with the Deschutes County Clerk.

1989: The Dowells acquired their property – Tax Lot 100 -- through a land sale contract dated August 3, 1989.

1992: On February 7, 1992 the Dowells submitted an application for LM site plan approval for a dwelling on their parcel. By a letter dated February 10, 1992, then-Associate Planner Paul Blikstad advised the Dowells that the previous conditional use and partition approvals affecting the subject property (CU-80-22 and MP-79-232, respectively) established a 400-foot maximum dwelling setback from Sisemore Road. The letter went on to state:

> *"I am sending you a copy of the official partition drawing which established this restriction. Frank Cibelli has submitted a Landscape Management Plan application on your behalf which changed the location of the dwelling site to meet this 400-foot restriction. The intent of this restriction was for preservation and protection of wildlife in the area."*

On March 10, 1992 the county granted LM site plan approval for the Dowells authorizing them to construct a 1,568-square-foot single-family dwelling on their parcel (LM-92-9). The LM decision states in the "site description" section: "These [conditional use and partition] approvals established the two parcels for building sites which required a maximum 400' setback from Sisemore Road retaining approximately 33 acres for the protection and preservation of wildlife in the area." However, the conditions of approval did not include or refer to the 400-foot maximum setback. The Dowells' LM site plan showed the dwelling set back from Sisemore Road 744 feet. However, the site plan also had a notation stating: "This drawing is not to scale, the house site will not be more than 400 ft from Sisemore Road."

On August 5, 1992, the county adopted amendments to Title 18, the county's zoning ordinance replacing PL-15, to establish in the WA Zone a *300-foot* maximum setback for dwellings from roads existing as of the date of the amendment.

On December 21, 1992 the Dowells applied for a one-year extension to the 1994 LM site plan approval (E-92-68).

1993: In March 1993, the county granted the Dowells' requested extension of their LM approval. On March 18, 1993 the Dowells submitted an application for a building permit for the previously-approved dwelling on their parcel.

1994: The original building permit for the Dowells' dwelling (B34821) was issued on July 22, 1994.

1995: In February of 1995 the Planning Division reviewed the Dowells' building permit B34821 for land use compatibility. The Assessor's data for the Dowells' parcel state the "entire residence" was approved, but that the Dowells would be building "Phase I" of the dwelling which would consist of a 1,000-square-foot structure including a 424-square-foot apartment/guest room and a 576-square-foot garage, and that when the rest of the dwelling was constructed the kitchen in the guest room had to be removed.

1996: The Dowells requested and received an extension of several construction permits for the dwelling on their parcel.

1997: The Dowells completed a portion of their dwelling and received final inspection and approval thereof from the Building Division on February 11, 1997. The record indicates the dwelling was constructed between 400 and 500 feet from Sisemore Road but still on the Dowells' parcel.

2001: On May 3, 2001, the Dowells requested that the county issue a declaratory ruling to determine the approved side yard setbacks for their dwelling (DR-01-5). On September 17, 2001 this Hearings Officer issued a decision declaring that the cluster development approval in CU-80-22 approved side yard setbacks on the subject property of less than 100 feet, but did not approve side yard setbacks of not less than 25 feet. The Dowells appealed the Hearings Officer's decision to the Deschutes County Board of Commissioners (board) (A-01-19). The board agreed to hear the appeal, but because the required transcript of the hearing before the Hearings Officer was not submitted within five days of the appeal hearing, the appeal hearing did not occur. By a letter dated December 12, 2001 the Dowells formally withdrew their appeal.

In 2001, the Kuhns filed a civil complaint in Deschutes County Circuit Court (Case No. 01CV0233MA). The lawsuit requested, among other things: (1) a declaratory judgment that the Dowells' dwelling on the subject property was unlawful because it was built more than 400 feet from Sisemore Road, and that the Dowells' practice of leaving exterior lights on all night constituted a nuisance; and (2) a mandatory injunction requiring the Dowells to enter into an agreement for maintenance of the common area (Tax Lot 300).

2002: On January 21, 2002, the Dowells submitted another land use application for a declaratory ruling concerning the required minimum side yard setbacks on their parcel (DR-02-2). On May 7, 2002 this Hearings Officer issued a decision denying this request on the ground that the question presented was the same as that addressed in the Dowells' previous declaratory ruling application, and the county's procedures ordinance prohibited the Dowells from applying for another declaratory ruling on the same question. The Dowells appealed that decision to the board (A-02-2). The board agreed to hear the appeal. In a decision dated August 11, 2002, the board found the record for the subject property included at least one site plan map showing a side yard setback of 40 feet, and therefore held the side yard setbacks for the subject property are 40 feet. The board's decision did not address the setback from Sisemore Road.

On August 2, 2002 Deschutes County Circuit Judge A. Michael Adler issued a judgment in the Kuhns' civil suit against the Dowells that included the following:

> *"(MANDATORY INJUNCTION)*

Defendants are ordered to enter into the required 'home owners association or agreement assuring the maintenance of common property' as set forth in the conditions required with respect to the conditional use permit. At a minimum, this agreement shall provide that any property taxes and any maintenance costs with regard to the common property shall be shared equally."

The circuit court's decision was affirmed without opinion by the Court of Appeals in *Kuhn v. Dowell*, 196 Or App 787, 106 P3d 699 (2004).

2006: In November 2006 the Dowells filed state and county Measure 37 claims asserting their property would be devalued by application of the 300-foot maximum road setback in the WA Zone established in August 1992 because compliance with that setback would prevent them from completing the second phase of their existing dwelling.

2007: On May 4, 2007 the Kuhns filed three county code enforcement complaints alleging, among other things, that the Dowells' existing dwelling is "illegal" because it was constructed outside the 400-foot maximum setback shown on the partition plat. On May 25, 2007 the Kuhns received an electronic mail message from Dennis Perkins, the county's Building Safety Director, stating that the county's code enforcement staff did not intend to pursue the May 2007 code violation complaints. By an electronic mail message dated May 30, 2007 the Kuhns advised Mr. Perkins that they wanted to appeal the county's decision not to prosecute their code violation complaints.

On July 23, 2007 the Dowells applied for a building permit to remodel the existing dwelling on their parcel in order to convert the garage into residential space. The Planning Division issued a Land Use Compliance Statement (LUCS), and a building permit for the interior remodel was issued by the Building Division on July 24, 2007 (B65731). By an electronic mail message dated August 3, 2007 to Dennis Perkins and to Tom Anderson, the county's Community Development Department Director, the Kuhns stated they were appealing the county's issuance of building permit B65731 on the ground that the existing dwelling is illegal, and referred to the Kuhns' May 4, 2007 code violation complaints. On August 8, 2007 the Kuhns filed with the Planning Division a land use appeal application form and paid the $250 appeal fee. The application stated the appeal was from "B65731 as a land use decision." On August 9, 2007 the Kuhns filed with the Building Division a "Request for Appeal" form concerning issuance of the building permit.

A hearing on the planning appeal was scheduled for September 24, 2007. The Dowells' attorney requested that the public hearing be continued because he could not be present at the hearing. The Hearings Officer continued the hearing to November 14, 2007.

On October 10, 2007 the Department of Land Conservation and Development (DLCD) issued a Draft Order in Claim No. M131207 recommending approval of the Dowells' state Measure 37 claim, and recommending that in lieu of compensation, application of the applicable provisions of Goal 5 and OAR 660, Division 23 enacted or adopted after September 20, 1987 be waived. DLCD did not issue a final Measure 37 waiver order because of the intervening adoption of Measure 49 which modified the scope of Measure 37 waivers. On October 22, 2007, the board signed Order No. 2007-080 approving the Dowells' county Measure 37 claim and waiving application of nonexempt

county land use regulations back to September 20, 1989, the date the Dowells acquired their parcel.

On November 26, 2007 the Kuhns submitted to the county another code violation complaint alleging the Dowells' existing dwelling and the county's issuance of the building permit to remodel the dwelling violated the Dowells' LM approval (LM-92-9) because the dwelling is located more than 400 feet from Sisemore Road.

2008: The record in the Kuhns' appeal of the county's issuance of a LUCS and building permit closed on January 2, 2008. On March 26, 2008, this Hearings Officer issued a decision dismissing the Kuhns' appeal on the grounds that the appeal was barred by the previous circuit court judgment, and that the Kuhns were not authorized to appeal the 2007 LUCS and building permit issuance under either state law or the county's land use procedures ordinance. I also found the LUCS and building permit were not land use decisions, and therefore the provisions of ORS 215.427 establishing a 150-day period for the issuance of a final local land use decision did not apply. The Kuhns appealed this decision to the board which declined to hear the appeal. On May 29, 2008, the Kuhns appealed the Hearings Officer's decision to LUBA.

