



Deschutes County Board of Commissioners
1300 NW Wall St., Suite 200, Bend, OR 97701-1960
(541) 388-6570 - Fax (541) 385-3202 - www.deschutes.org

AGENDA REQUEST & STAFF REPORT

For Board Business Meeting of April 13, 2015

DATE: April 6, 2016.

FROM: Peter Gutowsky. Department CDD Phone # ext. 1709

TITLE OF AGENDA ITEM:

Board decision: File No. DR-13-16; MA-14-1; 247-14-000165-A.

PUBLIC HEARING ON THIS DATE? No.

BACKGROUND AND POLICY IMPLICATIONS:

The Board conducted a de novo public hearing on January 13, to clarify what requirements are necessary for a homeowner's or maintenance agreement to be approved for property identified on County Assessor's Map 16-11-19, tax lot 300. The written record was left open until January 27, with a one week rebuttal period to February 3, and one week, February 10 for final argument. The Board deliberated on March 2.

FISCAL IMPLICATIONS:

None.

RECOMMENDATION & ACTION REQUESTED:

Adoption and signature of Document #2016-166

ATTENDANCE: Peter Gutowsky, Planning Manager

DISTRIBUTION OF DOCUMENTS:

Peter Gutowsky.



For Recording Stamp Only

**DECISION OF THE BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY**

FILE NUMBER: DR-13-16/MA-14-1/247-14-000165-A

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

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.

PROPERTY: 65595 Sisemore Road, Bend, OR 97701
Deschutes County Assessor's Map: 16-11-19, Tax Lots 100, 300.

STAFF CONTACT: Peter Gutowsky, Senior Planner

HEARING DATE: January 13, 2016

I. SUMMARY OF DECISION:

The subject application is a declaratory ruling requesting an interpretation of Condition of Approval #2 to CU-80-02. CU-80-02 approved a three parcel cluster development comprised of two residential parcels and an open space parcel (as referred to herein, Tax Lot #100 is the "Dowell Parcel", Tax Lot #200 is the "Kuhn Parcel", Tax Lot #300 is the "Open Space Parcel", and collectively, the Dowell Parcel, the Kuhn Parcel, and the Open Space Parcel are the "Cluster Development"). Cluster developments are a requirement of partitions within the Tumalo Winter Deer Range as a result of the Wildlife Area Combing Zone overlay that corresponds to its boundaries. The history of CU-80-

02 and a summary of the protracted legal proceedings that followed are set out in the Hearings Officer's June 3, 2014 decision (the "2014 Decision").

Condition of Approval #2 imposed the following requirement:

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 properties within the Cluster Development changed hands prior to the satisfaction of this condition. Failing to satisfy this condition eventually resulted in code enforcement proceedings on the properties within the Cluster Development, which remain active. The current owners, Jeff and Patti Dowell (the "Dowells") and Bill and Leigh Kuhn (the "Kuhns") have been unable to reach any understanding related to Condition of Approval #2, which prompted the filing of the declaratory ruling by the Dowells. The Dowells seek a determination of the specific provisions that the County would find acceptable in the Required Agreement (as defined below) as the Board previously found that "acceptable" means acceptable to the County.

The subject application first went before a Hearings Officer who rendered the 2014 Decision. The Dowells then appealed that decision. The Dowells objected to the Hearings Officer's findings that (1) uses of the Open Space Parcel are limited to wildlife habitat uses, (2) vegetation on the Open Space Parcel must be maintained for wildlife habitat values, (3) the Open Space Parcel cannot be conveyed independently of the Dowell Parcel, the Kuhn Parcel, or both, and (4) the Required Agreement must be executed by both the Dowells and the Kuhns.

For the reasons set out below, the Board of County Commissioners (the "Board") finds that the Open Space Parcel is not limited exclusively to wildlife habitat uses, that vegetation on the Open Space Parcel need only be maintained in a manner compliant with the County's noxious weed, hazardous vegetation, and other generally applicable ordinances, that the Open Space Parcel is severable from one or more of the residential parcels, and that the Required Agreement need not be executed jointly by the Dowells and Kuhns.

II. APPLICABLE CRITERIA:

The applicable criteria for a declaratory ruling are set out in the 2014 Decision, which is incorporated herein by reference. The procedural requirements for an appeal are set out in DCC Chapter 22.32.

III. BASIC FINDINGS:

The Board adopts the Hearings Officer's basic findings set out in Section II of the 2014 Decision as supplemented by the additional procedural history set out below.

IV. PROCEDURAL HISTORY:

The Board adopts the procedural history set out in Section II(F) of the 2014 Decision for the events leading up to the proceedings before the Board. The 2014 Decision was issued on June 3, 2014 and mailed on June 4, 2014. The Dowells submitted their Notice of Appeal on June 16, 2014 requesting an on the record review, which the Board granted. The appeal was then placed on hold while the County, the Kuhns, and the Dowells pursued settlement negotiations. The parties did not reach resolution through these efforts. On May 14, 2015, the Dowells reactivated the appeal and requested that the Board hear it *de novo*. At a June 3, 2015 work session and through Order No. 2015-032 dated June 24, 2015, the Board granted *de novo* review. A public hearing was held January 13, 2016. The record was extended until January 27, 2016 for any additional evidence, February 3, 2016 for rebuttal, and February 10, 2016 for final argument. The Board received a post hearing briefing at a work session held February 29, 2016. Deliberations were then held on March 2, 2016.

V. PROCEDURAL ISSUES

Availability of Declaratory Rulings

In the proceedings before the Hearings Officer, the Kuhns challenged the ability of the Dowells to file a declaratory ruling without the Kuhns as a signatory to the application and whether the Kuhns would be bound by a decision to which they are not the applicant. The Kuhns did not make a similar argument in the proceedings before the Board. To the extent this argument has not been waived by the Kuhns, the Board adopts the Hearings Officer's interpretation of ambiguous provisions in DCC 22.40.010(A)-(D) and 22.40.020 as supplemented by this decision.

DCC 22.40.020 does not impose a requirement that any and all persons affected by the declaratory ruling be signatories to the application and the Board declines to read such a requirement into this provision. Moreover, the Dowells are both "the owner" of the properties subject to the application and "the holder" of the conditional use permit at the center of this dispute. These provisions are ambiguous in that they do not address situations where there are multiple owners of a property (as is the case for the Open Space Parcel) or where there are multiple holders of the subject permit. An interpretation that declaratory rulings are limited exclusively to instances where only one person/entity is the owner of the property and/or the holder of the permit, would conflict with DCC 22.40.010(A)(2), which calls for creating a process for interpreting disputed or ambiguous provisions of land use permits. An interpretation that allows any owner or any holder of the permit to obtain a declaratory ruling harmonizes the conflicts between these two provisions.

The undefined term "persons affected by the ruling" (DCC 22.40.010(a)(5)) is not limited to the applicants for the declaratory ruling, but any and all persons affected by the ruling regardless of whether they are party to the application or party to the proceedings. It would impede the rights of other parties, undermine the declaratory ruling process, and

lead to inconsistency if a party affected by the proceeding could opt out by refusing to sign an application or intentionally avoid participating in the proceedings.

The Hearings Officer correctly found that the Dowells could apply for the Declaratory Ruling without the consent of the Kuhns for the reasons set forth in the 2014 Decision as supplemented by this decision. The Hearings Officer also correctly determined that the Declaratory Ruling would be binding on the Kuhns for the reasons set forth in the 2014 Decision as supplemented by this decision.