2009: On March 11, 2009 LUBA issued a decision remanding the Hearings Officer's decision dismissing the Kuhns' appeal for further county proceedings. *Kuhn v. Deschutes County*, 58 Or LUBA 483 (2009). LUBA held the LUCS and building permit at issue in the Kuhns' appeal constituted a land use decision from which the Kuhns had the right to appeal.

By a letter dated March 26, 2009, the Dowells requested that the remand proceedings be initiated. A public hearing on the LUBA remand was held on May 21, 2009. In August 2009 the Hearings Officer issued a decision reversing the Planning Division's decision to issue a LUCS and building permit to remodel the Dowells' existing dwelling, finding that the Dowells' dwelling was subject to the 400-foot maximum setback from Sisemore Road, and finding that since it was constructed outside the setback the Dowells' dwelling was not "lawfully established" for purposes of obtaining approval for an alteration of the dwelling under Section 18.40.020(N) of the zoning ordinance.

2010. By a decision dated February 22, 2010 (Document No. 2010-128), the board affirmed the Hearings Officer's decision (A-09-4, A-09-5, A-07-9) to reverse the Planning Division's decision to issue a LUCS and building permit to remodel the Dowells' dwelling, but on different grounds. The board held:

> *"Therefore, the Board finds that the parcel violates DCC Title 18 because of the lack of the existence of an acceptable homeowner's association regulations or agreement between both property owners for the maintenance of the open space parcel. Because the parcel violates DCC Title 18, the issuance of a remodel permit was also in error. Moreover, the Board finds that any existing building permits within the partition were issued unlawfully.*
>
> *The Board finds that it must also determine the meaning of 'acceptable.' In this case, 'acceptable' means acceptable to the County. That is not to say that the County will enforce the agreement. The County will review*

the agreement to determine that it 'assures the maintenance of common property.'

The Kuhns appealed the board's decision to LUBA. On October 22, 2010 LUBA issued a decision affirming the board's decision. *Kuhn v. Deschutes County*, 62 Or LUBA 165 (2010). The Kuhns appealed LUBA's decision to the Court of Appeals.

2011. The Court of Appeals affirmed LUBA"s decision without opinion on January 26, 2011. *Kuhn v. Deschutes County*, 240 Or App 563, 249 P3d 166 (2011) On December 21, 2011 the Dowells submitted an application requesting a "declaratory ruling to establish a homeowners' agreement" (DR-11-13).

2012. By a letter dated January 20, 2012 the Planning Division notified the Dowells that their declaratory ruling application was incomplete and informed them of the missing information. By a letter dated May 17. 2012, the Dowells withdrew their declaratory ruling application (DR-11-13).

F. **Procedural History.** On June 5, 2013 the Dowells submitted a declaratory ruling application (DR-13-16). The application form stated they were requesting "a declaratory ruling to establish a homeowner's agreement" and listed Tax Lots 100 and 300 as the property subject to the declaratory ruling. Their Burden of Proof Statement described their request as a declaratory ruling "to determine whether a proposed Maintenance Agreement assures the maintenance of common property and is acceptable to the County." The burden of proof included a proposed maintenance agreement. By a letter dated June 14, 2013, the Planning Division advised the Dowells that their application was incomplete and that they needed to submit a hearing fee. The fee was submitted on July 2, 2013 and the application was accepted as complete on that date.

Following extensive correspondence among planning staff, the Hearings Officer, the parties and their attorneys, a public hearing was scheduled for December 3, 2013. At the hearing, the Hearings Officer received testimony and evidence, left the written record open through February 7, 2014, and allowed the applicants through February 14, 2014 to submit final argument pursuant to ORS 197.763. At the hearing, the Hearings Officer inquired as to the precise nature of the applicants' request and the extent of my authority to address it under the declaratory ruling provisions in Chapter 22.40. By a letter dated December 11, 2013, to planning staff, the county's legal counsel, and the parties' attorneys, the Hearings Officer presented five questions concerning application of the declaratory ruling provisions and asked for briefing on those issues. By a letter dated December 12, 2013, Assistant County Legal Counsel Laurie E. Craghead submitted a response.

In response to the Hearings Officer's and Ms. Craghead's letters, on January 16, 2014 the Dowells submitted a modification application (MA-14-1) that revised their original declaratory ruling application to request a determination as to:

> *"What requirements (specific provisions, required signatures, and any other considerations) are necessary to satisfy condition of approval #2 of CU 80-22* [sic]*."*

Unlike the original declaratory ruling application, the modification application did not include a proposed maintenance agreement. It also included only Tax Lot 100 in the description of the subject property.

On January 21, 2014 opponents submitted a letter asserting the applicants' modification application did not constitute a modification as defined in the county code. On January 31, 2014 the applicants submitted their First Supplemental Burden of Proof on the modification responding to opponents' letter. On February 4, 2014 the Hearings Officer issued a "Determination and Order on Modification of Application" finding the applicants' modified declaratory ruling request constituted a "modification of application" as defined in Section 22.04.020. The Hearings Officer found that no additional public hearing would be required but directed the Planning Division to provide written notice of the modified application to all persons entitled to notice. The Hearings Officer also revised the post-hearing schedule for evidence and argument to close the written evidentiary record on February 28, 2014 and to allow the applicants' final argument through March 7, 2014. The order also stated the record for the modification would include the entire record for DR-13-16 and all non-duplicative evidence and argument submitted by the parties and planning staff until the close of the record on the modification (MA-14-1).

By a letter dated February 20, 2014, the applicants requested an extension of the record for the modification, and by a letter of the same date opponents stated they did not object to the extension. By an order dated February 21, 2014, the Hearings Officer revised the submission dates for evidence and argument to March 21 and March 28, 2014, respectively.

On February 27, 2014 the applicants submitted a second modification to their declaratory ruling request to add Tax Lot 300 – the open space parcel -- to the description of the property subject to the modified declaratory ruling. By an electronic mail messaged dated March 2, 2014 and transmitted electronically to the Hearings Officer on March 4, 2014, opponents questioned whether notice of the first modification was adequate due to a number of alleged procedural errors.

On March 5, 2014 the Hearings Officer issued a "Determination and Order on Second Modification of Application" addressing opponents' procedural issues, finding that the applicants' second modification request constituted a modification, that the second modification request was timely filed, and that no new hearing was required. The order directed the Planning Division to provide notice of the second modification by mailing notice to persons entitled to notice and directed that the subject property be posted with new notice of proposed land use action. In addition, the Hearings Officer revised the post-hearing schedule for evidence and argument to close the evidentiary record on March 28, 2014 and to allow the applicants' final argument through April 4, 2014.

By an electronic mail message dated March 31, 2014, Senior Planner Paul Blikstad informed the Hearings Officer that some of the testimony and exhibits submitted by opponents by electronic mail were not received by the county prior to the close of the record at 5:00 p.m. on March 28, 2014. By a letter to the parties dated April 1, 2014, the Hearings Officer advised the parties that in order to consider any such evidence opponents would have to submit a written request by 5:00 p.m. April 2, 2014 to reopen the record for that purpose. By an electronic message dated April 1, 2014, the Kuhns

advised the Hearings Officer that no request to reopen the record would be submitted.

The parties correctly note the statutory 150-day period under ORS 215.427(1) does not apply to the applicants' declaratory ruling request because it does not involve a "permit, limited land use decision, or zone change." However, the county code makes a 150-day period for issuance of final decisions applicable to all "land use actions." Section 22.20.040. Section 22.04.010 defines "land use action" to include "any consideration of a request for a declaratory ruling." The only declaratory ruling *not* subject to the 150-day period is one requesting a determination of whether an approval has been initiated. Section 22.20.040(D)(4). To the extent the county's procedures ordinance independently imposes a 150-day period for issuance of a final local land use decision in this declaratory ruling proceeding, the Hearings Officer finds the filing of the applicants' second modification on February 27, 2014 restarted the 150-day period and the period expires on July 27, 2014. As of the date of this decision there remain 60 days in the 150-day period.

G. **Public/Private Agency Notice.** The record indicates the Planning Division did not send notice of the applicants' original and modified declaratory ruling requests to agencies.

H. **Public Notice and Comment.** The record indicates the Planning Division mailed individual notice of the applicants' original declaratory ruling request to the owners of record of all property located within 250 feet of the subject property. 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. The record indicates notice of the applicants' first modification of the declaratory ruling request was not mailed to parties entitled to notice. In accordance with the Hearings Officer's March 5, 2014 order the Planning Division mailed individual notice to those persons entitled to notice and the subject property was again posted with a notice of proposed land use action sign. As of the date the record in this matter closed, the county had received two letters from the public in response to these notices. No members of the public testified at the public hearing.

I. **Lot of Record.** The subject property consists of three legal lots of record within a cluster development created through a 1979 partition (MP-79-232).

III. CONCLUSIONS OF LAW:

DECLARATORY RULING STANDARDS AND PROCEDURES

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

1. Chapter 22.40, Declaratory Ruling

a. Section 22.40.010, Availability of Declaratory Ruling

A. Subject to the other provisions of DCC 22.40.010, there shall be available for the County's comprehensive plans, zoning ordinances, the subdivision and partition ordinance and DCC Title 22 a process for:

* * *

2. **Interpreting a provision or limitation in a land use permit issued by the County or quasi-judicial plan amendment or zone change (except those quasi-judicial land use actions involving a property that has since been annexed into a city) in which there is doubt or a dispute as to its meaning and application; * * *.**

FINDINGS: The applicants request a declaratory ruling interpreting Condition of Approval 2 of CU-80-22, the decision approving the three-parcel cluster development. Condition 2 states:

> *"Prior to the sale of any lot a written agreement shall be recorded which establishes an acceptable homeowners association or agreement assuring the maintenance of common property in the partition."*

The applicants' first modification to its declaratory ruling application requests a determination of:

> *"What requirements (specific provisions, required signatures, and any other considerations) are necessary to satisfy Condition of Approval #2 of CU 80-22."*

In their burden of proof for the first modification application, the applicants described the nature of the doubt or dispute concerning Condition 2 in relevant part as follows:

> *"The history of this matter clearly illustrates that there is doubt or dispute as to what is required in Condition of Approval #2 of CU 80-02. The two current lot owners have attempted to negotiate a maintenance agreement for years. They disagree as to what must be in the agreement and the county has been unwilling to tell the parties what must be in the agreement. Moreover, county counsel stated in her December 12, 2013 letter that both owners must sign an agreement despite a lack of such a specific requirement in the condition.*
>
> * * *
>
> *For many years, the County and the property owners assumed that the document entitled 'Land Use Restrictions' recorded at Vol. 148, Page 1792 constituted the 'homeowners association or agreement' in compliance with the decision. The language in the Land Use Restrictions is identical to the proposed restrictions on land use submitted by the property owner at the time in CU-80-2. These provisions were evidently acceptable to the County because the County subsequently issued building permits to both the Kuhns and the Dowells. Moreover, the Kuhns acknowledged that this document had become accepted as compliance with the joint homeowners' maintenance agreement in a letter dated January 29, 1997 (Exhibit 8 in DR 13-16). Mr. Kuhn stated:*
>
> > *'The deed restrictions of record, met your definition of the necessary joint homeowners maintenance agreement.'*
>
> *Both the Applicant and the Kuhns purchased their properties after the Land Use*

Restrictions document was recorded and after the plat was filed. However, despite the fact that the County allowed the plat to be recorded and issued building permits for both parcels created by MP-79-232, the Board found that the Land Use Restrictions document was insufficient to comply with Condition of Approval #2 to CU 80-02. The Board found that the recorded Land Use Restrictions do not include provisions to ensure the maintenance of common property. This inconsistent interpretation by the County has led to a situation where the parties cannot agree on the matter because of the ambiguity in Condition of Approval #2 to CU 80-02. It is essential to moving this prolonged dispute forward that the County declare what provisions must be in the agreement, whether both owners must sign it, and any other pertinent considerations. A declaratory ruling is an available and appropriate vehicle for the County to take such an action."

The Hearings Officer finds the applicants' modified request asks for an interpretation of a provision or limitation in a land use permit issued by the county about which there is doubt or a dispute, and therefore satisfies this criterion.

Such a determination or interpretation shall be known as a "declaratory ruling" and shall be processed in accordance with DCC 22.40. In all cases, as part of making a determination or interpretation the Planning Director (where appropriate) or Hearings Body (where appropriate) shall have the authority to declare the rights and obligations of persons affected by the ruling.

FINDINGS: The parties disagree as to whether the requested declaratory ruling will declare the rights and obligations of, and be binding on, both the applicants and opponents and all three cluster development parcels. Opponents argue the ruling will not be binding on them for two reasons: (1) they did not sign or consent to the declaratory ruling application; and (2) the application does not include their property, Tax Lot 200.

As discussed in detail in the findings below, incorporated by reference herein, the Hearings Officer has found the applicants were authorized under Section 22.40.020 to submit the subject applications without opponents' signature or consent. In addition, I find both opponents and the applicants are "persons affected by" the requested declaratory ruling under this paragraph because both are parties to this proceeding and both own property within the cluster development approved by the decision in CU-80-2. Therefore, I find I have authority to declare the rights and obligations of the applicants and opponents with respect to the question presented in the declaratory ruling request.

The Hearings Officer also finds my declaratory ruling will be binding on all three parcels in the cluster development because Condition 2 of CU-80-2 is a condition of approval for the cluster development and as such applies to all three parcels. In addition, the condition specifically applies to both residential parcels by prohibiting the sale thereof prior to the recording of the required agreement.

For the foregoing reasons, the Hearings Officer finds my declaratory ruling will declare the rights and obligations of both the Dowells and the Kuhns insofar as they relate to the question presented in the applicants' declaratory ruling request, and will apply to and affect the entire

cluster development including the residential and open space parcels.

B. A declaratory ruling shall be available only in instances involving a fact-specific controversy and to resolve and determine the particular rights and obligations of particular parties to the controversy. Declaratory proceedings shall not be used to grant an advisory opinion. Declaratory proceedings shall not be used as a substitute for seeking an amendment of general applicability to a legislative enactment.

FINDINGS: The applicants requested a declaratory ruling of what is required to comply with Condition 2 of CU-80-2. As discussed in the findings above, the applicants' original application requested a determination of whether a specific proposed maintenance agreement would be acceptable. The applicants modified their original request by withdrawing the proposed agreement and instead requesting a determination of "what requirements (specific provisions, required signatures, and any other considerations) are necessary to satisfy Condition of Approval #2 of CU 80-22." The applicants stated this modification was prompted by questions posed by the Hearings Officer and responsive comments submitted by Assistant Legal Counsel Laurie Craghead regarding my authority to consider and find acceptable a specific agreement.

In the Hearings Officer's December 11, 2013 letter to the parties, I asked whether I had authority to declare what specific provisions must be included in any agreement required by Condition 2 of CU-80-2, and whether any such declaration would amount to a prohibited "advisory opinion." In her December 12, 2013 memorandum, Ms. Craghead responded in relevant part as follows:

> *"The question before the decision maker is not to determine what specific provisions must be included in any maintenance agreement. Therefore, the decision maker does not have that authority in this case.*
>
> *Such a determination, however, is not necessary in order to determine whether the particular agreement before the decision maker complies with the condition of approval. Of course, providing findings as to why the particular agreement complies with the condition of approval, <u>the decision maker may appear to be providing an advisory opinion to guide the drafting of any other homeowners' agreement that might also be proposed to meet the condition of approval</u>. Any finding in any type of decision, however, provides guidance for future similar decisions".* (Underscored emphasis added.)

The term "advisory opinion" is not defined in the county code. The ordinary definition of "advisory" is "advising" and "relating to advice." *Webster's New World Dictionary, College Edition*. The ordinary definition of "advise" includes "to give advice; to counsel; to offer as advice; to recommend." *Id.* In the context of Section 22.40.010(B), the term "advisory opinion" is contrasted with a ruling resolving a "fact-specific controversy." In light of these definitions and the context of the term "advisory opinion," the Hearings Officer finds the intent of Paragraph (B) was to limit declaratory rulings to resolving actual controversies rather than answering hypothetical questions. The applicants' modified declaratory ruling request arises from a fact-specific controversy concerning the meaning of Condition 2 of CU-80-2. Although the applicants' request is worded in a manner that suggests they are requesting an advisory opinion – i.e., asking for guidance as to what should be included in an agreement in order for it to be

acceptable to the county – the gist of their request is for a determination of what the language of Condition 2 means and requires. Consequently, I find the applicants' modified declaratory ruling application requests a determination to resolve a fact-specific controversy and is not for the purpose of obtaining an advisory opinion.