Modification of Application

In the proceedings before the Hearings Officer, the Kuhns challenged whether the Dowells' change to the question presented by the declaratory ruling constituted a "modification of application". The Kuhns did not make a similar argument in the proceedings before the Board. To the extent this argument has not been waived by the Kuhns, the Board adopts the Hearings Officer's interpretation of ambiguous provisions in DCC 22.04.020, 22.20.052, and 22.20.055(D) and particularly the clauses "development proposal", "approval process", "scale" "modify", and "modification of application" as supplemented by this decision.¹

The Hearings Officer correctly found that a modification of application under DCC 22.40.055 is not the exclusive means to modify a pending application. For purposes of a declaratory ruling, a modified question accompanied by new information, that changes the scale (scope) and/or "operating characteristics" (nature) of the question, thereby requiring the application of new criteria or a change in the findings of fact is a "modification of application" as that term is defined in DCC 22.04.020 and referenced in DCC 22.20.052 and 22.20.055. Provided the modified question presented is substantially related to the prior question(s) presented, as is the case here, the modified question does not constitute or require a new application. The Board finds that this resolution of the issue best harmonizes the ambiguities and conflicts between DCC 22.04.020, 22.20.052, and 22.20.055(D) for purposes of declaratory rulings.

The Hearings Officer correctly found that the change in the question presented constituted a "modification of application" and the modification of application was processed appropriately for the reasons set forth in the 2014 Decision as supplemented by this decision.

Advisory Opinion

In the proceedings before the Hearings Officer, the Kuhns challenged whether the requested declaratory ruling constituted an "advisory opinion" prohibited by DCC 22.40.010(B). The Kuhns did not make a similar argument in the proceedings before the Board. To the extent this argument has not been waived by the Kuhns, the Board adopts the Hearings Officer's interpretation of ambiguous provisions in DCC

¹ On February 4, 2014 the Hearings Officer issued a "Determination and Order on Modification of Application" and on March 5, 2014 the Hearings Officer issued a "Determination and Order on Second Modification of Application"

22.40.010(B), particularly the clause “instances involving fact-specific controversy and to resolve and determine the particular rights and obligations of particular parties to the controversy” and the undefined term “advisory opinion.”

DCC 22.40.010 does not adopt or incorporate the more rigid jurisprudence for what are commonly referred to as “advisory opinions” established by state and federal courts. Rather, it is intended to prohibit entirely speculative and/or hypothetical land use related questions. DCC 22.40.010 is ambiguous in that it does not elaborate on how fact-specific a decision must be to not constitute the undefined term “advisory opinion.” The Board finds that open ended questions anchored in a fact-specific scenario, such as interpretation of an ambiguous condition of approval, do not produce advisory opinions. As the question presented in the subject declaratory ruling pertains to a condition of approval actually imposed, the question presented is sufficiently fact-specific for a declaratory ruling. The Board finds that this interpretation harmonizes DCC 22.40.010(B) and DCC 22.40.010(A)(2), which calls for a process for interpreting disputed or ambiguous provisions of land use permits.

The Hearings Officer correctly decided that she could resolve the question presented in the subject declaratory ruling for the reasons set forth in the 2014 Decision as supplemented by this decision.

Procedural Errors before the Hearings Officer

Before the Hearings Officer, the Kuhns asserted a number of procedural errors including faulty notice, incorrect timelines, and a number of other claims. The Board finds that the Hearings Officer did not make any procedural errors and appropriately resolved procedural questions. To the extent errors were committed, the *de novo* hearing before the Board cured any issues and there have been no procedural challenges to the proceedings before the Board.

150 Day Rule

The Hearings Officer questioned whether the 150 day rule for counties to make certain land use decisions applies. This led to additional questions from the parties. The Board finds that the 150 rule under ORS 215.427(1) and DCC 22.20.040 does not apply to a declaratory ruling and to the extent it does the Dowells, as the applicant, tolled the clock for a sufficient amount of time that the decision has been issued within the 150 days. Furthermore, the Board finds that no party affirmatively objected to application or misapplication of the 150 days rule and that no prejudice to any of the parties resulted. The extended clock afforded the parties further opportunity to pursue settlement negotiations and to prepare their arguments before the Board.

Bias

In the various submittals, the Kuhns suggest that the County, and presumably the Board as the hearings body for this appeal, is biased against the Kuhns for a variety of

reasons. At the public hearing before the Board, the Kuhns had the opportunity to challenge one or all of the Board members for bias. No such challenge was made by the Kuhns. Moreover, the allegations of bias primarily stem from historical events or acts of staff and not specific actions by the members of this Board related to the instant application. See *Columbia Riverkeepers v. Clatsop County*, 267 Or. App. 578,790 (2014). Accordingly, to the extent the suggestions of bias were appropriately lodged, the high bar to disqualification of an elected official is not met.

The Board further notes that no other body is charged with resolving an appeal of a declaratory ruling for determining what the County finds acceptable for the required written agreement mandated by Condition of Approval #2. Accordingly, the rule of necessity dictates that even if the Board were in fact biased, the Board could nonetheless hear the appeal because no other body could.

Reopening the Record

Following the close of the record after the public hearing, the Kuhns requested that the Board reopen the record. The Board finds no basis for reopening the record. In addition to the open record period before the Hearings Officer, the parties had several months to assemble their evidence in advance of the public hearing before the Board and an extended record period afterwards. In light of the ample opportunity for submitting evidence, the Board finds no compelling reason to reopen the record and that no party would face prejudice by keeping the record closed.

VI. FINDINGS OF FACT AND CONCLUSION OF LAW:

CHAPTER 22.32 APPEALS

22.32.010. Who may appeal.

A. The following may file an appeal:

- 1. A party;**
- 2. In the case of an appeal of an administrative decision without prior notice, a person entitled to notice, a person adversely affected or aggrieved by the administrative decision, or any other person who has filed comments on the application with the Planning Division; and**
- 3. A person entitled to notice and to whom no notice was mailed. A person who, after such notices were mailed, purchases property to be burdened by a solar access permit shall be considered a person to whom notice was to have been mailed; and**
- 4. A city, concerning an application within the urban area for that city, whether or not the city achieved party status during the proceeding.**

B. A person to whom notice is mailed is deemed notified even if notice is not received.

FINDING: The Dowells, as the applicant, are a party to the 2014 Decision. As a party, the Dowells could file the subject appeal.

22.32.015. Filing appeals.

A. To file an appeal, an appellant must file a completed notice of appeal on a form prescribed by the Planning Division and an appeal fee.

B. Unless a request for reconsideration has been filed, the notice of appeal and appeal fee must be received at the offices of the Deschutes County Community Development Department no later than 5:00 PM on the twelfth day following mailing of the decision. If a decision has been modified on reconsideration, an appeal must be filed no later than 5:00 PM on the twelfth day following mailing of the decision as modified. Notices of Appeals may not be received by facsimile machine.

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D. The appeal fee shall be paid by cash or check or money order, except that local, state or federal governmental agencies may supply a purchase order at the time of filing.

FINDING: The Dowells filed their appeal on June 16, 2014, which is twelve days from the June 4, 2014 mailing date of the 2014 decision. The Notice of Appeal was submitted on the applicable form and accompanied by a check for the applicable filing fee.