C. **Declaratory rulings shall not be used as a substitute for an appeal of a decision in a land use action or for a modification of an approval. In the case of a ruling on a land use action a declaratory ruling shall not be available until six months after a decision in the land use action is final.**

FINDINGS: The Hearings Officer finds the subject declaratory ruling request is not a substitute for an appeal since the appeal period for CU-80-22 expired many years ago, and the applicants are not challenging the validity of that approval but rather an interpretation thereof.

D. **The Planning Director may refuse to accept and the Hearings Officer may deny an application for a declaratory ruling if:**

1. **The Planning Director or Hearings Officer determines that the question presented can be decided in conjunction with approving or denying a pending land use application or if in the Planning Director or Hearing Officer's judgment the requested determination should be made as part of a decision on an application for a quasi-judicial plan amendment or zone change or a land use permit not yet filed; or**

FINDINGS: The Hearings Officer finds the question presented through this declaratory ruling proceeding cannot be decided in conjunction with a pending land use application because none exists other than the subject declaratory ruling request. I also find the question cannot be resolved through a plan amendment, zone change or land use permit application not yet filed because the question presented does not request an interpretation of the county's comprehensive plan or zoning ordinance, and declaratory ruling proceedings are intended to provide a mechanism through which the status of a previously issued land use approval is determined.

2. **The Planning Director or Hearings Officer determines that there is an enforcement case pending in district or circuit court in which the same issue necessarily will be decided as to the applicant and the applicant failed to file the request for a declaratory ruling within two weeks after being cited or served with a complaint.**

FINDINGS: The Hearings Officer finds there are no enforcement cases pending in district or circuit court that raise the same issue presented in this declaratory ruling proceeding.

The Planning Director or Hearings Officer's determination to not accept or deny an application under DCC 22.40.010 shall be the County's final decision.

FINDINGS: The Hearings Officer finds neither the Planning Director nor the Hearings Officer determined to not accept or to deny the applicants' declaratory ruling request.

b. Section 22.40.020, Persons Who May Apply

A. DCC 22.08.010(B) notwithstanding, the following persons may initiate a declaratory ruling under DCC 22.40:

1. The owner of a property requesting a declaratory ruling relating to the use of the owner's property.

2. In cases where the request is to interpret a previously issued quasi-judicial plan amendment, zone change or land use permit, the holder of the permit; or

3. In all cases arising under DCC 22.40.010, the Planning Director.

FINDINGS: The referenced Section 22.08.010 establishes general requirements for filing land use applications. Paragraph (A) of that section defines "property owner" as "the owner of record or the contract purchaser and does not include a person or organization that holds a security interest." Paragraph (B) of Section 22.08.010 authorizes land use applications to be submitted "by the property owner or a person who has written authorization from the property owner as defined herein to make the application."

Section 22.40.020(A), relating to declaratory rulings, expands the list of applicants authorized to submit an application beyond those identified in Section 22.08.010 to include: (1) "the property owner" when the declaratory ruling relates to "the use of the owner's property;" (2) "the holder of the permit" in cases where the declaratory ruling requests an interpretation of a previously issued land use permit; and (3) the Planning Director "in all cases." In the Hearings Officer's decisions in *Smith* (A-10-2, NUV-09-1) and *Loyal Land* (DR-11-8) I found the intent of this broad authorization, combined with the extensive list of subjects for declaratory rulings under Section 22.40.010(A), is to provide an expansive rather than restrictive process for resolving issues and "status situations" in a timely manner.

The applicants own Tax Lot 100 and are co-owners with opponents of Tax Lot 300, the open space parcel. The Hearings Officer therefore finds the applicants are owners of the property subject to the declaratory ruling proceeding. I also find they are holders of the cluster development conditional use permit issued to their predecessor in title because under Section 22.36.050 that approval runs with the land. For these reasons, I find the applicants are entitled to request this declaratory ruling.

In her January 17, 2014 submission, Ms. Fancher argued the Hearings Officer cannot consider the applicants' declaratory ruling application because it was submitted without the Kuhns' signature or other form of consent. The Hearings Officer disagrees. In *Loyal Land* I found the applicant was entitled to request a declaratory ruling affecting nine tax lots comprising a destination resort although the applicant owned only eight of those tax lots and the owner of the remaining tax lot did not consent, and in fact was opposed, to the filing of the application. My holding was based on my analysis in *Smith* (A-10-2, NUV-09-1) in which I held that because Section 22.40.020(A)(1) authorizes "the" owner of property to apply for a declaratory ruling, in a

case involving multiple property owners the application can be submitted by "a" property owner.

The Hearings Officer adheres to my holdings in *Smith* and *Loyal Land* and finds the applicants had authority to submit their declaratory ruling requests without the signature or consent of the Kuhns.

B. A request for a declaratory ruling shall be initiated by filing an application with the planning division and, except for applications initiated by the Planning Director, shall be accompanied by such fees as have been set by the Planning Division. Each application for a declaratory ruling shall include the precise question on which a ruling is sought. The applicant shall set forth whatever facts are relevant and necessary for making the determination and such other information as may be required by the Planning Division.

FINDINGS: The record indicates the applicants filed original and modified declaratory ruling applications and paid the fees required by the county. The applications and supporting materials set forth both the questions posed by the applicants and the facts relevant to answering those questions. Therefore, the Hearings Officer finds the applicants satisfied this requirement.

c. Section 22.40.030, Procedures

Except as set forth in DCC 22.40 or in applicable provisions of a zoning ordinance, the procedures for making declaratory rulings shall be the same as set forth in DCC Title 22 for land use actions. Where the Planning Division is the applicant, the Planning Division shall bear the same burden that applicants generally bear in pursuing a land use action.

FINDINGS: The subject declaratory ruling application has been processed in accordance with the requirements of Title 22, the development procedures ordinance.

d. Section 22.40.040, Effect of Declaratory Ruling

A. A declaratory ruling shall be conclusive on the subject of the ruling and bind the parties thereto as to the determination made.

B. DCC 22.28.040 notwithstanding, and except as specifically allowed therein, parties to a declaratory ruling shall not be entitled to reapply for a declaratory ruling on the same question.

C. Except where a declaratory ruling is made by the Board of County Commissioners, the ruling shall not constitute a policy of Deschutes County.

FINDINGS: The Hearings Officer finds this declaratory ruling decision will be conclusive as to the question presented in the applicants' modified declaratory ruling request, and the parties

cannot reapply for a declaratory ruling on that same issue. And because this decision has not been made by the board, I find it does not constitute a policy of the county.

e. Section 22.40.050, Interpretation

Interpretations made under DCC 22.40 shall not have the effect of amending the interpreted language. Interpretation shall be made only of language that is ambiguous either on its face or in its application. Any interpretation of a provision of the comprehensive plan or other land use ordinance shall consider applicable provisions of the comprehensive plan and the purpose and intent of the ordinance as applied to the particular section in question.

FINDINGS: The applicants have not requested an interpretation of the comprehensive plan or zoning ordinance. Rather, they have requested an interpretation of Condition 2 of CU-80-2. As discussed in detail in the findings below, the Hearings Officer has found the language of Condition 2 is ambiguous both on its face and as applied. Therefore, I find the applicants' declaratory ruling request satisfies this criterion.

INTERPRETATION OF CONDITION 2 OF CU-80-2

FINDINGS: The applicants' modified declaratory ruling application requests a determination of:

> *"What requirements (specific provisions, required signatures, and any other considerations) are necessary to satisfy Condition of Approval #2 of CU 80-22."*

As noted in the findings above, this is a different question from that posed in the applicant's original declaratory ruling application which asked the Hearings Officer to declare that a specific proposed maintenance agreement would be acceptable to the county and satisfy Condition 2. As also discussed above, I have found the applicants' modified declaratory ruling request essentially asks for a determination of what the language of Condition 2 requires.

Condition 2 states:

> *"Prior to the sale of any lot a written agreement shall be recorded which establishes an acceptable homeowners association or agreement assuring the maintenance of common property in the partition."*

Section 22.40.050 authorizes the Hearings Officer to interpret only language that is "ambiguous either on its fact or in its application." As discussed in the findings above, the record indicates that until the board's 2010 decision held otherwise, planning staff and the parties apparently believed the requirements in Condition 2 had been fully satisfied by the recording of deed restrictions for the cluster development parcels. Therefore, I find this condition has been ambiguous in its application.

Condition 2 requires that prior to the sale of any cluster development lot:

1. a written agreement must be recorded;

2. that establishes either an acceptable homeowners association or acceptable agreement;

3. that assures the maintenance of common property in the cluster development.