22.32.020. Notice of Appeal.

Every notice of appeal shall include:

A. A statement raising any issue relied upon for appeal with sufficient specificity to afford the Hearings Body an adequate opportunity to respond to and resolve each issue in dispute.

B. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons why the Board should review the lower Hearings Body's decision.

C. 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 why the Board should provide de novo review as provided in DCC 22.32.030.

FINDING: The Dowells' Notice of Appeal identified with sufficient specificity the issues relied upon for appeal and stated sufficient reasons for the Board to take up the issue. Originally, the Dowells requested an on the record review, but later requested a de novo review. In granting de novo review through Order No. 2015-032, the Board found that the additional evidence would assist in deciding the issues on appeal.

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22.32.024. Transcript Requirement.

A. Except as otherwise provided in DCC 22.32.024, appellants shall provide a complete transcript of any hearing appealed from, from recorded magnetic tapes provided by the Planning Division.

B. Appellants shall submit to the Planning Division the transcript no later than the close of the day five days prior to the date set for a de novo appeal hearing or, in on-the-record appeals, the date set for receipt of written arguments. Unless excused under DCC 22.32.024, an appellant's failure to provide a transcript shall cause the Board to decline to consider the appellant's appeal further and shall, upon notice mailed to the parties, cause the lower Hearings Body's decision to become final.

C. An appellant shall be excused from providing a complete transcript if appellant was prevented from complying by: (1) the inability of the Planning Division to supply appellant with a magnetic tape or tapes of the prior proceeding; or (2) defects on the magnetic tape or tapes of the prior proceeding that make it not reasonably possible for applicant to supply a transcript. Appellants shall comply to the maximum extent reasonably and practicably possible.

FINDING: The Dowells submitted the required transcript prior to the applicable deadline for a *de novo* review.

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22.32.027. Scope of Review.

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B. Before the Board.

1. Review before the Board, if accepted, shall be on the record except as otherwise provided for in DCC 22.32.027.

2. The Board may grant an appellant's request for a de novo review at its discretion after consideration of the following factors:

a. Whether hearing the application de novo could cause the 150-day time limit to be exceeded; and

b. If the magnetic tape of the hearing below, or a portion thereof, is unavailable due to a malfunctioning of the recording device during that hearing, whether review on the record would be hampered by the absence of a transcript of all or a portion of the hearing below; or

c. Whether the substantial rights of the parties would be significantly prejudiced without de novo review and it does not appear that the request is necessitated by failure of the appellant to present evidence that was available at the time of the previous review; or

d. Whether in its sole judgment a de novo hearing is necessary to fully and properly evaluate a significant policy issue relevant to the proposed land use action. For the purposes of DCC 22.32.027, if an applicant is an appellant, factor DCC 22.32.027(B)(2)(a) shall not weigh against the appellant's request if the applicant has submitted with its notice of appeal written consent on a form approved by the County to restart the 150- day time clock as of the date of the acceptance of applicant's appeal.

3. Notwithstanding DCC 22.32.027(B)(2), the Board may decide on its own to hear a timely filed appeal de novo.

4. The Board may, at its discretion, determine that it will limit the issues on appeal to those listed in an appellant's notice of appeal or to one or more specific issues from among those listed on an applicant's notice of appeal.

FINDING: In granting Order No. 2015-032, the Board found that *de novo* review was appropriate to fully and properly assess the policy and other issues relevant to the declaratory ruling. As identified before, the 150 day rule is not applicable and/or was sufficiently tolled and both the Kuhns and Dowells submitted additional evidence indicating that no prejudice occurred.

22.32.030. Hearing on Appeal.

A. The appellant and all other parties to the decision below shall be mailed notice of the hearing on appeal at least 10 days prior to any de novo hearing or deadline for submission of written arguments.

B. Except as otherwise provided in DCC 22.32, the appeal shall be heard as provided in DCC 22.24. The applicant shall proceed first in all de novo appeals.

C. The order of Hearings Body shall be as provided in DCC 22.24.020.

D. The record of the proceeding from which appeal is taken shall be a part of the record on appeal.

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FINDING: The parties were provided sufficient notice of the hearing. Both the Kuhns and the Dowells participated in the public hearing before the Board with the Dowells, as the appellants, proceeding first. The Board is the appropriate hearings body for an appeal of a hearings officer's decision.

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CHAPTER 22.40 DECLARATORY RULINGS

FINDING: The Board adopts the findings of the Hearings Officer for the applicable provisions of Chapter 22.40 of the County Code except as supplemented for resolution of the procedural matters addressed above and as to the resolution of the following substantive issues:

CONDITION OF APPROVAL #2

Prior to reaching the assignments of error and the issues in the underlying declaratory ruling, the Board must first revisit the meaning of Condition of Approval #2. This provision has been addressed on a number of different occasions, by a number of different reviewers, and for a number of different purposes. The only formal interpretation of Condition of Approval #2 by the Board was the Board's determination of the term "acceptable" as meaning acceptable to the County. The Board made this determination in A-09-4/A-09-5/A-07-9 and the Board finds it is the only binding interpretation.²

To resolve the issues identified by the Dowells, and those ancillary to this appeal, a complete interpretation of Condition of Approval #2 is necessary. The Board finds that Condition of Approval #2 requires a written recorded agreement assuring the maintenance of common property within the partition (the "Required Agreement"). The Required Agreement may take the form of either (1) an instrument establishing a homeowners association or (2) some variety of agreement. In both forms, the Required Agreement must be "acceptable." As resolved in earlier decisions, "acceptable" means acceptable to the County. What the County finds "acceptable" is further discussed below.

"Assuring the maintenance of common property" means those activities and obligations necessary to keep common property compliant with code requirements, applicable laws

² See the discussion of issue preclusion below. The Board also notes that the County was not a party to Case No. 01CV0233MA filed by the Kuhns and thus it arguably holds no preclusive effect as to the County. As identified herein, the County has an interest in Condition of Approval #2 because it imposed the condition, it is the body that determines whether the resulting required agreement is acceptable, and it is the body that must enforce the condition. However, the Board notes that Judge Adler merely reiterated the wording of Condition of Approval #2 and decreed that taxes and maintenance costs be shared equally. Because the Board agrees that property and maintenance costs should be shared equally, the preclusive effect of Case No. 01CV0233MA is not further explored.

and CU-80-02. Specifically, this involves, but is not limited to, payment of property taxes and maintaining vegetation in a manner compliant with generally applicable regulations for noxious weeds and wildfire risk.

WILDLIFE USES

In the 2014 Decision, the Hearings Officer concluded that the property must be maintained for wildlife habitat values and made Declaration #4(b) based on that conclusion. The Dowells argued that wildlife habitat is but one of the permitted uses of the Open Space Parcel and that it is improper to limit uses exclusively to wildlife habitat. The Kuhns asserted that the Hearings Officer's conclusion is correct. The Board finds that the Open Space Parcel is not restricted exclusively to wildlife habitat.

Section 8.05(16)(C)(b) of PL-15, the land use ordinance in effective at the time of CU-80-02, required the applicant for a cluster development to submit "adequate deed restrictions to maintain the land in the open space provided." PL-15 defines "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; protect air, streams or water supply; promote conservation of soils, wetlands, beaches or marshes; conserve landscaped areas such as public or private golf courses, that reduce pollution and enhance the value of abutting or neighboring property; enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or other open space; enhance recreation opportunities; preserve historic, geological and archeological sites; promote orderly urban development; and minimize conflicts between farm and non-farm uses.