The Hearings Officer finds Condition 2 is ambiguous on its face for several reasons. It does not describe the form or nature of either agreement referred to in the condition. It does not identify the necessary parties to either agreement. It does not specify what is meant by "maintenance" of the common property. And it does not explain what constitutes an "acceptable" homeowners association or maintenance agreement, although as discussed above the board in its 2010 decision held the term "acceptable" means "acceptable to the county." However, neither Condition 2 nor the board's decision identifies what the homeowners' association or agreement must include to be "acceptable to the county." Finally, as discussed in detail in the findings below, the language of Condition 2 deviates from the ordinance language on which it was based by adding alternative language that has caused confusion for the parties and the county.

To interpret Condition 2 the Hearings Officer must look to the both the text and context of the condition to determine the drafter's intent. I find the context of Condition 2 includes PL-15, the zoning ordinance in effect when CU-80-2 was issued, the decision in CU-80-2, and the board's and LUBA's decisions interpreting and applying Condition 2.

PL-15

The record indicates that in 1980 the subject property was zoned Forest Use (F-3) and Wildlife Area Combining (WA). Sections 4.085 and 4.190 of PL-15, respectively, allowed cluster developments as a conditional use in the F-3 and WA Zones. Conditional uses were governed by Chapter 8 of PL-15. Section 8.050 established specific conditional use standards for cluster developments in relevant part as follows:

> **A conditional use shall comply with the standards of the zone in which it is located and with the standards and conditions set forth in this section.**
>
> * * *
>
> **(16) Cluster Development (Single-Family Residential Uses Only).**
>
> * * *
>
> **(B) The conditional use shall not be granted unless the following findings are made:**
>
> **(a) No more than 35 percent of the land will be utilized for the development and 65 percent will be kept in open space uses.**
>
> * * *
>
> **(C) All applications shall be accompanied by a plan with the following information:**
>
> * * *
>
> **(b) The area to be preserved for open space clearly designated on the plan and adequate deed restrictions to maintain the**

<u>land in open space</u> provided.

(c) **A written agreement establishing an acceptable homeowners association assuring <u>the maintenance of common property</u> in the development.** (Emphasis added.)

Section 1.030(80) of PL-15 defined "open space" as:

> **Lands used for agricultural or forest uses, and any land area that would, if preserved and continued in its present use, conserve and enhance natural or scenic resources . . . enhance the value to the public of . . . wildlife preserves.**

In light of the "open space" definition, the Hearings Officer finds the deed restrictions required by subparagraph (b) of Section 8.050(16)(C) were intended to assure that only open space uses could occur on designated open space. As discussed in the findings above, the record indicates deed restrictions were recorded for the subject cluster development residential parcels that limited the uses permitted on the open space parcel.

Subparagraph (c) of Section 8.050(16)(C) addresses "common property" rather than "open space." It requires an agreement establishing a homeowners' association for the "maintenance" of that property. Neither PL-14 nor PL-15 defined "common property." The ordinary definition of "common" includes "belonging to or shared by each or all." *Webster's New World Dictionary and Thesaurus, Second Edition.* Applying this definition, the Hearings Officer finds "common property" as used in Section 8.050(16)(C)(c) means property in the joint ownership of cluster development property owners.

The terms "open space" and "common property" have different meanings and are used in different contexts in Section 8.050(16)(C). Consequently, the Hearings Officer finds they do not necessarily encompass the same property. For instance, common property in a cluster or other planned development may include improvements such as a water or sewage disposal system that does not constitute "open space." Moreover, there appears to be nothing in the cluster development provisions of PL-15 that requires the designated open space be in joint ownership of the cluster development property owners.[1]

PL-15 also does not define the term "maintain." The ordinary definition of the term includes "to keep in continuance or in a certain state" and "to keep or keep up." *Webster's New World Dictionary and Thesaurus, Second Edition.* The Hearings Officer finds that in the context of Subparagraph (b) relating to open space, "maintain" has the former meaning – i.e., to keep in a certain state. I find that in the context of Subparagraph (c) relating to common property, "maintain" has the former meaning – i.e., to "keep up."

<u>CU-80-2</u>

The decision in CU-80-2 includes little analysis. However, the Hearings Officer finds two other

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[1] Section 1.030(21) of PL-15 defines "cluster development" as:

> **A planned development, at least five acres in area, permitting the clustering of single-family residences on one part of the property, with no commercial or industrial uses permitted.**

conditions of approval provide some context for interpreting Condition 2. Conditions 1 and 3 provide:

> "1. *The applicant shall receive an approved partition for two residential lots, with the remaining lot to be held in joint ownership prior to the sale of any lots.*
>
> 3. *The common areas shall not be used for any residential dwelling."* (Emphasis added.)

It appears from these conditions that in drafting Condition 2 for CU-80-2, former Hearings Officer Myer Avedovich considered the cluster development open space parcel to constitute common property – i.e., in joint ownership of the residential parcel owner(s). Such a finding is consistent with the cluster development partition plat, a copy of which is included in Exhibit 9 to the applicants' original burden of proof. The plat labels the open space parcel as "common area."

As discussed above, Section 8.050(16)(C)(c) requires the establishment of *only* a homeowners' association for maintenance of the common property. However, in Condition 2 former Hearings Officer Avedovich required a written agreement establishing *either* a homeowners' association *or* an "agreement" that assures the maintenance of common property. The record indicates there was no appeal from this condition. And no written agreement was executed or recorded establishing either a homeowners' association or a maintenance agreement.[2]

Finally, Condition 2 does not identify who must sign either the written agreement establishing a means for maintaining the common property, or the written agreement for maintenance which was offered as an alternative to the establishment of a homeowners' association. However, because the actions required by Condition 2 were required to be undertaken prior to the sale of partition lots – i.e., before there were any property owners other than Mr. Barton -- the Hearings Officer finds former Hearings Officer Avedovich necessarily contemplated the parties to the first agreement would be Mr. Barton *and the county*. In other words, the first agreement was intended to serve a function similar to an improvement guarantee or conditions of approval agreement typically executed between the developer and the county.[3]

The Hearings Officer finds that because the second agreement was offered to Mr. Barton as an alternative to establishing a homeowners association, it necessarily was intended have the same effect as a homeowners' agreement. In other words, it would specify how and by whom the common property would be maintained and would be binding on all future owners of the cluster development parcels. For the second agreement to have such an effect, it would have to be recorded against the residential parcels. And again, because Condition 2 required this maintenance agreement, if chosen by Mr. Barton, to be in place prior to the sale of any cluster development lots, I find the hearings officer likely also intended that the parties to this agreement would be the developer and the county.

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[2] Exhibit 9 to the applicant's original burden of proof includes a copy of a letter dated March 5, 1980 from James Drew, attorney for Mr. Barton, stating it was Mr. Barton's intent to develop "an agreement creating the Homeowners' Association" for maintenance of the "common property" including payment of taxes.

[3] Section 22.36.050(B) authorizes the county to require that an applicant record a conditions of approval agreement .

Board's 2010 Decision (A-09-4, A-09-5, A-07-9)

As discussed in the findings above, in its 2010 decision the board held the term "acceptable" in Condition 2 of CU-80-2 means "acceptable to the county." The parties disagree as to whether the board's decision interpreted any other language in Condition 2. The board found the applicants' parcel was in violation of Title 18 because of the lack of an acceptable homeowners' association or "agreement between both property owners" for maintenance of the open space parcel. Opponents argue the quoted language signifies the board's decision held both the applicants and opponents must sign any agreement creating a homeowners' association. The Hearings Officer disagrees. I find the above-quote language is *dicta* because it was not required for the board to resolve the question before it, which was whether the county erred in issuing a LUCS and a building permit for the applicants' proposed remodel of their dwelling in the absence of an acceptable homeowners association or written maintenance agreement. The question was *not* who is required to sign any agreement(s) required by Condition 2 of CU-80-2.

In order to determine the meaning of the phrase "acceptable to the county" in the board's 2010 decision, the Hearings Officer finds I must again look to PL-15 for context. As discussed in the findings above, cluster developments were conditionally permitted uses in the F-3 and WA Zones, and the definition of "cluster development" included an open space area. Section 8.050(16)(B)(a) required that at least 65 percent of the cluster development be "kept in open space uses" which included agricultural and forest uses and preservation of natural resources including wildlife habitat. Therefore, I find the purpose of the open space requirement for the subject cluster development was three-fold: (1) to assure no development of the open space parcel with uses other than "open space" uses – which was to be accomplished by the recording of deed restrictions; (2) to assure preservation of the natural resource values of the open space parcel, and in particular its value as wildlife habitat – which was to be accomplished through either a homeowners' association or a maintenance agreement; and (3) to assure the common property is "kept up" – i.e., that it does not become a "nuisance" due to lack of care and maintenance.