From this definition, "open space" consists of a variety of uses ranging from wildlife preserves to golf courses. Moreover, there is no express prohibition on structures or other improvements that may conflict with wildlife value and habitat. While "open space" may provide wildlife habitat or promote wildlife values, these terms are not interchangeable and there is no indication from the definition that wildlife take precedence over other open space values and uses.

It is also apparent that John Barton, the developer of the Cluster Development, did not resign the Open Space Parcel exclusively to wildlife habitat or promoting wildlife values. As part of his application materials, Mr. Barton contemplated that barns, stables, and greenhouses might be developed on the Open Space Parcel. Mr. Barton went on to record a document entitled "Land Use Restrictions", which set out a number of restrictions for all three parcels in the Cluster Development. While the Land Use Restrictions provide the "strongest encouragement to demonstrative sensitivity to living with the boundaries of the Tumalo Winter Deer Range" and urge owners to "adjust their life style accordingly", this document did not limit the Open Space Parcel exclusively to wildlife uses.

Finally, the Tumalo Winter Deer Range and imposition of the corresponding Wildlife Area Combing Zone does not relegate properties within the range to exclusively wildlife habitat. These demarcations establish additional restrictions on uses to minimize impacts on wildlife, but do not obligate property owners to devote their properties to wildlife purposes.

Although the Board previously found, and continues to find, that the Land Use Restrictions do not satisfy Condition of Approval #2, the Board does find that they satisfy any obligations Mr. Barton may have had under Section 8.05(16)(C)(b) and that CU-80-02, and specifically Condition of Approval #2, does not call for any further *use restrictions* given its emphasis on *maintenance*. The County cannot use the Required Agreement for *common property maintenance* to impose any further site-specific *use limitations* on the Cluster Development. Accordingly, the Open Space Parcel can be used for any open space use, as defined in PL-15, to the extent consistent with the Land Use Restrictions, County and Oregon Department of Fish and Wildlife Regulations for the Tumalo Winter Deer Range, and any other the generally applicable land use regulations now in effect or subsequently adopted. This does not prevent the present owners of the Open Space Parcel from establishing further use restrictions through private agreement, but it is not a necessary provision of the Required Agreement.

VEGETATION MANAGEMENT:

The Hearings Officer determined that the Required Agreement must include a provision describing how vegetation is to be maintained for wildlife habitat values (Declaration #4(b)). The Dowells argued that this restriction exceeded the scope of CU-80-02 and PL-15 because those authorities focus on preserving *open space* and not promoting *wildlife values*. The Kuhns supported inclusion of Declaration #4(b), primarily because of the existence of the Tumalo Winter Deer Range. The Board finds that Declaration #4(b) is not a mandatory element of the Required Agreement.

As discussed above, the Open Space Parcel is not dedicated exclusively to wildlife values or habitat by PL-15, CU-80-02, the Land Use Restrictions, the Tumalo Winter Deer Range or any other public law identified by the parties. The Hearings Officer's erroneous conclusion on that point led to Declaration #4(b). Consequently, vegetation on the Open Space Parcel need not be specially managed for wildlife habitat and the Required Agreement need not include a specific prescription for vegetation management to support wildlife habitat values.

However, vegetation does need to be managed on the Open Space Parcel. As is the obligation of all property owners within the County, vegetation must be maintained to minimize wildfire risk and the effects of noxious weeds. These generally applicable obligations are contained in Chapters 8.21 and 8.35 of the Deschutes County Code. Although these code requirements are generally applicable, the Board finds that the Required Agreement must reference these provisions and acknowledge that the signee(s) will comply with code requirements. A vegetation management regime beyond the requirements of the County Code is not a mandatory element of the Required Agreement.

OWNERSHIP OF THE OPEN SPACE PARCEL:

The Hearings Officer determined that the ownership interests in the Open Space Parcel cannot be severed from the ownership interests in the Dowell and Kuhn Parcels. The Dowells contend that interests in the Open Space Parcel are alienable from interests in the residential parcels. The Kuhns appear to agree with the Dowells on this issue. The Board agrees with the parties.

Conditions of Approval #1 and #3 to CU-80-02 provide as follow:

"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."

Based on these conditions, the Hearings Officer concluded the Open Space Parcel could not be conveyed separate from an interest in either the Dowell or Kuhn Parcel. The Hearings Officer found further support in the designation on the plat creating the Cluster Development, which labeled the Open Space Parcel as "common area".

It is not disputed that the Open Space Parcel was established and subsequently conveyed as property jointly owned by the two residential parcels. However, the Board finds that there is no requirement that the Open Space Parcel indefinitely remain commonly held. As a starting point, PL-15 does not require common property. Rather, Section 8.06(16)(B)(a) requires that 65% of the land area remain in "open space uses." Section 8.06(16)(C)(c) only signifies that if common property is created, then its maintenance must be assured.³ Thus, it is not a requirement under PL-15 that a cluster development include common property.

Condition of Approval #1 only required common ownership "prior to the sale of any lots." This condition was satisfied when Mr. Barton conveyed the residential parcels with a joint interest in the Open Space Parcel. However, Condition of Approval #1 does not impose an ongoing requirement that the Open Space Parcel remain in joint ownership.

Condition of Approval #3, in referencing the label included on the partition plat, reinforces the requirement of Section 8.06(16)(B)(c). Section 8.06(16)(B)(c) limits the number of residential units in a cluster development to the density of residential units

³ Section 8.06(16)(C)(c) requires a "written agreement establishing an acceptable homeowners association" to assure maintenance of common property. As has been recounted in multiple prior instances including the 2014 Decision, the hearings officer in CU-80-02 deviated from this standard in requiring as Condition of Approval #2 a written agreement establishing *either* a homeowners association or an "agreement assuring the maintenance of common property in the partition." This deviation was not appealed and thus remains binding on the Cluster Development.

permitted in the underlying zone.⁴ It also does not impose an ongoing requirement that the Open Space Parcel remain under common ownership.

As a final matter, the Board notes that ORS 94.665 allows for alienation of common property for planned communities. Although the cluster was not established under the Oregon Planned Community Act, the Board finds no reason to deprive the owners of the Cluster Development of the same right as long as the objectives of PL-15 (65% of the area remain in open space uses, no more than 2 dwelling units) are maintained. To ensure promotion of cluster development objectives, the Required Agreement must acknowledge that the Open Space Parcel comprise no less than 65% of the Cluster Development and cannot be used for the development of residential dwellings.

REQUIRED SIGNATORIES

The Hearings Officer held that the both the Kuhns and the Dowells must be parties to the Required Agreement because the Kuhns and Dowells “stand in the shoes” of Mr. Barton as his successors. In dicta, the Board made a similar finding in A-09-4/A-09-5/A-07-9. LUBA, also in dicta, reached that same conclusion in *Kuhn v. Deschutes County*, 62 Or LUBA 165 (2010). The Board now finds that the Required Agreement need not be signed by both the Kuhns and the Dowells.