LUBA Decision (*Kuhn v. Deschutes County*, 62 Or LUBA 165 (2010)

In its 2010 decision, LUBA reviewed the board's denial on appeal of the LUCS and building permit for a remodel of the dwelling on the applicants' dwelling. LUBA held that in the context of that appeal it was not improper for the board to reach and decide the issue of what the term "acceptable" in Condition 2 means. LUBA's decision states in relevant part:

> *"Petitioners* [Kuhns] *contend the above finding* ["acceptable" means "acceptable to the county"] *was unnecessary to the board of county commissioners' decision, since there is no agreement there is no issue presented regarding who the agreement must be acceptable to. We understand petitioners to contend that issue will not be presented until there is an agreement and it was error for the board of commissioners to resolve the issue in the decision that is the subject of this appeal.*
>
> *Petitioners are no doubt correct that the finding regarding who the agreement must be acceptable to is not actually presented in this case, need not have been answered by the board of commissioners, and need not be addressed by LUBA in this appeal. But while it may be improper for a judicial court to decide hypothetical questions, the board of county commissioners is not a judicial court,*

and it was no improper for the board of county commissioners to reach and decide a question that it felt was likely to arise in reaching the required agreement or arise after that agreement is reached.

The board of county commissioners' interpretation is also obviously correct. The agreement that is required by Condition 2 will only be entered if it is acceptable to both intervenors [Dowells] *and petitioners. The only other entity that has any direct interest in the agreement is the county. Viewed in this context, the requirement that the agreement be 'acceptable' could only mean it must be acceptable to the county."* (Emphasis added.)

The Hearings Officer finds the above-underscored language also is *dicta*. That is because the only question before LUBA was whether the board erred in interpreting "acceptable" to mean "acceptable to the county." It was not necessary to that holding for LUBA to determine who must sign the agreement(s).

Circuit Court Decision (Case No. 01-CV-0233-MA).

Opponents argue the context for interpreting Condition 2 in CU-80-2 also includes the decision issued by the Deschutes County Circuit Court on August 2, 2002, which included the following language:

> *"(MANDATORY INJUNCTION)*
>
> *Defendants are ordered to enter into the required 'home owners association or agreement assuring the maintenance of common property' as set forth in the conditions required with respect to the conditional use permit. At a minimum, this agreement shall provide that any property taxes and any maintenance costs with regard to the common property shall be shared equally."* (Emphasis added.)

In her March 21, 2014 submission, opponent's attorney Liz Fancher argued this language specifically ordered the applicant to enter into an agreement *with opponents*. The Hearings Officer disagrees. I find there is nothing in the above-quoted and underscored language that identifies who must be a party to the required maintenance agreement. Rather, the decision simply refers back to Condition 2.

Conclusion

As discussed in the findings above, the applicants' modified declaratory ruling request asked for a determination of:

> *"What requirements (specific provisions, required signatures, and any other considerations) are necessary to satisfy condition of approval #2 of CU 80-22* [sic]*."*

Based on the foregoing findings and conclusions, the Hearings Officer finds Condition 2 established the following four requirements of the original cluster development developer:

1. he must enter into a written agreement with the county that establishes either a homeowners'

association or maintenance agreement for the cluster development common area;

2. he must either establish a homeowners' association or a separate written agreement assuring maintenance of the common property;

3. he must obtain the county's approval of the homeowners' association or written maintenance agreement, whichever he chose; and

4. to be acceptable, the homeowners' association or written maintenance agreement must both preserve and maintain the natural resource values and wildlife habitat on the common property and assure the common property is kept up so it does not become a nuisance.

Mr. Barton did not comply with these requirements and is no longer in the picture.

Section 22.36.050 addresses the status of land use permits, approvals and conditions thereof following the transfer of property ownership as follows:

> **A. A land use action permit shall be deemed to run with the land and be transferable to applicant's successors in interest.**
>
> **B. The Planning Division may require that an applicant record a notice of land use permit and conditions of approval agreement in the Deschutes County Records. Such an agreement shall set forth a description of the property, describe the permit that has been issued and set forth the conditions of approval. The Planning Director is authorized to sign the notice and agreement on behalf of the County.**
>
> **C. The terms of the approval agreement may be enforced against the applicant and any successor in interest.**

The Hearings Officer finds that under Paragraph (A), the applicants and opponents now stand in the shoes of the applicant – i.e., Mr. Barton, original cluster development developer. In other words, they are *both* responsible for carrying out and complying with the conditions of approval in CU-80-2. Accordingly, I find that under the circumstances presented in this case, and in order to accomplish what the original developer did not, the applicants and opponents must *jointly* undertake all actions required to comply with Condition 2. I further find that under Section 22.36.050(B) the Planning Director may enter into a conditions of approval agreement with *both* the Dowells and the Kuhns through which they *jointly* acknowledge and agree to comply with the conditions of approval in CU-80-2, including Condition 2, in exchange for the exercising their rights under the cluster development conditional use approval.

With respect to the required homeowners' association or written agreement for maintenance of the common property, the Hearings Officer finds that because execution of one of these documents was required of the original developer, the applicants and opponents again step into his shoes and therefore must agree as to which method they will use for assuring maintenance of the common area. They also must agree on the language used in whichever document they chose, they must both sign that document, and they must present that document to the county for approval. Although Condition 2 does not expressly require that either the homeowners' association or written maintenance agreement be recorded, I find that the chosen document must be recorded in order for it to be binding on the cluster development parcels. In her March

21, 2014 submission, Ms. Fancher argued a maintenance agreement such as that contemplated by Condition 2 is not recordable. I am uncertain if this is the case. However, to assure any written maintenance agreement is recorded, I find that whichever document is chosen by the applicants and opponents to assure maintenance of the common property shall be attached to the conditions of approval agreement for recording.

With respect to the *contents* of the homeowners' association or written maintenance agreement, the Hearings Officer finds that whichever document is chosen by the applicants and opponents, it must include provisions assuring the natural resource values and wildlife habitat in the cluster development open space parcel are preserved and maintained, and that the open space does not become a nuisance through lack of maintenance. Those provisions should include, but need not be limited to: (1) who pays the property taxes on the open space parcel; (2) how vegetation is to be maintained for habitat values and to minimize risk of wildfire; (3) who is to physically maintain the common property;[4] (4) who is to pay for the costs of maintenance; and (4) how disputes between the parties concerning the maintenance agreement are to be resolved.[5]

IV. DECISION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby **DECLARES AS FOLLOWS:**

1. The Dowells and Kuhns now stand in the shoes of the original cluster development developer and as such are jointly responsible for carrying out and complying with the conditions of approval in CU-80-2 including Condition 2.

2. The Dowells and the Kuhns, as successors in interest to the original cluster development developer, may enter into a conditions of approval agreement with the county on a form of agreement provided by the county. Such agreement shall state that the Dowells and Kuhns acknowledge and agree to comply with the conditions of approval in CU-80-2, including Condition 2, in exchange for the exercising their rights under the cluster development conditional use approval.

3. The Dowells and the Kuhns, as successors in interest to the original cluster development developer, must agree as to whether they will use a homeowners' association or written maintenance agreement to assure maintenance of the cluster development common area.

4. Whichever document the Dowells and the Kuhns agree upon to assure maintenance of the cluster development common property, the document must include provisions assuring the natural resource values and wildlife habitat in the cluster development open space parcel are preserved and maintained, and that the open space does not become a nuisance through lack of maintenance. Those provisions should include, but need not be limited to:

---

[4] The Hearings Officer finds there is nothing in PL-15 or the decision in CU-80-2 that limits to the Dowells and/or the Kuhns the obligation to physically maintain the common property. In other words, a third party could undertake the required maintenance if the parties agree to that arrangement.

[5] Any additional provisions agreed to by the Dowells and the Kuhns must be directed at carrying out the purposes of the common property maintenance agreement.

a. who pays the property taxes on the open space parcel;

b. how vegetation is to be maintained for wildlife habitat values and to minimize risk of wildfire;

c. who is to physically maintain the common property;

e. who is to pay the costs of maintenance of the common property; and

e. how disputes between the Dowells and the Kuhns concerning the interpretation and implementation of the homeowners' association or maintenance agreement are to be resolved.

5. The Dowells and the Kuhns must agree on the language of the common property maintenance document they agree to use.

6. The Dowells and the Kuhns must both sign the common property maintenance document they agree upon.

7. The Dowells and the Kuhns must present the agreed-upon document to the county for approval prior to signing and recording the document with the conditions of approval agreement.

Dated this 3rd day of June, 2014.

Mailed this 4th day of June, 2014.

Karen H. Green

Karen H. Green, Hearings Officer

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

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/

CERTIFICATE OF MAILING

FILE NUMBERS: DR-13-16/MA-14-1

DOCUMENT MAILED: Hearings Officer's Decision

MAP/TAX LOT NUMBERS: 16-11-29, 100, 200, 300 (U1 and U2)

I certify that on the 4th day of June, 2014 the attached Hearings Officer's Decision, dated June 4, 2014, was mailed by first class mail, postage prepaid, to the persons and addresses set forth on the attached list.

Dated this 4th day of June, 2014.

COMMUNITY DEVELOPMENT DEPARTMENT

By: Sher Buckner

Jeff and Pat Dowell c/o Bryant, Lovlien & Jarvis, PC 591 SW Mill View Way Bend, OR 97702	William and Leigh Kuhn P.O. Box 5996 Bend, OR 97708-5996
Sharon Smith Bryant, Lovlien Jarvis, PC 591 SW Mill View Way Bend, OR 97702	Liz Fancher 644 NW Broadway Street Bend, OR 97701
Lavonda J. Lowther Living Trust Lavonda J. Lowther, Trustee 38943 Luckiamute Road Philomath, OR 97370	Thompson J. Barton 90 6th Street Ashland, OR 97520
Ron and Marilyn Peery 3910 Mirror Pond Way Eugene, OR 97408	Irene and Lance Olivieri 65580 Sisemore Road Bend, OR 97701
Richard and Alana Spinrad 8330 NW Chaparral Drive Corvallis, OR 97330	

DESCHUTES COUNTY

HEARINGS OFFICER

DESCHUTES COUNTY COURTHOUSE BEND, OREGON 97701
TELEPHONE (503) 382-4000, EXT. 223

FINDINGS AND DECISION

FILE NO: CU-80-22

APPLICANT: John Barton

REQUEST: An application for a conditional use permit to allow a cluster development for two lots in a F-3, Forest Use Zone with a WA, Wildlife Area Combining Zone, and LM Lanscape Management Combining Zone.

PLANNING STAFF RECOMMENDATION: Approval with conditions

PLANNING STAFF REPRESENTATIVE: Craig Smith

PUBLIC HEARING: Public Hearing was held in the Deschutes County Justice Building, Bend, Oregon, on March 25, 1980 at 7:00 P.M. An oral decision was rendered at that time.

BURDEN OF PROOF: In order to receive approval on this conditional use application the applicant must be in conformance with Article 8, Section 8.050 (16) of PL-15 of the Deschutes County Zoning Ordinance and Article I, Section 1.030 (25A) of PL-15. In addition must meet the conditions of Procedural Ordinance PL-9, Section 6.000.

FINDINGS:

A. Subject Property:

1. Location:
The subject property is located westerly of Sisemore Road, approximately one mile north of the Old Tumalo Dam ans is further described as Tax Lot 1414, Township 16 south, Range 11 east, Section 19.

2. Zone:
F-3, Forest Use Zone with a WA, Wildlife Area Combining Zone.

3. Comprehensive Plan Designation:
Agricultural and the Deschutes County Resource element of the plan designates the subject property to be within the deer winter range.

4. Site Description:
The subject property is approximately 43 acres in size, and has a rock ledge which runs east and west across approximately the middle of the property. The property is within the Tumalo Winter Deer Range.

Access will be provided to each lot by Sisemore Road, a county road. The surrounding property is zoned F-3, Forest Use and is within the WA, Wildlife Area and Landscape Management Combining Zones, as well as all surrounding property.

CONCLUSIONS:

A. The goals of Deschutes County Year 2,000 Plan concerning rural development on page 49 states:

"a. To preserve and enhance the open spaces, rural character, scenic values and natural resources of the County.

b. To quide the location and design of rural development so as to minimize the public costs of facilities and services, to avoid unnessary expansion of service boundaries and to preserve and enhance the safety an viability of rural land uses.

c. To provide for the possible long-term expansion of urban areas while protecting the destinction between urban (urbanizing) lands and rural land uses."

In addition the goals and policies of the Comprehensive Plan Year 2,000 concerning Fish and Wildlife indicate in part that the goals are:

a. To preserve and protect existing fish and wildlife area.

b. To maintain all species at optimum levels to prevent serious depletion of indigenous species.

c. To develop and manage the lands and waters of this country in a manner that will enhance, where possible, the production and public enjoyment of wildlife.

B. Certainly one of the more controversial issues in the County has been the deer winter ranges. Within the winter ranges the minimum lot size shall be 40 acres. Planned developments (including cluster developments) may be permitted on parcels 160 acres or larger in size. However, man's activities must be limited to 20 percent of the development's lands with 80 percent left as open space. In the case of planned developments the density shall be determined by the underlying zone.

C. The applicant is in conformance with LCDC Goals which are applicable as follows:

Goal Three - Agricultural Lands - not applicable. The subject property is within the Deschutes-Deskamp and Gosney-Deschutes soil associations. These soils are generally considered Class VI soils without irrigation. Therefore, this goal is not applicable to this case.

Goal Four - Forest Lands - The subject is considered a low timber productivity rating the Deschutes County Resource Element.

Goal Thirteen - Energy Conservation - The approval of this application will allow one additional dwelling on the property, therefore, the impact would be minimal.

DECISION:

Approval subject to the following conditions:

1. The applicant shall receive an approved partition for two residential lots, with the remaining lot to be held in joint ownership prior to the sale of any lots.

2. Prior to the sale of any lot a written agreement shall be recorded which establishes an acceptable homeowners association or agreement assuring the maintainance of common property in the partition.

3. The common area shall not be used for any residential dwelling.

4. Any buildings shall conform to section 4.180 concerning the Landscape Management Combining Zone of PL-15.

5. All necessary permits shall be received prior to the construction of any buildings.

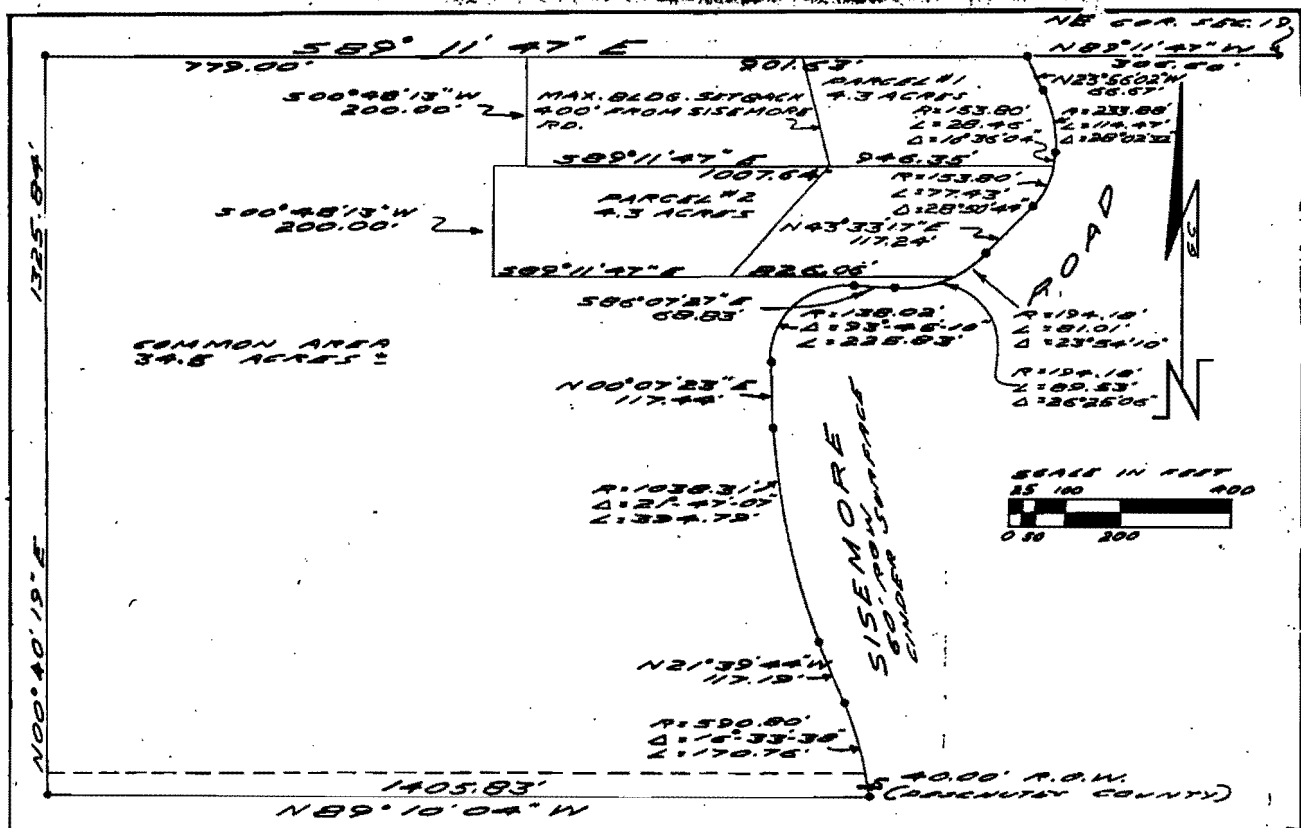
6. This development will be in accordance with the Year 2,000 Comprehensive Plan as it relates to the open space and dedication of that open space as required.