Because this finding turns on an interpretation of Condition of Approval #2, we restate it again here:

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 Board finds that Condition of Approval #2 is ambiguous for the same reasons found by the Hearings Officer. Of particular note, there is no identification of the required parties to the Required Agreement. The Board also concurs with the Hearings Officer that the obligations of Mr. Barton now fall to the current owners of the Cluster Development because land use approvals run with the land. However, the Board does not agree with the Hearings Officer that inheriting the obligations of Mr. Barton requires that such obligations be performed jointly.

Instead of beginning the inquiry at attempting to determine the requisite parties to the Required Agreement, the Board first notes that the foundation of Condition of Approval #2 is that it was imposed to assure the maintenance of common property. Similar to Section 8.06(16)(C)(c), Condition of Approval #2 is phrased in general terms and is only applicable if common property is involved.⁵ If, as found permissible above, the Open

⁴ At the time, the minimum lot size for the F-3 zone was 20 acres allowing two residential parcels for the 42+/- acres that became the Cluster Development.

⁵ The County regularly imposes conditions of approval phrased in the general such as requirements for sign permits, etc. By no means do these conditions obligate the applicant to obtain a sign or forever maintain a proposed sign.

Space Parcel were to be owned by a single party, Condition of Approval #2 would no longer be applicable as there would no longer be any common property.

If the Open Space Parcel remains commonly owned, the Board finds that the Required Agreement need not be signed by both the Kuhns and the Dowells. The County's concern in adopting Section 8.06(16)(C)(c) and imposing Condition of Approval #2 is to assure that the Open Space Parcel does not fall out of compliance with applicable laws as a result of a lack of coordination between the joint property owners. As long as one co-owner affirmatively agrees to its obligations, and to cover the obligations of the other property owner should they fail to meet their obligations, the objective of Section 8.06(16)(C)(c) and Condition of Approval #2 is satisfied. Accordingly, an agreement between the County and one of the joint owners identifying that owner's obligations for the Open Space Parcel would satisfy Condition of Approval #2 as to that owner.

The County finds further support in the fact that "acceptable" means acceptable to the County and thus it is the County that determines who must be party to the agreement in order for the County to find it acceptable. Additional support is found in the fact that "prior to the sale of any lot" there were not multiple property owners for which the Required Agreement could be between. The timing inherent in Condition of Approval #2 suggests that the Required Agreement might be between a property owner and the County.

The principals of collateral estoppel do not preclude this result.⁶ Collateral estoppel or issue preclusion prohibits re-litigation of issues conclusively determined in prior proceedings where (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104 (1993).

It remains an open question as to whether land use proceedings hold the requisite preclusive effect to satisfy the 5th element. See *Green v. Douglas County*, 63 Or LUBA 200, 207 (2011). Even if they do, the other elements are not present in the cited prior proceedings.

Kuhn submitted a settlement agreement with the County for a 2014 property tax appeal into the record as well as materials related to a pending 2015 property tax appeal. The settlement stipulates a number of "facts" with some potential bearing on the present proceedings. The specific purposes of this evidence were never fully developed so it is difficult to determine whether the issues in the tax proceedings and this declaratory ruling

⁶ Collateral estoppel is not the same as the doctrine of "law of the case" announced in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Under *Beck*, a party at LUBA fails to preserve an issue for review if, in a prior stage of a single proceeding, that issue is decided adversely to the party or that issue could have been raised and was not raised. This declaratory ruling is a different proceeding from all past litigation and decisions and law of the case is thus not applicable.

are identical. However, neither the 2014 or 2015 tax appeals resulted in a final decision on the merits as a result of being actually litigated.⁷ Moreover, the Dowells were not a party to the prior proceedings and had no opportunity to be heard. The Board adopts the Hearings Officers findings as to why Case No. 01-CV-0233-MA, A-09-4/A-09-5/A-07-9, and Kuhn v. Deschutes County, 62 Or LUBA 165 (2010) are not preclusive.

BURDENED PROPERTIES

In a planned community, the homeowners association generally holds title to common property. The owners within the community then hold an indirect ownership interest in the common property through their membership in the homeowners association. This indirect form of ownership necessitates the recording of conditions, covenants, and restrictions governing use and maintenance of common property against each property in the community in order to put successor owners on notice.

This is not the case with the Cluster Development. The common property in the Cluster Development is directly owned by the residential property owners, albeit jointly. Because there is direct ownership, and because the Open Space Parcel is alienable from the residential parcels, the Required Agreement need only be recorded against the Open Space Parcel if executed by both the Kuhns and the Dowells. If only executed by one party or other, the Required Agreement must contain a legal description of both the signing property owner's property and the Open Space and bind the property owner's successor in the Open Space Parcel (unless the successor brings the Open Space Parcel into a single ownership). This will place any successor to the Open Space Parcel on notice of their obligations without unnecessarily clouding the chain of title for the residential parcels.

DISPUTE RESOLUTION

The Board finds that a dispute resolution provision would encourage the parties to resolve their issues in a more efficient and definitive manner than the traditional venue of the court system. Prior court decisions have not yielded resolution of the issues in this long standing dispute and the lengthy timelines for reaching a decision only allowed circumstances to further deteriorate in the meantime.

REQUIRED AGREEMENT:

As the Board previously found, and LUBA upheld, the term "acceptable" in Condition of Approval #2 means the Required Agreement must be acceptable to the County. Consistent with this decision, the Board finds that the agreements attached hereto as Exhibit A and Exhibit B are acceptable to the County. Exhibit A reflects an agreement executed by both the Kuhns and the Dowells while Exhibit B is an agreement with one of the property owners and the County.

PROPORTIONATE ALLOCATION:

⁷ At least there is no judgment, order, or opinion included in the record.

Unless the joint owners of the Open Space Parcel agree otherwise, or the respective ownership interests change, the Board finds that it is only fair that the Required Agreement apportion responsibilities and obligations proportionately amongst the owners. Given that the Dowells and Kuhns presently hold an equal share, an equal allocation of property taxes and maintenances expenses is currently required consistent with Judge Adler's order. If one owner incurs additional expenses or takes on additional responsibilities above and beyond that necessary to meet the minimum requirements of this Decision, then such owner shall be solely responsible and cannot seek compensation from the other owner.

ALL OTHER ISSUES:

The Kuhns submitted voluminous amounts of other evidence and made additional arguments related to the siting of the Dowells' residence on the Dowell parcel, property valuation and taxes, alleged debts, allegations of criminal acts, fraud and deceit, conflicts, claimed County Code violations, and historical events in this long-standing land use dispute. Except as specifically addressed in this decision, the Board finds that such evidence is not relevant to the declaratory ruling or the resulting appeal, was conclusively resolved in prior proceedings, is moot or time-barred, and/or that the Board does not have authority to resolve such issues. To the extent such other evidence and arguments hold some relevance and/or are within the Board's jurisdiction the Board finds that it is outweighed by evidence cited in this decision or unnecessary to address for resolving the issues presented.

OTHER FINDINGS:

Except as modified, corrected, amended, or supplemented by this decision, the Board adopts the remainder of the Hearings Officers findings.

V. DECISION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Board hereby declares as follows:

1. The Dowells and Kuhns are subject to Condition of Approval #2 as the successors of Mr. Barton.
2. The Open Space Parcel constitutes common property for purposes of Condition of Approval #2. However, the Open Space Parcel is freely alienable from one or both of the residential parcels within the Cluster Development. If the Open Space Parcel were to be owned by a single party (with husbands and wives/civil unions constituting a single party), then Condition of Approval #2 is no longer applicable and there is no further need for the Required Agreement.

3. The joint owners of the Open Space Parcel are directed to (a) execute the attached Exhibit A, or (b) enter into a separate agreement with each other, subject to the County's review and approval for consistency with this decision. Alternatively, one or more of the joint owners may execute the attached Exhibit B agreement with the County.
4. If all of the joint owners of the Open Space Parcel are parties to the Required Agreement, it shall only be recorded against the Open Space Parcel. If only one joint-owner is a signatory to the Required Agreement, then the Required Agreement must include a description of both the residential parcel and the Open Space Parcel and bind the signing property owner's successors in the Open Space Property (unless the successor brings the Open Space Parcel into a single ownership). The County shall execute appropriate releases if the need for a particular recording no longer exists.
5. Whichever form of document is relied upon by a party to satisfy Condition of Approval #2, the document, at a minimum, must include language reflecting the following requirements:
 - a. A prohibition on developing a residence on the Open Space Parcel;
 - b. A requirement that the Open Space Parcel comprise no less than 65% of the area of the Cluster Development;
 - c. Acknowledgement that a party will comply with applicable regulations and restrictions of the Tumalo Winter Deer Range and the Wildlife Area Combining Zone;
 - d. Acknowledgement that a party will comply with generally applicable regulations for property owners to control noxious weeds and minimize wildfire risk;
 - e. A proportional allocation of property taxes based on ownership interest;
 - f. A proportional allocation of maintenance responsibilities based on ownership interest;
 - g. A proportional allocation of maintenance costs based on ownership interest with eligible costs being limited to that necessary to maintain compliance with generally applicable property maintenance requirements;
 - h. A provision that non-eligible costs are the responsibility of the party incurring such costs;

- i. A requirement to notify an owner, and provide time to cure, prior to assuming that owner's maintenance responsibilities/incurred maintenance costs and seeking compensation; and
 - j. An alternative dispute resolution provision requiring that disputes arising from or related to the Required Agreement be resolved by binding arbitration with costs assessed to the non-prevailing party.
 - k. Acknowledgement that a party may be held responsible as a joint-owner on account of code violations arising from the failure of another owner to perform their proportionate share.
6. The agreements attached as Exhibit A and Exhibit B⁸ to this decision satisfy the requirements of this decision and are acceptable to the County. If the agreement in Exhibit A, is executed, the County will find that both the Dowells and the Kuhns have satisfied their obligations under Condition of Approval #2 and will dismiss the pending code enforcement action against both the Dowells and the Kuhns. If the agreement in Exhibit B, is executed by a property owner and the County, the County will find that the signing property owner has satisfied its obligations under Condition of Approval #2 and will dismiss the pending code enforcement action against that property owner.
7. The declarations by the Board herein wholly replace those made by the 2014 Decision.

DATED this ____ day of April, 2016.

MAILED this ____ day of April, 2016.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ALAN UNGER, CHAIR

TAMMY BANEY, VICE CHAIR

ATTEST:

Recording Secretary

ANTHONY DEBONE, COMMISSIONER

THIS DECISION BECOMES FINAL UPON MAILING. PARTIES MAY APPEAL THIS DECISION TO THE LAND USE BOARD OF APPEALS WITHIN 21 DAYS OF THE DATE ON WHICH THIS DECISION IS FINAL.

⁸ County reserves the right to make editorial or other amendments, in its sole discretion, to satisfy the requirements of this decision.

EXHIBIT A

After recording return to:

Deschutes County
ATTN: Legal Counsel
1300 NW Wall St # 205
Bend, OR 97703

CONDITIONS OF APPROVAL AGREEMENT

This Conditions of Approval Agreement (this “**Agreement**”) is made as of this ____ day of _____ by _____ (“**Owner A**”), _____ (“**Owner B**”), and Deschutes County, a political subdivision of the State of Oregon (the “**County**”).

- A. County approved a three parcel cluster development comprised of two residential parcels and an open space parcel through file no. CU-80-02 (the “**Cluster Development**”).
- B. Owner A and Owner B (collectively, and including their respective heirs, successors, and assigns with respect to the open space parcel, the “**Owners**”) are the joint owners of the open space parcel, which is described in the attached Exhibit 1 (the “**Open Space Parcel**”).
- C. County imposed a condition of approval as part of CU-80-02 that requires the Owners to assure the maintenance of the Open Space Parcel.
- D. In DR-13-16/MA-14-1/247-14-000165-A, County issued a declaratory ruling establishing the requirements for assuring the maintenance of the Open Space Parcel.
- E. The parties now desire to record this Agreement to assure the maintenance of the Open Space Parcel in compliance with CU-80-02 and the declaratory ruling.

NOW THEREFORE, the Owners and County agree as follows:

- 1. **Covenants.** With respect to the Open Space Parcel, the Owners covenant to:
 - a. Adhere to Deschutes County Code Chapters 8.21 and 8.35, as same may be amended from time to time, and comply with all other generally applicable laws governing property maintenance.
 - b. Adhere to all requirements and regulations of the Tumalo Winter Deer Range and the Wildlife Area Combining Zone in which the Open Space Parcel is located.
 - c. Each pay a proportionate share of the property taxes assessed to the Open Space Parcel. Separate tax accounts may be established for this purpose.

- d. Each perform a proportionate share of the maintenance responsibilities necessary to comply with this Agreement. This may occur through physically performing required tasks or hiring others to perform required tasks.
- e. Each pay a proportionate share of the maintenance expenses necessary to comply with this Agreement to the extent such expenses are not separately assignable or attributable to an individual owner. For such shared expenses, an owner shall first provide written notice with a reasonable description of the work to be performed, rationale for why such work is necessary to comply with this Agreement, and an estimate of the costs to other Owners. An owner's failure to object to any proposed expense within 20 calendar days of receipt from another owner shall be deemed authorization for such work and an agreement to pay such expenses. An owner shall be solely responsible for costs if the required notice is not provided or if the owner proceeds with such work prior to resolving any objection. Nothing herein shall preclude the Owners from pursuing additional work, provided all Owners must agree to such additional work for an owner to be responsible for its proportionate share.
- f. After providing notice, and no less than 20 calendar days for opportunity to cure, an owner may perform the maintenance responsibilities and/or pay the maintenance expenses of any other owner who fails to meet their proportionate obligations to assure the maintenance of the Open Space Parcel. An owner will only seek reimbursement from another owner for costs necessary to comply with this Agreement and shall be solely responsible for any expenses incurred above and beyond such requirements or those incurred without providing appropriate notice and opportunity to cure.
- g. The Owners shall pursue alternative dispute resolution methods for any dispute arising from or related to maintenance of the Open Space Parcel. Specifically, if the dispute is not resolved between the Owners after a good faith effort, the Owners shall seek resolution through binding arbitration before the Arbitration Service of Portland in accordance with their then current rules including selection of the arbitrator. Venue for any arbitration hearing shall be in Deschutes County. The prevailing party shall be entitled to an award of attorney fees and costs as determined reasonable by the arbitrator(s) as well as those incurred to obtain court enforcement of the arbitrator's decision and any appeal as deemed reasonable by the court. This provision shall not limit (nor require) County's rights to use any means provided by law, including but not limited to issuing a civil citation or obtaining equitable relief, to enforce code violations occurring on the Open Space Parcel and/or the conditions of this Agreement. In any action between an owner and the County, the prevailing party shall be awarded attorney fees and costs, including those incurred in any appeal, as deemed reasonable by the court.