DATED this 3rd day of April, 1980.

Myer Avedovech
HEARINGS OFFICER

MA:ch

cc: file
John Barton
Planning Commission
Planning Department



BEARINGS ARE BASED ON PREVIOUS BY G. COLVIN.

REGISTERED PROFESSIONAL LAND SURVEYOR

George Colvin

OREGON
FEBRUARY 14, 1975
GEORGE W. COLVIN, JR.
1020

MINOR LAND PARTITION

MP- 79 - 232 DATE 12-10-79

TWSHP 16 S RNGE 11 E SEC 19 TL 16-11 14-14

DEED OWNER DESCHUTES COUNTY

PARTITIONER JOHN BARTON
17671 SNOW CR. RD.
BEND, ORE.

SURVEYOR COLVIN & HOERNING
ENGINEER 942 N.W. HILL, BEND

SEWAGE DISPOSAL SYSTEM
- [x] SEPTIC TANK
- [ ] CITY SEWER
- [ ] COMMUNITY SEWER

ZONE F-3

WATER SOURCE
- [x] WELL
- [x] CISTERN
- [ ] COMMUNITY WATER
- [ ] P.U.W. SYSTEM

DESCHUTES COUNTY
PLANNING DEPARTMENT

APPROVALS:

Edgar W. Graves COUNTY SURVEYOR	10/2/80 DATE
Albert A. Young COUNTY COMMISSIONER	11-12-80 DATE
Robert C. Pentland COUNTY COMMISSIONER	11-12-80 DATE
[illegible] COUNTY COMMISSIONER	11/12/80 DATE
John C. Hodgson COUNTY PLANNING DIRECTOR	11-12-80 DATE
John K. Glover COUNTY SANITARIAN	11-12-80 DATE

148-1792
148 - 1792

CIS 106814-E

87-14178

Agreed to Restrictions

LAND USE RESTRICTIONS

JOHN E. BARTON and MARK BURCHETT, being the owner's of property more particularly described in Exhibit A attached hereto, hereby declare said property to be subject to the following Conditions, Covenants and Restrictions.

1. Owners or family members may not acquire additional dogs other than the dog(s) they may own when they purchase the property. All dogs must be kept in such a way that they do not run loose in the area. Dogs allowed to "run" will disrupt deer habitat.

2. Owners or family members may not operate "dirt bikes" on the property.

3. All telephone and electric lines must be underground.

4. All fencing must be wood. Top rail may not be higher than 42"; bottom rail may not be lower than 18". No barbed wire or straight wire may be used for fencing.

5. Owners or family members may not take "target" practice with rifle or hand gun on property.

6. This contract carries with it the strongest encouragement to demonstrate sensitivity to living within the boundaries of the Tumalo Winter Deer Range, and urges the owners to adjust their life style accordingly.

Dated this 20 day of July, 1987.

John E. Barton
John E. Barton

Mark Burchett
Mark Burchett

STATE OF OREGON, COUNTY OF DESCHUTES)ss.

The foregoing instrument was acknowledged before me this 20 day of July, 1987 by JOHN E. BARTON.

NOTARY PUBLIC

Cheryl L. Scott
Notary Public for Oregon
My Commission Expires: 6-9-89

STATE OF OREGON, COUNTY OF DESCHUTES)ss.

The foregoing instrument was acknowledged before me this 20 day of July, 1987 by MARK BURCHETT.

NOTARY PUBLIC

Cheryl L. Scott
Notary Public for Oregon
My Commission Expires: 6-9-89

Barton's copy-

THIS IS WHAT JEB FILED WITH County.

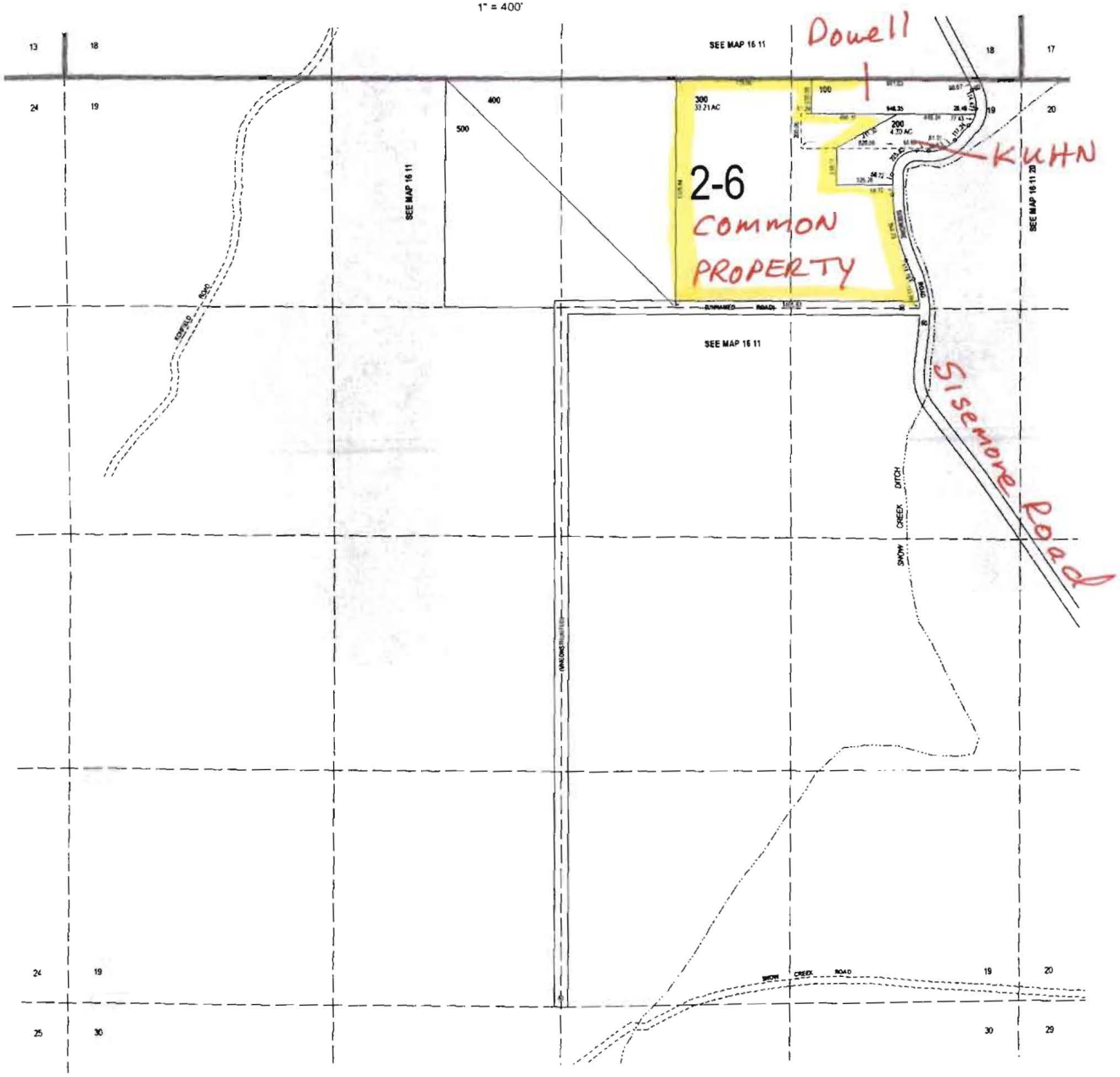
[illegible] COUNTY FILE CO
[illegible]
BEND, OREGON 97701

THIS MAP WAS PREPARED FOR ASSESSMENT PURPOSE ONLY

7/18/2013

SECTION 19 T.16S. R.11E. W.M.
DESCHUTES COUNTY
1" = 400'

16 11 19



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