2. **Restrictions.** With respect to the Open Space Parcel, the Owners agree to the following restrictions:

- a. No residential dwelling may be constructed on the Open Space Parcel.

- b. The Open Space Parcel must comprise no less than 65% of the area of the parent parcel of the Cluster Development.
3. **Proportionality.** References herein to proportional shares shall refer to the respective ownership interests in the Open Space Parcel. For example, an owner's proportionate share would be 1/3 if there are three owners with equal ownership interests or, where a percentage ownership is stated in a deed, the percentage ownership. Husbands and wives, and equivalent legal relationships for joint-ownership, shall constitute a single owner. Nothing herein shall preclude the Owners from reaching a different allocation of expenses and responsibilities by separate agreement.
4. **No Partnership.** County is not, by virtue of this Agreement, a partner or joint venture of the Owners in connection with activities carried on under this Agreement, shall have no obligation with respect to the Owners' obligations or liabilities of any nature, and is not a guarantor of the Owners or the work to be performed.
5. **Amendment and Repeal.** Any provision of this Agreement may be amended or repealed, or provisions may be added, only by the written consent of the Owners, or their successors and assigns, and the County.
6. **Appurtenant.** This Agreement is appurtenant to and runs with the Open Space Parcel and shall bind any future owner of the Open Space Parcel, so long as the Open Space Parcel is jointly owned. References to the obligations of an owner shall refer to then current owners of record of the Open Space Parcel
7. **No third party beneficiaries.** Nothing herein shall create any rights, as a third party beneficiary, or otherwise, in favor of any persons, entities or associations not a party hereto.
8. **Notices.** Any notice required or permitted under this Agreement shall be delivered via first class mail, postage prepaid. Notices to the County shall be delivered to the address listed above. Notices to an owner of the Open Space Parcel shall be delivered to the address of record with the Deschutes County Assessor's Office or the last address provided by that owner.
9. **Release.** If the Open Space Parcel is no longer jointly owned, County shall execute, upon request, an appropriate instrument to release this Agreement.
10. **Severability.** If any provision of the Agreement is declared unenforceable by a court of competent jurisdiction in any respect, such unenforceability in any other respect, and that of the remaining provisions, shall not be impaired.
11. **Counterparts.** This Agreement may be signed in counterparts.

[signatures on following page]

OWNER:

OWNER:

COUNTY:

Deschutes County,
a political subdivision of the State of Oregon

By: Alan Unger
Its: Board, Chair

State of Oregon)
) ss.
County of Deschutes)

This instrument was acknowledged before me on _____,by

Notary Public – State of Oregon

State of Oregon)
) ss.
County of Deschutes)

This instrument was acknowledged before me on _____,by

Notary Public – State of Oregon

State of Oregon)
) ss.
County of Deschutes)

This instrument was acknowledged before me on _____, by
_____, Alan Unger, Chair, Board of Commissioners, Deschutes County,
a political subdivision of the State of Oregon.

Notary Public – State of Oregon

EXHIBIT 1

LEGAL DESCRIPTION OF THE OPEN SPACE PARCEL

A parcel of land located in the Northeast $\frac{1}{4}$ of Section 19, T.16 S., R.11 E., W.M., Deschutes County, Oregon which is described as follows:

Commencing at the Northeast corner of said Section 19; thence S $51^{\circ}27'37''$ W 962.37' to the TRUE POINT OF BEGINNING; thence S $00^{\circ}07'23''$ W 58.72'; thence on a 1038.31' radius curve left 394.79', the long chord of which bears S $10^{\circ}46'10''$ E 392.42'; thence S $21^{\circ}39'44''$ E 117.19'; thence on a 590.80' radius curve right 170.76', the long chord of which bears S $13^{\circ}22'54''$ E 170.17'; thence N $89^{\circ}10'04''$ W 1405.83'; thence N $00^{\circ}40'19''$ E 1325.84'; thence S $89^{\circ}11'47''$ E 779.00'; thence S $00^{\circ}48'13''$ W 200.00'; thence S $89^{\circ}11'47''$ E 498.11'; thence S $61^{\circ}42'30''$ W 411.30'; thence S $00^{\circ}48'13''$ W 210.11'; thence S $89^{\circ}11'47''$ E 325.26' to the TRUE POINT OF BEGINNING, containing 34.5 acres more or less.

EXHIBIT B

After recording return to:

Deschutes County
ATTN: Legal Counsel
1300 NW Wall St # 205
Bend, OR 97703

CONDITIONS OF APPROVAL AGREEMENT

This Conditions of Approval Agreement (this “**Agreement**”) is made as of this ____ day of _____ by _____ (“**Owner**”) and Deschutes County, a political subdivision of the State of Oregon (the “**County**”).

- A. County approved a three parcel cluster development comprised of two residential parcels and an open space parcel through file no. CU-80-02 (the “**Cluster Development**”).
- B. Owner is the owner of one of the residential parcels, which is described in the attached Exhibit 1 (the “**Property**”).
- C. County imposed a condition of approval as part of CU-80-02 that requires Owner to assure the maintenance of the open space parcel, which is described in the attached Exhibit 2 (the “**Open Space Parcel**”). Owner is a joint-owner of the Open Space Parcel (each ownership of the Open Space Parcel is an “**Open Space Parcel Owner**” and all ownerships are collectively the “**Open Space Parcel Owners**”).
- D. In DR-13-16/MA-14-1/247-14-000165-A, County issued a declaratory ruling establishing the requirements for assuring the maintenance of the Open Space Parcel.
- E. The parties now desire to record this Agreement to assure the maintenance of the Open Space Parcel in compliance with CU-80-02 and the declaratory ruling.

NOW THEREFORE, Owner and County agree as follows:

- 1. **Covenants.** With respect to the Open Space Parcel, Owner covenants to:
 - a. Adhere to Deschutes County Code Chapters 8.21 and 8.35, as same may be amended from time to time, and comply with all other generally applicable laws governing property maintenance.
 - b. Adhere to all requirements and regulations of the Tumalo Winter Deer Range and the Wildlife Area Combining Zone in which the Open Space Parcel is located.
 - c. Pay a proportionate share of the property taxes assessed to the Open Space Parcel. Separate tax accounts may be established for this purpose.

- d. Perform a proportionate share of the maintenance responsibilities necessary to comply with this Agreement. This may occur through physically performing required tasks or hiring others to perform required tasks.
- e. Pay a proportionate share of the maintenance expenses necessary to comply with this Agreement to the extent such expenses are not separately assignable or attributable to a specific Open Space Parcel Owner. For such shared expenses, Owner shall first provide written notice with a reasonable description of the work to be performed, rationale for why such work is necessary to comply with this Agreement, and an estimate of the costs to other Open Space Parcel Owners. If the other Open Space Parcel Owners refuse to be responsible for their proportionate share, Owner may seek to enforce that obligation by any means provided by law. Owner acknowledges and agrees that Owner will be solely responsible if Owner proceeds with work above and beyond that required by this Agreement including all costs and attorney fees, of any nature and incurred by any party, in any action, arbitration, or ruling that results in a determination that the work is not required by this Agreement.
- f. Owner acknowledges that it may be held responsible as a joint-owner of the Open Space Parcel for breach of this Agreement and violations of Deschutes County Code if the Open Space Parcel falls out of compliance as a result of the failure of another Open Space Parcel Owner's failure to perform its proportionate share. If County identifies a potential violation related to another Open Space Parcel Owner's failure to perform their proportionate share, Owner shall correct the violation after providing the other Open Space Parcel Owner notice and no less than 20 calendar days to cure.
- g. Nothing herein shall limit (nor require) County's rights to use any means provided by law, including but not limited to issuing a civil citation or obtaining equitable relief, to enforce code violations occurring on the Open Space Parcel and/or the conditions of this Agreement. In any action between Owner and the County, the prevailing party shall be awarded attorney fees and costs, including those incurred in any appeal, as deemed reasonable by the court.

2. **Restrictions.** With respect to the Open Space Parcel, Owner agrees to the following restrictions:

- a. No residential dwelling may be constructed on the Open Space Parcel.
- b. The Open Space Parcel must comprise no less than 65% of the area of the parent parcel of the Cluster Development.

3. **Proportionality.** References herein to proportional shares shall refer to the respective ownership interests of the Open Space Parcel Owners. For example, an Open Space Owner's proportionate share would be 1/3 if there are three Open Space Parcel Owners with equal ownership interests or, where a percentage ownership is stated in a deed, the percentage ownership. Husbands and wives, and equivalent legal relationships for joint-ownership, shall constitute a single Open Space Parcel Owner. Nothing herein shall preclude the Open Space

Parcel Owners from reaching a different allocation of expenses and responsibilities by separate agreement.

4. **No Partnership.** County is not, by virtue of this Agreement, a partner or joint venture of Owner in connection with activities carried on under this Agreement, and shall have no obligation with respect to Owner's obligations or liabilities of any nature, and is not a guarantor of Owner or the work to be performed.

5. **Amendment and Repeal.** Any provision of this Agreement may be amended or repealed, or provisions may be added, only by the written consent of Owner, or its successors and assigns, and the County.

6. **Appurtenant.** This Agreement is appurtenant to and runs with the land and shall bind all successors and assigns of Owner who hold an interest in the Open Space Parcel. No obligations or responsibilities shall run to any party who only holds an ownership interest in the Property or is not an heir, successor, or assign of Owner with respect to the Open Space Parcel.

7. **No third party beneficiaries.** Nothing herein shall create any rights, as a third party beneficiary, or otherwise, in favor of any persons, entities or associations not a party hereto. This expressly applies to any other Open Space Parcel Owner unless such Open Space Parcel Owner executes an instrument with the County that proximately mirrors the terms and conditions of this Agreement. If all of the Open Space Parcel Owners enter into an agreement governing maintenance of the Open Space Parcel, such agreement shall supersede and replace this Agreement and the County will execute an appropriate release of this Agreement.

8. **Notices.** Any notice required or permitted under this Agreement shall be delivered via first class mail, postage prepaid. Notices to the County shall be delivered to the address listed above. Notices to Owner and any other owner of the Open Space Parcel shall be delivered to the address of record with the Deschutes County Assessor's Office.

9. **Severability.** If any provision of the Agreement is declared unenforceable by a court of competent jurisdiction in any respect, such unenforceability in any other respect, and that of the remaining provisions, shall not be impaired.

10. **Counterparts.** This Agreement may be signed in counterparts.

[signatures on following page]

OWNER:

COUNTY:

Deschutes County,
a political subdivision of the State of Oregon

By: Alan Unger
Its: Board Chair

State of Oregon)
)
County of Deschutes) ss.

This instrument was acknowledged before me on _____,by

Notary Public – State of Oregon

State of Oregon)
)
County of Deschutes) ss.

This instrument was acknowledged before me on _____, by Alan Unger,
Board Chair, Deschutes County, a political subdivision of the State of Oregon .

Notary Public – State of Oregon

EXHIBIT 1

LEGAL DESCRIPTION OF THE PROPERTY (Dowell)

(2) A parcel of land located in Section 19, T.16 S., R.11 E., W.M., Deschutes County, Oregon and described as follows:

Beginning at the Northeast corner of said Section 19; thence N 89°11'47" W 306.60 feet to the Westerly right-of-way line of Sisemore County Road and the true point of beginning; thence along said right-of-way line S 23°56'02" E, 66.67 feet; thence along said right-of-way line on a 233.88 foot radius curve right 114.47 feet, the long chord of which bears S 09°54'46" E, 113.33 feet; thence along said right-of-way line on a 153.80 foot radius curve right 28.46 feet; the long chord of which bears S 09°24'32" W 28.42 feet; thence N 89°11'47" W, 946.35 feet; thence N 00°48'13" E, 200.00 feet; thence S 89°11'47" E, 901.63 feet to the TRUE POINT OF BEGINNING, containing 4.3 acres more or less net.

EXHIBIT 1

LEGAL DESCRIPTION OF THE PROPERTY
(Kuhn)

A parcel of land located in the Northeast $\frac{1}{4}$ of Section 19, T.16 S., R.11 E., W.M., Deschutes County, Oregon which is described as follows:

Commencing at the Northeast corner of said Section 19; thence S 53°26'03" W 329.52' to the TRUE POINT OF BEGINNING; thence on a 153.80' radius curve right 77.43', the long chord of which bears S 29°07'56" W 76.62'; thence S 43°33'17" W 117.24'; thence on a 194.18' radius curve right 170.54', the long chord of which bears S 68°42'55" W 165.11'; thence N 86°07'27" W 68.83'; thence on a 138.02' radius curve left 225.84', the long chord of which bears S 46°59'58" W 201.48'; thence S 00°07'23" W 58.72'; thence N 89°11'47" W 325.26'; thence N 00°48'13" E 210.11'; thence N 61°42'30" E 411.30'; thence S 89°11'47" E 448.24' to the TRUE POINT OF BEGINNING, containing 4.3 acres more or less.

EXHIBIT 2

LEGAL DESCRIPTION OF THE OPEN SPACE PARCEL

A parcel of land located in the Northeast $\frac{1}{4}$ of Section 19, T.16 S., R.11 E., W.M., Deschutes County, Oregon which is described as follows:

Commencing at the Northeast corner of said Section 19; thence S $51^{\circ}27'37''$ W 962.37' to the TRUE POINT OF BEGINNING; thence S $00^{\circ}07'23''$ W 58.72'; thence on a 1038.31' radius curve left 394.79', the long chord of which bears S $10^{\circ}46'10''$ E 392.42'; thence S $21^{\circ}39'44''$ E 117.19'; thence on a 590.80' radius curve right 170.76', the long chord of which bears S $13^{\circ}22'54''$ E 170.17'; thence N $89^{\circ}10'04''$ W 1405.83'; thence N $00^{\circ}40'19''$ E 1325.84'; thence S $89^{\circ}11'47''$ E 779.00'; thence S $00^{\circ}48'13''$ W 200.00'; thence S $89^{\circ}11'47''$ E 498.11'; thence S $61^{\circ}42'30''$ W 411.30'; thence S $00^{\circ}48'13''$ W 210.11'; thence S $89^{\circ}11'47''$ E 325.26' to the TRUE POINT OF BEGINNING, containing 34.5 acres more or less.